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ABSTRACTS

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Since 1898, Puerto Rico has been a territory of the United States, meaning that Congress wields plenary power over the Island. Although scholars have highlighted the history and some modern manifestations of this power, conversations about how plenary power affects the territories have largely ignored constitutional criminal procedure.

This Article is the first to center the territory's criminal legal system within the broader debate over the exercise of plenary power. In doing so, it fills significant gaps in the constitutional and criminal law literature on the territories by uncovering how the federal government's plenary power affects local criminal adjudication. This Article maps out the general contours of what it terms the "territorial criminal legal system." That system allows Congress to intervene in local criminal affairs to a far greater degree than it could in any state. At the same time, the system imposes administrative constraints on local prosecutorial actions and poses an existential threat to the existence of local criminal systems. Further, in 2010, federal and local prosecutors in Puerto Rico signed a Memorandum of Understanding that funneled more cases into federal court, subjecting a growing number of Puerto Ricans to federal laws and procedures they had no say in creating. Sharing insights from over a dozen interviews, this Article uncovers how federal prosecutors circumvent protections embedded in Puerto Rican local law and constitutional text. Indeed, while the U.S. government may have granted Puerto Rico a greater semblance of home rule, colonial dominance has never left the Island.

Most lawyers know that the Federal Rules of Civil Procedure merged the divergent trial procedures of the common law and of equity, but fewer are familiar with the development of federal appellate procedure. Here too there is a story of the merger of two distinct systems. At common law, a reviewing court examined the record for errors of law after the final trial judgment. In the equity tradition, an appeal was a rehearing of the law and the facts that aimed at achieving justice and did not need to await a final judgment. Unlike the story of federal trial procedure, in which we can identify a date of merger (1938, with

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ARTICLES

COLONIZING BY CONTRACT

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Since 1898, Puerto Rico has been a territory of the United States, meaning that Congress wields plenary power over the Island. Although scholars have highlighted the history and some modern manifestations of this power, conversations about how plenary power affects the territories have largely ignored constitutional criminal procedure.

This Article is the first to center the territory's criminal legal system within the broader debate over the exercise of plenary power. In doing so, it fills significant gaps in the constitutional and criminal law literature on the territories by uncovering how the federal government's plenary power affects local criminal adjudication. This Article maps out the general contours of what it terms the "territorial criminal legal system." That system allows Congress to intervene in local criminal affairs to a far greater degree than it could in any state. At the same time, the system imposes administrative constraints on local prosecutorial actions and poses an existential threat to the existence of local criminal systems. Further, in 2010, federal and local prosecutors in Puerto Rico signed a Memorandum of Understanding that funneled more cases into federal court, subjecting a growing number of Puerto Ricans to federal laws and procedures they had no say in creating. Sharing insights from over a dozen interviews, this Article uncovers how federal prosecutors circumvent protections embedded in Puerto Rican local law and

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constitutional text. Indeed, while the U.S. government may have granted Puerto Rico a greater semblance of home rule, colonial dominance has never left the Island.

INTRODUCTION

Puerto Rico, we are told, has a relationship with the United States that "has no parallel in our history."[1] For the last seventy years, the U.S. and Puerto Rican governments have maintained that while the Island[2] is a territory of the United States, as a matter of governance, it is akin to a state.[3] For most purposes, it is "an autonomous political entity, 'sovereign

1. Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 596 (1976).

2. Puerto Rico is an archipelago consisting of various islands. Off. of the Gov't of P.R., Puerto Rico 5 (1951). It is commonly referred to as *la isla*, or the Island. This Article will do so throughout.

3. In 1953, representatives of the U.S. government conveyed to the United Nations that Puerto Rico had achieved a new constitutional relationship with the United States when the territory reached commonwealth status. Frances P. Bolton & James P. Richards, Report on the Eighth Session of the General Assembly of the United Nations, H.R. Rep. No. 83-

over matters not ruled by the Constitution.'"[4] It enjoys almost complete home rule, a popularly elected executive and legislative branches, and a complex and expansive governmental apparatus.[5]

But that is not exactly true. The federal courts have typically marshaled this narrative to shield explicitly colonial histories and outcomes. Indeed, the list of undesirable achievements related to the Island abound. Chief among them is that Puerto Rico remains one of five "unincorporated" territories,[6] meaning that Congress can, and does, treat

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1695, app. 9, at 241 (2d Sess. 1954). This status, according to federal agents, was "a compact of a bilateral nature whose terms may be changed only by common consent." Id. This, and other statements, prompted the General Assembly of the United Nations to express that Puerto Rico had achieved "a new constitutional status." G.A. Res. 748 (VIII), ¶ 2 (Nov. 27, 1953). In Puerto Rico, the meaning of the commonwealth status is a hotly contested issue on which the major political parties are divided, with the Partido Popular Democrático, the commonwealth party, believing that the Island is no mere territory. See Emmanuel Hiram Arnaud, Llegaron los Federales: The Federal Government's Prosecution of Local Criminal Activity in Puerto Rico, 53 Colum. Hum. Rts. L. Rev. 882, 913–15 (2022) [hereinafter Arnaud, Llegaron los Federales] ("[T]he compact theory had become, and continues to be, the backbone of the Partido Popular Democrático, one of the two main political parties on the Island . . . ."); Christina D. Ponsa-Kraus, Political Wine in a Judicial Bottle: Justice Sotomayor's Surprising Concurrence in *Aurelius*, 130 Yale L.J. Forum 101, 106 (2020), https://www.yalelawjournal.org/pdf/Ponsa-KrausEssay_z7qnqvjm.pdf [https://perma.cc/9QZA-TGN4] [hereinafter Ponsa-Kraus, *Aurelius* Concurrence] ("[C]ommonwealthers argue that Puerto Rico is no mere territory, but rather has a mutually binding bilateral compact with the United States, which elevates its status to something analogous to, but different from, that of a state.").

4. Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982) (internal quotation marks omitted) (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 673 (1974)).

5. See Off. of the Gov't of P.R., supra note 2, at 20 (describing the evolution of Puerto Rico's government structure and degree of independence).

6. The Supreme Court of the United States created the "unincorporated territory category" in the Insular Cases of the early twentieth century. The concept first appeared in a law review article, and then in a judicial opinion in *Downes v. Bidwell* and was explicitly adopted as a constitutional doctrine in *Balzac v. Porto Rico*. See Abbott Lawrence Lowell, The Status of Our New Possessions: A Third View, 13 Harv. L. Rev. 155 (1899); see also Downes v. Bidwell, 182 U.S. 244, 287 (1901); Balzac v. Porto Rico, 258 U.S. 298, 305–06 (1922). Using explicitly racist narratives as guidance, the Court explained that unincorporated territories are those that are not on the path towards statehood and in which at least some parts of the Constitution (like the jury trial right or the Uniformity Clause) do not apply. See *Downes*, 182 U.S. at 287 ("If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible . . . ."); see also *Balzac*, 258 U.S. at 309 ("In Porto Rico, however, the Porto Rican can not insist upon the right of trial by jury, except as his own representatives in his legislature shall confer it on him."). Incorporated territories are on the path to statehood. See *Downes*, 182 U.S. at 252 ("This evidently committed the government to the ultimate, but not to the immediate, admission of Louisiana as a State, and postponed its incorporation into the Union to the pleasure of Congress."). Today, there are four other unincorporated territories: American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands. R. Sam Garrett, Cong. Rsch. Serv., IF11792, Statehood Process and Political Status

it differently than the states, and its territorial status may continue in perpetuity without offending the federal Constitution.[7] Further, inhabitants of the territories remain politically powerless. They cannot vote for President or Vice President, nor can they elect a voting representative to Congress.[8] Importantly, in the 1950s, Congress invited Puerto Rico to draft a constitution of its own making—the first time a territory was asked to do so without a connection to statehood.[9] The creation of that constitution ostensibly heralded a new epoch in Puerto Rican history: the commonwealth. But soon after its creation, the practical consequences of the commonwealth status came into view. It did not, as major Puerto Rican political leaders, scholars, and federal judges professed, elevate Puerto Rico out of its territorial status.[10] All the new moniker did was give a stronger semblance of home rule with a fancy name to go along with it.[11] The federal government retained power to rule over the territory, including interfering in local affairs in ways it could never interfere with a state.

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of U.S. Territories: Brief Policy Background 1 (2024), https://crsreports.congress.gov/product/pdf/IF/IF11792 [https://perma.cc/G6QF-VTMV].

7. Most recently, the Supreme Court explained that Congress can extend fewer benefit programs to the territories than the states. See United States v. Vaello Madero, 142 S. Ct. 1539, 1541 (2022) (holding that Congress may make fewer Supplemental Security Income benefits available to residents of Puerto Rico than residents of states without violating the Fifth Amendment's equal protection clause).

8. Emmanuel Hiram Arnaud, A More Perfect Union for Whom?, 123 Colum. L. Rev. Forum 84, 87 (2023), https://columbialawreview.org/wp-content/uploads/2023/04/Arnaud-A_more_perfect_union_for_whom.pdf [https://perma.cc/WXV4-2Y9F] [hereinafter Arnaud, A More Perfect Union] (reviewing John F. Kowal & Wilfred U. Codrington III, The People's Constitution: 200 Years, 27 Amendments, and the Promise of a More Perfect Union (2021)). Congress extended citizenship to inhabitants of Puerto Rico in 1917. See Jones Act, Pub. L. No. 64-368, ch. 145, 39 Stat. 951, 953 (1917).

9. See Mitu Gulati & Robert K. Rasmussen, Puerto Rico and the Netherworld of Sovereign Debt Restructuring, 91 S. Cal. L. Rev. 133, 150 (2017) (describing how Congress "retained a veto over any constitution" Puerto Rico proposed and required that the Puerto Rican Constitution contain a bill of rights).

10. See Arnaud, Llegaron los Federales, supra note 3, at 913–20 (recounting prominent arguments suggesting that the commonwealth status changed the relationship between Puerto Rico and the United States); Salvador E. Casellas, Commonwealth Status and the Federal Courts, 80 Revista Jurídica de la Universidad de Puerto Rico [Rev. Juris. U. P.R.] 945, 949 (2011) (arguing that the commonwealth status "set forth the basis for a new relationship between the people of Puerto Rico and the United States"); Pedro A. Malavet, Puerto Rico: Cultural Nation, American Colony, 6 Mich. J. Race & L. 1, 33–34, 36–37 (2000) (highlighting official statements made by federal officials suggesting that the commonwealth status changed the constitutional relationship between the United States and Puerto Rico).

11. Juan R. Torruella, Commentary, Why Puerto Rico Does Not Need Further Experimentation With Its Future: A Reply to the Notion of "Territorial Federalism", 131 Harv. L. Rev. Forum 65, 85 (2018), https://harvardlawreview.org/wp-content/uploads/2018/01/vol131_Torruella.pdf [https://perma.cc/E63W-VB67] [hereinafter Torruella, A Reply] (referring to the commonwealth status as a "monumental hoax").

Puerto Rico's relationship with the federal government affects every facet of the Island's existence. But one of the most understudied aspects of Puerto Rico's relationship with the United States is the way its territorial status affects the adjudication of criminal offenses on the Island. To put it plainly, the federal government has significantly influenced the way criminal prosecutions are brought on the Island, from preventing local prosecutors from filing certain charges in local courts to authorizing federal prosecutors to prosecute what are essentially local offenses. One of the most recent manifestations of the federal government's ability and desire to intrude into local affairs came in 2010 when the U.S. Attorney's Office for the District of Puerto Rico (USAO) and the Puerto Rican Department of Justice (PRDOJ)—the entity tasked with local Island-wide criminal prosecutions—signed a confidential Memorandum of Understanding (MOU).[12] This agreement gave federal prosecutors primary jurisdiction over certain categories of offenses.[13] The local prosecutors, in effect, preemptively forfeited their ability to prosecute certain sets of cases, believing that the federal government would be able to do a better job. Their conception of collaboration allows the federal government, in some cases, to effectively replace local prosecutors.

This Article argues that prosecutorial arrangements like this one, fueled by a territorial relationship, are a modern manifestation of colonialism on the Island. These arrangements constrain local governmental capacity in ways that endanger criminal defendants and betray fundamental norms of democratic accountability and the ostensible promise of decolonization. This Article surveys this phenomenon through the lens of the MOU. This MOU, which has been altered in subsequent years, explained which offenses the USAO would prosecute federally, even though a local analogous statute applied and the PRDOJ remained ready to prosecute on its own. The offenses placed solely in the USAO's hands reflected violent crimes that had been increasing on the Island, like

12. See Memorandum of Understanding Between the Department of Justice for the Commonwealth of Puerto Rico, The Puerto Rico Police Department, and the U.S. Attorney's Office for the District of Puerto Rico for the Referral and Handling of Cases Where There Is Concurrent State and Federal Jurisdiction, Feb. 2, 2010 (on file with the *Columbia Law Review*) [hereinafter 2010 MOU]. Although the MOU is confidential, federal and local public officials in Puerto Rico have talked about the document openly in various forums including media interviews, press releases, and press conferences. See Limarys Suárez Torres, Arma le Cuesta Siete Años de Cárcel, El Nuevo Dia (Oct. 18, 2011) [hereinafter Suárez Torres, Arma le Cuesta] (describing public statements by Judge José Fusté discussing the MOU); Luis J. Valentín Ortiz, Amplían Acuerdo Entre Gobierno y Agencias Federales para Combatir el Crimen, CB En Español (Feb. 1, 2017), https://cb.pr/amplian-acuerdoentre-gobierno-y-agencias-federales-para-combatir-el-crimen/ [https://perma.cc/F2CCVM83].

13. See 2010 MOU, supra note 12, at 1–7 (delegating some drug trafficking, carjacking, bank robberies, and child sexual abuse cases to federal prosecutors).

firearms offenses and carjackings.[14] The following pages uncover the history of the MOU and explore how such a simple agreement subverted procedural protections under Puerto Rican law and subjected a greater number of people accused of crimes in Puerto Rico to punishment by a government they had no say in electing, exposing a significant issue of representational criminal justice. By doing so, this Article aims to fill a gap in scholarship on the territories, which has given insufficient attention to criminal legal administration.

What prompted the federal government to intervene so aggressively in Puerto Rican affairs? The answer lies principally in the plenary power doctrine. As explained more fully below, plenary power refers to Congress's constitutional prerogative to rule over U.S. territories, allowing it to operate as both the federal and local legislature.[15] This, in turn, makes federal interventions customary and, as some scholars have proposed, creates a power dynamic in which only federal power in the territories is deemed legitimate and respectable.[16] The weight of the scholarship concerning the U.S. territories and Puerto Rico typically focuses on the historical trajectory of plenary power. For instance, scholars have long explored the origins of Congress's plenary power, linking it to the nation's practice of producing new states mainly from contiguous territories through war, peacetime treaties, and settler colonialism.[17] Plenary power is not new, and Congress has used that power to create and govern territories since the Founding.[18] After the Spanish–American War in 1898,

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14. See id. at 1 (stating that delegating the prosecution of certain violent offenses to federal prosecutors is necessary to effectively fight crime on the Island).

15. See infra section I.C.

16. See Eduardo J. Rivera Pichardo, John T. Jost & Verónica Benet-Martínez, Internalization of Inferiority and Colonial System Justification: The Case of Puerto Rico, 78 J. Soc. Issues 79, 82 (2022) ("[W]e hypothesize that pro-statehood sentiments . . . would reflect colonial forms of thinking (or colonial mentality) associated with system justification . . . and internalization of inferiority . . . ." (emphasis omitted)).

17. See Christina Duffy Burnett, Untied States: American Expansion and Territorial Deannexation, 72 U. Chi. L. Rev. 797, 816–17 (2005) (describing Congress's use of plenary power to legislate for new territories since the Founding); Juan F. Perea, Denying the Violence: The Missing Constitutional Law of Conquest, 24 U. Pa. J. Const. L. 1205, 1241–55 (2022) (describing the consequences of the Northwest Ordinance on patterns of territorial expansion); Bartholomew H. Sparrow, Empires External and Internal: Territories, Government Lands, and Federalism in the United States, *in* The Louisiana and American Expansion, 1803–1898, at 231, 233–34 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005) (outlining the federal government's established pattern of territorial expansion). See generally Sam Erman, Almost Citizens: Puerto Rico, the U.S. Constitution, and Empire (2018) (describing the role of the political branches in the acquisition and establishment of a territorial government in Puerto Rico); Aziz Rana, The Two Faces of American Freedom (2010) [hereinafter Rana, The Two Faces] (describing the federal Constitution's role in facilitating and justifying expansion and settler colonialism).

18. See U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property

however, the understanding of territorial governance changed. The United States suddenly held far-off territories like Puerto Rico, and nobody quite knew what to do with them.[19] The Supreme Court ultimately answered that question in the *Insular Cases*[20] of the early twentieth century, providing the federal government with the power to hold the new possessions for an indeterminate period without granting them statehood, while preserving deannexation as a possible outcome.[21] The *Insular Cases* left the federal government's plenary power over the territories intact but decimated the expectation of statehood and left the new possessions in a territorial limbo.[22] That, in large part, remains true today. Despite expansion of home rule in most territories,[23] it has become patently clear

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belonging to the United States . . . ."); see also Northwest Ordinance of 1787, 1 Stat. 51 (creating internal governance for the Northwest Territories).

19. The parameters for expansion were narrowed even further following the creation of what Professor Sam Erman refers to as the "Reconstruction Constitution," which stood in the way of acquiring foreign lands by entrenching the tradition that territorial acquisitions, even noncontiguous ones, were on the fast track to statehood. The Reconstruction Constitution represents the new post-reconstruction constitutional regime that, through the Reconstruction Amendments, guaranteed "near-universal citizenship, expanded rights, and eventual statehood. Specifically, all Americans other than Indians, regardless of race, were citizens." Erman, supra note 17, at 2. The promises of the Reconstruction Constitution, Erman explains, caused even the staunchest imperialists in the United States to think twice before supporting extraterritorial annexations. See id. (explaining how the "prospect of having to acknowledge so many nonwhite persons as citizens" effectively stopped U.S. expansion until 1898).

20. Juan R. Torruella, The *Insular Cases*: The Establishment of a Regime of Political Apartheid, 29 U. Pa. J. Int'l L. 283, 299–312 (2007). The acquisition of these territories also marked the nation's "imperial turn," which refers to the moment, in 1898, when the United States began holding noncontiguous territories for indefinite amounts of time without the promise of statehood. Id. at 287.

21. See Burnett, supra note 17, at 802 ("[T]he *Insular Cases* rejected the assumption that all U.S. territories were on their way to statehood, [but] the unprecedented implication of this reasoning was . . . that the United States could relinquish sovereignty over an unincorporated territory altogether."). Deannexation refers to processes by which the federal government could cut ties with a territory, such as by granting independence. Id.

22. See id. at 799 (explaining how the *Insular Cases* denied the territories "all but a few constitutional protections" while "denying them a promise of statehood"). To boot, not all constitutional rights and provisions applied to the newly minted "unincorporated" territories. Most notably, the jury trial right and the Uniformity Clause did not extend to these territories. Id. at 819; see also Balzac v. Porto Rico, 258 U.S. 298, 309 (1922) (holding that the Sixth Amendment jury trial right did not apply to Puerto Rico). Despite treating the territories with some trepidation, the federal government was in control of their internal governance.

23. See Rafael Cox Alomar, The Puerto Rico Constitution 35–37 (2022) ("On July 3, 1950, President Truman signed U.S. Public Law 600, providing 'for the organization of a constitutional government by the people of Puerto Rico.'" (quoting Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319 (codified at 48 U.S.C. §§ 731 et seq. (2018)))); Juan R. Torruella, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal 117–25 (1985) (discussing modest expansion of home rule and relevant Puerto Rican political movements in the early twentieth century); José Trías Monge, Puerto Rico: The Trials of the Oldest

that the federal government continues ruling the territories like the colonies of old. It exercises its plenary power to legislate freely over the territories, intruding into local affairs and producing constitutionally sanctioned inequality and disparate treatment.[24] Although the MOU did not emanate directly from Congress's plenary power, they interact to exacerbate the problem of federal intervention.

Further, the federal government's intervention in Puerto Rican criminal affairs prompts important criticisms about the federalization of criminal law throughout the United States. Scholars and advocates have long critiqued the federal government's intervention in areas of criminal law that were traditionally seen as being within the exclusive province of the states.[25] Critics view the criminalization of especially violent crimes by the federal government as an overstep largely because criminalizing those offenses exceeds Congress's enumerated powers and, as a result, violates commonly accepted understandings of federalism.[26] In the opposing camp, many scholars point out not only that the Constitution provides broad enumerated powers but also that the Founders had an expansive understanding of Congress's power to draft federal criminal statutes.[27]

Colony in the World 107–18 (1997) [hereinafter Trías Monge, Oldest Colony in the World] (discussing the establishment of the commonwealth status).

24. See United States v. Vaello Madero, 142 S. Ct. 1539, 1541 (2022) (holding that Congress may make fewer Supplemental Security Income benefits available to residents of Puerto Rico than residents of states without violating the Fifth Amendment's equal protection clause); Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 118 (2016) ("Puerto Rico [is barred] from enacting its own municipal bankruptcy scheme to restructure the debt of its insolvent public utilities companies."); Fitisemanu v. United States, 1 F.4th 862, 864–65 (10th Cir. 2021) (holding that citizens of American Samoa were not birthright citizens of the United States by virtue of the Fourteenth Amendment's Citizenship Clause); Cori Alonso-Yoder, Imperialist Immigration Reform, 91 Fordham L. Rev. 1623, 1634 (2023) ("The government is permitted by law to regulate racial minorities, but not to extend full legal protections to these same groups.").

25. See Gerald G. Ashdown, Federalism, Federalization, and the Politics of Crime, 98 W. Va. L. Rev. 789, 790–91 (1996) ("[T]he Tenth Amendment le[ft] the general police power and responsibility for criminal law enforcement in the hands of the states."); Stephen F. Smith, Federalization's Folly, 56 San Diego L. Rev. 31, 34–42 (2019) ("The daunting size and utter chaos in federal criminal law resulted principally from the fact that new criminal laws are continuously enacted by Congress year after year without periodic review and revision."). See generally Dick Thornburgh, Charles W. Daniels & Robert Gorence, The Growing Federalization of Criminal Law, 31 N.M. L. Rev. 135, 135–36 (2001) (recounting the history of the gradual federalization of criminal law).

26. See Kathleen F. Brickey, Criminal Mischief: The Federalization of American Criminal Law, 46 Hastings L.J. 1135, 1165–67 (1995) (arguing that Congress has overstepped by passing laws in tension with state prerogatives and central tenets of federalism).

27. See Erin C. Blondel, The Structure of Criminal Federalism, 98 Notre Dame L. Rev. 1037, 1040 (2023) ("The Constitution, federal law, and federal norms give states almost unfettered control over their laws and officers, and having the police power provides strong incentives to maximize the reach of state law and enforcement."); Peter J. Henning, Misguided Federalism, 68 Mo. L. Rev. 389, 394–95 (2003) ("The Founders certainly

Indeed, Congress demonstrated a capacious understanding of its enumerated powers when it passed the earliest federal criminal statutes.[28]

Although federalism issues are broad, it is important to highlight that the territories represent, in many ways, the complete federalization of criminal law. Like the states, federal criminal statutes apply to the territories.[29] But because of Congress's plenary power over the territories, the typical constraints on federal action are absent. The federalization of crime in the territories entails the circumvention of local constitutional protections and the undemocratic adjudication of criminal offenses. Indeed, the continued federalization of crime in Puerto Rico and recent congressional actions like PROMESA—a 2016 act that created a presidentially appointed fiscal control board that governs the Island's budget and approves local laws[30]—show that there is no future for what

envisioned that federal crimes could encompass conduct also subject to state prosecution."); Adam H. Kurland, First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction, 45 Emory L.J. 1, 56 (1996) ("At the outset, the First Congress recognized that federal criminal law authority was not limited to the few explicit constitutional grants of authority to define punishments."); Tom Stacy & Kim Dayton, The Underfederalization of Crime, 6 Cornell J.L. & Pub. Pol'y 247, 262–63 (1997) ("[W]e argue that the constitutional objections to the current national crime fighting role are quite misplaced.").

28. Congress, for example, used the Postal Clause to create federal offenses against the stealing of mail. Kurland, supra note 27, at 58. See generally Dwight F. Henderson, Congress, Courts, and Criminals 7–10 (1985) (discussing the Crimes Act of 1790 and the initial structure of the federal criminal justice system).

29. See Antilles Cement Corp. v. Fortuño, 670 F.3d 310, 320 (1st Cir. 2012) ("Whether and how a federal statute applies to Puerto Rico is a question of Congressional intent." (citing Jusino Mercado v. Puerto Rico, 214 F.3d 34, 40 (1st Cir. 2000))); United States v. Acosta-Martinez, 252 F.3d 13, 18 (1st Cir. 2001) (noting that unless otherwise stated, the "default rule" is that a federal statute applies to a territory because the territories are typically included in the jurisdictional section of federal criminal statutes). But the applicability of some federal criminal statutes to Puerto Rico is continually contested in federal courts. See, e.g., id. at 13 (concerning the Federal Death Penalty Act (FDPA)).

In contrast, some federal statutes explicitly do not apply to the territories. For example, Congress preempted the territories from creating their own municipal debt restructuring legislation. See *Franklin Cal. Tax-Free Tr.*, 579 U.S. at 117–18 (holding that Puerto Rico cannot authorize its municipalities to seek relief under Chapter 9 of the Bankruptcy Code). And Congress has exempted American Samoa and the Northern Mariana Islands from particular sections of immigration laws and the Fair Labor Standards Act. See Alonso-Yoder, supra note 24, at 1628 ("[The covenant] limited the applicability of the federal minimum wage provisions set forth in the Fair Labor Standards Act of 1938."); Arnold H. Leibowitz, American Samoa: Decline of a Culture, 10 Cal. W. Int'l L.J. 220, 248–51, 269 (1980) (explaining that Congress has created special immigration restrictions for American Samoa).

30. Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114–187, §§ 101–212, 130 Stat. 549, 553–577 (2016) (codified as 48 U.S.C. §§ 2121–2152 (2018)).

some commentators call "territorial federalism."[31] The MOU provides a view of the effects of the federal government's power over the territories at a granular level, opening new chapters in debates concerning both the law of the territories and the federalization of crime. To this point, the scholarship on the federalization of criminal law has also overlooked the territories.

To be sure, the MOU was a calculated product of its time. Its creation stems from a major crime wave in Puerto Rico dating to the 1990s and early 2000s. Violent crime reached unprecedented levels, with the Island seeing the murder rate spike 229% from 1970 to 2009, hovering at three times the national average.[32] To combat these staggering numbers, the USAO and PRDOJ decided that federal prosecutors should lead the charge prosecuting violent crime. As a result of the MOU, criminal charges in the District Court of Puerto Rico increased dramatically.[33] But not everyone was happy with this new arrangement. Federal judges in Puerto Rico faced a surge of new cases driven by the U.S. Attorney's policies, and some of the judges expressed their frustrations. The former Chief Judge of the District of Puerto Rico, for example, chided federal prosecutors on several occasions, explaining that "the wholesale referral of cases for federal prosecution 'takes a heavy toll on the federal court, which is not designed or equipped to become a de facto state court.'"[34]

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31. See, e.g., Developments in the Law—The U.S. Territories, 130 Harv. L. Rev. 1616, 1632–33 & n.1 (2017) (arguing that the relationship between territories and the federal government has become more similar to the relationship between states and the federal government over time); see also Zachary S. Price, Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction, 113 Colum. L. Rev. 657, 665, 698 (2013) (suggesting a functional approach to federalism for territories and tribes by shifting the focus to the "practical reality of divided sovereignty," requiring a nuanced approach to the interterritorial division of governmental functions and accommodating local cultural norms). But see Torruella, A Reply, supra note 11, at 66–70 (arguing that "territorial federalism" is a repackaging of the same unequal colonial relationship that has been in place for over a century).

32. Dora Nevares-Muñiz, El Crimen 13–14 (2011) [hereinafter Nevares-Muñiz, El Crimen].

33. In 2008, the federal government secured a total of 754 convictions. That number increased to 1,478 convictions by 2015. See U.S. Sent'g Comm'n, Statistical Information Packet: Fiscal Year 2008: District of Puerto Rico (2008), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2008/pr08.pdf [https://perma.cc/F2R9-LPPJ]; U.S. Sent'g Comm'n, Statistical Information Packet: Fiscal Year 2015: District of Puerto Rico (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2015/pr15.pdf [https://perma.cc/8YV6-3E7L]; see also Interview with D (n.d.) (on file with the *Columbia Law Review*) (explaining that AUSAs were charging around two thousand defendants a year after the MOU but have begun charging fewer cases under current U.S. Attorney Stephen Muldrow).

34. United States v. Colon de Jesus, No. 10-251 (JAF), 2012 WL 2710877, at *4 (D.P.R. July 6, 2012) (quoting United States v. Sevilla-Ovola, 854 F. Supp. 2d 164, 170 (D.P.R. 2012), vacated, 770 F.3d 1 (1st Cir. 2014)).

By referring cases to federal court, the new arrangement raised fundamental questions about the criminal legal system on the Island, beginning with its legitimacy. Because Puerto Ricans lack representation in the federal system, the federal government prosecutes Puerto Ricans under statutes that they have never had a say in creating. The MOU exacerbates this democratic issue, creating downstream complications. In particular, one result of funneling enumerated offenses into the federal district courts is the circumvention of local constitutional protections. The Puerto Rican Constitution and Penal Code provide robust protections for people facing criminal charges, including the right to bail, prohibitions on wiretaps, required pretrial hearings, and strict adherence to speedy trial rules.[35] The strong protections offered by Puerto Rican criminal procedure should be respected as expressions of the community, particularly because this community's expression is excluded from the federal system. But supporters of the MOU have instead weaponized these very protections as justifications for relying on a federal process that is more beneficial to prosecutors.[36]

Moreover, because federal trials are conducted in English, federal jurors must speak English proficiently in order to participate.[37] Puerto Ricans mainly speak Spanish, and as a result, by some estimates, close to ninety percent of the Puerto Rican population is ineligible to serve on federal juries.[38] To add insult to injury, federal prosecutors have been

35. See P.R. Const. art. II, §§ 10–11; see also P.R.S. St. T. 34 Ap. II, Rule 109 ("A motion for continuance not complying with the foregoing provisions shall be denied flatly."). These provisions were adopted by the Puerto Rican constitutional convention and approved by the U.S. Congress without opposition. The wiretap prohibition found its inspiration in the vocal progressive and socialist wing of the constitutional convention which believed communication through cable, telegraph, and telephone to be "inviolable." José Trías Monge, 3 Historia Constitucional de Puerto Rico 191–92 (1982) [hereinafter Trías Monge, Historia Constitucional] (translation provided by author). The right to bail for all defendants emerged as a natural consequence of the constitutional prohibition against the death penalty. Under the Jones Act of 1917, there was a right to bail except for capital crimes in certain circumstances. As a result of the prohibition of the right to bail for capital cases, the right to bail was expanded to all defendants with minimal opposition by the conservative delegates of the convention. Id. at 196.

36. See Interview with D, supra note 33 (explaining that local procedural protections were one factor motivating the MOU); Interview with E (June 6, 2023) (on file with the *Columbia Law Review*) (same).

37. 28 U.S.C. § 1865(b)(2)–(3) (2018) (stating that a person is qualified for jury service unless they are "unable to speak the English language").

38. Jasmine B. Gonzales Rose, The Exclusion of Non-English-Speaking Jurors: Remedying a Century of Denial of the Sixth Amendment Right in the Federal Courts of Puerto Rico, 46 Harv. C.R.-C.L. L. Rev. 497, 498 (2011) [hereinafter Gonzales Rose, Exclusion of Non-English Speaking Jurors].

historically aggressive in seeking the death penalty despite the Puerto Rican Constitution prohibiting that sanction.[39]

The following pages provide a deeper look into how the MOU exacerbates the deleterious consequences of Puerto Rico's territorial condition. To assist in this endeavor, this Article begins developing a descriptive framework—which this Article refers to as the "territorial criminal legal system"—to account for the unique problems created when the federal government employs its power to adjudicate criminal offenses in the territories. This framework captures the broad parameters of criminal adjudication in the territories, regardless of the existence of an MOU. Within the ambit of the territorial criminal legal system are two interrelated processes that facilitate increased federal participation. The defining feature of the territorial criminal legal system is Congress's use of plenary power. This power allows Congress to treat the territories differently than the states, act as both the federal and local (or territorial) legislature,[40] unilaterally apply new laws to the territories,[41] establish local governmental systems,[42] expand the jurisdiction of district courts to include offenses under local penal codes,[43] and create offenses that apply

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39. See Emmanuel Hiram Arnaud, A License to Kill: State Sponsored Death in the Oldest Colony in the World, 86 Rev. Juris. U. P.R. 295, 311, 315–19 (2017); Interview with J (July 20, 2023) (on file with the *Columbia Law Review*) (describing how the United States has repeatedly ignored Puerto Rico's prohibition on the death penalty).

40. The Supreme Court has explained on many occasions that in "legislating for [the territories], Congress exercises the combined powers of the general, and of a state government." Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 546 (1828). The Court would speak in even clearer terms a few decades later, stating that

> All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. . . . The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States . . . .

Nat'l Bank v. County of Yankton, 101 U.S. 129, 133 (1879).

41. See Dora Nevares Muñiz, Evolution of Penal Codification in Puerto Rico: A Century of Chaos, 51 Rev. Juris. U. P.R. 87, 104–09 (1982) [hereinafter Nevares Muñiz, Evolution of Penal Codification] (describing the process by which Congress replaced the local Puerto Rican Penal Code with the California Penal Code in 1902).

42. From the Founding, Congress has used its plenary power to create rules of internal governance, known as organic acts, for territories acquired by the United States. Emmanuel Hiram Arnaud, Dual Sovereignty in the U.S. Territories, 91 Fordham L. Rev. 1645, 1659–63 (2023) [hereinafter Arnaud, Dual Sovereignty] (explaining that Congress used its plenary power to establish local governments in newly acquired territories beginning with the Northwest Ordinance in 1787).

43. In the U.S. Virgin Islands, federal prosecutors have the statutory power to file charges under the local penal code in the federal district court. See id. at 1661; see also

specifically to the actions that occur within the territories without affecting a broader federal interest.[44] The plenary power doctrine interacts with criminal legal doctrines in important ways. One of the most striking examples is through another feature, the dual sovereign doctrine. Under this doctrine, only the federal government or the local territorial government may prosecute someone for the same offense.[45] This means that if law enforcement refers certain cases to one entity—say, the federal government—the other entity (the local government) is preempted from pursuing that same case. The MOU and the federal government's superior resources funnel violent crime to the federal courtroom, sometimes leaving the local government's interests unfulfilled. Ultimately, the territorial criminal legal system is a manifestation of the federal government's ability to control or influence local affairs when it so chooses.[46]

Part I traces the evolution of federal prosecutorial power in Puerto Rico. Specifically, it discusses the creation of the federal district court for Puerto Rico, the USAO that came with it, and the Puerto Rican Department of Justice, which was created to prosecute local crimes. Part II unearths the history of the MOU, focusing on its origins, the purpose of the agreement, its practical consequences, and the important procedural protections for criminal defendants under local law. This effort is informed by confidential interviews of attorneys, academics, and judges possessing personal knowledge of the MOU.[47] Part III discusses how the

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United States v. Gillette, 738 F.3d 63, 70–71 (3d Cir. 2013) (explaining that under the U.S.V.I. Organic Act, local courts have original jurisdiction in all criminal acts but "Congress specifically provided that the District Court would retain concurrent jurisdiction over charges alleging local crimes that are related to federal crimes").

44. Arnaud, Llegaron los Federales, supra note 3, at 886–91.

45. Grafton v. United States, 206 U.S. 333, 355 (1907) ("[W]e adjudge that . . . a soldier in the Army[] having been acquitted of the crime of homicide . . . by a military court of competent jurisdiction . . . could not be subsequentially tried for the same offense in a civil court exercising authority in [the territory of the Philippines]."); see also Puerto Rico v. Sanchez Valle, 579 U.S. 59, 62 (2016) ("In this case, we must decide if . . . Puerto Rico and the United States may successively prosecute a single defendant for the same criminal conduct. We hold they may not, because the oldest roots of Puerto Rico's power to prosecute lie in federal soil."); Arnaud, Dual Sovereignty, supra note 42, at 1652 (contrasting the several states' independent sovereign powers with the territories' derivative powers, which come from the federal government).

46. The criminal legal systems of the U.S. Virgin Islands, American Samoa, the Northern Mariana Islands, and Guam function differently than that of Puerto Rico in practice. Arnaud, Dual Sovereignty, supra note 42, at 1659–63. The author will discuss the unique dynamics of those criminal legal systems in subsequent pieces.

47. Many parts of this Article rely on interviews with attorneys practicing criminal law in Puerto Rico. The author interviewed former and current prosecutors, defense attorneys, judges, and academics on the Island who have personal knowledge of the Memorandum of Understanding and who have extensive practice experience in Puerto Rico. The author asked each person open-ended questions about the historical backdrop of the MOU, the purpose of the agreement, their perception of the agreement, and their experiences with

MOU is a manifestation of the federal government's plenary power over the territories. Through the MOU, the federal government accomplished the important goal of prosecuting violent offenders but, in doing so, circumvented important local procedural protections for defendants and subjected an increasing number of Puerto Ricans to a criminal legal system that does not represent them.[48] Finally, this Article compares Puerto Rico's type of arrangement to that of other jurisdictions and offers a way forward.

Ultimately, this is a story about how the most powerful democracy on earth continues to perpetuate a colonial system that delegitimizes local authority and deprives Puerto Ricans of democracy and self-determination. This story focuses on criminal prosecutions on the Island and highlights the extent to which the U.S. government continues intervening in local affairs. In doing so, the federal government circumvents Puerto Rican constitutional protections and subjects millions to foreign laws.

I. PROSECUTORIAL POWER IN PUERTO RICO

The United States has been in the business of territorial expansion since the Founding.[49] The drafters of the federal Constitution created mechanisms for the administration of current and future territorial possessions and believed that the federal government had a special interest in not only acquiring new territories but also absorbing them into the Union.[50] As part of that tradition, the federal government has always enjoyed power over local affairs in the territories, including the

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criminal adjudication on the Island. These interviews were conducted on the condition of anonymity. Citations to those interviews will be marked as "Interview with [letter]" with the letter corresponding to the order in which the interview took place. All interviews are on file with the *Columbia Law Review*.

48. The MOU moves a significant group of offenses to federal court, where local criminal procedure rules do not apply. In the states of the Union, this is orthodox in the sense that state laws and procedures do not exist in the federal district court of those states. But here, the PRDOJ and the USAO entered into an agreement that was motivated in part by the conscious desire to free what otherwise are local prosecutions from the protections of the Puerto Rican Constitution and rules of criminal procedure. Moreover, the agreement subjects more Puerto Ricans to federal laws and procedures they have not had a say in crafting.

49. See The Declaration of Independence para. 9 (U.S. 1776) ("He has endeavoured to prevent the population of these States; for that purpose . . . raising the conditions of new Appropriations of Lands."); Northwest Ordinance of 1787, art. IV (providing for the governance of newly acquired territories); see also Perea, supra note 17, at 1241–44 ("In essence, the Northwest Ordinance created the blueprint for the conquest of the United States . . . .").

50. See U.S. Const. art. IV, § 3, cl. 1 (explaining how new states will be admitted). The Continental Congress included similar mechanisms in the Articles of Confederation. See Perea, supra note 17, at 1231–36 (explaining how the Framers sought to address the Articles of Confederation's barriers to territorial expansion).

adjudication of criminal offenses.[51] That power generally flows from the Territorial Clause of the U.S. Constitution, which provides Congress with the power to make "needful Rules and Regulations" for the nation's territories.[52] Beginning with the very first territories, Congress created their internal governmental structures, including territorial courts, and commanded the recently formed local governing bodies to enact criminal offenses.[53] The federal government had a special interest in organizing new territories in preparation for their eventual admission to the Union as states.[54]

But for some territories, including Puerto Rico, that historically implied promise of statehood vanished. It soon became clear that those territories would remain in territorial purgatory absent political will or unrest to the contrary.[55] As a result, Puerto Rico's internal governance evolved over time in ways that provided Puerto Ricans more power over

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51. See Frederick S. Calhoun, The Lawmen: United States Marshals and Their Deputies 1789–1989, at 143–58 (1989) ("[T]he lines of authority between territorial and federal lawmen, who were often the same man, were frequently confused and laxly respected."); Lawrence M. Friedman, Crime and Punishment in American History 261 (1993) ("All the states outside of the original ones had had their larval periods as 'territories,' and territorial law was federal; territorial courts were federal courts.").

52. U.S. Const. art. IV, § 3, cl. 2. Congress also exercises plenary authority over the District of Columbia. U.S. Const. art. I, § 8, cl. 17.

53. See Northwest Ordinance of 1787, §§ 5, 8 ("The governor and judges . . . shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary . . . .").

54. See Stanley K. Laughlin, Jr., The Constitutional Structure of the Courts of the United States Territories: The Case of American Samoa, 13 U. Haw. L. Rev. 379, 384, 389 (1991) ("In order to make these [territorial] arrangements mutually beneficial, however, careful crafting of political and legal structures is imperative."). The Northwest Ordinance provided a three-stage process for new states to be admitted from the Northwest Territory. The Ordinance stated that the territory would be "temporary," and that Congress would "provide also for the establishment of States, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest." Northwest Ordinance of 1787, §§ 1, 13, art. V.

55. Since the Founding, the federal government has acquired territories with the aim of admitting them as new states. See Shively v. Bowlby, 152 U.S. 1, 49 (1894) ("[T]he territories acquired by congress, whether by deed of cession from the original states, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States . . . ."). But following the Spanish American War of 1898, not all territories, particularly the former Spanish colonies, were destined for statehood; instead, they were to be held as territories in perpetuity. See Christina Duffy Burnett & Burke Marshall, Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented, *in* Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution 1, 4–5 (Christina Duffy Burnett & Burke Marshall eds., 2001) ("[A]nti-imperialists did not object to the acquisition of territories . . . . [T]hey objected to the idea that arose with respect to the former Spanish colonies: that Congress could subject them to *permanent* territorial status, without intending ever to admit them into the Union as full and equal member states.").

local affairs.[56] Today, the Island has a local government that, for the most part, functions independently from the federal government and looks just like any state of the Union. But appearances can be deceiving. While Puerto Rico's local government may appear to command the same respect as other local authorities, the federal government has made clear that the notions of federalism that define its relationship with states are absent with respect to the U.S. territories.[57] Accordingly, the federal government intrudes in local criminal affairs in ways that are unique to the territories. This Part describes the presence of federal prosecutorial power and its local analog to better understand the unique relationship between the Puerto Rican and federal governments. This Part reveals that the federal government has intruded in local Puerto Rican criminal affairs from the moment U.S. troops first landed on the Island.

A. *Federal Prosecutorial Power*

The United States acquired Puerto Rico from Spain in 1898 following the Spanish–American War.[58] While the belligerents negotiated peace, the United States governed the Island by military rule. The parties signed the Treaty of Paris, which formally ended the war, on December 10, 1898, and Congress ratified the treaty on February 6, 1899.[59] The U.S. military, however, continued its military rule on the Island from the initial occupation in 1898 until 1900.[60]

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56. See Igartua De La Rosa v. United States, 229 F.3d 80, 87–88 (1st Cir. 2000) (Torruella, J., concurring) ("[T]he civil rights of United States citizens residing in Puerto Rico . . . have remained dormant at best . . . . The granting of so-called 'Commonwealth' status in 1952, itself an enigmatic condition which merely allowed the residents of Puerto Rico limited self-government, did nothing to correct Puerto Rico's fundamental condition . . . ." (footnote omitted)); Trías Monge, Oldest Colony in the World, supra note 23, at 105–07 (explaining that Congress gave Puerto Ricans the ability to elect members of the Puerto Rico legislature, vote for their Governor, and make a constitution of their own, and allowed the Puerto Rico governor to appoint justices of the Puerto Rico Supreme Court).

57. For example, in 2016, the U.S. Congress unilaterally created a fiscal control board that was placed within Puerto Rico's government. Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114–187, 130 Stat. 549 (2016) (codified as 48 U.S.C. §§ 2101–2241); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC., 140 S. Ct. 1649, 1661 (2020) (explaining that members of the fiscal control board were territorial, rather than federal, officers because, even though the board was created by Congress, the board lived within the Puerto Rican government and performed territorial duties).

58. See Treaty of Paris of 1898, Spain–U.S., arts. I–III, Dec. 10, 1898, 30 Stat. 1754, T.S. No. 343 (entered into force Apr. 11, 1899).

59. Manuel Del Valle, Puerto Rico Before the United States Supreme Court, 19 Rev. Juris. U. Interamericana P.R. 13, 17–18 (1984).

60. See Pedro A. Malavet, The Inconvenience of a "Constitution [that] Follows the Flag . . . But Doesn't Quite Catch Up With It": From *Downes v. Bidwell* to *Boumediene v. Bush*, 80 Miss. L.J. 181, 213 (2010).

Those two years brought drastic changes to the organization of the local Puerto Rican government and judiciary. Initially, General Nelson Miles, who was in command of the Island on behalf of the United States during its invasion, expressed a desire to protect local customs and laws.[61] In July 1898, he issued General Order 101, in which he proclaimed that even though military decrees were the supreme law of the land,

> [T]he municipal laws of the conquered territory, such as those which affect individual's rights and property rights and provide for the punishment of crime, are considered continuing in force, so far as they are compatible with new order of things, until they are suspended or superseded by the occupying belligerent . . . .[62]

This position was in keeping with General Miles's appreciation of local customs and likely genuine belief that the United States brought the "blessings of liberty" to the Island and that they arrived in Puerto Rico to "bring . . . protection . . . to promote your prosperity and bestow upon you the immunities and blessings of the liberal institutions of our [g]overnment."[63]

Nevertheless, the military government quickly modified local laws and governmental structures. The military government reorganized the local court system, in some cases narrowed the jurisdictional reach of local courts, and ordered that local judges could stay in their posts only if they pledged allegiance to the federal government.[64] Importantly, under the purview of the third military governor, General Guy V. Henry, Puerto Rican courts were barred from hearing cases in which civilians were accused of crimes against members of the U.S. military.[65] Instead, those cases were heard by specially created military tribunals.[66]

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61. See Del Valle, supra note 59, at 21 ("The local law of the conquered territory and those laws governing private rights remained in force during military occupation except where suspended by the military authorities.").

62. General Order 101, July 13, 1898, reprinted in Guillermo A. Baralt, History of the Federal Court in Puerto Rico: 1899–1999, at 69–70 (Janis Palma trans., 2004).

63. Trías Monge, Oldest Colony in the World, supra note 23, at 30 (internal quotation marks omitted) (quoting Documents on the Constitutional History of Puerto Rico 55 (Off. Commonwealth P.R. in Washington, D.C. ed., 2d ed. 1964)).

64. See Baralt, supra note 62, at 69–70 (Janis Palma trans., 2004); Nevares Muñiz, Evolution of Penal Codification, supra note 41, at 103 (highlighting and explaining some of these actions). General Davis reorganized the local court system through General Order 114 of August 7, 1899. Baralt, supra, at 105.

65. See Baralt, supra note 62, at 87 (explaining that military commissions were in "charge of the Seditions Bands cases and the defendants charged with acts of violence"). Henry's predecessor, General Brooke, had also prohibited local courts from hearing arson or murder cases. Noting that local courts were not acting with sufficient severity or promptness, he reasoned that ad hoc military tribunals could do a better job. See José Trías Monge, El Sistema Judicial de Puerto Rico 49 (1978) [hereinafter Trías Monge, El Sistema].

66. There was Supreme Court precedent prohibiting the prosecution of civilians by court martial/military commission during peacetime. See, e.g., Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866) (asserting that when "the [civilian] courts are open," martial rule is

Chief among the changes to Puerto Rico's internal governance was the creation of a federal district court for Puerto Rico. The creation of this court was exceptional.[67] The federal district court for Puerto Rico was not initially created by an act of Congress.[68] Instead, General George W. Davis, the fourth Military Governor of Puerto Rico, created a federal provisional court of the United States on June 27, 1899, through military decree.[69] A confluence of interests prompted the creation of the provisional court. First, there was a perceived rise in local criminal activity that, to many Spanish and Puerto Rican aristocrats on the Island, was not being dealt with properly by local authorities.[70] Second, the local Puerto Rican courts had seemingly proven ineffective for Spaniards, who had willingly stayed in Puerto Rico to defend their financial interests in court.[71] Finally, for the Americans, the creation of a district court had the added benefit of beginning the process of cultural assimilation. From an empire-building perspective, the federal court provided a forum, in English, for the litigation of cases that involved federal interests on the Island. One of General Davis's official reports puts this point clearly: "The influence of this court is destined to be a [potent agent] in Americanizing the Island, and is certainly one of the best measures instituted since the Spanish evacuation."[72]

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improper). But General Henry reasoned that since the armistice protocol had been signed but not the peace treaty, they were still technically at war. Baralt, supra note 62, at 86–87.

67. Indeed, it was exceptional that there was a federal district court in a territory. Throughout most of U.S. expansion, a single trial court heard cases arising under territorial and federal law: the territorial court. See Gregory Ablavsky, Federal Ground: Governing Property and Violence in the First U.S. Territories 129 n.74 (2021). These territorial courts often had similar jurisdictional parameters as federal district courts along with the power to hear cases arising under local territorial law. Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 544–45 (1828). But in Puerto Rico, Congress allowed for local Puerto Rican courts and the federal district court to exist simultaneously. Burnett, supra note 17, at 837–38.

68. See Baralt, supra note 62, at 91 (describing General Order No. 88, June 27, 1899, which established the federal District Court of Puerto Rico).

69. Id. Not everyone welcomed the creation of the provisional federal court. For example, the leader of the prominent Federal Party, Luis Muñoz Rivera, expressed his fierce opposition. Id. at 96. To these opponents, the federal court was a sign of legal subordination which flew in the face of the Federal Party's main objective of more autonomy with respect to local rule. Id. at 130. Moreover, the court was established in the face of stark opposition from notable local government leaders like the Puerto Rican Secretary of Justice, Puerto Rican Supreme Court justices, and many of the Island's leading attorneys. The opposition feared the very Americanization that General Davis relished. Id. at 87, 96; Trías Monge, El Sistema, supra note 65, at 52.

70. Baralt, supra note 62, at 81–92.

71. Id. at 96.

72. Carmelo Delgado Cintrón, Historia de un Desproposito, Prologo [Foreword] to Alfonso L. García Martinez, Idioma y Politica: El Papel Desempeñado por los Idiomas Español e Inglés en la Relación Politica Puerto Rico–Estados Unidos 5, 9–10 (1976) (internal quotation marks omitted) (quoting Report of Brigadier-General George W. Davis, U.S.V., on Civil Affairs of Puerto Rico 212 (1899)).

Practically, the court was like any other district court. Its jurisdictional powers closely tracked that of the other U.S. district courts, and all proceedings were conducted in English.[73] But there were also important differences. For example, the federal court had jurisdiction over any criminal matter—local or federal.[74] Further, unlike the other district courts, appeals from the provisional court went directly to the Supreme Court of the United States through the certiorari process.[75]

Within a year, it was Congress's turn to act. In 1900, Congress passed the Foraker Act, formally ending the military rule on the Island.[76] The Foraker Act was the Island's first organic act—a congressional statute aimed at organizing a territory's internal governmental structure.[77] It established a presidentially appointed Executive Council, a popularly elected House of Representatives, an entirely new judiciary system for the Island (including a new Supreme Court), and a nonvoting delegate to Congress known as the Resident Commissioner.[78] The Foraker Act also

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73. Nevares Muñiz, Evolution of Penal Codification, supra note 41, at 103.

74. Governor Henry provided this expansive jurisdiction in criminal cases due to distrust in the local judicial system. Trías Monge, El Sistema, supra note 65, at 52.

75. Baralt, supra note 62, at 93. The provisional court consisted of three judges, the first being attorney Noah Brooks Kent Pettingill. Id. at 91–94. Majors Eugene D. Dimmick and Earl D. Thomas of the U.S. Cavalry served alongside Pettingill as the first associate judges of the provisional court. Id. at 94. The first criminal jury trial under the provisional court was held on September 20, 1899. Id. at 97. Originally, the judges of the district court served for fixed terms until 1966, when Congress granted the judges life tenure. Act of Sept. 12, 1966, Pub. L. No. 89-571, 80 Stat. 764 (1966) (codified in 28 U.S.C. § 134 (2018)). The Supreme Court acknowledged this change in *Examining Board v. Flores de Otero*, stating that the district court in Puerto Rico now "possesses the same jurisdiction as that conferred on the federal district courts in the several States" and the judges in that district also now have life tenure. 426 U.S. 572, 594 n.26 (1976). These changes, several courts and commentators have suggested, converted the District Court of Puerto Rico from a legislative court to an Article III court. See Gustavo A. Gelpí, A Legislative History of the District of Puerto Rico Article III Court, Fed. Law. 18 (July 2016); see also Igartua-De La Rosa v. United States, 417 F.3d 145, 166 (1st Cir. 2005) (en banc) (Torruella, J., dissenting) ("An Article III District Court sits [in Puerto Rico] . . . ."); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 830 F.2d 374, 385 n.69 (D.C. Cir. 1987) ("Puerto Rico has an Article III district court . . . ."); United States v. Santiago, 23 F. Supp. 3d 68, 70 (D.P.R. 2014) (Gelpí, J.) (finding that the District of Puerto Rico is now organized under Article III). The district courts of Guam, the U.S. Virgin Islands, and the Northern Mariana Islands are organized under different sections. See 48 U.S.C. §§ 1424b(a), 1614(a), 1821(b) (2018). The judges of those courts, unlike those in the fifty states and Puerto Rico, do not enjoy life tenure. Id.

76. Foraker Act, ch. 191, 31 Stat. 77 (1900) (codified as amended at 48 U.S.C. § 731); see also Diane Lourdes Dick, U.S. Tax Imperialism in Puerto Rico, 65 Am. U. L. Rev. 1, 28 (2015) ("The Foraker Act . . . ended military rule and installed a civilian colonial government.").

77. These congressional statutes that organized U.S. territories are known as organic acts. See Organic Act, Black's Law Dictionary (4th ed. 1968) (defining an organic act as one that constitutes the government of a newly organized territory).

78. Foraker Act, §§ 18–35, 39, 31 Stat. 77, 81–86.

statutorily authorized the Puerto Rican federal district court,[79] bringing its jurisdictional reach into conformity with all other federal district courts.[80] The appeals from the district court continued being heard by the Supreme Court of the United States until 1915, when Congress gave the U.S. Court of Appeals for the First Circuit jurisdiction over appeals from the District Court of Puerto Rico.[81]

Along with the creation of the district court came a post for the representative of the U.S. government in that forum: the United States Attorney.[82] The President of the United States appointed the first United States Attorney of Puerto Rico when the provisional court was created in 1899.[83] The President authorized the U.S. Attorney to bring cases in violation of civil and criminal federal statutes and cases in violation of any general orders issued during military rule. Just like the U.S. Attorneys on the mainland, the U.S. Attorney in Puerto Rico also represented the United States in all suits to which it was a party in that district.[84]

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79. Id. ch. 191, § 34, 31 Stat. 77, 84; see also James T. Campbell, Note, Island Judges, 129 Yale L.J. 1888, 1909 (2020) ("The original district court in Puerto Rico hardly resembled the court Congress sought to reform in 1966."). Litigants challenged the propriety and power of the federal district court throughout the twentieth century. *Santiago v. Nogueras* represents one of the earliest challenges. 2 P.R. Fed. 467 (1907), aff'd, 214 U.S. 260 (1909). The plaintiffs in that case challenged a default judgment against them resulting from unpaid promissory notes. Id. at 471. The default judgment was issued by the provisional court and executed by the district court created under the Foraker Act. Id. at 471–72. In response to the judgments, Plaintiff alleged, in part, that the district court was unauthorized to proclaim its judgment because it was improperly constituted and therefore lacked jurisdiction over the original suit. Id. at 472. The court rejected the arguments, explaining that the Executive's war powers allowed it to create the provisional court and, based on prior cases, those provisional courts retain their power to hear cases until Congress modifies them. Id. at 476, 488–89. As a result, the district court in both its iterations—the provisional court and the district court created by Congress—retained the power to hear the underlying suit concerning the unpaid notes.

80. Foraker Act § 34; Monge, El Sistema, supra note 65, at 61.

81. In 1915, Congress placed the district court within the First Circuit Court of Appeals—the court that hears appeals from the district court to this day. Act of Jan. 28, 1915, ch. 22, § 1, 38 Stat. 803, 803 (codified at 28 U.S.C. § 41 (2018)).

82. Or the United States District Attorney, as the U.S. Attorneys were referred to at that time. See Foraker Act § 34 ("The President, by and with the advice and consent of the Senate, shall appoint a district judge, a district attorney, and a marshal for said district, each for a term of four years, unless sooner removed by the President.").

83. See Baralt, supra note 62, at 91–92.

84. Id. at 92 (describing General Order 88, June 27, 1899, which assigned the duties of the U.S. Attorneys). J. Marbouh Keedy served as the first Provisional United States Attorney, but he did not last long. Id. at 94; Eulalio A. Torres, The Puerto Rico Penal Code of 1902–1975: A Case Study of American Legal Imperialism, 45 Rev. Juris. U. P.R. 1, 76 (1976) [hereinafter Torres, Case Study]. Noah Brooks Kent Pettingill, the first district court judge of the provisional court, replaced Keedy as the first U.S. Attorney for Puerto Rico in the post-Foraker Act district court. Pettingill served as the U.S. District Attorney before being fired by Theodore Roosevelt. See Judges' Info, U.S. Dist. Ct. for the Dist. of P.R., https://www.prd.uscourts.gov/judges-info [https://perma.cc/T4AJ-EUBT] (last visited

Today, the USAO for the District of Puerto Rico is one of ninety-three U.S. Attorneys representing ninety-four districts.[85] Internally, there are close to sixty Assistant U.S. Attorneys in the office, and just under half of them are native-born Puerto Ricans.[86] Additionally, there are about five Special Assistant U.S. Attorneys—attorneys in different Puerto Rican governmental agencies that are on loan, or in *destaque*, to the U.S. Attorney.[87] The office is extremely busy with one of the highest cases per attorney rates in the country.[88]

B. *Local Prosecutorial Power*

Puerto Ricans exercised local prosecutorial power while under Spanish rule.[89] On the eve of the Spanish–American War, mounting political pressure in Puerto Rico and Cuba convinced Spain to grant those territories greater autonomy.[90] In 1897, the Crown instituted the *Carta Autonómica de Puerto Rico*—or Autonomic Charter—granting the Island a greater level of home rule.[91] As a part of the charter, the Crown created a

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Aug. 13, 2024) (noting that Pettingill was the first provisional judge); Letter from Theodore Roosevelt, President of the U. S., to Charles F. Stokes, (Dec. 5, 1906), https://www.theodorerooseveltcenter.org/Research/Digital-Library/Record/ImageViewer?libID=o197452 [https://perma.cc/X7X2-JMPQ] ("To my great regret your letter reached me nearly a week after I had removed Mr. Pettingill."). A Puerto Rican would not serve on the district court until Judge Clemente Ruíz Nazario joined the bench in 1952. See Judges' Info, supra ("On January 28, 1952, President Harry S. Truman nominated Clemente Ruiz Nazario to be the first native-born Puerto Rican United States district judge.").

85. Court Role and Structure, U.S. Courts, https://www.uscourts.gov/about-federal-courts/court-role-and-structure [https://perma.cc/JV68-Z3A9] (last visited Aug. 13, 2024).

86. Interview with B (n.d.) (on file with the *Columbia Law Review*); Interview with E, supra note 36. About eight AUSAs do appellate work, and some others do civil work. Interview with E, supra note 36. The percentage of the office doing violent crime or gun cases is around ten percent. Id. The addition of around ten SAUSAs was seen as a "huge increase" in personnel. Id. The USAO started hiring more people from the mainland in the late 1990s and early 2000s. Id. The PRDOJ used to offer competitive salaries compared to the AUSAs, which posed a problem for local recruitment. Id. Another issue is the need for English speakers. Id. As one person explained, local prosecutors might not feel comfortable writing or arguing in English. Id. As a result, there is a smaller pool to recruit from. Id.

87. See DOJ, United States Attorneys' Annual Statistical Report 4, 19 tbls. 1 & 4 (2023), https://www.justice.gov/usao/media/1343726/dl?inline [https://perma.cc/LS52-SME8] (depicting the total caseload of the U.S. Attorneys' Offices through 2023).

88. Interview with B, supra note 86 (noting that the office handles more cases per attorney than most offices).

89. Carta Autonómica de 1897 de Puerto Rico, art. 45 (creating the Secretary of Justice).

90. See Burnett, supra note 17, at 873 n.327 (2005) ("Proponents of a compact also cite Puerto Rico's Charter of Autonomy of 1897, enacted by Spain in a futile attempt to quell the then-raging war for independence in Cuba by granting increased autonomy to Cuba and Puerto Rico.").

91. Id.

local Secretary of Justice who was tasked with prosecuting criminal offenses on the Island.[92] A year later, the United States acquired the Island.[93]

During the U.S. military rule, the military governor created a new Department of Justice tasked with enforcing the local Puerto Rican Penal Code.[94] The military governor tinkered with the Department's focus to match the existing Attorney General Office structures on the mainland, christened the head of the Department the Attorney General, and left the general enforcement of local criminal offenses in the hands of the newly created Department of Justice.[95] The role of the Attorney General underwent slight modifications in the Foraker Act of 1900 and again in the federal government's imposition of the Puerto Rican Political Code of 1902.[96] Ultimately, the Attorney General remained the local government's representative in criminal matters and also played a role in the internal administration of the local Puerto Rican courts.[97]

The Puerto Rican Penal Code has existed in some form since 1902.[98] From 1900 to 1902, the federal government commissioned several committees to study the existing Puerto Rican Penal and Civil Code and make suggestions for their improvement.[99] Although initially supportive of the existing Penal Code, the last commission to study the code suggested a complete overhaul.[100] The U.S. Congress obliged, replacing the Puerto Rican Penal Code not with a specially curated set of statutes that represented the voice of the local population but instead with the slightly altered Penal Code of California of 1873.[101] The California code, according to the Commission, had a special "punitive character, proper of a code of a frontier community under rapid economic development."[102] More importantly, however, the California Penal Code was readily available in both English and Spanish, considerably diminishing the necessary workload for the Commission.[103] That same Penal Code

92. Carta Autonómica de 1897 de Puerto Rico, art. 45 (creating the Secretary of Justice).

93. Off. of the Gov't of Puerto Rico, supra note 2, at 8.

94. Act No. 205 of Dec. 9, 2004, Statement of Motives, 2004 P.R. Laws 235, 235 (describing General Order No. 12, February 6, 1899).

95. Baralt, supra note 62, at 104–07 (describing General Order No. 98, July 15, 1899).

96. Foraker Act, ch. 191, §§ 8, 16, 31 Stat. 77, 79, 81 (1900); Ley Núm. 205 de 9 de Agosto de 2004, at 2 (2004), http://www.justicia.pr.gov/wpcontent/uploads/2021/02/Ley-Orgánica-del-DJ-205-2004-actualizada-2021-febrero.pdf [https://perma.cc/TW79-FLSB].

97. Ley Num. 205 de 9 de Agosto de 2004, supra note 96, at 2.

98. Dora Nevares-Muñiz, Recodification of Criminal Law in a Mixed Jurisdiction: The Case of Puerto Rico, Elec. J. Compar. L., May 2008, at 1, 2 [hereinafter Nevares-Muñiz, Recodification of Criminal Law].

99. Torres, Case Study, supra note 84, at 3–4, 10–20.

100. Id. at 17, 19–20.

101. Nevares Muñiz, Evolution of Penal Codification, supra note 41, at 104–07, 111; Nevares-Muñiz, Recodification of Criminal Law, supra note 98, at 5.

102. Nevares-Muñiz, Recodification of Criminal Law, supra note 98, at 5.

103. Id.

remained in effect with some amendments for seven decades. In 1974, the Puerto Rican legislature instituted major reforms to the Penal Code. This Code attempted to combine the common law tradition of the California Penal Code with the original civil law tradition of the Island.[104] The Puerto Rican legislature would go on to adopt an entirely new Penal Code in 2004.[105]

The Puerto Rican Department of Justice—the entity that today is tasked with representing the local government in its courts—was created in 1952 as part of Puerto Rico's most recent organic act.[106] In 1950, Congress passed Public Law 600, which allowed Puerto Ricans to write and adopt a constitution of their own making.[107] Puerto Ricans held a constitutional convention and, in 1952, ratified their constitution after Congress made some changes and approved the final version.[108] In their new constitution, Puerto Ricans provided for a Department of Justice under the direction of a Secretary of Justice.[109] Puerto Rico's new Congress retained the power to reorganize the PRDOJ and did so immediately after the constitution's ratification by transferring the role and responsibilities of the previously existing Attorney General to the Secretary of the PRDOJ.[110] The Office of the Chief District Attorney was then established as the criminal enforcement wing of the PRDOJ. Within that office, there are thirteen district attorneys who each oversee their corresponding district in Puerto Rico.[111] These district attorneys are charged with prosecuting violations of the Puerto Rican Penal Code.

C. *Plenary Power*

A common theme in the story of Puerto Rico's governmental structure is the presence of the federal government. Despite the creation of parallel local and federal prosecutorial structures, Puerto Rico's relationship to the federal government is not like that of a state. Indeed, the federal government was essential to the creation of the Puerto Rican prosecutorial apparatus. Specifically, the PRDOJ would not have existed but for Congress approving the Puerto Rican Constitution. Moreover, although Puerto Rico enjoys a robust local prosecutorial office, the people

104. Id. at 7 (citing Puerto Rico Penal Code, Law No. 116 (1974) (codified as amended, 33 L.P.R.A. § 3001 et seq. (2003))).

105. Id. at 8.

106. P.R. Const. art. IV, § 6.

107. Alomar, supra note 23, at 35–36.

108. Id. at 36.

109. P.R. Const. art. IV, § 6. The Secretary of the Department of Justice is the territorial equivalent of the Attorney General of the United States.

110. Ley Núm. 6 de 24 de julio de 1952.

111. Departamento de Justicia de Puerto Rico, Estructura Organizacional (Mar. 20, 2023), https://www.justicia.pr.gov/wp-content/uploads/2023/04/20230320__organigrama.pdf [https://perma.cc/8Q3K-M998?type=image].

of the Island are not the ultimate source of prosecutorial power, as Puerto Rico's power to enact and prosecute criminal laws comes from the federal government. Consequently, the federal government has the final say in the structure, mechanisms, and laws that apply to the Island.

How can it be that Congress continues to wield complete authority over a territory in this day and age? The answer rests in Congress's plenary power. The federal government's plenary power over the territories is as old as the Constitution itself.[112] The Constitution provides Congress with "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[113] As the Supreme Court explained, plenary power means that Congress "has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments."[114]

To a large degree, plenary power over the territories was a practical necessity. Following the ratification of the Constitution in 1788, the United States was left in possession of the Northwest Territories, and the former colonists were keen on continuing their westward expansion.[115] To facilitate the governance and organization of current and future territories, the federal government passed laws, known as organic acts, which provided for a territory's internal governance along with certain markers that would trigger expanded autonomy within the territory.[116] These organic acts were meant to be temporary and facilitated the territory's purported march towards statehood.[117] In so doing, "Congress exercise[d] the combined powers of the general, and of a state government."[118] In other words, Congress inhabited a strange space as

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112. There were different provisions concerning the treatment of territorial expansion in the Articles of Confederation as well. See Perea, supra note 17, at 1231–36.

113. U.S. Const. art. IV, § 3. As Maggie Blackhawk has recently made clear, the development and use of the plenary power doctrine in continental expansion and subordination of marginalized people—including Indigenous and colonized people—played a central role in creating the "Constitution of American Colonialism." See Maggie Blackhawk, Foreword: The Constitution of American Colonialism, 137 Harv. L. Rev. 1, 22–26 (2023).

114. De Lima v. Bidwell, 182 U.S. 1, 196 (1901) (internal quotation marks omitted) (quoting Nat'l Bank v. County of Yankton, 101 U.S. 129, 133 (1880)).

115. Rana, The Two Faces, supra note 17, at 109.

116. See Burnett, supra note 17, at 816–17 ("Congress passed organic acts establishing governments with congressionally appointed governors, partially elected legislatures, and untenured judges; reserved the right to annul territorial laws; and limited each territory's federal representation to one nonvoting delegate in the U.S. House of Representatives.").

117. Developments in the Law: The U.S. Territories, 130 Harv. L. Rev. 1632, 1644–45 (2017) [hereinafter Developments in the Law].

118. Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 546 (1828); see also *County of Yankton*, 101 U.S. at 133 ("The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme . . . ."); United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840) ("Congress has the same power over [a territory] as over any other property belonging

both the federal legislature and the legislature for the new territories. The practical effect was that Congress could not only create organic acts but also pass subsequent statutes that affected the internal governance of those territories. This remains true to this day, with Congress having passed several organic acts for the U.S. Virgin Islands, Guam, and Puerto Rico.[119] The only difference is that these territories, unlike the ones before them, were never truly on the path towards statehood and are therefore perpetually subject to Congress's legislative powers.

In the twenty-first century, Congress's plenary power continues producing results that offend the United States' purported anti-imperialist origins and perceptions of the United States as a bastion of freedom.[120] For example, the federal government, relying on its plenary power, discriminates against the territories without offending the U.S. Constitution and with the Supreme Court's blessing. Congress has provided people in the mainland United States greater financial assistance under federal programs than those in the territories.[121] Similarly, because the Supreme Court held that the territories are not subject to the Uniformity Clause,[122] Congress charged different duties for goods imported into the territories.[123] Congress has also excluded the territories from federal bankruptcy laws, again, with the Supreme Court's blessing.[124] Moreover, wearing its hat as both the federal and local legislature,

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to the United States; and this power is vested in Congress without limitation; and has been considered the foundation upon which the territorial governments rest.").

119. Congress has not passed an organic act for American Samoa, and the legislative body entered into a covenant with the Northern Mariana Islands. Michael Milov-Cordoba, Territorial Courts, Constitutions, and Organic Acts, Explained, State Ct. Rep. (Aug. 14, 2023), https://statecourtreport.org/our-work/analysis-opinion/territorial-courts-constitutions-and-organic-acts-explained [https://perma.cc/668G-ATNF].

120. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, The Constitution of Difference, 137 Harv. L. Rev. 133, 144–54 (2024) (explaining how the Insular Cases and the doctrine of territorial incorporation are in tension with some of the values embodied by the Constitution); Aziz Rana, Colonialism and Constitutional Memory, 5 U.C. Irvine L. Rev. 263, 269 (2015) (explaining how the expansion of the constitutional acquisitive power to include the holding of colonial possessions contradicts the accepted American liberatory creed); see also Rana, The Two Faces, supra note 17, at 3 (explaining "how a uniquely American ideal of freedom entailed imperial frameworks, which over time undermined the very promise of this ideal").

121. For example, Congress does not have to, nor does it, make Supplemental Security Income benefits available to residents of Puerto Rico to the same extent that Congress makes those benefits available to residents of the States. United States v. Vaello Madero, 142 S. Ct. 1539, 1541 (2022).

122. See supra note 6.

123. Downes v. Bidwell, 182 U.S. 244, 247–48 (1901). Congress passed tariffs aimed at the territories to protect stateside agriculture, especially sugar production, to the detriment of the new territories. Dick, supra note 76, at 29–32 (2015).

124. Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 117–18 (2016).

Congress recently explicitly placed a fiscal control board within Puerto Rico's local government.[125]

Congress's use of its plenary power also extends the jurisdictional reach of federal criminal statutes, authorizing the government to prosecute offenses that occur within a territory without the offense necessarily affecting a federal interest. Section 2423(a) of the Mann Act prohibits someone from transporting a person under the age of eighteen "in any commonwealth, territory or possession of the United States" for the purposes of committing a sex crime.[126] Despite this section applying to actions within states only when the victim is transported in interstate or foreign commerce, the First Circuit has explained that Congress has the ability to go further with respect to the territories and to criminalize activities occurring solely within a territory.[127] Similarly, Section 1951(b)(3) of the Hobbs Act defines "commerce" as "commerce within the District of Columbia, or any Territory or Possession of the United States."[128] These statutes make more sense when viewed from the lens of plenary power. Since the territories are essentially a creation of Congress, and Congress sits as a federal and local legislature for the territories, all actions within the territories affect federal interests.[129] Accordingly, even though the federal government has expressed a desire to respect local autonomy, there is simply no constitutional constraint preventing Congress from intruding further into local affairs.

Plenary power not only sanctions the federal government's ability to encroach into local affairs by prosecuting local offenses, but it also acts as a constraint on local prosecutorial power. The Supreme Court's double jeopardy jurisprudence is a perfect example of this reality. The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution forbids placing a person twice in jeopardy for the same offense.[130] But that does not prevent two sovereign entities from prosecuting someone for the same offense. As the Supreme Court has made patently clear, the term "offense" means a transgression against the law, and someone may certainly

125. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., 140 S. Ct. 1649, 1661 (2020).

126. 18 U.S.C. § 2423(a) (2018).

127. See United States v. Cotto-Flores, 970 F.3d 17, 35 (1st Cir. 2020) (holding that the Mann Act applies to a defendant who transported his or her victim solely within Puerto Rico); see also Arnaud, Llegaron los Federales, supra note 3, at 889 ("[T]he federal government maintains the unfettered ability to meddle in what are otherwise local criminal activities on the Island.").

128. 18 U.S.C. § 1951(b)(3). The Hobbs Act prohibits robbery or extortion that affects interstate commerce. Id. § 1951(a).

129. See United States v. López-Martínez, No. 15-739 (PAD), 2020 WL 5629787, at *26 (D.P.R. Sept. 21, 2020) (noting that "Puerto Rico is an 'unincorporated territory' of the United States subject to the Territorial Clause" and therefore falling "within the intra-territory provision" of the Hobbs Act), rev'd in part, vacated in part by United States v. Falcon-Nieves, 79 F.4th 116 (1st Cir. 2023).

130. U.S. Const. amend. V.

transgress the law of more than one sovereign with one action.[131] Therefore, two separate sovereigns may prosecute someone for the same offense because the underlying action offends both sovereigns.

That rule—known as the dual sovereign doctrine—has significant implications on the ground. For example, local prosecutors in New Jersey and an Assistant U.S. Attorney (AUSA) for the District of New Jersey can prosecute someone under their respective penal codes. If the AUSA fails to convict, the local prosecutors can still try the defendant subsequently or concurrently. If the two entities are not separate sovereigns, however, one failed prosecution forecloses a successive prosecution by either sovereign. Otherwise, the same sovereign, under the guise of a different name, could again prosecute someone for the same offense.

The U.S. territories and the federal government, unlike a state, are not separate sovereigns.[132] The power to prosecute in territories ultimately emanates from the creation of the federal Constitution.[133] The Supreme Court most recently affirmed this proposition in *Puerto Rico v. Sanchez Valle*.[134] There, it explained that for purposes of determining whether an entity is a separate sovereign for double jeopardy, courts must determine the ultimate source of the entity's prosecutorial power.[135] Puerto Rico, the Court found, drew its power to prosecute not from the people of the Island, but rather from the federal government, which gave it the ability

131. Moore v. Illinois, 55 U.S. 13, 19 (1852).

132. This was not always the case. As discussed elsewhere, in the early nineteenth century the Supreme Court suggested that territories were dual sovereigns in Moore v. Illinois, 55 U.S. (14 How.) 13 (1852). Multiple territorial supreme courts relied on those expressions in finding that they were dual sovereigns for double jeopardy purposes, and the Attorney General of the United States, Caleb Cushing, expressed that legal conclusion in various court martial opinions. Arnaud, Dual Sovereignty, supra note 42, at 1654–55 ("The twenty-third U.S. attorney general, Caleb Cushing, to whom military court-martial cases were appealed, similarly believed that territories were a separate sovereign for double jeopardy purposes. Cushing made this point most clearly in *Howe's Case*."). The Supreme Court, however, would change course in a case dealing with one of its new insular possessions, the Philippines. Grafton v. United States, 206 U.S. 333, 354–55 (1907) (finding that the territory of the Philippines was not a dual sovereign for double jeopardy purposes); see also Puerto Rico v. Shell Co., 302 U.S. 253, 264 (1937) (same with respect to Puerto Rico). The Court of Appeals for the First Circuit would make a contrary finding many years later when it found that Puerto Rico became a separate sovereign because its internal governance now resembled that of a state. See United States v. Lopez Andino, 831 F.2d 1164, 1167–68 (1st Cir. 1987). The Supreme Court reversed that ruling in Puerto Rico v. Sanchez Valle, 579 U.S. 59 (2016).

133. Saenz v. Roe, 526 U.S. 489, 504 n.17 (1999) ("The Framers split the atom of sovereignty. . . . The resulting Constitution . . . establish[ed] two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." (internal quotation marks omitted) (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring))).

134. 579 U.S. at 75–77.

135. Id. at 68.

to create a local constitution and criminal legal system.[136] The effect? Only one entity can prosecute a person for the same offense—either the federal government or the local government.

Congress's plenary power is an important and unexplored aspect of the federal police power. Although local prosecutors in the territories carry out the bulk of prosecutions, the federal government can intervene in local affairs in ways that it could not do in states.[137] Further, the Double Jeopardy Clause acts as a constraint on local power. As discussed further below, the combination of these two circumstances often significantly undermines democratic accountability and circumvents important rights for defendants under local law.

One way in which both the federal and local governments navigate this unique reality is through constant communication. Over time, the two governments have worked ever closer on investigations and establishing prosecutorial priorities.[138] There perhaps is no better example of the close tie between the two governments than the Memorandum of Understanding between the USAO and PRDOJ.

II. THE MEMORANDUM OF UNDERSTANDING

In 2010, the PRDOJ and the USAO for the District of Puerto Rico entered into an agreement that referred various types of offenses to the USAO for prosecution.[139] Those offenses, "which are prosecuted as state crimes virtually everywhere else in the United States," could have been prosecuted by the PRDOJ under local law.[140] Nevertheless, the USAO and the PRDOJ felt a need for these cases to be prosecuted federally. While it

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136. Id. at 73.

137. See, e.g., 2010 MOU, supra note 12, at 1–2 (noting that while "DOJ-PR and PRPD shall have primary prosecutorial and investigative jurisdiction in all cases involving the possession . . . of controlled substances" in ports of entry, the "USAO-PR and federal law enforcement agencies . . . shall have primary jurisdiction in" cases based on the amount of drugs in possession).

138. See, e.g., Press Release, DOJ & Drug Enf't Admin., Caribbean Corridor Strike Force Dismantles Drug Trafficking Organization Responsible for Transporting Drugs and Money Between Puerto Rico–Culebra–St Thomas, Drug Enforcement Administration (Apr. 1, 2014), https://www.dea.gov/press-releases/2014/04/01/caribbean-corridor-strike-force-dismantles-drug-trafficking-organization (on file with the *Columbia Law Review*) (describing a joint task force consisting of federal officers and Puerto Rico Police Department agents).

139. United States v. Colon-de-Jesus, No. 10–251 (JAF), 2012 WL 2710877, at *4 (D.P.R. July 6, 2012).

140. See id. ("[T]he wholesale referral of cases for federal prosecution 'takes a heavy toll on the federal court, which is not designed or equipped to become a de facto state court by recycling failed state prosecutions.'" (quoting United States v. Sevilla-Ovola, 854 F.2d 164, 170 (D.P.R. 2012), vacated, 770 F.3d 1 (1st Cir. 2014))); see also 2010 MOU, supra note 12, at 1 (discussing Puerto Rico and DOJ as having "concurrent jurisdiction" over crimes involving "the possession, transportation or seizure of controlled substances within and through ports of Puerto Rico").

is true that similar arrangements exist elsewhere,[141] the MOU in Puerto Rico is fundamentally different because of its breadth and local consequences. The MOU does not cover a discrete set of offenses, but rather it covers six different categories of offenses: certain types of drug trafficking cases in airports, carjackings, bank robberies, firearms cases, Hobbs Act cases, and certain sex offenses.[142] Further, as discussed below, one of the main purposes of the MOU in Puerto Rico was to circumvent local procedural protections.[143] By doing so, it subjects more people to criminal statutes that they never had a say in creating, furthering the democratic void in the territories.

The first MOU was signed in 2010. But the origins of this agreement date back to the beginning of a familiar crime wave in the 1990s.

A. *Crime in Puerto Rico*

Beginning in the 1990s, Puerto Rico witnessed a steady rise in its crime rate.[144] Violent crimes, particularly murders and firearm-related offenses, accounted for much of the increased activity.[145] From 1970 to 2009, the murder rate alone increased a whopping 229%, placing the murder rate at three times the average in the United States.[146] The Island, which has a population hovering around three million people, had 600 reported murders in 1990. By 1994, there were over 800 reported murders—27.5 murders per 100,000 people.[147] Many of these murders were connected to drug trafficking on the Island, which had become endemic by the mid-1990s.[148] And with the drug trade came firearms.[149] By the 1990s, Puerto

141. See infra notes 333–336 and accompanying text.

142. 2010 MOU, supra note 12, at 1–7.

143. See infra notes 249–254 and accompanying text.

144. See Héctor Tavárez & Ricardo R. Fuentes-Ramírez, Economic Development, Environmental Disturbances, and Crime: The Case of Puerto Rico, 11 J. Socioecon. Rsch. 55, 58 (2023) (stating that crime rates in Puerto Rico peaked in the early 1990s).

145. Although incidents of murder were quite high in Puerto Rico, other violent crimes like rape, burglary, and property crimes were low compared to the rest of the United States. According to the FBI's statistics, the average violent crime rate in the mainland was almost double that of Puerto Rico. Compare FBI: UCR Table 1, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-1 (on file with the *Columbia Law Review*) (last visited Aug. 12, 2024), with FBI: UCR Table 5, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-5 (on file with the *Columbia Law Review*) (last visited Aug. 12, 2024).

146. Nevares-Muñiz, El Crimen, supra note 32, at 13–14.

147. Id.

148. Ivelaw L. Griffith, Drugs and Democracy in the Caribbean, 53 Mia. L. Rev. 869, 870 (1999).

149. There are no firearm manufacturers on the Island. As a result, virtually all firearms in Puerto Rico have been imported. This fact has been increasingly important as, even without the MOU, any offenses involving a firearm necessarily involve interstate commerce. Interview with J, supra note 39.

Rico had become a central drug trafficking hub in the Caribbean. Some drugs stayed on the Island, of course, but Puerto Rico was mainly a transfer point, allowing people to traffic drugs into and out of the mainland United States.[150] As a result, tensions rose between drug trafficking agents on the Island. In 1997, for example, 83.3% of murders were reportedly connected to drug trafficking in some way.[151]

The Puerto Rican government's response to the rising crime rate was similar in many respects to responses to rising crime throughout the mainland: get tough on crime.[152] Tough-on-crime policies in Puerto Rico, referred to as *la mano dura contra el crimen* (the iron fist against crime), were enacted to punish offenses more harshly than before and to send a clear message to would-be offenders that crime would not be tolerated.[153] The resulting policies increased terms of incarceration for certain offenses and promoted aggressive police tactics throughout the Island.[154] For example, then-Governor Pedro Juan Rosselló[155] signed legislation restricting access to public housing, known as *caserios*, in an attempt to curb the rising crime rate.[156] Public housing projects were seen as a hub of

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150. Nevares-Muñiz, El Crimen, supra note 32, at 151–52 (2008).

151. Patricio G. Martínez Llompart, In the Custody of Violence: Puerto Rico Under la Mano Dura Contra el Crimen, 1993–1996, 84 Rev. Juris. U. P.R. 447, 449–50 (2015).

152. See Alfredo Montalvo-Barbot, Crime in Puerto Rico: Drug Trafficking, Money Laundering, and the Poor, 43 Crime & Delinq. 533, 535 (1997) ("Echoing the federal 'war on drugs,' the government of Puerto Rico has implemented a series of crime control policies aimed at eradicating the use of the island for drug trafficking and money laundering.").

153. José Caraballo-Cueto, Policing Life and Death: The Perverse Consequences of an Iron Fist Policy Against Crime, Crim. L. & Crim. Just. Books (March 2020), https://clcjbooks.rutgers.edu/books/policing-life-and-death-the-perverse-consequences-of-an-iron-fist-policy-against-crime/ [https://perma.cc/R7KZ-A2YB] (reviewing Marisol LeBrón, Policing Life and Death: Race, Violence, and Resistance in Puerto Rico (2019)).

154. See Marisol LeBrón, Policing Life and Death: Race, Violence, and Resistance in Puerto Rico 114–15, 144–45 (2019) [hereinafter LeBrón, Policing Life and Death] (describing criticism of the tough-on-crime approach and police violence around student-led protests).

155. Rosselló served as governor from 1993 to 2001. Former Governors—Puerto Rico, Nat'l Governors Ass'n, https://www.nga.org/former-governors/puerto-rico/ [https://perma.cc/GJ25-AZQL] (last visited Sept. 30, 2024).

156. The Puerto Rican Congress passed legislation in 1987 allowing people to control private residential communities. Ley de Control de Acceso, Ley Núm. 21 del 20 de Mayo de 1987, 23 LPRA §§ 64-6411. Following the new legislation signed by Rosselló, private communities saw a spike in the creation of security checkpoints in their communities. The result was physical segregation, with wealthy private gated communities on one hand and poor gated public housing communities on the other. Llompart, supra note 151, at 464–65. Moreover, it bears noting that Puerto Rico is a poor territory, with about forty percent of the population living under the poverty line. The median household income is about $24,000. QuickFacts: Puerto Rico, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/PR/PST045221 [https://perma.cc/3LBT-CJM8] (last visited Aug. 12, 2024). For context, in Mississippi, the poorest state in the Union, only roughly nineteen percent of people live under the poverty line and the median household income is approximately $53,000. U.S. Census Bureau, QuickFacts: Mississippi, United States

criminal activity.[157] According to political leaders, many drug traffickers and gang members either lived or were harbored there.[158] According to the theory, restricting access by sealing off the projects and having one or two security checkpoints could curb crime.[159] Further, Rosselló went as far as activating the Puerto Rican National Guard to help implement and run those security checkpoints, making these public housing complexes feel like warzones.[160]

As was true nationwide,[161] the tough-on-crime policies enacted by the local government were largely ineffective. Although there was a spike in criminal charges, as well as a rise in the jail and prison population at the local and federal levels, violent crime persisted.[162] And despite increasingly aggressive police tactics—tactics that later forced the U.S. DOJ to investigate the Puerto Rico Police Department, condemn their tactics, and institute reforms[163]—*caserios* are still considered "hotspots for drug activity and gang violence."[164]

Well into the twenty-first century, violent crime remained a major issue for the Island. In 2011, there were over 1,000 murders and non-

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https://www.census.gov/quickfacts/fact/table/MS/PST045222 [https://perma.cc/VFT5-MLQV] (last visited Aug. 12, 2024).

157. LeBrón, Policing Life and Death, supra note 154, at 52.

158. Id.; Llompart, supra note 151, at 462.

159. See Marisol LeBrón, Puerto Rico's War on Its Poor, Bos. Rev. (Dec. 12, 2018), https://www.bostonreview.net/articles/marisol-lebron-puerto-rico-war-poor/ (on file with the *Columbia Law Review*) [hereinafter LeBrón, War on Its Poor]; see also Llompart, supra note 151, at 464 ("For [those] who grew up in the island during the 1990s, . . . private communities invoke safety and order, while public spaces remain the realm of danger and violence.").

160. See LeBrón, War on Its Poor, supra note 159 (describing the militarized Mano Dura approach to policing public housing). Notably, apart from its tough on crime approach, the Puerto Rican Congress attempted to meet the persistent crime wave by reorganizing the PRDOJ in 2004. In doing so, Congress attempted to streamline communication between the internal departments and cut out unnecessary bureaucratic obstacles. Ley Núm. 205 de 9 de Agosto de 2004, supra note 96.

161. See, e.g., Elaine R. Jones, The Failure of the "Get Tough" Crime Policy, 20 U. Dayton L. Rev. 803, 803–04 (1995).

162. See LeBrón, War on Its Poor, supra note 159 ("While Rosselló's administration officially celebrated a decrease in the number of robberies and carjackings, Puerto Rico experienced an increase in the murder rate as *Mano Dura* intensified battles between rival gangs over turf.").

163. See DOJ, C.R. Div., Investigation of the Puerto Rico Police Department 5 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/09/08/prpd_letter.pdf [https://perma.cc/T984-S5VT].

164. See Puerto Rico: Security Overview and Travel Assessment, Armada Global 11 (2015), https://amizade.org/wp-content/uploads/2014/09/PuertoRico-WebVersion.pdf [https://perma.cc/SU3G-TTVG].

negligent manslaughters on the Island.[165] Puerto Rico outnumbered the murders in Chicago (433) and the entire state of Illinois (721) that year.[166] By 2011, Puerto Rico was in the midst of the most violent crime wave in its history.[167] Indeed, for Puerto Rico, the first two decades of the twenty-first century looked a lot like the last decades of the twentieth century in terms of crime and violence—except that today, the Island must also contend with unconstitutionally aggressive police tactics, a government sponsored physical segregation in *caserios*, and a fearful populace. While it is possible that *la mano dura* might eventually stem the tide of violence, the USAO was not inclined to wait.

B. *The U.S. Attorney Steps In*

The USAO was well aware of the increase in drug-related violent crime throughout the Island. Indeed, the federal docket reflected a rise in both drug-related crimes and offenses involving firearms. For example, from 1994 to 2000, the percentage of cases resulting in conviction and sentencing for drug-related crimes increased from 51.9% to 62.4% of the docket.[168] The docket also shows a steady increase in the share of firearm-related offenses handled by the federal prosecutors. In the 1990s, firearm offenses accounted for just 2–3% of concluded cases. By the year 2008, however, firearms offenses accounted for twelve percent of offenses[169] and steadily increased until reaching a high of thirty-two percent of cases in 2015.[170]

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165. Crime in the United States by State, 2011, FBI, https://ucr.fbi.gov/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-5 [https://perma.cc/5C8P-GCKZ] (last visited Aug. 12, 2024).

166. Id.; Chicago Police Dep't, Chicago Murder Analysis 2 (2011), https://home.chicagopolice.org/wp-content/uploads/2014/12/2011-Murder-Report.pdf [https://perma.cc/KF97-S3FM].

167. Lymaris Suarez, Plan Contra el Aficionado a Halar Gatillo, El Nuevo Dia (Sept. 21, 2011) (on file with the *Columbia Law Review*).

168. U.S. Sent'g Comm'n, Data Reports: District of Puerto Rico 1 (1995), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/1995/PR95.pdf [https://perma.cc/2MWS-THXD]; U.S. Sent'g Comm'n, Data Reports: District of Puerto Rico 1 (1998), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/1998/PR98.pdf [https://perma.cc/4KV7-ZZ3L]; U.S. Sent'g Comm'n, Data Reports: District of Puerto Rico 1 (2000), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2000/pr00.pdf [https://perma.cc/99PH-2CSD].

169. U.S. Sent'g Comm'n, Data Reports: District of Puerto Rico 1 (2008), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2008/pr08.pdf [https://perma.cc/U3B9-72ZH].

170. U.S. Sent'g Comm'n, Data Reports: District of Puerto Rico 1 (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2015/pr15.pdf [https://perma.cc/KA95-RFT7].

This steady increase in drug-related and firearm prosecutions at the federal level paralleled the rise in violent crime throughout the Island. Unsurprisingly, both the federal and Puerto Rican governments determined that something had to be done to reduce the incidence of violent crime on the Island. In that spirit, the newly minted U.S. Attorney, Rosa Emilia Rodríguez-Vélez,[171] and the PRDOJ Secretary Guillermo A. Somoza Colombani, agreed to work together and find a more efficient mechanism to combat crime on the Island. Their answer was to give the federal government more responsibility in prosecuting cases and to increase collaboration between federal and local law enforcement agencies and prosecution offices.[172] Three main factors motivated that decision. First, the local government had been unable to reduce the incidence of violent crime, and in particular the murder rate, since the turn of the century.[173] Second, prosecutorial authorities were frustrated by key protections granted to criminal defendants under the Puerto Rican Constitution and rules of criminal procedure.[174] And third, officials believed that the superior resources of the federal government could assist tremendously in lowering the crime rate.[175]

Their strategy would be to lower the murder rate by targeting people with firearm-related offenses. The murder rate was, indeed, a problem. In the lead up to the signing of the MOU, there were calendar years in which the Island saw over a thousand murders.[176] The understanding within the government was that the vast majority of murders in high-crime areas were related to drug trafficking. This was especially true in the metropolitan areas like San Juan, Carolina, and Ponce.[177] If the federal government could imprison people believed to possess firearms illegally, then it would

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As explained below, the increase in adjudication of firearm offenses was in large part due to the 2010 MOU.

171. Rodríguez-Vélez, a native-born Puerto Rican, served as the U.S. Attorney for the District of Puerto Rico from 2007 to 2019. She previously worked both as a local prosecutor in the PRDOJ and as an AUSA for the District of Puerto Rico, offering her insight and particular familiarity with crime on the Island. Although nominated by President George W. Bush, she was never confirmed by the Senate and instead was confirmed and reappointed by the judges of the federal District of Puerto Rico. During her tenure, the USAO ramped up public corruption cases, notably prosecuting the sitting Puerto Rican Governor, Aníbal Acevedo Vilá, for campaign finance violations. He was acquitted after a trial. Andrew Scurria, Justice Department Seeks Ouster of Top Puerto Rico Prosecutor, Wall St. J. Online (May 16, 2018), https://www.wsj.com/articles/justice-department-seeks-ouster-of-top-puerto-rico-prosecutor-1526489580 (on file with the *Columbia Law Review*).

172. Interview with D, supra note 33; Interview with K (Jan. 2, 2024) (on file with the *Columbia Law Review*).

173. Interview with D, supra note 33.

174. Id.; Interview with E, supra note 36.

175. Interview with K, supra note 172; Interview with E, supra note 36; Interview with D, supra note 33.

176. Interview with D, supra note 33; Interview with E, supra note 36.

177. Interview with D, supra note 33.

simultaneously disable much of the drug trade. Accordingly, the main focus of the MOU was directed at firearms offenses, especially targeting felons in possession of a firearm.[178]

Relatedly, many federal officials viewed the Puerto Rican Constitution and local criminal procedure rules as a significant barrier to lowering the crime rate.[179] Three sections of the Puerto Rican Constitution provide particularly robust protections to people facing criminal charges. First, the constitution has a near-absolute prohibition on wiretapping and an exclusionary rule to enforce it.[180] Prosecutors have long argued that this prohibition stunts investigations and precludes local police from securing important evidence. Second, the Constitution provides a right to bail and prohibits pretrial incarceration exceeding six months.[181] Especially in the lead up to the MOU, officials saw the right to bail not as an important protection for defendants but as a get-out-of-jail-free card. In their view, the right to bail allowed gang members and other people accused of violent crimes to leave jail and commit further violent acts while their case was pending.[182] Finally, the Puerto Rican Constitution prohibits the death penalty.[183] While federal prosecutors in Puerto Rico use the death penalty to pressure defendants to plead guilty, this tool is unavailable in the local court system.[184]

Puerto Rico's local criminal procedure code also provides robust pretrial requirements. Two rules are worth noting. The first rule is the

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178. Interview with E, supra note 36.

179. Interview with B, supra note 86; Interview with D, supra note 33; Interview with E, supra note 36; Interview with K, supra note 172.

180. P.R. Const. art. II, § 10. "Only the consent of the telephone call's participants, accompanied by a supporting court order, can trump the explicit prohibition." Alomar, supra note 23, at 86 (citing Pueblo v. Santiago Feliciano, 139 P.R. Dec. 361 (1995)). This prohibition, however, does not prevent the admission of recorded telephone conversations in federal court. See United States v. Quinones, 758 F.2d 40, 43 (1st Cir. 1985).

181. P.R. Const. art. II, § 11. The prohibition of pretrial detention exceeding six months was a watershed moment for the Puerto Rican Constitution. Unlike many other provisions, the six-month prohibition was not imported from the previous organic acts or the U.S. Constitution. Instead, it was created as a direct reaction to the local prosecutors' practice of keeping people in pretrial detention by simply filing successive criminal complaints. This new rule would protect defendants from prosecutorial abuse. The provision would be accepted after some debate at the Constitutional Convention but was uncontested by the federal Congress. Trías Monge, Historia Constitucional, supra note 35, at 196.

182. See Interview with D, supra note 33 (explaining that the new bill would allow defendants to be set free on bail after six months); Interview with E, supra note 36 (explaining how the right to bail for murders requires greater collaboration between federal officers and local ones); Interview with G (Apr. 10, 2023) (on file with the *Columbia Law Review*) (describing how if someone commits murder, they only have to post ten percent of the bail amount to be released).

183. P.R. Const. art. II, § 7.

184. See Interview with J, supra note 39 (discussing how the death penalty interacts with the federal system in Puerto Rico).

speedy trial right.[185] The strict adherence to speedy trial rules by local tribunals attracted criticism for leading to dismissals of cases, with prejudice, after prosecutors fail to bring cases to trial in a timely fashion.[186] The application of the rule in local courts is seen as too strict, particularly by not allowing continuances for reasons typically granted in federal court. The second local rule governs the initial hearing.[187] In Puerto Rico, once someone is arrested and accused of a felony, the defendant is granted an initial hearing. This hearing is not a simple arraignment—defendants in Puerto Rico get that too.[188] But in Puerto Rico, the accused person gets an additional full hearing,[189] called the initial hearing, where the prosecution presents the charges against the defendant along with supporting evidence that is then contested or refuted by defense counsel. If a judge finds that the prosecutors did not establish probable cause to charge the alleged offenses, the charges are dismissed.[190] These hearings are not pro

185. The speedy trial right is also found in the Puerto Rican Constitution, but enforcement measures are set out in the Puerto Rican criminal procedure code. The constitutional provision found its origins in article II of the Organic Act of 1917, which also tracked the Sixth Amendment of the federal Constitution. The delegates to the Puerto Rican constitutional convention were aware of serious issues with the speed of the criminal process on the Island, but felt that enforcement mechanisms were of a legislative, not constitutional, nature. Trías Monge, Historia Constitucional, supra note 35, at 193.

186. See Interview with D, supra note 33 (explaining how the need for speedy trials leads to dismissals); Interview with E, supra note 36 (discussing how the federal officers have a much larger time frame during which to act than the local prosecutor). The speedy trial right is found both in the Puerto Rican constitution and in the local code of criminal procedure. P.R. Const. art. II, § 11; 34 LPRA Ap. II, 64(n)(4); see also Pueblo v. Custodio Colon, 192 P.R. Dec. 567, 580 (2015) ("Nuestra sociedad tiene un interés vigoroso en evitar la demora en los procesos criminales contra personas acusadas de violar sus leyes." ["Our society has a strong interest in avoiding delays in criminal proceedings against persons accused of violating its law."]).

187. See Interview with A (July 10, 2022) (on file with the *Columbia Law Review*) (explaining that people who were arrested have a right to appear quickly before a magistrate judge); Interview with F (n.d.) (on file with the *Columbia Law Review*).

188. An arraignment occurs in Puerto Rico almost immediately following the arrest. At the arraignment, the trial judge needs to find probable cause for the defendant's arrest. P.R. S. St. T. 34 Ap. I., § 22(a); P.R. Const. art. II, § 10. The constitutional requirement for a judicial order of arrest was seen as an "excellent contribution to the cause of civil rights in Puerto Rico" because up to that point arrest warrants could be issued by judges and district attorneys, "a situation that was clearly not desired and facilitated arrests en masse" of nationalist sympathizers in the 1950s. Trías Monge, Historia Constitucional, supra note 35, at 191 (author trans.). This change was also suggested by the progressive wing of the constitutional convention.

189. Etapas del Encausamiento Criminal Para Delitos Graves, Poder Judicial, https://poderjudicial.pr/Documentos/Educo/temas-legales/Procedimiento-judicial-criminal/Etapas-del-Encausamiento-criminal-delitos-graves.pdf [https://perma.cc/3L5G-RRJQ] (last visited Sept. 28, 2024); see also Nunzio Frattallone di Gangi, Comment, La Vista Preliminar, 16 Revista de Derecho Puertorriqueño [Rev. Der. P.R.] 231, 231–33 (1976).

190. P.R.S. St. T. 34 Ap. I, § 23. If the defendant successfully argues lack of probable cause, the district attorney then gets to reargue the merits of the case in front of another judge within the trial court. P.R.S. St. T. 34 Ap. I, § 24(c). See Luis Rivera Román, Los

forma and have produced controversial results. Recently, Puerto Rican Judge Rafael Villafañe Riera[191] courted controversy by dismissing charges against five defendants accused of murdering the beloved Puerto Rican boxer and former heavyweight champion Hector Macho Camacho,[192] citing misgivings about the veracity of the witnesses' statements during the initial hearing.[193]

The Puerto Rican Constitution and criminal procedure code provide robust protections for people accused of crimes, and those protections should be respected.[194] But supporters of the MOU use those very protections as justifications for pivoting to a federal process that is far less favorable to defendants and far more favorable to prosecutors. Importantly, criminal defendants have none of the aforementioned protections at the federal level, making the district court an ideal forum for prosecutions.

Given these important differences between the federal and local criminal legal apparatus, it is not altogether surprising that the USAO and PRDOJ decided that the federal government's superior resources, combined with the Federal Rules of Criminal Procedure and federal Constitution, could help lower the crime rate. The federal government was free to use all tools at its disposal in the investigation and prosecution of people suspected of criminal activity and was not at the mercy of local

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Derechos de los Acusados en los Procedimientos Penales Bajo la Constitución de Puerto Rico y los Estados Unidos, 46 Rev. Juris. U. Interamericana P.R. 417, 431–32 (2011–2012).

Some of the Puerto Rican procedural protections were inherited from Spain, including gathering sworn statements from witnesses and producing them to the other party. This, many argue, cannot meet the needs of law enforcement today because it gives too much information to potentially dangerous defendants. See Interview with D, supra note 33 (discussing how the requirement of listing witness information may result in witness intimidation and in prosecutors losing their witnesses). As one person explained, PRDOJ district attorneys are required to provide the name, address, and telephone numbers of the witnesses for initial hearings. When that happens, this opens the door for witness intimidation. There is a fear that some may get murdered, scared out of testifying, or start changing their testimony. As a result, cases may get delayed and prosecutors at the local level may lose witnesses. Id.

191. Interestingly, after Riera's finding in the Camacho case, the Supreme Court of Puerto Rico decided to not recommend him for a position on the Puerto Rico Court of Appeals in 2022. See Letter from Maite D. Oronoz Rodríguez, Chief Judge of the P.R. Sup. Ct., to Hon. Pedro R. Pierluisi Urrutia, Governor of P.R. (Nov. 2, 2022), https://poderjudicial.pr/Documentos/Supremo/Evaluacion/Ascenso-y-renominacion/2022/Rafael-A-Villafane-Riera.pdf [https://perma.cc/H3GB-H386].

192. Alex Figueroa Cancel, Encuentran No Causa Para Juicio en el Caso Por el Asesinato de Héctor "Macho" Camacho, El Nuevo Dia (Oct. 4, 2022), https://www.elnuevodia.com/noticias/tribunales/notas/encuentran-no-causa-para-juicio-en-el-caso-por-el-asesinato-de-hector-macho-camacho/ [https://perma.cc/V3D5-8WXN].

193. Lo Se Todo TV, No Causa Contra los Imputados por el Asesinato de Macho Camacho, Youtube, at 2:24 (Oct. 5, 2022), https://www.youtube.com/watch?v=3UfTicDIaI8 (on file with the *Columbia Law Review*).

194. See supra notes 179–190 and accompanying text.

rules of procedure, the Puerto Rican Constitution, or localized politics. In the words of one Puerto Rican jurist, "From a legal point of view, we were basically federalizing the island completely. Local courts weren't doing their job."[195] At the same time, there was a growing consensus that the proper administration of justice in local courts, too, was an obstacle to successful prosecutions. The "local government had to concede and accept that they did not have the resources, the money, power, nor the procedural mechanisms to deal with what was going on."[196] The people of Puerto Rico were demanding justice, and the federal government was ready to provide it.

1. *The MOU and Subsequent Amendments.* — The conversations between the PRDOJ and USAO resulted in the signing of a Memorandum of Understanding between the entities in 2010 with the primary goal of decreasing the murder rate and other violent offenses. The MOU attempted to achieve that goal by giving federal prosecutors primary jurisdiction over certain offenses and streamlining communication between the federal and local police and prosecutors.

According to the MOU,[197] the USAO would gain primary jurisdiction over certain weapons offenses, drug trafficking offenses, carjackings, robberies, and sex offenses.[198] But federal prosecutors still retained discretion over which cases to accept or decline. For example, one provision of the MOU provided that nothing in the agreement precludes the USAO from declining a case over which it has primary jurisdiction.[199] Other provisions offer nonbinding guidelines for accepting or declining a case, which was intended to provide federal prosecutors discretion to return a case to local prosecutors. And while the MOU is not legally binding, the parties agreed to act in accordance with its terms, and should a dispute arise as to which entity should take a case, there is an understanding within the USAO that the document will prevail.[200]

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195. Interview with G, supra note 182.

196. Id.

197. The current version of the MOU is confidential. One attorney with internal knowledge expressed hesitancy to publicize the MOU in fear of the text being used against the federal and local prosecutors. They noted that "defense counsel can get creat[ive]." Interview with E, supra note 36.

198. Mariana Cobián, Con Refuerzos Fiscalía Federal Para el 2014, El Nuevo Dia (Dec. 29, 2013) (on file with the *Columbia Law Review*); Interview with D, supra note 33. It bears noting that the PRDOJ had made a prior agreement for the federal government to prosecute carjackings involving death since at least 2001. See U.S. DOJ, The Federal Death Penalty System: A Statistical Survey (1988–2000), at 4 (2000), https://www.justice.gov/archives/dag/survey-federal-death-penalty-system (on file with the *Columbia Law Review*). The lack of transparency with respect to the MOU is perplexing. This is a document that represents the objectives of both federal and local governments, yet the entities keep it under lock and key.

199. Interview with E, supra note 36.

200. Id.

The MOU also streamlined collaboration between federal and state investigatory agencies.[201] Before the MOU, for example, the Puerto Rico Police Department (PRPD) conducted initial investigations and later referred the case to a federal agency. That still happens to a certain extent. But under the MOU, the PRPD is instructed to contact the relevant federal agency as soon as it has any indication that there could be federal jurisdiction.[202] That change allows the federal agency to take over the investigation from the outset. Further, the MOU provides several point persons for communication between the entities. If the PRDOJ needs to discuss a matter with the USAO, the MOU will direct the PRDOJ to the exact person that covers those types of cases or issues. Apart from streamlining investigations, officials hope that the MOU can increase collaboration between the prosecutorial entities.

Shortly after signing the MOU, U.S. Attorney Rodríguez-Vélez would make clear that it was not set in stone. In fact, she announced that "new initiatives" were in the pipeline and the enumerated offenses assigned to federal authorities would change over time.[203] The confidential MOU has been updated on several occasions, including in 2017 and in 2020.[204] Of note, the 2017 MOU expanded a prior practice wherein the PRDOJ and other local governmental entities loaned out some of their attorneys to the USAO. Those attorneys serve as Special Assistant United States Attorneys (SAUSA) and have the same roles and responsibilities of AUSAs. The only difference is that Puerto Rico, not the federal government, pays their salaries.[205] By loaning out these government attorneys, the Puerto Rican government bolsters the resources and prosecutorial power of the federal government while draining its own financial and human resources.

In 2020, the PRDOJ and USAO signed an amended MOU in which the PRDOJ decreased its commitment of Puerto Rican government attorneys on detail to the USAO from ten attorneys to five.[206] The contents

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201. There has always been plenty of cooperation between the federal and local governments in Puerto Rico. Throughout the 2010s, they continued their involvement in several strike forces that focused on violent crime like the Caribbean Strike Force. There was also a committee on fraud, waste and abuse, and public corruption. Interview with D, supra note 33.

202. Limarys Suárez Torres, Refuerzo Federal a la Lucha Contra el Crimen, El Nuevo Dia (Feb. 3, 2010) (on file with the *Columbia Law Review*).

203. Osman Pérez Méndez, Más Iniciativas Contra el Crimen, El Nuevo Dia (Oct. 15, 2011) (on file with the *Columbia Law Review*) (author trans.).

204. Puerto Rico y el Gobierno Federal Firman Acuerdo Para Reforzar la Lucha Contra el Crimen, Microjuris al Día (Feb. 1, 2017), https://aldia.microjuris.com/2017/02/01/puertorico-y-el-gobierno-federal-firman-acuerdo-para-reforzar-la-lucha-contra-el-crimen/ [https://perma.cc/W6BC-ADBD]; Interview with E, supra note 36.

205. Arnaud, Llegaron los Federales, supra note 3, at 891–92.

206. Interview with E, supra note 36. According to one person, the PRDOJ had budget issues and did not have enough prosecutors to loan out. Id. The USAO welcomes SAUSAs

of the MOU otherwise stayed mostly the same.[207] The USAO continued establishing formal points of contact and obligations between the entities. The offices created interagency coordinators between USAO and PRDOJ providing points of contact related to major areas like drug trafficking cases.[208] This facilitates the federal government's pursuit of Hobbs Act or carjacking cases when there is violence or someone has been killed. Likewise, the MOU now provides an easier process for local officials to alert the federal government when there is a killing or kidnapping, and guarantees that, per the MOU, federal prosecutors can evaluate whether a case should be a federal or local one.[209]

The MOU between the USAO for the District of Puerto Rico and the Puerto Rican Department of Justice was the product of a rise in violent crime, a perceived need for federal assistance and resources to better prosecute cases, and a desire to circumvent local procedural protections.[210] As expected, the MOU resulted in a significant increase in federal prosecutions and a much heavier criminal docket at the federal district court, causing even seasoned federal judges to express concern for the practice. In the words of federal district Judge José Fusté: "On September 20 [of 2010], this Court was surprised . . . [to hear that we] would now be state judges. Do you know why? Because there is now a Memorandum of Understanding between federal and state authorities that will transfer all firearm cases" to the federal district court.[211]

2. *The MOU in Action: Firearm Offenses*. — The Memorandum of Understanding incorporated a new strategy for targeting firearms offenses as a means of reducing the murder rate.[212] In a nutshell, every potential firearms case would be evaluated by federal authorities and, if possible,

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to supplement their staffing. But not all of the SAUSA spots have been filled. By one count, the PRDOJ had yet to fill four SAUSA positions. Interview with D, supra note 33.

207. There was not a large expansion in the types of offenses under the MOU because so many were already included. The MOU covers categories of offenses like drug trafficking, firearms offenses, Hobbs Act robberies, bank robberies, human trafficking, sexual exploitation of children, sex offender registration, Medicaid fraud, elder justice fraud, and misappropriation of federal funds cases. Interview with E, supra note 36; see also Interview with D, supra note 33.

208. Interview with E, supra note 36.

209. Id.

210. In the words of one federal official, "This was a cry for help"—local officials were desperate to do something about the crime rate, and the federal government was able to assist. Interview with D, supra note 33.

211. Suárez Torres, Arma le Cuesta, supra note 12 (quoting Judge Fusté). A member of the defense bar made a formal ethical complaint against Judge Fusté, alleging that his criticisms of the local courts and public statements about criminal adjudication violated the judicial code of conduct. Order at 1–2, In Re Complaint No. 01-10-90030 (1st Cir. Jud. Council 2011). The First Circuit found no wrongdoing. Id.

212. Interview with B, supra note 86; Interview with D, supra note 33. Although the murder rate on the Island has decreased, the role that the MOU played in that reduction is an open question.

taken by federal prosecutors.[213] This marked a significant change in the way those cases would be prosecuted. Firearm offenses had, up to this point, been considered local offenses, tried by local prosecutors in local courts under local law.[214] But with the federal prosecutors aggressively pursuing those cases under the MOU, most of those cases would end up in federal court.[215]

Take, for example, the "classic case" of the MOU in action: a felon in possession of a firearm.[216] The case usually begins with a traffic stop by the PRPD. While they run the person's name through their system, they observe or otherwise find that the detained person has a weapon on them. Not only do they have a weapon, but the name search shows that the person also has a state or federal felony conviction. The PRPD officer then immediately contacts the federal agency as delineated in the MOU (in this case, most likely the Bureau of Alcohol, Tobacco, Firearms and Explosives). That person is then taken into federal custody and charged with a federal crime.[217] Once upon a time, this same offense would have been charged locally, but under the MOU, most firearm possession cases are now directed into federal court. Once the PRPD contacts the federal authorities, they begin an investigation which is unmoored from the Puerto Rican Constitution, criminal procedure code, and local customs. The detainee, now facing federal charges, can be detained without bail, remain in jail during the entirety of pretrial proceedings, and is more likely to plead guilty.[218] Through this strategy, federal prosecutors would be able to get the person "off the street for two to three years while the process lasted."[219]

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213. Interview with B, supra note 86.

214. See id.; Interview with D, supra note 33.

215. Interview with B, supra note 86. The USAO and PRDOJ implemented the policy slowly at first. With the deliberate, slow start, the entities hoped to evaluate the new policy and gain some insight into more efficient strategies. The USAO primarily concentrated in San Juan, Carolina, and Ponce to see how the experiment went. The new strategy went so well (with an alleged fifty percent drop in murders in some areas) that they decided to expand it throughout the Island. Interview with D, supra note 33.

216. Interview with A, supra note 187.

217. See Interview with A, supra note 187; Interview with B, supra note 86; Interview with D, supra note 33.

218. Interview with D, supra note 33.

219. Id. Prosecutors would also take cases with botched investigations to achieve the same purpose. See id. (noting that the USAO would sometimes take on cases that "had problems" because "the [defendant] was so bad"). In other situations, federal agents would receive tips about potential criminal activity. Federal agents would then surveil the suspect, and when they thought their investigation established that they had weapons or drugs, a marked patrol car would follow the individual until they violated the state motor vehicle law. At that point, the officer would talk to the person, search them, and if they had a firearm, they would take them in and alert federal agents. See id.

While the PRDOJ essentially delegated firearms offenses to the federal government in 2010, the USAO scaled back prosecutions of firearm offenses a decade later in order to focus on other crimes like public corruption, which is likewise covered by the MOU.[220] This shift reveals that federal prosecutors are generally satisfied with the effect of the MOU. There has been a drop in murders on the Island, which some prosecutors attributed to the MOU and the more aggressive posture on firearms cases.[221]

C. *Territorial Federalism?*

To this point, the elucidation of the problematic consequences of federal prosecutions in Puerto Rico and the MOU has focused on the Island's territorial condition. But this story inevitably raises questions pertaining to a related doctrine: federalism. As explained below, federalism as a constitutional constraint is not applicable to the U.S. territories. Nevertheless, some commentators suggest that a doctrine of "territorial federalism"—a guiding principle that urges courts to respect local territorial governance as if they were states—could help ameliorate concerns with the representational chasm.[222] As argued here, federalism, and especially territorial federalism, does little, if anything, to ameliorate the troubling characteristics of the territorial criminal legal system.

Our system of federalism places the power to enact and enforce criminal offenses in at least two[223] entities: the states and the federal government. That much is clear. What is less clear is the extent to which those entities' prosecutorial prerogatives interact without offending constitutional principles. That tension has been subject to countless studies and has invigorated a sustained debate on the federalization of criminal offenses.[224] Traditionally, scholars, commentators, and even the

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220. See id. (noting that the PRDOJ is now more interested in public corruption cases); see also Interview with B, supra note 86 (noting AUSAs increased selectivity in choosing cases after the 2010s).

221. See Interview with B, supra note 86.

222. Developments in the Law, supra note 117, at 1623–32.

223. In some states, local municipalities enact and enforce their own criminal laws. See Brenner M. Fissell, Local Offenses, 89 Fordham L. Rev. 837, 854 (2020). For double jeopardy purposes, however, local municipalities are treated as part of the state governments. See supra notes 130–132 and accompanying text.

224. Dominant concerns about the federalization of crime focus mainly on either constitutional and historical arguments of the proper realms of federal-state jurisdiction or how prosecutorial discretion can be a mechanism for which the federalization of local crime can be increased or curtailed. See, e.g., Rachel E. Barkow, Our Federal System of Sentencing, 58 Stan. L. Rev. 119, 121–23 (2005) (discussing constitutional and policy limitations on federal crime enforcement); Brickey, supra note 26, at 1137–41 (explaining the historical increase in federal involvement in criminal law "extending beyond direct federal interests"); Daniel Richman, The Past, Present, and Future of Violent Crime Federalism, 34 Crime & Just. 377, 382–90 (2006) (describing the federal historical

Supreme Court[225] have described the states and federal government as functioning in two exclusive spheres of influence. The traditional narrative suggests that the power to prosecute crime rests primarily with the states and not the federal government. Some parts of the Constitution certainly suggest as much. The Constitution does not explicitly create a general police power for the federal government, instead reserving that unenumerated power to the states.[226] Further, the Constitution prescribes power to the national government regarding specific criminal offenses. The Constitution gave the federal government power to "define and punish Piracies and Felonies committed on the high Seas, and [offenses] against the Law of Nations" along with the power to punish treason.[227] What readers will not find in the Constitution is an explicit power to define and enforce general criminal laws. Indeed, the Court "can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."[228] Accordingly, under this

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government's involvement with violent crime); Michael A. Simons, Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization, 75 N.Y.U. L. Rev. 893, 899 (2000) (suggesting that prosecutorial discretion is the best vehicle for curbing federalization of crime enforcement). The focus of this debate on prosecutorial discretion and congressional overreach, however, has not only overlooked the territories—where federal power is synonymous with local power—but also largely overlooked democratization as a potential solution, especially for the territories.

225. See Screws v. United States, 325 U.S. 91, 109 (1945) (plurality opinion) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States." (citing Jerome v. United States, 318 U.S. 101, 105 (1943))).

226. See Patterson v. New York, 432 U.S. 197, 201–02 (1977) ("It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." (citation omitted)); United States v. Lamont, 330 F.3d 1249, 1252–53 (9th Cir. 2003) ("The Supreme Court has recently spoken with unusual force regarding the need to reserve to the states the exercise of the police power in traditional criminal cases . . . ." (citing United States v. Morrison, 529 U.S. 598, 618 (2000))); The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

227. U.S. Const. art. I, § 8, cl. 10 (piracies and felonies); id. art. III § 3, cl. 1 (treason). The Constitution also mentions the crime of bribery, but the crime is not defined, and the federal government is not explicitly given the power to define it. Instead, it is denoted as a ground for impeachment. U.S. Const. art. II, § 4. At least one scholar argues that the mention of bribery in this context signaled "that the federal government possessed a power to enact federal criminal legislation which extended far beyond the narrow explicit constitutional grants." Kurland, supra note 27, at 46–49.

228. *Morrison*, 529 U.S. at 618.

standard account, the administration of criminal laws rests primarily with the states.[229]

But that is not the whole story. It is true that the Constitution clearly placed the power to prosecute specific criminal offenses in the hands of the federal government. But the Constitution also implicitly provided the federal government with considerable latitude in creating federal criminal statutes. This power was well understood during the early republic. Take, for instance, the Necessary and Proper Clause.[230] The Clause makes no mention of criminal offenses. Yet the First Congress used the Clause to enact a series of offenses that were not described in the Constitution.[231] In the 1790 Crimes Act, Congress created criminal statutes proscribing bribery, perjury, the falsifying of court records, and obstruction of justice.[232] Moreover, Congress also used the Postal Clause[233] to enact a series of criminal offenses—including stealing mail[234]—all of which went well beyond any explicit grants of power.[235] The Commerce Clause would become the source of a litany of federal criminal statutes, many with no direct relation to any of the federal government's enumerated powers.[236]

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229. Congress, unlike the states, can create crimes against the United States only when it "act[s] within the scope of those [aforementioned] delegated powers." United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (quoting *Screws*, 325 U.S. at 109); see also Kurland, supra note 27, at 3 n.6, 19 n.56, 54 ("Some Antifederalists asserted the narrow literal position that, except for the categories of crimes expressly enumerated in the Constitution—treason, counterfeiting, piracy, and offenses against the law of nations—there was no other federal criminal authority under the Constitution."); Smith, supra note 25, at 34–35 ("[T]he federal government had no inherent power but only limited, enumerated powers.").

230. U.S. Const. art. I, § 8, cl. 18 (noting that Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

231. See Collection Act of 1789, ch. 5, §§ 34–35, 1 Stat. 29, 46–47 (repealed 1790) (prohibiting officers from receiving bribes or conniving at a false entry); Act of Sept. 1, 1789, ch. 11, § 36, 1 Stat. 55, 65 (prohibiting fraudulent certificates of records for ships and vessels); Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67 (codified as amended in scattered sections of 31 U.S.C.) (prohibiting members of the Treasury from personal financial connections to certain industries or property).

232. Crimes Act of 1790, ch. 9, § 14, 1 Stat. 112, 116–17 (stealing or falsifying court records); id. § 18 (perjury); id. § 21 (bribery); id. § 22 (obstruction of justice); see also David P. Currie, The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791, 61 U. Chi. L. Rev. 775, 833 (1994) (listing crimes defined in the Crimes Act of 1790).

233. U.S. Const. art. I, § 8, cl. 7.

234. Act of Feb. 20, 1792, ch. 7, § 17, 1 Stat. 237.

235. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 417 (1819) (acknowledging Congress's power to create criminal offenses under the postal clause); Peter J. Henning, Misguided Federalism, 68 Mo. L. Rev. 389, 417 (2003) (noting that there is no express grant of power under the Postal Clause to adopt criminal laws).

236. U.S. Const. art. I, § 8, cl. 3; see, e.g., Gonzales v. Raich, 545 U.S. 1, 22 (2005) (permitting Congress to prohibit the local cultivation and use of marijuana under the Commerce Clause). But see United States v. Lopez, 514 U.S. 549, 551 (1995) (finding that

In the words of Chief Justice John Marshall, "The several powers of Congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given."[237]

Although the first and subsequent Congresses used various constitutional provisions to create federal criminal offenses that were not specifically provided for in the text of the Constitution, it was not until after the Civil War[238] that the federal apparatus began expanding into the massive force it is today.[239] Since then, Congress has displayed a consistent commitment to creating new federal crimes concerning subjects like drug trafficking,[240] lotteries, interstate theft,[241] organized crime, international drug production and transportation, and, most recently, terrorism statutes and offenses targeting violent crime.[242] Some scholars and Supreme Court

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the 1990 Gun-Free School Zones Act exceeded Congress's power to legislate under the Commerce Clause because it was not sufficiently related to commerce).

237. *McCulloch*, 17 U.S. (4 Wheat.) at 417.

238. The federal criminal code remained rather small and subject to a decentralized federal prosecutorial body through much of the early republic. The Judiciary Act of 1789 provided for the appointment of the very first Attorney General of the United States as well as the appointment of U.S. Attorneys for each federal judicial district. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92–93. But there was not much for the Attorney General to do. He got paid less than any of the other cabinet members, essentially functioned as a counselor to the executive branch, and even had to find part-time work in order to keep his house warm. Moreover, it was not clear that the Attorney General was in charge of the U.S. Attorneys. See Jed Handelsman Shugerman, The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service, 66 Stan. L. Rev. 121, 130–32 (2014) ("In the very beginning, the Attorney General had no power over district attorneys or their appointment process."). The result was a disorganized system with several federal district attorneys acting in isolation.

239. See Blondel, supra note 27, at 1068–70 (discussing the increase in federal criminal enforcement after the Civil War). Congress has passed many criminal statutes, by some counts reaching over three thousand distinct offenses. John S. Baker, Jr., Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes, 54 Am. U. L. Rev. 545, 551 (2005). Another study puts the number closer to five thousand. GianCarlo Canaparo, Patrick McLaughlin, Jonathan Nelson & Liya Palagashvili, The Heritage Found., Count the Code: Quantifying Federalization of Criminal Statutes 4 (2022), https://www.heritage.org/sites/default/files/2024-05/SR251.pdf [https://perma.cc/96CP-F3BC]. Some scholars argue that despite the large amount of criminal offenses, federal prosecutions have a nominal effect on criminal justice enforcement as compared to the states. See Susan R. Klein & Ingrid B. Grobey, Debunking Claims of Over-Federalization of Criminal Law, 62 Emory L.J. 1, 5 (2012) ("[I]n spite of the large increase in the number of federal criminal statutes, this growth itself has caused almost no impact on federal resources, nor has it destabilized the traditional balance of power between state and federal courts.").

240. See, e.g., Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551, 551–56 (repealed 1970).

241. See, e.g., Carlin Act, Pub. L. No. 62-377, 37 Stat. 670 (1913) (codified as amended at 18 U.S.C. § 659 (2018)).

242. See Thornburgh et al., supra note 25, at 135–36. Notably, by some measures, "forty percent of all the federal criminal laws passed since the Civil War have been enacted since 1970." Id.

Justices have seen many of those federal crimes created after the Civil War as an encroachment into areas traditionally reserved to the states.[243]

Nevertheless, in practice, federal and state criminal law have overlapped in significant ways for a long time.[244] Moreover, much evidence suggests that the Founders may have even welcomed federal and state collaboration. For example, at the Founding, "Congress . . . left to the State Courts concurrent jurisdiction with the Federal Courts over certain offenses against the criminal and penal statutes of the United States . . . ."[245] Today, there may not be concurrent jurisdiction for criminal matters, but federal and state law enforcement authorities constantly collaborate on issues ranging from drug trafficking and kidnapping to terrorism.[246] Indeed, the realms of federal and state criminal law overlap significantly today, and the line between federal and state jurisdiction is a blurred one.

The enormity of the federal criminal legal apparatus is felt throughout the United States, and the territories are no exception. Puerto Rico in particular has felt the full brunt of the federalization of criminal law, similarly triggering discussions about the appropriate level of intervention by the federal government into local affairs.

Although the effects of expanded federal authority in Puerto Rico evoke concerns stemming from the modern debate on federalism, ultimately, the Island—and the other territories—rest on very different

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243. Id. at 145 ("Congress needs to understand that in federalizing criminal law—in essence providing concurrent state and federal jurisdiction—it's giving extraordinary discretion and power to prosecutors. That's the practical effect of many of these 'crime [du] jour, bill [du] jour' statutes becoming law."). Another argument is that Congress has ceased being concerned with crimes of national interest and instead focuses on crimes that are local in nature but concern high-profile events or perceived surges in crime—the crime du jour. How does Congress justify enacting statutes aimed at offenses with tenuous connections to national interests? The answer, critics posit, is a mistaken understanding of federalism. Id. at 138.

244. See Blondel, supra note 27, at 1069–70 ("This era also saw the first drug regulations, which . . . emerged locally and federally simultaneously."). For example, federal statutes criminalizing the use and production of certain drugs emerged almost simultaneously with state analogues. Indeed, "[f]rom the outset, federal agents partnered with the locals to enforce federal laws"—a relationship that exists to this day. Id.

245. Charles Warren, Federal Criminal Laws and the State Courts, 38 Harv. L. Rev. 545, 545 (1925). This was due in part to Congress's hesitance to create inferior federal courts. The thought process was that state courts were able to adjudicate federal questions, and those decisions could then be appealed to federal tribunals. This practice fell out of favor after Congress created local federal courts. Congress also eventually gave sole jurisdiction, by statute, over federal criminal offenses to the federal district courts. See 18 U.S.C. § 3231 (2018).

246. See Bridget A. Fahey, Data Federalism, 135 Harv. L. Rev. 1007, 1018 (2022) (explaining how federal and state law enforcement officials sometimes "agree to share data they gather about a target being investigated for both federal and state crimes" or "form joint policing task forces to collaboratively investigate an area of criminal activity . . . and share their corresponding information").

ground. As discussed above, Congress's plenary power over the territories provides a unique twist to the debate on the federalization of crime. For the territories, federal power is not a new phenomenon but rather the lifeblood of the territorial condition. In this instance, the effects of a complete federal police power emerge through the portal of plenary power over the territories. We must begin from the proposition that all prosecutorial power in the territories flows from the federal government. The Supreme Court has made this point patently clear: "Put simply, Congress conferred the authority to create the Puerto Rico Constitution, which in turn confers the authority to bring criminal charges. That makes Congress the original source of power for Puerto Rico's prosecutors . . . ."[247] Because Congress is the ultimate source of prosecutorial power, and therefore has the ultimate say in approving Puerto Rican criminal law, it follows that the federal government has a constitutional prerogative to prosecute offenses in Puerto Rico in ways in which it cannot do in the states.[248] Once there is an interest to intervene, the federal government is constitutionally empowered to do so as much as it wants.

Federalism as a guiding principle, then, can only be useful in the territories insofar as the federal government chooses to respect local governance. Indeed, that is precisely the animating ethos of what some commentators call territorial federalism.[249] Territorial federalism stands for the proposition that if the federal government recognizes that the territories in many ways mimic states, then federal courts could apply federalism constraints to the federal government as if the territories were states.[250] But applying federalism constraints to the territories in this manner is wholly deficient for at least two reasons. First, although the theory purports to have decolonial aims (mainly by spurring local

247. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 76–77 (2016).

248. Indeed, it does just that in the District of Columbia and in the U.S. Virgin Islands.

249. See Developments in the Law, supra note 117, at 1627 ("Territorial federalism . . . describes Puerto Rico's structural and functional progression toward a state-like level of self-governance."); cf. Price, supra note 31, at 665, 698 ("Tribes and territories . . . should enjoy the same autonomy in enforcing their own laws that states do in enforcing theirs."). For a discussion concerning consequences of repurposing the *Insular Cases* and the promise of more inventive statesmanship, see Christina Duffy Ponsa-Kraus, The *Insular Cases* Run Amok: Against Constitutional Exceptionalism in the Territories, 131 Yale L.J. 2449 (2022) (arguing that the *Insular Cases* are an illegitimate and undesirable doctrinal vehicle for preserving the cultural practices of the people living in the unincorporated territories); Torruella, A Reply, supra note 11, at 104 ("'Territorial federalism' without political power is not federalism. It is just another hollow and meaningless name for the same colonial inequality to which the inhabitants of Puerto Rico have been subjected . . . ."(footnote omitted)).

250. Developments in the Law, supra note 117, at 1649, 1652–54 ("[A]n alternative approach begins to take shape . . . [u]nder this approach, the courts—cognizant of the vulnerability of unincorporated territories to politics in which they lack voting representation . . . —would recognize and protect territorial federalism through the application of a robust form of judicial review.").

governmental evolution), its effect would be to further delay any decolonial action by simply introducing a new experiment in territorial governance for another indeterminate period.[251] Second, the application of territorial federalism could be abandoned as quickly as it was applied, still leaving the territories at the whim of the federal government. As Professor David Helfeld, former Dean of the University of Puerto Rico School of Law, explained many years ago, the federal government can make promises to the territories, but those pledges do not entail an abdication of its constitutional power over the territories.[252] Furthermore, as explained above, the U.S. government has already treated Puerto Rico like a state in some ways, for example, by creating a parallel criminal legal system on the Island.[253] Nevertheless, the federal government continues to aggressively intervene on the Island. The experiment in territorial federalism, then, has in a sense already failed before it started.[254]

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251. Torruella, A Reply, supra note 11, at 67–68 (arguing that "territorial federalism" is not an acceptable solution to rectify the "egregious violation of [Puerto Ricans'] civil rights").

252. David M. Helfeld, The Historical Prelude to the Constitution of the Commonwealth of Puerto Rico, 21 Rev. Juris. U. P.R. 135, 150 (1952) ("No more than a pledge of respect for unrestricted self-rule was possible, since it is doubtful if Cong[]ress could in perpetuity formally abdicate its plenary Constitutional power over the territories.").

253. In the words of the Supreme Court, Congress has "delegated" many of its powers to the territories, including Puerto Rico. See Puerto Rico v. Sanchez Valle, 579 U.S. 59, 75 (2016) ("[L]ocal prosecutors . . . exercised only such power as was 'delegated by Congress' . . . . Their authority derived from, rather than pre-existed association with, the Federal Government." (quoting Brief for Petitioner at 28, *Sanchez Valle*, 579 U.S. 75 (No. 15-108), 2015 WL 7294879)). Nevertheless, "the delegator cannot make itself any less so—no matter how much authority it opts to hand over." Id. at 77. But see Anthony M. Ciolli, United States Territories at the Founding, 35 Regent U. L. Rev. 73, 77 (2023) (explaining that Congress has never completely delegated their powers over the territories to territorial governments).

254. Indeed, the creation of the Commonwealth of Puerto Rico was essentially what supporters of territorial federalism are asking for. There was, at least superficially, a promise of non-intervention into local affairs. See, e.g., Arnaud, Llegaron los Federales, supra note 3, at 915 ("[R]epresentatives at the Constitutional Convention of Puerto Rico adopted resolutions explaining that Puerto Rico was not 'a state which is free of superior authority in the management of its own local affairs . . . .'" (quoting Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36, 40 (1st Cir. 1981))). But that promise held true only insofar as the federal government thought it prudent. See id. at 918–19 ("The rest of the legislative record reflects Congress' understanding that they were not, in fact, relinquishing control over Puerto Rico . . . . Rather, Congress imposed upon itself, at best, an aspirational goal of staying out of Puerto Rican local affairs, without creating a legal prohibition against doing so."); Torruella, A Reply, supra note 11, at 81–82 ("It soon became apparent that congressional perception about the entire matter centered on the general view that Congress's function was one of substantive oversight, not just one of rubber-stamping approval."). Nothing short of independence, statehood, or a true free association can force the federal government to completely respect a territory's home rule. Id. at 77–89 (discussing various ways in which Congress has exerted oversight of Puerto Rico's governance).

III. TERRITORIAL EXCEPTIONALISM IN CRIMINAL LAW?

The MOU was lauded by politicians, commentators, and prosecutors alike, although there was a contingent of less vocal dissenters. Those who supported the creation of the MOU saw the federal government as the only entity capable of lowering the crime rate, especially in the face of a local system that was perceived as inadequate and corrupt.[255] Some supporters viewed the MOU as a way to ensure that accused people would be imprisoned.[256] By freeing prosecutors from the protections of Puerto Rican law, federal prosecutors would be able to use the force of federal resources to ensure jail time for folks charged with federal offenses.

The fact that the federal government took on a greater role in prosecuting localized offenses did not violate any established norms.[257] In fact, it was quite the opposite. There seemed to have been an expectation that the federal government would step in once the local government could not deal with the rising crime rate. As one local intellectual leader described it, this is simply an outgrowth of the "colonial mentality" that is sometimes experienced on the Island.[258] On this view, the federal government is a competent entity that can solve important issues, while the local government is not.[259] As a result, federal interventions are not just common but welcomed.

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255. See Interview with B, supra note 86 (discussing corruption in the local system); Interview with I (n.d.) (on file with the *Columbia Law Review*) (discussing the local implementation of MOUs); see also United States v. Rivera-Ruiz, 43 F.4th 172, 176 (1st Cir. 2022) (racketeering conviction based on "corrupt group of PRPD officers who habitually stole money from the subjects of traffic stops and narcotics investigations, among other abuses"); United States v. Martínez-Mercado, 919 F.3d 91, 96–97 (1st Cir. 2019) (charges against former Puerto Rico Police officers/ATF Task Force officer for conspiring with other officers to break into an apartment to steal money and drugs); United States v. Díaz-Maldonado, 727 F.3d 130, 134–35 (1st Cir. 2013) (highlighting "Operation Guard Shack" charging seventeen law enforcement agents); United States v. Flecha-Maldonado, 373 F.3d 170, 172 (1st Cir. 2004) (discussing "widespread corruption within the Puerto Rico Police Department"). Claims of corruption or political nepotism in the judicial and criminal legal system are not new. Scholars and commentators have long criticized the highly politicized nature of choosing local judges on the Island. See, e.g., Trías Monge, El Sistema, supra note 65, at 174–75 (explaining that the political process plays an outsized role in the appointment of local judges).

256. See Interview with D, supra note 33 (explaining that even a failed federal prosecution would ensure incarceration of a person for several years pending proceedings).

257. Congress has recently, for example, created a fiscal control board in Puerto Rico that oversees and, to a large extent, controls the Puerto Rican government's budget decisions and approves local laws. Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. 114-187, 130 Stat. 549, 553, 563–68, 570–73 (2016) (codified at 48 U.S.C. § 2101 (2018)).

258. Interview with C (n.d.) (on file with the *Columbia Law Review*).

259. Trías Monge, El Sistema, supra note 65, at 173–74 (cautioning against reliance on foreign influences in judicial administration and adjudication).

The perception of the MOU within the general public was a bit different. Oddly, the MOU is rarely discussed outside political circles and the Puerto Rican bar.[260] Crime has been the biggest worry on the Island for quite some time, and Puerto Ricans are concerned about violent crime in particular. The perception, then, is that most Puerto Ricans are indifferent to the manner in which criminal offenses are adjudicated as long as some entity does it.[261] Despite the MOU being mainly absent from the local political discourse, as explained below, increased federal prosecutions in Puerto Rico produce problematic consequences that bolster the neocolonial project.

A. *Territorial Criminal Legal System*

In the territorial criminal legal system, the federal government retains full power to intervene in local affairs while also retaining, and at times using, its capability to prevent local actors from prosecuting cases.[262] It is one in which, with or without an MOU, people are punished under laws they never had a say in creating, and at times disagree with. This system at times accommodates competing interests but is ultimately an expression of the federal government's power over local affairs. It is a violent embodiment of the territorial condition. By funneling cases to the federal district court, the MOU exacerbates key features of the territorial criminal legal system by subjecting even more people to an entirely different adjudicative landscape. Specifically, federal prosecutors are able to work around local constitutional protections,[263] subject defendants to a jury that is not representative of the Puerto Rican population, and seek punishments specifically prohibited under local law.[264] Further, federal prosecutors accuse people under statutes that they never had a say in creating. Lastly, the Double Jeopardy Clause and constraints on resources act as obstacles for local prosecutors seeking to vindicate local interests after a case makes it to the federal district court.[265]

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260. See Interview with F, supra note 187 (noting a lack of discussion about the MOU among the public).

261. See id. (discussing positive public perceptions of federal prosecutions); Interview with G, supra note 182 (noting public approval of federal law enforcement agencies' involvement).

262. See Arnaud, Llegaron los Federales, supra note 3, at 892–93 n.33 ("Puerto Rico is not only subjected to the general expansion of prosecutions . . . on the Island, but Puerto Ricans have no say in the creation of those laws nor in their enforcement. People in the mainland could ostensibly limit those types of prosecution through legislation . . . .").

263. See id. at 927–28 n. 217 ("The authority to treat Puerto Rico different is also manifested in the supremacy of federal statutes over the Puerto Rican Constitution even with respect to local matters.").

264. See id. at 885 n.1 ("Despite . . . specifically prohibiting the penalty in their Constitution, inhabitants of Puerto Rico are subject to the federal death penalty.").

265. The existence of the MOU and federal power on the Island produces palpable tensions, which are highlighted in this Article. Among these is a tension between effective

1. *Circumventing Local Rules.* — Local district attorneys' offices typically work with the federal government on investigations and federal prosecutions. What is unique to Puerto Rico, however, is that one of the explicit motivating factors for the MOU was the circumvention of local rules of criminal procedure.[266] The federal government's ability to disregard expressions of the local community through formal agreements speaks directly to the type of relationship the federal government has with its territories.

As previously explained, the Puerto Rican Constitution and local criminal procedure code provide accused people broader protections than available in the federal system. There are prohibitions on wiretaps, stricter speedy trial rules, and multiple robust pretrial hearings at crucial stages of proceedings.[267] These procedural protections have frustrated local officials who feel like they are working with their hands tied. The local rules add "more work" to prosecutors, purportedly leading to dismissals of cases or loss of witnesses.[268]

Another incentive for federalizing offenses was that most of those local procedural protections do not exist in federal court. As a result, many prosecutors laud the MOU precisely because the federal system lacks the broad protections available at the local level. As one prosecutor explained, the "general feel is that federal cases [are] more consistent in terms of delivering justice[,]"[269] and one of the primary reasons for this is because the local system has several procedural factors, like the initial hearing, that the federal prosecutor does not have to deal with.[270] There is also a prohibition on wiretaps and one-party recordings on the Island that makes it harder to gather evidence.[271] Prosecutions are easier on the federal side while many cases get dismissed for lack of probable cause at the local

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prosecutions at the federal and state level and the understanding that more prosecutions do not necessarily lower crime rates. This Article is not advocating for an increase in prosecutions. Indeed, a greater investment in Puerto Rico's infrastructure and the eradication of pernicious and outmoded federal laws like the Jones Act would bolster the Island's economic prosperity—objectives that are often tied to lower crime rates. The manner in which prosecutions occur on the Island today highlights the utter lack of democratic accountability, raises significant issues of representational criminal justice, and promotes the territorial condition.

266. Interview with A, supra note 187; Interview with D, supra note 33; Interview with E, supra note 36; Interview with G, supra note 182.

267. See supra notes 179–190 and accompanying text.

268. Interview with F, supra note 187.

269. Interview with B, supra note 86.

270. See id. (explaining the differences between the federal system and the local system, including the fact that the federal process implicates grand juries).

271. Id. (explaining how the wiretap ban on the island makes it more difficult to obtain a conviction).

level.[272] "Generally, federal cases work better. That's one of the reasons for trying to take on those gun cases."[273]

Not only does the MOU benefit prosecutions by placing them in federal court but federal prosecutors use bail as a system of incarceration. Take, for example, a person who is charged at the local level with several murders. That person will eventually be released pending trial under the local rules. But, if the federal government is also interested in that person, the federal government can charge them with "some discrete federal offenses," like a firearms offense, so they can keep the person incarcerated.[274] To be sure, the officials in the Puerto Rican government acknowledge that some local protections may stymie prosecutions. Nevertheless, the people of the Island remain supportive of those robust protections. For example, in 2012 then-Governor Luis Fortuño attempted to push a bill that would change the state constitution and eliminate the right to bail. The bill was soundly rejected, leaving the constitutional protection in place.[275]

In sum, through the MOU the federal government ignores the value expressions of the local criminal procedure code, and instead subjects Puerto Ricans to a federal system with deficient procedural protections for defendants.

2. *Juries.* — Another consequence of the MOU was that defendants in federal tribunals would now be subject to a substantively different jury than at the local level. To serve as a juror in federal court, a person must have a certain level of English proficiency—a level of proficiency that few Puerto Ricans possess. Some estimates suggest that somewhere between ten to fifteen percent of the local population possesses the requisite English proficiency, and those folks tend to be wealthy and white Puerto Ricans.[276] As a result, there is a perception that federal juries in Puerto Rico are not a jury of one's peers but instead a jury of the elite.[277] This

272. Id.

273. Id.

274. Interview with E, supra note 36.

275. Puerto Ricans Reject Constitutional Changes in Upset Vote, Reuters (Aug. 19, 2012), https://www.reuters.com/article/business/puerto-ricans-reject-constitutional-changes-in-upset-vote-idUSL2E8JK007/ (on file with the *Columbia Law Review*). In 2019, Governor Ricardo Roselló similarly attempted to impose legislative limitations on bail. This attempt also failed. Javier Colón Dávila, Insistirá en Limitar la Fianza, El Nuevo Día (Jan. 14, 2019), https://www.elnuevodia.com/noticias/locales/notas/rossello-insistira-en-limitar-la-fianza/ (on file with the *Columbia Law Review*).

276. See Gonzales Rose, Exclusion of Non-English Speaking Jurors, supra note 38, at 498, 509 (explaining the correlation between English language abilities and socioeconomic backgrounds in Puerto Rican communities).

277. Interview with C, supra note 258.

"elite" jury pool also tends to be more supportive of the federal government and more punitive than local juries.[278]

Prosecutors, on the other hand, tend to dismiss these criticisms as overbroad. It is undeniable, as one prosecutor explained, that you will likely not find "the kid who grew up in the projects and doesn't speak English" or any of the folks in that person's community in the federal jury pool.[279] But the English proficiency requirement is seen as a necessary evil, because it assures language conformity across the United States district courts.[280] Others expressed that the federal jury pool may actually be more beneficial to the community because "what you end up with is an educated jury pool. You have to speak English, which means you have education above high school."[281] Moreover, there is a perception that an increase in younger bilingual Puerto Ricans is transforming the jury pool.[282] In any event, prosecutors have a high degree of confidence in the existing jury pool and the procedures in place to choose them.[283]

Despite that degree of confidence, the English proficiency requirement fundamentally undermines one of the most democratic aspects of the criminal legal system: community condemnation. The constitutional right to a jury, as Laura Appleman explains, refers not only to a defendant's right to a jury of their peers but also to the community's right to be represented in a jury.[284] Indeed, "the right to a jury trial is grounded in the community's central role in deciding punishment for criminal offenders and in its ability to determine moral blameworthiness."[285] The community's right is central to adjudicating

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278. For example, interviewee C expressed such sentiments in an interview:

> Feds probably like it because it's good for the law enforcement people. Good for the pro-government people. The attorneys have a monopoly. A lot of local attorneys don't feel comfortable trying cases in English. Sometimes they speak Spanglish. The elite issue is a class thing. This a court for the good people. The elite, the toughest attorneys. But being tried by your peers means a totally different thing. If you look at the juror's income, social background, their race, their relation to the feds—that's not Puerto Rico. That's like 5% of the population.

Interview with C, supra note 258.

279. Interview with E, supra note 36.

280. Id.

281. Interview with D, supra note 33.

282. See Interview with E, supra note 36 (explaining how some people have observed an increase in younger jurors who are bilingual).

283. Interview with D, supra note 33; Interview with E, supra note 36. In the words of one interviewee, "I just want smart people connected to the community" on the jury. Interview with E, supra note 36.

284. Laura I. Appleman, The Lost Meaning of the Jury Trial Right, 84 Ind. L.J. 397, 405 (2009).

285. Id.; see also U.S. Const. art. III, § 2; Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 11 (1998) (explaining that Article III's formulation of the jury trial right has a collective dimension).

criminal offenses because, as a historical matter, "liberal, democratic decision making vested in the jury's determination of blameworthiness relied on the community's role in linking punishment to the crime committed, so that the offender would feel more responsibility for her actions."[286] Indeed, the criminal jury is a quintessential civic duty at the very heart of a participatory democracy. The jury is an institution of democratic deliberation by which jurors "become active participants in governance—commanding the law to respond to the citizen's vision as the citizen seeks to conform to its strictures." [287] In the Federal District Court of Puerto Rico, however, most Puerto Ricans are prohibited from serving this vital democratic function.

It is no surprise, then, that the eligibility requirements and subsequent composition of the federal jury pool in Puerto Rico is controversial and the subject of much litigation.[288] The most common challenge is that the jury pool does not represent a fair cross section of the community, in violation of the Sixth Amendment's jury trial right. But the First Circuit has been patently clear that, even assuming that large portions of the population are systematically excluded from the jury pool, the interest in having all federal proceedings in English is paramount.[289] Put differently, Congress has instructed, and federal courts have accepted, that language uniformity in federal court proceedings is more important than the fairness of those proceedings. Subjecting more Puerto Ricans to federal trials, then, places them in courtrooms built upon the exclusion of their people.

3. *Double Jeopardy*. — The dual sovereign doctrine is another prominent part of the territorial criminal legal system that interacts with the MOU. In Puerto Rico, the MOU, in conjunction with the dual sovereign doctrine, can prevent local prosecutors from seeking concurrent or successive prosecutions. Moreover, as made clear by the history of the local penal code and *Sanchez Valle*, the entire existence of

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286. Appleman, supra note 284, at 404 (citing Blakely v. Washington, 542 U.S. 296, 309 (2004)).

287. Jenny Carroll, The Jury as Democracy, 66 Ala. L. Rev. 825, 829–30 (2015).

288. See Gonzales Rose, Exclusion of Non-English Speaking Jurors, supra note 38, at 518–24.

289. United States v. Gonzalez-Velez, 466 F.3d 27, 40 (1st Cir. 2006) (explaining that the English proficiency requirement is "justified by 'the overwhelming national interest served by the use of English in a United States court'" (quoting United States v. Aponte-Suárez, 905 F.2d 483, 492 (1st Cir. 1990))); United States v. Benmuhar, 658 F.2d 14, 18–20 (1st Cir. 1981) ("We consequently decide that the national language interest is significant[] [and] [a]ppellant therefore was not denied a representative jury in violation of the Sixth Amendment."); accord United States v. Candelario-Santana, 356 F. Supp. 3d 204, 207–08 (D.P.R. 2019). Apart from being deprived of a jury of their peers, many Puerto Rican defendants, who also do not speak English well, experience the entirety of their proceedings through the voice of an interpreter, further alienating the defendant and feeding the notion that they are being judged by a foreign entity that does not represent their community.

Puerto Rico's criminal legal system is still at the mercy of the federal government.[290] The dual sovereign doctrine, then, both constrains local prosecutorial capacity and also highlights the specter of federal intrusion into local criminal practice.

As previously explained, Puerto Rico is not a dual sovereign for double jeopardy purposes, which means that if a person is charged and prosecuted for a crime in federal court, local prosecutors cannot charge that person with the same offense and vice versa. Prosecutors do not seek successive prosecutions often, but they have certainly occurred. Indeed, *Sanchez Valle* is a perfect example. In that case, Puerto Rican prosecutors charged Sanchez Valle with selling a firearm. Shortly thereafter, federal prosecutors charged him under analogous federal statutes.[291] The inverse has also occurred. Take, for example, a case currently making its way through the First Circuit—*Núñez Pérez v. Rolon Suarez*.[292] In that case, defendant Núñez Pérez was charged by federal prosecutors with a carjacking resulting in death.[293] A few months later, Puerto Rican prosecutors charged him under corresponding carjacking and manslaughter statutes.[294]

Although the Double Jeopardy Clause certainly poses a legal obstacle for successive or concurrent prosecutions, collaboration between the PRDOJ and USAO, including the MOU, functions as a potential guard against unlawful prosecutions after *Sanchez Valle*. As one prosecutor explained, "*Sanchez Valle* hasn't been a big deal,"[295] although it has made it even more important for federal and local officials to work together.[296] Moreover, the MOU already channels many cases to the federal system. Unlawful successive prosecutions have not been problematic in practice because the MOU provides clear guidelines as to how the investigations of certain cases occur and what federal investigatory bodies should be alerted by local authorities. If the crime is covered by the MOU, then the local police will call the designated authority so that the federal government can

290. See Puerto Rico v. Sanchez Valle, 579 U.S. 59, 76–77 (2016).

291. Id. at 65.

292. 618 F. Supp. 3d 49 (D.P.R. 2022).

293. Id.

294. Id. at 55–56. The parties in that case agreed that the offenses were the same but disagreed about the retroactivity of *Sanchez Valle*. Id. at 69. Several other cases making their way through the First Circuit seeking the retroactive application of *Sanchez Valle* provide a sense of how often successive or dual prosecutions occurred on the Island. See, e.g., Rodriguez-Mendez v. United States, 16-cv-2683CCC, 2019 WL 4875301, at *1–2 (D.P.R. Sept. 30, 2019); Lopez-Rivera v. United States, 12-cr-656 (ADC), 2018 WL 5016399, at *2 (D.P.R. Oct. 16, 2018); Santana-Rios v. United States, 235 F. Supp. 3d 386, 387–88 (D.P.R. 2017), aff'd on other grounds, No. 17-1199, 2019 WL 13202902, at *1 (1st Cir. Apr. 1, 2019). On the ground, *Sanchez Valle* has also provided a vehicle for people who had been convicted of analogous crimes at the federal and local level to seek relief.

295. Interview with A, supra note 187.

296. Interview with E, supra note 36.

evaluate the case initially. If the federal agency is interested in the case, then it will arrest the suspect and federal prosecutors will charge them with a federal crime. If it is not interested, then the local police department and prosecutors handle the case. Because of this arrangement, a person now seldom gets prosecuted for the same crime in both jurisdictions.[297]

Moreover, from the federal prosecutor's perspective, the double jeopardy bar has not proven problematic because prosecutors can simply file different charges stemming from the same offense.[298] Prosecutors must only ensure that any subsequent charges consist of crimes with different elements under the low bar established by the Supreme Court in *Blockburger v. United States*.[299] AUSAs have, on occasion, "recycle[d]" failed local prosecutions by simply charging a person federally with different crimes.[300] For example, several members of a gang were acquitted in local court for multiple murders in the infamous *massacre de Pájaros*. Once the local proceedings ended, federal agents arrested the acquitted defendants on federal charges. They all pleaded guilty to federal drug trafficking charges soon thereafter.[301]

Further, the Double Jeopardy Clause does not prevent federal prosecutors from using state convictions as predicate offenses. For example, federal felon in possession of a firearm charges often stem from cases in which the defendant had a state conviction. Another common

297. Interview with A, supra note 187; Interview with B, supra note 86. Further, even before the MOU, the federal and local governments cooperated substantially. For example, many federal investigations are done by local Puerto Rican police officers on *destaque*, or on detail, with different federal agencies. Other times, officers on joint task forces, composed of both local and federal police officers, conduct the investigations. There have been long-standing task forces like the Organized Crime Drug Enforcement Task Force (OCDETF) and the High Intensity Drug Area program (HIDA). These are ways to encourage joint coordinated efforts to combat drug trafficking and violent crime. Interestingly, on these task forces, many local officers work alongside federal agents. The federal agents have a four-year tour, so there is a turnaround. But the local police officers have longevity, and as a result, are the "lifeblood" of the task force. Because of their longevity, local folks on the task force know the culture and the Island better. Given the considerable overlap, local and federal investigators are constantly exchanging information. As a result, when charges are filed, people in other agencies will invariably find out about the case. Interview with A, supra note 187. Now with the MOU in place, there is also added coordination between prosecutors.

298. United States v. Almonte-Núñez, 963 F.3d 58, 70–71 (1st Cir. 2020) (finding that federal offense of brandishing a firearm during a crime of violence and Puerto Rican offense of intentionally aiming a firearm towards another person were separate offenses); Interview with D, supra note 33; Interview with G, supra note 182.

299. 284 U.S. 299, 304 (1932).

300. Interview with G, supra note 182. As one person explained, prosecutors still want to be cautious when filing subsequent cases to prevent creating inconvenient precedent. As a result, whenever there is a close call regarding elements being similar, the prosecutorial entities communicate with each other. Interview with D, supra note 33.

301. Limarys Suárez Torres, El Juez Fusté Arremete Contra Cortes Boricuas, El Nuevo Dia (Nov. 13, 2010); see also Interview with E, supra note 36; Interview with G, supra note 182.

example is conspiracies. A person may plead guilty to charges under local law, and federal prosecutors can charge a long-term RICO conspiracy and include those state convictions as overt acts.[302]

Importantly, *Sanchez Valle* certainly served to clarify Puerto Rico's territorial status. The Court explained that Puerto Rico remains a territory and that its power to prosecute local crime derives from the federal government.[303] The Court noted that Puerto Rican prosecutorial "authority derived from, rather than pre-existed association with, the Federal Government" and that although "the Commonwealth's power to enact and enforce criminal law now proceeds" from the Puerto Rican Constitution, that only made Puerto Rico "the most immediate source of such authority."[304] The federal government permitted Puerto Ricans to create a constitution that Congress then amended and approved. "That makes Congress the original source of power for Puerto Rico's prosecutors."[305] The Court's doctrine exudes an air of control that perpetuates the colonial mentality that the federal government remains the most legitimate authority on the Island.[306] Further still, the Court's language confirmed that Puerto Rico's entire criminal structure emanates from Congress. Under this logic, even local laws are ultimately expressions of the same sovereign: the federal government.[307] Consequently, the federal government holds ultimate control over Puerto Rican criminal affairs. Although it is unlikely that the federal government would intervene to such an extent as to alter local criminal laws, Congress's recent creation of the fiscal control board in Puerto Rico[308] is a reminder that even unlikely events may come to pass in moments of crisis.

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302. Interview with E, supra note 36.

303. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 75–76 (2016). In a recent case, Justice Clarence Thomas suggested that the Court's characterization of Puerto Rico's sovereignty extended well beyond the Double Jeopardy Clause. The rest of the Court's territorial jurisprudence certainly supports that suggestion. See Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, 143 S. Ct. 1176, 1188 (2023) (Thomas, J., dissenting).

304. *Sanchez Valle*, 579 U.S. at 75–76.

305. Id. at 76.

306. See Arnaud, Dual Sovereignty, supra note 42, at 1666–68.

307. Although Congress approved of Puerto Rico's internal governance, suggesting that those rules are, in essence, federal laws, absent when a court sits in diversity jurisdiction, local laws and rules of procedure only apply in local courts. Federal prosecutors are not bound by them because, like in the states, prosecutions in federal district court are subject to the federal rules of civil and criminal procedure. United States v. Long, 118 F. Supp. 857, 859 (D.P.R. 1954).

308. Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114–187 (2016). This statute created a presidentially appointed fiscal control board that has total control over the Island's budget and laws. The board members are territorial officers who do not need to be appointed with the advice and consent of the Senate. They also answer to the President, not the Governor of Puerto Rico, despite the control board technically forming part of the Puerto Rican government. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1666 (2020).

Taken together, the MOU interacts with the dual sovereignty doctrine in ways that limit local prosecutorial power and justify future federal intervention in local criminal practice. The MOU increases cooperation between federal and local authorities and ensures that a person accused of certain violent offenses is only prosecuted in one venue (federal court), producing the effect of largely avoiding double jeopardy violations. Although this is certainly a normatively beneficial result in the context of limiting mass incarceration, this practice effectively preempts certain local prosecutions, subjecting more people accused of violent crimes to the federal forum that does not represent local voices. Further, the Supreme Court's dual sovereignty jurisprudence continues emphasizing the federal government's power to unilaterally intervene in local criminal practice if it deems it necessary.

4. *Representative Criminal Justice.* — Another important aspect of the territorial criminal legal system that is exacerbated by the MOU is that of representative criminal justice. There is a representational chasm between federal criminal statutes and the people of Puerto Rico. That chasm exists principally because Puerto Ricans lack federal voting rights, and consequently, they have never had a say in the application of any federal criminal statutes.[309] That representational void persists because the federal government refuses to extend federal voting rights to any of the territories.[310] The MOU exacerbates this issue by imposing the federal system onto a greater number of Puerto Ricans.[311] The representational chasm is clearly manifested through the mismatch between federal and local expressions of the community through criminal sanctions and procedures. Although local and federal statutes prohibit much of the same misconduct, the sentences vary, in some cases significantly. Moreover, the

309. On the ground, the issue of representative criminal justice is far from the public eye. Most people "don't care who the FBI is or the AUSAs . . . [they] don't see the colonialism in that sense. They see it more in the not voting for president . . . ." Interview with C, supra note 258.

310. Arnaud, A More Perfect Union, supra note 8, at 100–09. There is a vein of criminal procedure scholarship examining democracy as a major tool for criminal justice reform. This democratizing literature is crucial for interrogating the modern role and limits of public participation in criminal law. One powerful argument sees an increase in public participation in the criminal legal system as a check on an excessively punitive system. E.g., Joshua Kleinfeld, Manifesto of Democratic Criminal Justice, 111 Nw. U. L. Rev. 1367, 1397–1400 (2017). Another equally incisive observation argues that our current criminal legal system produces antidemocratic results by limiting those who can participate in it, and democratizing that system would provide marginalized communities with an arrangement that is fairer along racial and class lines. Jocelyn Simonson, Radical Acts of Justice: How Ordinary People Are Dismantling Mass Incarceration, at xiii–xvi (2023); Jocelyn Simonson, Democratizing Criminal Justice Through Contestation and Resistance, 111 Nw. U. L. Rev. 1609, 1610–11 (2017). This is an important debate that is relevant to the U.S. territories and provides helpful warnings about the pitfalls that a facially democratic criminal legal system faces. Although helpful, at the moment, the federal criminal legal system in Puerto Rico is not a forum that is subject to effective democratic governance to begin with.

311. Interview with G, supra note 182.

local penal code is a manifestation of the Puerto Rican community,[312] while federal statutes have been imposed on the Island.

One of the clearest examples of the representational chasm is seen through the application of the death penalty in federal courts. Federal prosecutors seek the death penalty in Puerto Rico,[313] even though it has not been applied on the Island since 1927 and was abolished by the local legislature in 1929.[314] Although the death penalty is still a permissible sanction at the federal level, it is prohibited under the Puerto Rican Constitution. The majority of Puerto Ricans are undoubtedly against the death penalty.[315] And the rejection of that sanction plays out in the federal courts. For example, in 2013, federal prosecutors sought the death penalty against Alex Candelario-Santana, who had been convicted of killing eight people and an unborn child at the grand opening of a bar called *La Tómbola*.[316] Candelario-Santana and some accomplices arrived at the bar and immediately opened fire on the crowd outside of the establishment.[317] Candelario-Santana then entered the bar and let the patrons know that nobody was getting out alive.[318] He opened fire on the crowd inside the bar.[319] Despite the grisly details of what would be known as the Tómbola massacre, a Puerto Rican federal jury declined to impose the death

312. See Henry M. Hart, Jr., The Aims of the Criminal Law, 23 Law & Contemp. Probs. 401, 406–14 (1958) (explaining how legislatures frame their criminal laws to reflect societal moral values); Erik Luna, Principled Enforcement of Penal Codes, 4 Buff. Crim. L. Rev. 515, 537 (2000) ("Law expresses the values and expectations of society; it makes a statement about what is good or bad, right or wrong.").

313. United States v. Pedró-Vidal, 991 F.3d 1, 3 (1st Cir. 2021); Interview with I, supra note 255.

314. Ricardo Alfonso, The Imposition of the Death Penalty in Puerto Rico: A Human Rights Crisis in the Path Towards Self-Determination, 76 Rev. Juris. U. P.R. 1077, 1085 (2007). Although a Puerto Rican jury in federal court has never sentenced someone to death, the threat of death is significant. As one person explained, defense counsel would never advise a defendant to gamble on their life, even in Puerto Rico. If DOJ certifies the death penalty in a case, it would be unethical for defense counsel to instruct their client that the possibility of receiving death is zero. As a result, the specter of receiving the death penalty is an important factor when considering a plea deal. Interview with J, supra note 39.

315. See Adam Liptak, Puerto Ricans Angry that U.S. Overrode Death Penalty Ban, N.Y. Times (July 17, 2003), https://www.nytimes.com/2003/07/17/us/puerto-ricans-angry-that-us-overrode-death-penalty-ban.html (on file with the *Columbia Law Review*) ("In general, Puerto Ricans are massively against the death penalty . . . ." (quoting Puerto Rican Senator Kenneth McClintock)); see also United States v. Acosta-Martinez, 252 F.3d 13, 19 (1st Cir. 2001) (acknowledging "Puerto Rico's interest and its moral and cultural sentiment against the death penalty").

316. Press Release, DOJ, Puerto Rico Man Sentenced to Life in Prison for 2009 Mass Shooting (Aug. 28, 2013), https://www.justice.gov/usao-pr/pr/puerto-rico-man-sentenced-life-prison-2009-mass-shooting [https://perma.cc/75HF-FP2G].

317. Id.

318. Id.

319. Id.

penalty.[320] Though this federal jury didn't impose the death penalty, it remains a potent bargaining chip for federal prosecutors.[321]

Next, take the sentences for carjackings—a crime covered by the MOU. The sentences vary substantively between the Puerto Rican Penal Code and federal statutes. If a person is convicted in federal court for a carjacking that results in death, the defendant can face life without parole or even death.[322] Under Puerto Rican law, a person convicted of a violent carjacking faces a fixed term of 25 years in prison and can never face the death penalty because it is explicitly prohibited under their constitution.[323] These differences are significant because "[w]hen the law fails to mirror the community's values, this lack of alignment undermines the law's moral credibility"[324] and "weakens the law's ability to dictate proper conduct."[325]

Apart from the incongruence of federal sentencing, funneling criminal offenses to the federal district courts also degrades the local criminal legal system.[326] While it is true that the PRDOJ and the USAO believed it was necessary to sign the MOU in 2010, the collateral damage on the reputation of the local courts and PRDOJ is manifest. Take, for example, one of the most recent high-profile cases on the Island: the 2023 murder of banking executive Maurice Spagnoletti. The federal interest in the case, at first, seemed odd. The prosecution's initial theory was that the defendants killed Spagnoletti after he had cancelled a work contract with them.[327] The murder occurred on a highway near San Juan while Spagnoletti was driving home from work. Nevertheless, federal prosecutors decided to take the case. The PRDOJ could have prosecuted the case themselves. But there is a perception that the local system

320. Jury Declines to Impose Death Penalty in Puerto Rico Murders, Reuters (Mar. 23, 2013), https://www.reuters.com/article/us-usa-deathpenalty-puertorico/jury-declines-to-impose-death-penalty-in-puerto-rico-murders-idUSBRE92N02020130324 (on file with the *Columbia Law Review*); Interview with J, supra note 39.

321. Interview with J, supra note 39 ("[T]he specter of death will always be a factor for pleas.").

322. 18 U.S.C. § 2119 (2018).

323. P.R. Laws Ann. tit. 9, § 3217 (2022) (defining carjacking as a third-degree felony).

324. Kevin K. Washburn, Federal Criminal Law and Tribal Self-Determination, 84 N.C. L. Rev. 779, 841 (2006).

325. Id. (internal quotation marks omitted) (quoting Paul H. Robinson & John M. Darley, Justice, Liability, and Blame: Community Views and the Criminal Law 201–02 (Routledge 2018) (1995)). "The fact that petitioner received a sentence of 35 years in prison when the maximum penalty for the comparable state offense was only 10 years illustrates how a criminal law like this may effectively displace a policy choice made by the State." Jones v. United States, 529 U.S. 848, 859–60 (2000) (Stevens, J., concurring) (citation omitted).

326. Interview with G, supra note 182.

327. Jim Wyss, NJ Banker's Murder Case Ends With Guilty Verdict for Two Men, Bloomberg (May 11, 2023), https://www.bloomberg.com/news/articles/2023-05-11/nj-banker-s-murder-case-ends-with-guilty-verdict-for-two-men#xj4y7vzkg (on file with the *Columbia Law Review*). The contract was with a cleaning company that was charging an absurd monthly fee. It turns out that the cleaning company was involved in the drug trade.

currently lacks the resources to deal with these cases, as opposed to the federal one.[328] This in turn, "unfairly malign[s]"[329] the local system because it is seen as incompetent and subservient to federal power. Further, "[e]xcessive use of federal jurisdiction diminishes the prestige of local law enforcement authorities and thus may interfere with their development of responsibility for and capacity to handle complex matters or detract from the distinctive role states play as 'laboratories of change.'"[330]

From the local prosecutor's perspective, the local forum makes it more difficult for them to prosecute. And from the perspective of the general public, the PRDOJ is subservient and inferior to federal power.[331] From the defense perspective, the Puerto Rican government has chosen to forsake local community expressions and subject the people of Puerto Rico to the federal forum.[332] All the while, Puerto Rican community expressions are nonexistent at the federal level.

B. *Similar Arrangements*

The federal government has been present in what are typically considered local affairs for quite some time. Congress at the Founding passed criminal laws that overlapped with state offenses, and today federal and local agencies work closely together in the investigation and prosecution of criminal offenses. Dozens of task forces allow federal and local agencies to cooperate on issues like drug trafficking, firearm trafficking, and public corruption. But not all arrangements are created equal.

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328. Interview with G, supra note 182.

329. See Interview with E, supra note 36.

330. Brickey, supra note 26, at 1173 (citation omitted). Trust in the local criminal legal system in Puerto Rico has certainly eroded in part because of the federal government's interventions. See Wapa TV, ¿Se Puede Confiar en el Departamento de Justicia de Puerto Rico?, YouTube (Nov. 23, 2022), https://www.youtube.com/watch?v=M9M7LpdTl2E&t=187s [https://perma.cc/XAF6-4PUE]. Moreover, administrative issues in Puerto Rican courts have hurt the image of the local judicial system, although courts have worked hard with what they have. See Trías Monge, El Sistema, supra note 65, at 183–84.

331. Putting aside the constitutional arguments, the federal government's handling of Puerto Rico's bankruptcy bolsters the perception that the federal government is supreme on the Island. "[The] federal court has become the law of the land. Which is good from a social point of view, but terrible from a standpoint of state-federal relationship and horrible from a standpoint of mutual respect the systems should have for each other." Interview with G, supra note 182.

332. See Interview with J, supra note 39 (noting that Puerto Rico "has a newer constitution that is informed by a vision of human rights that's missing from the U.S. Constitution" and the "need to acknowledge that people in Puerto Rico understand their problems"); see also 2010 MOU, supra note 12, at 1.

The MOU in Puerto Rico resembles major policy strategies by the U.S. Department of Justice elsewhere. In 1991, the Attorney General for the United States initiated the nationwide Project Triggerlock whereby U.S. Attorneys and federal law enforcement agencies worked with local prosecutors and investigatory agencies to identify cases with federal firearms violations.[333] When local police officers identified a person with a possible firearm violation, they would alert the FBI or ATF. Federal prosecutors could then take the case and subject the defendant to harsher penalties under the federal sentencing guidelines. Much like the MOU in Puerto Rico, firearms cases in the 1990s were being funneled into the federal system. But, unlike the territories, the states were represented in creating federal law and related policies[334] and the local district attorney's office could still bring successive state prosecutions.[335] Even though the federal policy affected local prosecutions, it did not prevent local district attorney offices from prosecuting cases, nor did it subject defendants to statutes that did not represent their community's expressions.[336] While

333. Ultimately, just a handful of jurisdictions implemented Project Triggerlock. The policy was extremely efficient in bringing successful federal prosecutions in the jurisdictions that implemented it. Emma Luttrell Shreefter, Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Centuries-Old Methods to Disarm Black Communities, 21 CUNY L. Rev. 143, 160–62 (2018); see also Thornburgh et al., supra note 25, at 146 ("Operation Triggerlock . . . was designed to, in close cooperation between federal and state prosecutors, identify the most egregious gun violators and throw the book at them.").

334. Whether the states are adequately represented in federal policymaking as a practical matter is, at times, an open question. Some representatives may have their state's interests in mind, while others may answer to the interests of their financial contributors instead. The Supreme Court has taken the position that as a general matter, representatives in Congress do adequately represent their states. See Garcia v. San Antonio Metro. Transit Auth., 469 US 528, 551–53 (1985). But see Printz v. United States, 521 U.S. 898, 919–22 (1997) ("[T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people . . . ."). The territories, however, do not have even the semblance of adequate representation in the political branches.

335. The Triggerlock policy is making a comeback recently. See Ian Marcus Amelkin, Don't Make a Federal Case out of Gun Possession; It Harms Black and Latino New Yorkers, Daily News (Feb. 3, 2022), https://www.nydailynews.com/opinion/ny-oped-federal-gun-possession-adams-biden-20220203-iwxrvaigivhvdhkluofjo7jqxq-story.html (on file with the *Columbia Law Review*) (last updated Feb. 4, 2022) ("Mayor Adams' plan for curbing gun violence . . . would expand a Department of Justice initiative launched in the 1990s called 'Project Triggerlock.'"); Larry Celona, Feds Helping N.Y. Put Heat on Gun Thugs, N.Y. Post (Sept. 25, 2000), https://nypost.com/2000/09/25/feds-helping-n-y-put-the-heat-on-gun-thugs/ [https://perma.cc/KUK7-F8RF] (praising Project Triggerlock for its punitive and deterrent effects in New York City).

336. Another agreement in 1997, Project Exile, is perhaps even more similar to the MOU. To combat the rising murder rate in Richmond, Virginia, the U.S. Attorney for the Eastern District of Virginia and the Richmond Commonwealth Attorney's Office worked

initiatives like Project Triggerlock are focused on narrow issues, the federal government is omnipresent in the territories.

Moreover, not all arrangements are agreements. Take, for example, Congress's actions with respect to Indigenous Nations.[337] The 1885 Major Crimes Act placed certain felonies that occurred in Indian Country within the jurisdiction of the federal government, exclusive of states.[338] The Act was and is a unique statute. It specifically directs the federal government to prosecute offenses that occurred within tribal lands and by an Indigenous person.[339] Arguably, "[T]ribes retain[ed] concurrent jurisdiction over those offenses, limited to the maximum sentence allowed under the Indian Civil Rights Act," and the Tribal Law and Order Act.[340] Nevertheless, the Act was a significant incursion into tribal sovereignty and deviated greatly from the weight of authority on federal Indian criminal law at the time which had "preserved exclusive tribal jurisdiction over

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together to prosecute felon in possession cases in federal court. As the official communiqué explained:

> The U.S. Attorney's Office, along with a Richmond Assistant Commonwealth's Attorney who is cross-designated as a [S]pecial Assistant U.S. Attorney, reviews cases involving felons with guns, drug users with guns, guns used in drug trafficking, and gun/domestic violence referrals and prosecutes these cases in Federal court when a Federal nexus exists and State prison sentences or pretrial detention is insufficient.

Off. of Juv. Just. & Delinq., DOJ, Project Exile, U.S. Attorney's Office—Eastern District of Virginia, https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/gun_violence/profile38.html [https://perma.cc/RM5C-M5T9] (last visited Aug. 12, 2024).

337. Federal criminal statutes apply to actions that occur on Indigenous land. Jurisdictional questions concerning criminal adjudication in Indian Country are notoriously complicated—a "jurisdictional maze" in the words of Robert Clinton. Robert N. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 504 (1976). When a crime occurs on Indigenous land, deciphering which entity gets to prosecute is largely driven by whether the defendant or the victim are Indigenous or not. For example, if a crime occurs between Indigenous persons, the prosecution may be exclusively in the hands of the federal government, if it is a major crime, or the tribal government when not a major crime. See 18 U.S.C. § 1153 (2018) (listing "murder, manslaughter, kidnapping, . . . , felony child abuse or neglect, arson, burglary, robbery," and more as crimes "within the exclusive jurisdiction of the United States"). If a non-Indigenous person commits a crime against an Indigenous person, however, the federal government and the state government have concurrent jurisdiction. Id. § 1152; Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491 (2022). This jurisdictional maze is not only confusing but also diminishes the sovereignty of Indigenous nations and their power to confront harms that occur on their land. As an added wrinkle, Indigenous nations are considered as separate sovereigns for purposes of the Double Jeopardy Clause, potentially subjecting Indigenous persons to successive or concurrent prosecutions. Denezpi v. United States, 142 S. Ct. 1838, 1843 (2022).

338. 18 U.S.C. § 1153 (2018).

339. Id.

340. M. Brent Leonhard, Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds, 47 Gonz. L. Rev. 663, 674–75, 678–79 (2012).

intra-tribal crimes."[341] When we compare the law to the Puerto Rican MOU, however, there are some significant differences. First, the Major Crimes Act was not a negotiated outcome. The Major Crimes Act was foisted onto Indigenous people after a Supreme Court decision prevented the Dakota territory from prosecuting an Indigenous person.[342] Second, the process for prosecuting cases can be different. For example, an offense that occurs in Indian Country that is covered under the Major Crimes Act could first be reported by tribal officials to federal ones, and then accepted or declined by the USAO.[343] The USAOs covering Indian Country notoriously decline to prosecute referrals, declining around half of all cases between fiscal years 2005 and 2009[344] and are more prone to declining the case if it involves an adult sex crime.[345]

Puerto Rico's arrangement exists somewhere between policies like Project Triggerlock and the forced acquiescence to federal prosecutions in Indian Country. The government could have taken a similar route to the Major Crimes Act and simply instructed the PRDOJ of a new policy requiring more federal prosecutions. But instead of acting unilaterally, the federal government opted for collaboration. Taking this route is facially beneficial because it shows respect between the federal and Puerto Rican government. But the federal government's efforts in this regard appear insincere when considering the conscious objective of circumventing local law to effectuate its goals. Further, when viewing the MOU within the context of the territorial criminal legal system, it becomes clear that the PRDOJ is not meant to be the face of crime enforcement, even though they handle most prosecutions on the Island. Puerto Rico is the federal government's domain, and it is its prerogative to intrude as much as they want.

Taken together, the federal government has meddled, to varying degrees, with the enforcement of criminal laws of different political entities. The MOU in Puerto Rico is another expression of the federal

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341. Id. at 673.

342. Ex parte Crow Dog, 109 U.S. 556, 572 (1883). Tribes can, arguably, also prosecute certain offenses covered by the Major Crimes Act, although they do so less frequently because of the significant expenses associated with trial. Addie C. Rolnick, Recentering Tribal Criminal Jurisdiction, 63 UCLA L. Rev. 1638, 1652 (2016) (discussing concurrent jurisdiction of offenses enumerated in the Major Crimes Act); Kevin K. Washburn, American Indians, Crime, and the Law, 104 Mich. L. Rev. 709, 768–69 (2006) [hereinafter Washburn, American Indians] ("While there may be no formal bar to access, the federal regime's removal of the trial from the community where the crime occurred to a distance city creates a routine, de facto denial of the public access to trials.").

343. David Patton, Tribal Law and Order Act of 2010: Breathing Life Into the Miner's Canary, 47 Gonz. L. Rev. 767, 778–79 (2012); Washburn, American Indians, supra note 342, at 732–33.

344. U.S. Gov't Accountability Off., GAO-11-167R, U.S. Department of Justice Declinations of Indian Country Criminal Matters 3 (2010).

345. Susan Filan, Epidemic Hiding in Plain Sight, Ariz. Att'y, July/Aug. 2021, at 44, 46.

government's broad prosecutorial power. But in Puerto Rico, the MOU functions covertly, furthering federal power on the Island.

C. *Another Way Forward*

To achieve substantive change in the territories, solutions in the criminal and civil realms must cope with the democratic deficit because that representational chasm is the lifeblood of the territorial condition. With an eye towards mitigating that deficit, two solutions—one of immediate practicality and another of constitutional dimension—would ameliorate the existing territorial arrangement.

First, it would behoove the PRDOJ and USAO to renegotiate the MOU. While this solution would not solve the underlying democratic issue, it is a harm reduction measure that could ameliorate one manifestation of the democratic deficit. A key concern with the current MOU is that it was negotiated in the shadow of executive power. The negotiations were in secret and the contents of the MOU remain unpublished. These processes shut out important power brokers in the federal and local criminal legal system, including the defense bar, nonprofit organizations, the formerly incarcerated, and the public. By bringing more parties to the negotiation table in a public setting, the MOU could better represent the objectives of not just a few prosecutors but of the community as a whole. Practically, a public renegotiation could result in fewer offenses in the MOU, different diversion programs, or even the wholesale repudiation of an MOU. Moreover, by holding these negotiations publicly, Puerto Rican voters could either reelect or vote out the local leaders that support these types of arrangements.

But a more significant action is necessary to target the undemocratic nature of the current arrangement. The fact that such a solution has not emerged is not for lack of trying. The usual reaction to any issue in the territories, especially with respect to Puerto Rico, is a search for a definitive end to the territorial condition through either statehood, a new type of free association, or independence. Puerto Rico's future status has been debated ad nauseum[346] and the protracted conversation contributes to the existent territorial limbo. Puerto Ricans have participated in a series of nonbinding plebiscites, the results which have been mixed or have had their legitimacy seriously questioned. Recently, a new bill has yet again

346. See, e.g., Arnaud, Llegaron los Federales, supra note 3, at 945–47 (describing two proposed bills that would address Puerto Rico's future status, as well as non-Congressional sources that could possibly address the issue); Gary Lawson & Robert D. Sloane, The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered, 50 B.C. L. Rev. 1, 44 (2009); Ponsa-Kraus, *Aurelius* Concurrence, supra note 3, at 102–03; Juan Cartagena, What Would Statehood Mean for Puerto Rico's Criminal Justice Reforms?, Common Dreams (July 28, 2023), https://www.commondreams.org/opinion/puerto-rico-criminal-justice-reforms [https://perma.cc/74HH-2ZZ4].

emerged in Congress asking for a binding plebiscite to determine Puerto Rico's status, and there seems to be no solution in sight.[347] With each passing election cycle, the promise of a decolonial option seems further away.

The endurance of the territorial condition has not stopped Puerto Ricans from acting. Nonprofit organizations on the ground have taken matters into their own hands, attempting to marshal local resources to ameliorate a dearth in community-centric leadership.[348] Other organizations have tried harnessing the collective power of all the territories to confront the democratic deficit head-on through organizing and impact litigation.[349] These organizations, and others like them, have begun to work without the federal government's blessing precisely because the federal government constrains Puerto Rico's actions. In 2014, for example, the Puerto Rican legislature tried to pass a local bankruptcy statute to deal with its crippling debt; the Supreme Court swiftly struck down the measure.[350] Instead, as previously discussed, Congress established the Financial Oversight and Management Board, which controls the Island's budget and can veto local legislation.[351] In 2000, Puerto Rican legislators passed a new firearm statute with updated license requirements and stiffer penalties for firearm offenses. That statute has been called into question following the Supreme Court's decision in *NYRPA v. Bruen* but has so far survived challenges at the local level.[352] Further, several economic policies, such as the Jones Act, have effectively neutered the local economy for over a hundred years.[353]

Nevertheless, it is undeniable that some issues in Puerto Rico have a significant federal interest, especially in the criminal context. The Puerto

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347. Puerto Rico Status Act (2023) H.R. 2757, https://www.congress.gov/bill/118th-congress/house-bill/2757/text (on file with the *Columbia Law Review*).

348. See, e.g., FURIA Inc., ¿Quiénes Somos?, https://furiapr.org/quienes-somos [https://perma.cc/JX2F-VWLB] (last visited Aug. 13, 2024).

349. See, e.g., Who We Are, Right to Democracy: Confronting Colonialism, https://www.righttodemocracy.us/about (on file with the *Columbia Law Review*) (last visited Sept. 7, 2024).

350. See Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 117–18 (2016) (holding that Puerto Rico is a "State" for purposes of the Federal Bankruptcy Code's preemption provision).

351. See Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1661–62 (2020) (explaining that the president-appointed financial oversight board can prevent local laws from taking effect in Puerto Rico).

352. 142 S. Ct. 2111 (2022); see also Pueblo v. Rodriguez Lopez, 210 P.R. 752, 757 (2022).

353. Some scholars and commentators have called for extended waivers or the repeal of the Jones Act of 1920, which, by some estimates, costs the Island hundreds of million dollars a year. See Tom C.W. Lin, Americans, Almost and Forgotten, 107 Calif. L. Rev. 1249, 1292–94 (2019) (advocating an extended waiver of the Jones Act to mitigate the "significant economic strain" the Act places on the Territories); Marie Olga Luis Rivera, Hard to Sea: Puerto Rico's Future under the Jones Act, 17 Loy. Mar. L.J. 63, 127–28 (2018).

Rican Police Department, for example, has been under a federal monitorship for several years because of a culture of pervasive discrimination leading to constitutional violations.[354] Scholars and politicians attribute much of the violent crime on the Island to the drug trade that moves through Puerto Rico.[355] Because the international drug trade affects U.S. ports of entry, the federal government has a significant interest in investigating and prosecuting drug trafficking and other offenses that stem from the drug trade. Moreover, Congress can always authorize more prosecutorial intrusion through legislation. But, as explained above, funneling cases to the federal level to circumvent local rules and procedures undermines the legitimacy of those prosecutions. There is only a nominal criminal legal reform movement on the Island, leaving the political branches of the local and federal government to implement their policies with little resistance.

What, then, can be done at this moment when the status impasse meets problematic prosecutions? Because the federal government will always be involved in territorial governance, the second and most effective solution is to provide people living in Puerto Rico with full federal voting rights. This author has argued before that the nation should ratify a constitutional amendment providing the people of Puerto Rico and the other four unincorporated territories with full federal voting rights.[356] Each territory should be provided with two senators and representatives commensurate with their populations. A less drastic solution would be to provide full representation and voting rights through statute, although that type of legislation would be subject to constitutional challenge and possible revocation by a future Congress.[357] Notwithstanding the route,

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354. See C.R. Div., DOJ, Investigation of the Puerto Rico Police Department (Sept. 5, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/09/08/prpd_letter.pdf [https://perma.cc/JT6S-ALJ3] (explaining the federal investigation that led to the monitorship).

355. See Juan Nadal Ferrería, The Colossal Coast of Subsidizing Failure: How the Drug War Impacts Puerto Rico's Budget, 81 Rev. Jur. U.P.R. 1139, 1144–45 (2012) ("Most of the crimes committed in Puerto Rico are a direct consequence of the Drug War. It is commonly believed that the drug-related crime rate is between 65–75% of total crimes.").

356. See Arnaud, A More Perfect Union, supra note 8, at 103, 107–09. Others have also argued for a constitutional amendment providing full federal voting rights. See Sigrid Vendrell-Polanco, Puerto Rican Presidential Voting Rights: Why Precedent Should Be Overturned, and Other Options for Suffrage, 89 Brook. L. Rev. 563, 566 (2024); Neil Weare, Equally American: Amending the Constitution to Provide Voting Rights in U.S. Territories and the District of Columbia, 46 Stetson L. Rev. 259, 265 (2017).

357. For more on the mechanics and challenges of future legislation, see Luis Fuentes-Rohwer, Bringing Democracy to Puerto Rico: A Rejoinder, 11 Harv. Latino L. Rev. 157, 162 (2008) ("[I]f one accepts the view that Congress could and should grant citizens of Puerto Rico representation in the House by mere legislation, one must be reconciled to the fact that Congress could always take this representation away."); César A. López Morales, A Political Solution to Puerto Rico's Disenfranchisement: Reconsidering Congress's Role in Bringing Equality to America's Long-Forgotten Citizens, 32 B.U. Int'l L.J. 185, 218–22 (2014).

Puerto Ricans and residents of the other unincorporated territories should be afforded full representation and federal voting rights.

This proposal is both normatively and practically beneficial. This solution ameliorates many of the fundamental issues with the current balance of power between the federal government and the Island. It would provide Puerto Ricans with a voice in amending and creating new federal statues and rules of criminal procedure and evidence. Further, it would begin to alleviate the lack of representational criminal justice at the federal level. In essence, the representational chasm created by the territorial condition would begin to narrow. Practically, it would give Puerto Ricans an actual voice in Congress, permitting representatives to use their political capital to amend harmful federal rules, like the English proficiency requirement for jury service in federal court. Indeed, Puerto Rico is not the only place in the nation where English proficiency bars a segment of the population from serving on federal juries.[358] Representatives from Puerto Rico could band together with those from states like Texas, New Mexico, and Arizona, to eradicate the English proficiency requirement, and instead provide translation services for potential jurors, as is done in some state courts. Further, Puerto Rico's representatives could use their voting power to push for amendments to the Supplemental Security income program and other government programming that offer fewer funds to the territories than the states.

The Island, and the other territories, need an alternative to their never-ending odyssey through the territorial desert. For Puerto Rico, waiting for the status question to be resolved without an earnest attempt at ameliorating systems of inequality would simply perpetuate the current reality. Extending full representation and voting rights to the territories is a substantial step towards remedying those inequalities.

CONCLUSION

The federal government wields complete power in the U.S. territories and that power is evident in the field of criminal adjudication. The effects of that power were recently on display when the U.S. Attorney's Office for the District of Puerto Rico negotiated a memorandum of understanding in which the Puerto Rican Department of Justice gave the USAO primary jurisdiction over prevalent violent crimes on the Island. The result was an increase in the federal criminal docket, the increased prosecution and sentencing of Puerto Rican defendants under laws that do not represent the populace, a conscious disregard for the expressions of Puerto Ricans through local criminal law and procedure, and the optical displacement

358. Jasmine Gonzales Rose, Language Disenfranchisement in Juries: A Call for Constitutional Remediation, 65 Hastings L J. 811, 815 (2014) ("In 2009, eighty-seven percent of the [Limited English Proficiency] population was comprised of people of color. As applied to the current population, that is 25.67 million people of color. Furthermore, approximately forty-four percent of Latinos and forty percent of Asians are LEP.").

of local prosecutors from their essential functions. The MOU did come with certain benefits, however, chief among them being the facilitation of criminal convictions in federal courts and a formal agreement that helped parties navigate issues of double jeopardy. Nevertheless, the arrangement had the equally powerful function of bolstering federal presence in the territorial criminal legal system and furthering the U.S. neocolonial project.

LAW AND EQUITY ON APPEAL

*Aaron-Andrew P. Bruhl**

Most lawyers know that the Federal Rules of Civil Procedure merged the divergent trial procedures of the common law and of equity, but fewer are familiar with the development of federal appellate procedure. Here too there is a story of the merger of two distinct systems. At common law, a reviewing court examined the record for errors of law after the final trial judgment. In the equity tradition, an appeal was a rehearing of the law and the facts that aimed at achieving justice and did not need to await a final judgment. Unlike the story of federal trial procedure, in which we can identify a date of merger (1938, with the Federal Rules) and a winning side (equity), the story of federal appellate procedure laid out in this Article reveals a merger that occurred fitfully over two centuries and yielded a blended system that incorporates important aspects of both traditions.

In addition to revealing the complicated roots and hybrid character of current federal appellate practice, this Article aims to show that an appreciation of the history can explain some current pressures in the system and open our minds to the possibility of reform. Some odd developments in the appellate courts can be understood as suppressed features of equity practice reasserting themselves. With regard to the potential reforms, the suggestion is not that we resurrect the bifurcated procedure of the past. Nonetheless, there are circumstances in which today's federal courts could benefit from recovering features of the equitable model of appeal.

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INTRODUCTION

Something seems to be out of whack in the federal appellate system. Extremely consequential questions of national policy on matters like immigration and abortion are being decided through emergency motions on the Supreme Court's "shadow docket."[1] In other instances, the Court has added cases to its regular docket through the formerly rare mechanism of "certiorari before judgment," in which the Court takes a case straight from a district court, skipping over the court of appeals.[2] The mechanism of certiorari before judgment has been used more than twenty times in the last few years after being used only a few times in the preceding three decades.[3] These changes in the Court's practices are partly the product of changes in the behavior of the lower courts, particularly the proliferation of nationwide injunctions through which district judges set aside national policies for everyone everywhere all at once. Leaders in the Biden Department of Justice, like those in the Trump Administration before them, have criticized these district judges for overstepping the proper role of a trial court.[4] Joining the chorus, Justice Elena Kagan said in a public

1. See, e.g., Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) (criticizing "'shadow-docket' decisions [that] may depart from the usual principles of appellate process").

2. Stephen I. Vladeck, A Court of First View, 138 Harv. L. Rev. (forthcoming 2024) (manuscript at 3, 17–18), https://ssrn.com/abstract=4726492 [https://perma.cc/J6ZF-5Y48].

3. Id. (manuscript at 18); e.g., Biden v. Nebraska, 143 S. Ct. 2355, 2365 (2023).

4. E.g., Application for a Stay of the Judgment at 5, United States v. Texas, 143 S. Ct. 51 (2022) (No. 22A17), 2022 U.S. S. CT. BRIEFS LEXIS 3000 (stating that suits by states seeking nationwide relief "allow single district judges to dictate national policy, nullifying decisions by other courts and forcing agencies to abruptly reverse course while seeking review of novel and contestable holdings"); see also William P. Barr, U.S. Att'y Gen., Remarks to the American Law Institute on Nationwide Injunctions (May 21, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-american-law-institute-nationwide [https://perma.cc/X4F2-6MDL] ("Giving a single district judge such outsized power is irreconcilable with the structure of our judicial system.").

appearance that "[i]t just can't be right that one district judge can stop a nationwide policy in its tracks and leave it stopped for the years that it takes to go through the normal process."[5]

Yet while one criticism is that district courts are acting too much like national policy setters, thereby mucking up the normal appellate process, another criticism is that the Supreme Court is acting too much like a trial court. In April 2021, a United States Senate committee held a hearing on "Supreme Court Fact-Finding and the Distortion of American Democracy."[6] Senator Sheldon Whitehouse, the hearing's organizer, led off with a fiery statement in which he condemned the Supreme Court's handling of facts in several high-profile cases, particularly the *Shelby County* decision limiting the Voting Rights Act and the campaign-finance blockbuster *Citizens United*.[7] According to Senator Whitehouse, the outcomes in those cases turned on factual findings about matters such as whether the expenditures at issue in *Citizens United* posed a risk of corruption and, in *Shelby County*, whether conditions in the South and other jurisdictions had changed such that the Voting Rights Act's preclearance rules were no longer needed.[8] Not only were the Court's conclusions on those points "provably wrong,"[9] but, Senator Whitehouse said, the Court had overstepped its proper appellate role in making factual findings in the course of reaching its decisions.[10]

Evaluating whether things are amiss at either the top or the bottom of the appellate hierarchy requires a conception of the proper roles of different courts. Like many others, Senator Whitehouse refers to the proper role of appellate courts and their relationship to trial courts as if the roles were obvious. But we can improve our understanding of current happenings, and the range of potential responses to them, if we expand our view and question some assumptions about the "proper" or

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5. Josh Gerstein, Kagan Repeats Warning that Supreme Court Is Damaging Its Legitimacy, Politico (Sept. 14, 2022), https://www.politico.com/news/2022/09/14/kagan-supreme-court-legitimacy-00056766 [https://perma.cc/YHP6-PQB7] (internal quotation marks omitted).

6. Supreme Court Fact-Finding and the Distortion of American Democracy: Hearing Before the Subcomm. on Fed. Cts., Oversight, Agency Action, and Fed. Rts. of the S. Comm. on the Judiciary, 117th Cong. (2021), https://www.judiciary.senate.gov/committee-activity/hearings/supreme-court-fact-finding-and-the-distortion-of-american-democracy (on file with the *Columbia Law Review*) [hereinafter Fact-Finding Hearing].

7. Id. at 16:30 (statement of Sen. Whitehouse); see also Shelby County v. Holder, 570 U.S. 529 (2013); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

8. Fact-Finding Hearing, supra note 6, at 19:00, 23:45 (statement of Sen. Whitehouse).

9. Id. at 24:20.

10. See id. at 16:57 (stating that "[a]ppellate courts aren't supposed to do factfinding . . . [except for a] limited, limited appellate role"); id. at 26:25 (referring to the Supreme Court's "sacrifice[]" of a "rule against appellate fact-finding"). Senator Whitehouse expanded on his criticisms, again invoking the traditional appellate role, in a subsequent article. See Sheldon Whitehouse, Knights-Errant: The Roberts Court and Erroneous Fact-Finding, 84 Ohio St. L.J. 837, 842–43, 883 (2023).

"traditional" appellate function. That is not because history should necessarily confine us; it might instead broaden our horizons.

This Article engages in such an investigation of the history of appellate procedure. Things are more complicated than one might guess from facile invocations of the appellate role. If one looks into the past, one finds two very different traditions of appellate review, one from the common law and one from equity. The distinction between law and equity is well known when it comes to trial litigation: The common law had juries and damages, while equity had the chancellor and injunctions.[11] But we used to have two separate systems for appellate review too.[12] At common law, after the jury found the facts, the court entered a final judgment upon them, and then (and only then) the higher court reviewed the record for errors of law, using the writ of error.[13] In the other tradition, that of equity, an appeal was a rehearing of the law *and* the facts aimed at achieving justice, and the appeal did not need to wait until a final judgment.[14] One of our best early jurists, Justice James Wilson, concluded that the Constitution entrenched these divergent practices, such that the Supreme Court was required to engage in a wide and deep review of the facts in equity cases.[15] Wilson was in the minority,[16] but the dispute should warn us away from easy invocations of *the* traditional appellate role.

Widening the lens beyond appeals for a moment, an important recent development is the revival of interest in the doctrines and practices traditionally associated with courts of equity. For the most part, the interest has centered on certain bodies of substantive law associated with equity (e.g., the law of fiduciaries)[17] or remedies characteristic of equity.[18] There also has been some interest in expanding the reach of, or at least recovering the memory of, certain aspects of equity's characteristic trial procedure. For example, Professor Samuel Bray has argued for a new interpretation of the Seventh Amendment jury right that would take some categories of litigation away from juries because the cases were traditionally part of equity's jury-free jurisdiction.[19] Professor Amalia Kessler has argued that many of the ills of our current system of civil justice

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11. Any 1L Civil Procedure text will explain. E.g., Richard D. Freer, Wendy Collins Perdue & Robin J. Effron, Civil Procedure: Cases, Materials, and Questions 16–18 (9th ed. 2024).

12. See infra Part I (describing these differences in detail).

13. See infra note 118 and accompanying text.

14. See infra notes 73–76 and accompanying text.

15. See infra notes 242–244 and accompanying text.

16. See infra notes 242–244 and accompanying text.

17. E.g., Henry E. Smith, Why Fiduciary Law Is Equitable, *in* Philosophical Foundations of Fiduciary Law 261, 261 (Andrew S. Gold & Paul B. Miller eds., 2014).

18. E.g., Samuel L. Bray, The System of Equitable Remedies, 63 UCLA L. Rev. 530 (2016); Caprice L. Roberts, Remedies, Equity & *Erie*, 52 Akron L. Rev. 493 (2018).

19. Samuel L. Bray, Equity, Law, and the Seventh Amendment, 100 Tex. L. Rev. 467, 497 (2022) [hereinafter Bray, Seventh Amendment].

result from the thoughtless mixture of equitable tools like liberal discovery and joinder on the one hand with the adversarial, party-driven model of the common law on the other.[20] Improvements could come, she argues, from reviving some of the quasi-inquisitorial, court-controlled features of the equity model.[21] In the Supreme Court, the interest in equity has mostly concerned remedies, with some Justices deploying a form of "equity originalism" that in practice has served to restrict injunctive remedies in public-law cases on the ground that they lack a footing in Founding-era English practice.[22] Other Justices have argued for a more "dynamic" approach to injunctive remedies, drawing on the remedial flexibility associated with equity.[23]

Neglected so far in the new debates over old equity is the role that the equity tradition might play in advancing our understanding of modern appellate procedure and, possibly, improving that system's workings. It is time that the revival of equity enriched the law of appellate procedure.

In an effort to advance our understanding, Part I of the Article reveals the origins of modern federal appellate procedure and the choices that shaped it. When it comes to trial procedure, it is routine to speak of the Federal Rules of Civil Procedure of 1938 as merging law and equity, with equity prevailing.[24] When it comes to appeals, the story is less known and more complicated. There is no equivalent to the civil rules' epoch-marking opening declaration that the new rules "govern . . . all suits of a civil nature whether [formerly] cognizable as cases at law or in equity."[25] Instead, through a series of decisions spread across two centuries, a blended appellate system has emerged: one that partly follows the model of the common law but in some ways retains the spirit and forms of the equitable

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20. See Amalia D. Kessler, Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial, 90 Cornell L. Rev. 1181, 1251–54 (2005) [hereinafter Kessler, Our Inquisitorial Tradition].

21. Id. at 1270, 1274–75.

22. E.g., Whole Woman's Health v. Jackson, 142 S. Ct. 522, 535 (2021) (declining to enjoin unnamed private persons from enforcing a state law because the "equitable powers of federal courts are limited by historical practice"); Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, 527 U.S. 308, 327–33 (1999) (noting that "the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence"); see also James E. Pfander & Jacob P. Wentzel, The Common Law Origins of *Ex Parte Young*, 72 Stan. L. Rev. 1269, 1357 (2020) (describing and criticizing this development); Asaf Raz, The Original Meaning of Equity, 102 Wash. U. L. Rev. (forthcoming 2024) https://ssrn.com/abstract=4800000 [https://perma.cc/YSN9-TWAK] (manuscript at 12–19) (developing an originalist account of equity that is not static).

23. See, e.g., *Grupo Mexicano*, 527 U.S. at 336–38 (Ginsburg, J., concurring in part and dissenting in part).

24. See infra notes 30–34 and accompanying text. As the discussion there acknowledges, the common understanding about trial-level merger neglects some nuances.

25. Fed. R. Civ. P. 1 (1938).

appeal. There is a certain functional logic to the mixture, albeit with some path dependency thrown in too.

Having illuminated the current system's blended character in Part I, the Article proceeds in Part II to show that an appreciation of equity's appellate system can explain some current pressures in the judicial system, shed light on novel proposals, and suggest some potential improvements. Calls for more opportunities for interlocutory appeal, for example, reflect the logic of equity reasserting itself in a respect in which the common law submerged it.[26] And the federal courts would likely benefit from such reemergence in other aspects of their procedure too, such as through more searching appellate review of high-stakes decisions like national injunctions.[27] To be very clear, however, Part II does not call for resurrecting the bifurcated appellate procedure of ages past. Many old practices and distinctions have been abolished for good reason.[28] *Bleak House*, with its interminable, ruinous Chancery case of *Jarndyce v. Jarndyce*, is not a how-to guide for legal reformers.[29] Nonetheless, there are some circumstances in which the equitable model of appeal—review of the facts, reweighing of the equities, tolerance of interlocutory appeals, an orientation toward concluding a matter with full justice—still makes sense today. That is, there are good *functional* reasons for nonantiquarians to appreciate aspects of the equitable model of appeal. One way of using history is to fix meaning or close off possibilities, but in this instance history instead illustrates the range of possibilities open before us.

I. THE CURRENT SYSTEM'S BLENDED MERGER AND HOW IT GOT THAT WAY

The 1938 Federal Rules of Civil Procedure famously unified the trial procedures of law and equity, providing that the new rules governed "all suits of a civil nature whether cognizable as cases at law or in equity" and that henceforth there would be only "one form of action to be known as a 'civil action.'"[30] So solid is the fusion of law and equity that the rulemakers'

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26. See infra section II.B.

27. See infra section II.C.

28. For example, have you ever heard of the old appellate procedure of "summons and severance"? If not, count yourself lucky. Rule 74 of the 1938 Federal Rules of Civil Procedure abolished it, and we have never looked back. See Fed. R. App. P. 3 advisory committee's note on subdiv. a (1967) (but I wouldn't, honestly).

29. Charles Dickens, Bleak House 13–15 (Oxford World Classics 1998) (1853).

30. Fed. R. Civ. P. 1, 2 (1938); see also Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283 (1988) (referring to "the merger of law and equity, which was accomplished by the Federal Rules of Civil Procedure"). It is a bit of an oversimplification to say that merger happened only and entirely in 1938. For example, the methods of taking evidence at trial—traditionally, through live testimony at common law and via written depositions in equity—first merged, then unmerged, and finally merged again all well before 1938. See infra text accompanying notes 181–192 (describing these events). Further, it is worth remembering that some states harmonized procedure much earlier than did the federal courts. On movements toward fusion in the states, including through the Field Code,

2007 restyling project dropped Rule 1's express reference to unifying law and equity because "[t]here is no need to carry forward the phrases that initially accomplished the merger."[31]

The merged trial procedure is not a mixture in equal measures. Rather, as set out in Professor Stephen Subrin's classic article, it is generally said that equity procedure "conquered" the common law.[32] Most of the Federal Rules of Civil Procedure can be traced to procedures of equity. This is true of the joinder rules and discovery provisions, for example, and more generally of the Rules' emphasis on pretrial proceedings over jury trial.[33] It is true as well of the Rules' philosophical orientation toward judicial discretion.[34]

Subrin's article, like the Federal Rules of Civil Procedure it addresses, almost entirely concerns trial procedure, not appeals. What about modern federal appellate procedure—does it reflect the triumph of equity as well, or is it something else?

As with trial procedure, federal appellate practice has largely merged the two old systems of law and equity into one track.[35] Indeed, the fusion is more complete in the sense that appellate procedure has no lingering distinction so glaring as the jury trial, which is the largest remaining difference between law and equity in trial procedure, a distinction that is constitutionally hardwired into the system.[36] But in the appellate-level merger, neither system clearly prevailed. As the following sections will explain, we have a system of appellate procedure that mixes the traditions in a way that preserves important aspects of each.

The mixed merger of appellate procedure is more complicated than the merger of trial procedure for another reason too, namely that one

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see Amalia D. Kessler, Inventing American Exceptionalism 112–50 (2017) [hereinafter Kessler, Inventing American Exceptionalism]; John H. Langbein, Renée Lettow Lerner & Bruce P. Smith, History of the Common Law: The Development of Anglo-American Legal Institutions 383 (2009); Kellen Funk, The Union of Law and Equity: The United States, 1800–1938, *in* Equity and Law: Fusion and Fission 46, 47 (John C. P. Goldberg, Henry E. Smith & P. G. Turner eds., 2019).

31. Fed. R. Civ. P. 1 advisory committee's note on 2007 Amendment.

32. Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909, 973 (1987). To be sure, the "conquest" account elides some complications. Before 1938, federal equity had already borrowed some features of the common law, particularly when it came to modes of proof at trial, such that the equity practice that the Rules mostly adopted in 1938 was not the equity practice of centuries past. See Kessler, Our Inquisitorial Tradition, supra note 20, at 1225; Langbein et al., supra note 30, at 390.

33. See Subrin, supra note 32, at 922–25.

34. Id. at 922–25, 1001.

35. There is of course admiralty practice too. Like equity, it used the appeal. See infra note 51. For simplicity, this Article will refer mostly to law and equity, with the understanding that admiralty usually mirrors the latter when it comes to appellate review.

36. See U.S. Const. amend. VII (preserving the right to jury trial "[i]n Suits at common law").

cannot so readily identify the merger with a single event like the promulgation of the Federal Rules of Civil Procedure in 1938. One might look to the 1967 promulgation of the Federal Rules of Appellate Procedure as such an event, but that would be a false cognate. The appellate rules did not play a large role in fusing the distinct appellate procedures of law and equity, and they will appear very rarely in the pages that follow. The appellate rules do not have any pretensions toward anything so dramatic as the declarations in the original versions of Rules 1 and 2 of the Federal Rules of Civil Procedure that banished the forms of action and the distinction between law and equity. They instead largely address matters that might be described as procedure in the narrow sense: deadlines, required contents of briefs, and the like.[37] The defining features of today's mixed federal appellate procedure are instead the result of many different enactments and shifts in judicial practices, some going back to the Judiciary Act of 1789 and some coming as recently as 1985, though the events of 1985 were not understood in terms of merger.[38]

The following sections reveal the blended nature of our current system and explain how it came to be. Each section considers one dimension of appellate review (standard of review, timing of review, goals of review, etc.) and explains how our current federal system chose the path of equity or common law, a blend of the two ideal types, or something new.

One venerable rendering of the law–equity divide deserves mention at the outset because it will *not* play a significant role in what follows. That is the contrast, which goes back to antiquity, in which equity provides a flexible, situation-specific corrective to the harshness that may result from strict adherence to general laws.[39] Despite its importance for other purposes, that rendering of the law–equity divide is not very helpful in characterizing our appellate procedure. For one thing, the contrast between rigid generality and flexible specificity has not mapped onto the Anglo-American legal categories of law and equity for centuries at least. Long before merger and even before American independence, equity had been hardening into general rules, and the law was not always without flexibility.[40] Further, although one can feasibly assess whether some aspect

37. See, e.g., Fed. R. App. P. 28 (governing appellants' briefs).

38. See infra text accompanying notes 211–217 (describing the 1985 amendments to Federal Rule of Civil Procedure 52).

39. See Aristotle, Nicomachean Ethics bk. V, at 142 (Martin Ostwald trans., Bobbs-Merrill Co. 1962) ("And this is the very nature of the equitable, a rectification of law where law falls short by reason of its universality."); 1 Joseph Story, Commentaries on Equity Jurisprudence 4–5 (4th ed. 1846) (discussing this definition of equity).

40. See 3 William Blackstone, Commentaries *433–444 (contrasting the discretionary system of justice that chancellors had foresworn a century before with the contemporary system in which courts of law and equity are "equally artificial systems, founded in the same principles of justice and positive law"); 1 James Kent, Commentaries on American Law 456 (New York, O. Halsted 1826) (observing that "there are now many settled rules of equity

of our appellate practice (such as the timing of review or standards of review) draws more from one historical model of procedure than the other, it is hard to say whether our appellate procedure, as a whole, more embodies rigid generality or instead ameliorative flexibility. If one were forced to choose, the latter probably has the stronger claim. For support, consider that Federal Rule of Appellate Procedure 2 allows suspension of most rules for good cause,[41] that appellate courts may recall their mandates to prevent injustice,[42] and that some norms of appellate procedure are subject to exceptions that, to leave no doubt about their presumed origins, are expressly described as "equitable."[43] At the same time, there is plenty of rigidity in appellate procedure too, such as in some of the rules about the time for filing an appeal.[44] But none of that—neither the case-specific standards nor the unforgiving rules—seems particularly revealing of the character of federal appellate procedure.[45] At the very least, a general orientation toward rigidity or flexibility would not be as diagnostic of the system's character as the features that are addressed in the following sections.

Onward, then, to those defining features of the character of federal appellate procedure.

A. *The Name*

What's in a name? In the case of "appeal," rather a lot of history. It was in no way preordained that "appeal" would become our most common mode of review. History furnished a number of alternatives.

The appeal as a mechanism of reviewing the decision of an inferior court came to England through the Roman legal tradition.[46] Appeals were used within England's hierarchically ordered ecclesiastical court system,

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which require to be moderated by the rules of good conscience, as much as the most rigorous rules of law did before the chancellors interfered on equitable grounds").

41. Fed. R. App. P. 2(a).

42. E.g., Bennett v. Mukasey, 525 F.3d 222, 224 (2d Cir. 2008) (Newman, J., in chambers) (reinstating petition to reopen removal proceedings and recalling mandate because it would be "unfair to penalize the client" for his lawyer's neglect of obligations).

43. E.g., Staley v. Harris County, 485 F.3d 305, 310–12 (5th Cir. 2007) (considering whether the "equities" of the case justified the "extraordinary remedy of vacatur" (emphasis omitted) (internal quotation marks omitted) (quoting U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 26 (1994))).

44. E.g., Bowles v. Russell, 551 U.S. 205, 214 (2007) (deeming a deadline jurisdictional and not waivable for excusable neglect).

45. But see Joseph J. Gavin, Comment, The Subtle Birth of Activism: The Federal Rules of Appellate Procedure, 2004 Mich. St. L. Rev. 1101, 1122–24 (describing the Federal Rules of Appellate procedure as embodying equity's discretion and promoting judicial activism).

46. See Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327–29 (1796) (opinion of Ellsworth, C.J.) (noting the civil law roots of the appeal); Mary Sarah Bilder, The Origin of the Appeal in America, 48 Hastings L.J. 913, 923–42 (1997) [hereinafter Bilder, The Origin of the Appeal in America] (describing the appeal's origins and early development).

which had a broad jurisdiction over many topics considered secular today, such as family law and probate.[47] "*Appellatio*," Sir Edward Coke accordingly wrote in the *Institutes*, "is a removing of a cause in any ecclesiastical court to a superior . . . ."[48] In the ecclesiastical courts, an appeal ran from lower-level church bodies to higher levels and in principle all the way to the Pope—or, later, after Henry VIII's break from Rome, to the king as head of the Church of England.[49] (Indeed, one of the actions that constituted the break with Rome was the 1533 "Act for the Restraint of Appeals,"[50] such that one could say with some justification that a law about appellate jurisdiction kicked off the English Reformation!)

Later on, the term "appeal" was used in Chancery (itself led by churchmen and staffed by canon lawyers in the early days), with the term coming into consistent usage there by the early seventeenth century.[51] Still later, when the House of Lords established the power to review decisions from Chancery in the seventeenth and eighteenth centuries, the name "appeal" was used for those proceedings.[52] The appeal was also the traditional mode of review in the Scottish judiciary, though by the time of American independence the Scottish supreme civil court, which melded law and equity, had rejected appeals in favor of other devices more in the nature of supervisory writs.[53]

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47. 1 R.H. Helmholz, The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s, at 348–53 (2004); Bilder, The Origin of the Appeal in America, supra note 46, at 929–32.

48. 2 Edward Coke, The First Part of the Institutes of the Laws of England § 500, at 287 (Legal Classics Library 1985) (1628). There was another, very different sense of "appeal" in medieval English criminal procedure, namely the "[a]ppeale of felonie." Id. Here the appeal was an accusation against a wrongdoer, a means of commencing prosecution; it was not the review of one court's decision by another court. See John Cowell, The Interpreter: Or Booke Containing the Signification of Words (1607) (calling this meaning drawn from criminal law more common than the other meaning involving removing a case to a superior court "as appeale to Rome"); Langbein et al., supra note 30, at 29–35 (describing appeal of felony).

49. 1 William Holdsworth, A History of English Law 603–04 (7th ed. 1956) (1903); Thomas J. McSweeney, Priests of the Law: Roman Law and the Making of the Common Law's First Professionals 73–74 (2019); Bilder, The Origin of the Appeal in America, supra note 46, at 929–32.

50. 24 Hen. 8 c. 12; 25 Hen. 8 c. 19; 6 John Baker, The Oxford History of the Laws of England: 1483–1558, at 246–47 (2003) [hereinafter Baker, Oxford History].

51. 1 Holdsworth, supra note 49, at 410–11; Langbein et al., supra note 30, at 196, 279–80; Bilder, The Origin of the Appeal in America, supra note 46, at 935–36. The appeal was also used in admiralty, another system of justice with civilian roots. On the history of appeals in admiralty, see John Baker, Introduction to English Legal History 131–33 (5th ed. 2019) [hereinafter Baker, English Legal History]; Selden Soc'y, Select Cases in Chancery: A.D. 1364 to 1471, at 124 (William Paley Baildon ed., 1896).

52. Baker, English Legal History, supra note 51, at 151–52; Louis Blom-Cooper & Gavin Drewry, Final Appeal: A Study of the House of Lords in Its Judicial Capacity 18–22 (1972); Bilder, The Origin of the Appeal in America, supra note 46, at 935–36.

53. See Lord Kames, Historical Law-Tracts 265–83 (Edinburgh 3d ed. 1776); see also James E. Pfander & Daniel D. Birk, Article III and the Scottish Judiciary, 124 Harv. L. Rev.

Colonial Americans were familiar with another use of the appeal that derived specifically from the context of empire. This was the appeal from colonial courts or legislatures (sometimes the same thing, in that era) to the king's Privy Council.[54] As legal historian Mary Sarah Bilder explains, this mechanism was used to check colonial laws for consistency with the laws of England, and this appeal bolstered the development of domestic judicial review of statutes for repugnance to the state and national constitutions.[55]

But all of this leaves out the modes of review within the courts of the common law. In England's system of common law, the ordinary vehicle for review of civil and criminal judgments, such as it was, was the writ of error.[56] The writ of error was not just another name for the same thing as appeal but was instead a more limited device with a different theory behind it. As the following sections will explain in more detail, the writ of error was conceived of as a separate suit limited to review of legal errors on the record of a prior judgment. The writ of error made its way to this country, finding an important place in the Judiciary Act of 1789, which provided for appeals in some situations and writs of error in others.[57] The courts understood the Act to preserve the traditional distinctions between the vehicles, such as whether the facts were reviewable, except where Congress expressly overrode those distinctions.[58] Some mainstays of the 1L curriculum came to the Supreme Court through the writ of error, thereby puzzling students with terminology like "plaintiff in error" for the party initiating the error proceeding.[59]

The writ of error was banished from federal practice by legislation in 1928,[60] but this did not effect anything like the merger of trial practice

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1613, 1638–42 (2011) (documenting Kames's influence on James Madison, James Wilson, and others).

54. Mary Sarah Bilder, The Transatlantic Constitution: Colonial Legal Culture and the Empire 73–90 (2004).

55. Id. at 186–96.

56. This summary skips over archaic devices like "attaint" and "false judgment," which conceived of the jury's or trial judge's errors as personal faults to be punished. See Baker, English Legal History, supra note 51, at 146–47 & n.12; 1 Holdsworth, supra note 49, at 200–01; Lester Bernhardt Orfield, Criminal Appeals in America 15–17, 22–23 (1939) [hereinafter Orfield, Criminal Appeals]. Besides the writ of error, there were mechanisms available at some times and in some circumstances to provide a form of collegial review, including informal discussion among the judges or decision of motions for new trials in the en banc court. See infra text accompanying notes 131–133.

57. Judiciary Act of 1789, ch. 20, §§ 22, 25, 1 Stat. 73, 845–87.

58. See, e.g., Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796) (opinion of Ellsworth, C.J.) ("[The terms 'appeal' and 'writ of error'] are to be understood, when used, according to their ordinary acceptation, unless something appears in the act itself to controul, modify, or change, the fixed and technical sense which they have previously borne.").

59. E.g., Plessy v. Ferguson, 163 U.S. 537, 549 (1896); Pennoyer v. Neff, 95 U.S. 714, 719 (1877); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 317 (1819).

60. Act of Jan. 31, 1928, ch. 14, 45 Stat. 54; Act of Apr. 26, 1928, ch. 440, 45 Stat. 466.

brought about through the 1938 Federal Rules. For while the name disappeared in 1928, in substance the writ of error lived on. Congress provided that the class of proceedings that used to be called error would continue to mimic the old ways of the writ of error, and the courts continued to distinguish between different kinds of appeals (as they were now all called) based on whether the case was one of common law or of equity.[61] As sections below will explain, some features of our current system of review still mimic the writ of error.[62] But as far as nomenclature goes, the advantage today goes to equity.

Modern federal practice has other mechanisms for review besides error and appeal, most notably certiorari, which deserves a brief mention if only to note its odd path. Certiorari is a word with many meanings. Today, certiorari is familiar as the discretionary device by which the Supreme Court hears almost all of its cases.[63] Historically, certiorari was not the usual mode of appellate review in either the courts of common law or of equity; rather, the royal courts at different times used different forms of certiorari for various and sundry purposes including to supervise local courts, to bring criminal indictments before them, or to control justices of the peace and what we would now call administrative agencies.[64] Certiorari has come a long way since the days it could be used to review fines imposed by the sewer commissioners.[65]

Compared to the modern form of certiorari, mandamus remains closer to its roots. In modern federal practice, appellate courts use mandamus to correct "usurpation" of jurisdiction or other "clear abuses,"

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61. See Bengoechea Macias v. De La Torre & Ramirez, 84 F.2d 894, 895 (1st Cir. 1936) (explaining that the statute substituting the appeal for the writ of error did not enlarge the scope of review); 8 William J. Hughes, Federal Practice §§ 5423, 5425, 5693, 5816 (1931) (noting that the legislation "merely changed the name and form of the procedure for obtaining an appellate review, without changing any substantial right to such a review or the scope of the appellate jurisdiction").

62. See infra section I.D (discussing the final-judgment rule).

63. E.g., 28 U.S.C. §§ 1254(1), 1257(a) (2018).

64. See Baker, English Legal History, supra note 51, at 153–54, 159–60 (describing various uses of certiorari in English courts); 1 Holdsworth, supra note 49, at 213 (describing use of certiorari to remove criminal cases to the court of King's Bench in the fifteenth and sixteenth centuries). Looking centuries further back, before the King's Bench was fully formed as a judicial body separate from the monarch, the court *coram rege* used writs with "certiorari" in the title to bring records of prior proceedings before it, "the closest thing one could find to an appeal in thirteenth-century English law." McSweeney, supra note 49, at 155. In our federal courts, the common-law writ of certiorari was not used as a removal device or as a vehicle for appellate review, but still another manifestation of the common law writ of certiorari, which the Supreme Court did use, as an auxiliary writ that could enlarge or cure defects in the record in a case already being reviewed in a superior court through another vehicle. See Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co., 148 U.S. 372, 380 (1893); Reynolds Robertson & Francis R. Kirkham, Jurisdiction of the Supreme Court of the United States ch. 34, §§ 281–82, at 531–33 (1936).

65. See Baker, English Legal History, supra note 51, at 159–60 (noting the use of certiorari in the seventeenth century to review fines imposed by bodies like sewer commissions).

typically in interlocutory postures that cannot be reviewed through the "ordinary" channel of appeal after final judgment.[66] It is ironic that our federal courts today use the royal judges' prerogative writ of mandamus as a corrective to the rigidities of a system of "appeal," the traditional appeal in equity not being limited to final decrees at all.[67]

When the American colonists got the chance to make their own legal institutions, it was not obvious that the colonists, or at least the more rebellious and dissenting of them, would happily embrace the appeal as a mode of review within their court systems. For many colonists, the common law meant the cherished rights of Englishmen, while courts of equity were objects of suspicion due to their association with the crown and colonial governors.[68] As for the equitable appeal more specifically, it "embodied all that the Puritan colonists despised—Rome, the Anglican ecclesiastical system, the king."[69] Yet the appeal took root on this side of the Atlantic, eventually becoming the name for the workaday vehicle of review in most American courts. Despite its baggage, the appeal had a powerful connection to a compelling vision of justice.[70] The next section explores that vision's attractions by considering the purposes of appellate review.

B. *The Goal*

Appellate review has multiple potential goals. Today, commentators tend to emphasize two of them: correcting error and developing the law.[71] Historically, the common law and equity had distinct ideas about the goals of review, ideas that do not exactly map onto our familiar categories of error correction and law development.[72] Nonetheless, the balance of the

66. See, e.g., Cheney v. U.S. Dist. Ct., 542 U.S. 367, 380 (2004); In re Depuy Orthopaedics, Inc., 870 F.3d 345, 350–53 (5th Cir. 2017); DeMasi v. Weiss, 669 F.2d 114, 117 (3d Cir. 1982).

67. See infra section I.D (discussing equity's allowance of interlocutory appeals).

68. Kessler, Inventing American Exceptionalism, supra note 30, at 19; Stanley N. Katz, The Politics of Law in Colonial America: Controversies Over Chancery Courts and Equity Law in the Eighteenth Century, *in* 5 Perspectives in American History: Law in American History 257, 257–58 (Donald Fleming & Bernard Bailyn eds., 1971).

69. Bilder, The Origin of the Appeal in America, supra note 46, at 943; see also Gerhard Casper, The Judiciary Act of 1789 and Judicial Independence, *in* Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789, at 281, 288–90 (Maeva Marcus ed., 1992) (describing the Anti-Federalists' complaints about excessively powerful courts, which among other things exerted foreign equity powers over the common law and juries).

70. Bilder, The Origin of the Appeal in America, supra note 46, at 967–68 (describing the colonists' "culture of appeal," which "ironically was based on a procedural device that was linked to institutions they despised . . . but with a set of meanings that held forth a promise of justice nonexistent in England").

71. See, e.g., Daniel John Meador, Appellate Courts in the United States 2–3 (2d ed. 2006) [hereinafter Meador, Appellate Courts in the United States]; J. Dickson Phillips, Jr., The Appellate Review Function: Scope of Review, 47 Law & Contemp. Probs. 1, 2 (1984).

72. Compare infra notes 73–75 and accompanying text, with infra notes 76–78 and accompanying text.

evidence shows that today's federal courts are leaning toward a version of the common law's vision of the function of review.

The divergence between law and equity is clearest when one considers how the two traditions approach error correction. In fact, even to speak of "error correction" begs the question in favor of the law side. In equity, the function of an appeal is not to identify a lower court's errors and, upon finding error, annul the proceedings. Rather, the goal of an appeal in equity is the same as the goal of the original proceedings: to bring all the affected parties together and render a just resolution of the whole dispute.[73] As one state court put it, the question in an appeal in equity is, "Did [the trial court] seek equity and do it?"[74] And if the trial court fell short of that duty, the appellate court should fulfill it. Doing so might mean hearing evidence not presented below or allowing amendment of the pleadings to join new parties.[75] One might think that doing complete equity and correcting error sound like two ways of saying a similar thing, but the common law itself makes it very clear that they are not the same at all. As one expert on appellate procedure puts it, with admittedly a bit of exaggeration, appellate review in the common-law system "had *nothing* to do with whether justice was done."[76]

A major reason the common law's appellate courts could not do justice, nor even correct all errors, was because they traditionally could not

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73. See Brown v. Kalamazoo Cir. Judge, 42 N.W. 827, 828–29 (Mich. 1889) (detailing how Michigan law empowered appellate courts in equity to "make the final disposition such as it should have been in the first place" rather than remand for a new trial); 9 W.S. Holdsworth, A History of English Law 336, 338 (1926) (noting that in equity, "the court considered the whole circumstances of the case . . . and tried to make a decree which would give effect to the rights of all the parties"); Henry L. McClintock, Handbook of Equity 11, 15–16, 23 (1936) ("[T]he question presented [in an appeal] is, not whether error was committed by the lower court, but whether the decree rendered was that which should have been rendered in light of the entire case as disclosed by the record." (footnotes omitted)); see also Diffenderffer v. Winder, 3 G. & J. 311, 348 (Md. 1831) (stating that "[u]pon [a] reversal, we are called on to exercise, as it were, an original equity jurisdiction–to give that decree on the record before us, which the [lower court] ought to have given").

74. Lee v. Lee, 167 S.W. 1030, 1032 (Mo. 1914).

75. See The Marianna Flora, 24 U.S. (11 Wheat.) 1, 38 (1825) (noting "the constant habit of the Circuit Courts" in admiralty appeals to allow amendments adding new counts to pleadings); Smith v. Chase, 22 F. Cas. 478, 479 (C.C.D.D.C. 1828) (No. 13,022) (stating that in an appeal, "the cause commences de novo in the appellate court"); 3 Edmund Robert Daniell, A Treatise on the Practice of the High Court of Chancery 74–76 (London, I.G. M'Kinley & J.M.G. Lescure 1846) (describing circumstances in which new evidence is allowed and stating that "the Court will give the plaintiff leave to amend, by adding parties in the same manner as upon an original hearing"). Appeals from Chancery to the House of Lords were more limited, as new evidence was not allowed. 3 Daniell, supra, at 88–89.

76. Robert J. Martineau, Appellate Justice in England and the United States 6 (1990) (emphasis added); see also Edson R. Sunderland, The Proper Function of an Appellate Court, 5 Ind. L.J. 483, 485 (1930) ("The question never arose as to whether the judgment was just or unjust, nor did the proceeding ever involve an inquiry as to what the true judgment ought to be.").

review the facts.[77] For them, correcting error meant correcting errors of law, and only those errors of law that appeared on the record, which did not report the whole proceedings.[78] Although the trial judge could comment on the evidence and grant a new trial to nullify verdicts that were clearly wrong on the facts, for a long time the trial court's decision on whether to grant a new trial based on a verdict against the weight of the evidence was subject to minimal or no further review.[79] In any event, the power of a higher court to order a do-over of an unfounded verdict falls short of the power of ordering a just and complete resolution, much less directly instating one.

It was not only that the common-law writ of error fell short of doing justice by reversing too little, for it could also reverse too much! The rules of common-law pleading and procedure were notoriously technical, and missteps by counsel and court were therefore frequent.[80] And while modern reviewing courts look for prejudice and use doctrines like harmless error to affirm decisions that fall short of the ideal,[81] it was hard to deem a mistake immaterial in an era in which the minimalistic nature of the trial record in cases at law—in particular the absence of a transcript

77. For more on the scope of review, see infra section I.E.

78. Martineau, supra note 76, at 6. Unlike a modern record that often includes a verbatim transcript of all proceedings, the record of old contained little, essentially just the pleadings, the question for the jury and its verdict, and the judgment. The record could be expanded through a bill of exceptions, in which a party would ask the trial judge to set down in writing his ruling on some matter to which the party objected, such as a refused jury instruction. 1 Holdsworth, supra note 49, at 215, 223–24; Martineau, supra note 76, at 2. Although it is generally true to say that the common-law courts governed by the writ of error did not allow reversal for errors of fact, a more precise statement would acknowledge that certain matters of collateral fact extrinsic to the record were cognizable, such as the death or infancy of a party. This factual contention could then be put to trial so as to become a matter of record that would nullify the original proceedings. Baker, Oxford History, supra note 50, at 406; John Palmer, The Practice in the House of Lords, on Appeals, Writs of Error, and Claims of Peerage 131–32 (London, Saunders & Benning 1830).

79. For the federal practice, which barred review until the second half of the twentieth century, see Fairmount Glass Works v. Cub Ford Coal Co., 287 U.S. 474, 480–83 (1933); Hannis Taylor, Jurisdiction and Procedure of the Supreme Court of the United States 662–64 (1905); 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2819 (3d ed. 2012). For the early practice in the states, some of which forbade review and others of which permitted it in narrow circumstances, see 3 Thomas W. Waterman, A Treatise on the Principles of Law and Equity Which Govern Courts in the Granting of New Trials in Cases Civil and Criminal ch. XV.I.b, at 1213–31 (New York, Gould, Banks & Co. 1855). On judicial comment on the evidence as a sort of pre-emptive substitute for the lack of appeal, see Renée Lettow Lerner, How the Creation of Appellate Courts in England and the United States Limited Judicial Comment on Evidence to the Jury, 40 J. Legal Pro. 215, 220–23 (2016).

80. 1 Holdsworth, supra note 49, at 223–24.

81. See 28 U.S.C. § 2111 (2018); Fed. R. Civ. P. 61.

of the testimony—made it hard to know whether an error affected the outcome.[82]

Which of these things, correcting error or doing justice, does our federal system pursue today? There is no uncontestable answer to such a question, but the better view is that our system tilts toward the old legal model of correcting errors of law on the record. It is true that we now have some appellate review of the facts, though it is deferential to the trial court.[83] The conclusion that the courts come out in favor of the law side is based more on the apparent aversion to justice-seeking seen in today's appellate courts, an aversion that permeates even their review of questions of law. Consider as an example the way appellate courts handle changes in law that occur during the pendency of an appeal. If new law applies immediately to all pending cases, as changes in decisional law usually do and statutes sometimes do, the official doctrine is that the appellate court should reverse if the new law would change the judgment, even though the lower court may have proceeded correctly under the old, "wrong" law.[84] Yet today's courts will strain to avoid that result, eagerly applying doctrines like forfeiture or waiver to avoid upsetting judgments.[85] Likewise, and although there are certainly exceptions, appellate courts resist expanding the record or reversing for reasons not preserved in the court below.[86] That may be the right approach, all things considered, but it elevates other values above the just resolution of each case.

Although the divergence between the mindsets of law and equity stands out most clearly when it comes to the error-correction function of review, it is worth briefly mentioning the law-clarifying function as well, which is the other most frequently cited purpose of appellate review. At first, one might think equity had little need for developing the law. On the classical understanding, equity is meant to respond to the particularities of the situation in a way that categorical rules of law cannot.[87] And if one

82. See Blom-Cooper & Drewry, supra note 52, at 47 (noting that "[p]oints arising outside the narrow confines of the 'record' were unimpeachable, while many sensible decisions were quashed on a mere verbal quibble resulting from a slip of the clerk's pen"); Lester B. Orfield, Appellate Procedure in Equity Cases: A Guide for Appeals at Law, 90 U. Pa. L. Rev. 563, 564 (1942) [hereinafter Orfield, Appellate Procedure] (describing the limited scope of common-law pleadings in error); Sunderland, supra note 76, at 485–87 (same).

83. See infra section I.E.

84. Aaron-Andrew P. Bruhl, Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change, 96 Cornell L. Rev. 203, 210–12 (2011) [hereinafter Bruhl, Deciding When to Decide]; see also, e.g., The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) (applying changed law to pending case).

85. Bruhl, Deciding When to Decide, supra note 84, at 212–14.

86. See Meador, Appellate Courts in the United States, supra note 71, at 2, 37 (emphasizing that appellate courts rarely go beyond the record created at trial); see also Thomas B. Marvell, Appellate Courts and Lawyers: Information Gathering in the Adversary System 160 (1978) (quoting an anonymous appellate judge as saying, "I can't think of anything more fundamental than [sticking to the record]").

87. See supra note 39.

believed the detractors who complained that the substance of equity was whim, its only measure the chancellor's foot,[88] then one would not see much value in writing down precedents. But by the time of American independence, a characterization of equity as a zone of individual caprice would have been a slander.[89] The systems are not vastly different on that score.

Nonetheless, while not poles apart, even today there may be some reasons for the lawmaking role to have somewhat greater importance in the context of common law than of equity. The need to control juries by expanding the zone of law at the expense of fact may require devoting more effort to expounding a huge body of detailed rules than is needed in a system exclusively administered by judges.[90] And there may be enduring reasons for the substantive law of equity to feature more standards and more discretion, such as equity's role as a "backup" system that exists to police clever, rule-evading opportunism.[91] But these are relatively modest differences between the two systems, and so it is hard to say that today's federal courts follow one model rather than the other on this point.

The biggest difference in how courts in today's system wield the lawmaking function does not involve the nature of the case as legal versus equitable. Rather, it tracks positions in the appellate hierarchy. The Supreme Court, with its small, self-selected docket, tends to favor bright-line rules that settle issues, while the courts of appeals mostly issue unpublished decisions that do not make binding law at all.[92] That divergent behavior has more to do with differing institutional roles and vastly different caseloads than with the law–equity divide.[93]

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88. John Selden, Equity, *in* The Table Talk of John Selden 60, 61 (Samuel Harvey Reynolds ed., 1892) (1689) ("Equity is a roguish thing. . . . One chancellor has a long foot, another a short foot, a third an indifferent foot; 'tis the same thing in the chancellor's conscience.").

89. See 3 Blackstone, supra note 40, at *429–435 (disagreeing with Selden's assessment); see also 1 Holdsworth, supra note 49, at 468–69 (describing the growth of precedent and case reporting in Chancery); James Wilson, Of the Judicial Department, *in* 2 Collected Works of James Wilson 922–26 (Kermit L. Hall & Mark David Hall eds., 2007) (stating that "precedents and rules govern as much in chancery as they govern in courts of law").

90. On the theme of rule elaboration as a tool for narrowing jury discretion, see Langbein et al., supra note 30, at 448–50.

91. See generally Henry E. Smith, Equity as Meta-Law, 130 Yale L.J. 1050, 1076–77 (2021) (emphasizing the role of equitable doctrines like constructive fraud and unconscionability in combating opportunism).

92. On the Supreme Court's approach to lawmaking, see Tara Leigh Grove, The Structural Case for Vertical Maximalism, 95 Cornell L. Rev. 1, 11–21, 53–57 (2009). On the lower courts and unpublished opinions in particular, see William M. Richman & William L. Reynolds, Injustice on Appeal: The United States Courts of Appeals in Crisis 10–41 (2013).

93. See Richman & Reynolds, supra note 92, at 22–94 (describing mechanisms such as unpublished opinions and reductions in oral argument as ways of dealing with increased caseloads in the courts of appeals).

Returning to error correction, on which our courts have more clearly taken a side, and to sum up this section: The federal courts of appeals see their role as correcting error on the record, particularly errors of law, rather than doing what is necessary to justly resolve the parties' dispute. In that respect, they follow the model of the writ of error and call it appeal. To gain confidence in that tentative assessment, we can consider other dimensions of our modern appellate system. Let's turn to appellate remedies, which are closely tied to the goals of review.

C. *Appellate Remedies*

We ordinarily think about remedies as what the plaintiff wants from the defendant through the trial court: money, an injunction, a declaratory judgment, or perhaps something more exotic like an equitable accounting. But appellate courts grant remedies of a sort too—"remedies for losers," we might call them. A modern appellate court has an abundance of remedial options at its disposal. The appellate court might reverse and remand for a new trial, or it might reverse with instructions to enter judgment for one party or the other, or it might leave the lower court to decide whatever further proceedings seem appropriate.[94] It might not remand at all but might instead respond to error by "affirming as modified," altering the judgment to give greater or lesser relief, with no need for further proceedings in the lower court.[95] As with other features of the appellate system, we can associate the two historical traditions with different attitudes toward appellate remedies and then see where the modern federal courts fit.

A generous menu of remedial options is not a universal, timeless feature of appellate justice. On the contrary, flexibility of remedial options is characteristic of the equity approach. As explained above, the goal of a court of equity, at trial or on appeal, is to render a just resolution of the whole dispute.[96] That requires significant authority and flexibility. With both the law and the facts before it, its own equitable conscience to satisfy, and no jury rights to worry about, an appellate court in equity often could wrap up the case on its own by entering the decree the lower court should

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94. In criminal cases, the options are fewer because the Fifth and Sixth Amendments prevent the courts from, among other things, directing a guilty verdict or finding that a not-guilty verdict is factually insufficient. See Sullivan v. Louisiana, 508 U.S. 275, 280 (1993) (holding that the Sixth Amendment bars such review); Burks v. United States, 437 U.S. 1, 17–18 (1978) (holding the same for the Fifth Amendment).

95. See Aaron-Andrew P. Bruhl, The Remand Power and the Supreme Court's Role, 96 Notre Dame L. Rev. 171, 173–74 (2020) [hereinafter Bruhl, Remand Power] (describing these and similar options for appellate courts).

96. See Brown v. Kalamazoo Cir. Judge, 42 N.W. 827, 829 (Mich. 1889) ("[T]he necessities of justice and equity require that all persons and all things concerned in the controversy shall be brought before the court to have their respective interests charged or protected, and to end the controversy once for all."); McClintock, supra note 73, at 11, 15–16, 23.

have entered or, if complete resolution were not advisable, telling the lower court exactly what proceedings to conduct on remand.[97]

An appellate court at common law was much more limited in its remedial options. A reviewing court could not determine questions of fact on its own, so errors in jury instructions or admission of evidence or the like often required a new trial to see what an untainted jury would find.[98] And even aside from the need to protect jury rights, the writ of error was understood to contain some remedial restrictions that may strike the modern reader as bizarre. The proceedings in error were, of old, regarded not as a continuation of the original case but rather as a separate case—a conception perhaps traceable to the lingering intellectual influence of even older proceedings like "attaint" or "false judgment," which were quasi-criminal actions aimed at the wrongdoing of juries and judges, respectively.[99] Since the reviewing court was not charged with continuing and correctly resolving the original case, the court's options were limited. Traditional practice disallowed complex dispositions like modifying the judgment or affirming in part and reversing and remanding in part for further proceedings as directed.[100] For example, if a judgment was valid and even uncontested as against one defendant but legally deficient as against another defendant due to some incapacity or immunity, the reviewing court could not affirm as to the one defendant and reverse as to the other, nor order the lower court to enter the correct judgment.[101] A new trial was required to (hopefully) set things aright.

In the federal system, the choice from the start was for the more flexible, equitable approach to appellate remedies. The original Judiciary Act provided:

> [W]hen a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree as the district court should have rendered or passed; and the Supreme Court shall do the same on reversals therein, except when the reversal is in favour of the plaintiff, or petitioner in the original suit, and the damages to be assessed, or matter to be

97. See *Brown*, 42 N.W. at 828–29; McClintock, supra note 73, at 23; Bruhl, Remand Power, supra note 95, at 191–95.

98. Sunderland, supra note 76, at 485–87.

99. See 1 Holdsworth, supra note 49, at 213–14, 337–40; Roscoe Pound, Appellate Procedure in Civil Cases 25–27, 39–40, 72 (1941).

100. See, e.g., Griffin v. Marquardt, 17 N.Y. 28, 31–32 (1858) (distinguishing between appellate remedies in law and in equity and explaining the unifying effect of the Field Code); Wyne v. Atl. Coast Line R.R. Co., 109 S.E. 19, 20–21 (N.C. 1921) (describing the former practice in the state, which had been superseded by new statutes and the merger of law and equity).

101. See, e.g., Gaylord v. Payne, 4 Conn. 190, 196 (1822); Richards v. Walton, 12 Johns. 434, 434 (N.Y. Sup. Ct. 1815); Swearingen v. Pendleton, 4 Serg. & Rawle 389, 396–97 (Pa. 1818). But see Wilford v. Grant, 1 Kirby 114, 116 (Conn. Super. Ct. 1786) (acknowledging that "[t]he common-law rules of England are indeed against a reversal in part only, in a case like this," but departing from the English rule).

> decreed, are uncertain, in which case they shall remand the cause for a final decision.[102]

As the last part of the quoted provision shows, remands were sometimes necessary, especially when a jury would need to determine damages, but the general idea was for the appellate court to conclude the case by entering the correct judgment or decree when practicable. The need to respect jury rights meant that this function could be performed more easily in equity cases, of course, but the statute did not limit itself to equity cases.

The current federal statute governing appellate remedies, though little remarked upon, follows in the path of the Judiciary Act by providing just about all the remedial flexibility an appellate court could want. The statute, which has been essentially the same since 1872, provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.[103]

When it comes to appellate remedies, has the federal system therefore chosen the ways of equity? Yes and no. Courts of appeals sometimes make use of the broad authority granted by statutes like those above. For example, courts of appeals often modify judgments, occasionally enter their own injunctions, and may resolve the merits of a case on an interlocutory appeal raising another issue.[104] In the rare circumstance in which the district court has earned distrust, courts of appeals deploy their authority particularly aggressively.[105] In one otherwise unremarkable case that is eyebrow-raising only because it invoked the old law–equity distinction thirty-five years after the supposed merger, a court of appeals observed: "This is an equity case, and it is well established that in such a case, although a reviewing court will usually decide only those issues which are necessary to dispose of an appeal, an interlocutory appeal brings the entire case before the court."[106] The court accordingly dismissed the case

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102. Judiciary Act of 1789, ch. 20, § 24, 1 Stat. 73, 85.

103. 28 U.S.C. § 2106 (2018); see also Bruhl, Remand Power, supra note 95, at 191–95 (describing the statute's history). This broad grant of authority is of course subject to some limitations, notably jury rights. See Bruhl, Remand Power, supra note 95, at 209–10.

104. See, e.g., 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3921.1 (3d ed. 2012) (citing examples).

105. See, e.g., In re United States, No. 24-684, slip op. at 4–5 (9th Cir. May 1, 2024) (granting mandamus for failure to follow previous mandate and ordering the district court to "dismiss the case forthwith for lack of Article III standing, without leave to amend"); Hall v. West, 335 F.2d 481, 485 (5th Cir. 1964) (granting mandamus, admonishing the district judge for delay, and prescribing the proper desegregation decree).

106. Aerojet–Gen. Corp. v. Am. Arb. Ass'n, 478 F.2d 248, 252 (9th Cir. 1973).

on the merits rather than stopping with dissolving the preliminary injunction.[107]

Yet despite the broad power the federal courts enjoy and occasionally deploy, the workaday practice of the federal courts, and their current habit of mind, departs substantially from the equitable model of appellate remedies. Modern federal appellate courts seem reluctant to wrap up cases on their own, even when no obstacle like jury rights or an underdeveloped factual record stands in the way of doing so.[108] They find error and then remand for further proceedings in cases involving legal questions such as whether a complaint states a sufficient claim,[109] whether the record is sufficient to withstand summary judgment,[110] and whether a statute is constitutional.[111] They find error in the district court's interpretation of a statute, refrain from giving the correct interpretation, and remand for the district court to give it another shot.[112] In one recent case involving an appeal from the denial of a preliminary injunction against a private employer's vaccine mandate, the court of appeals reversed and remanded, based on its conclusion that the district court had erred in finding the plaintiffs did not satisfy the irreparable-harm prong—without contesting the dissent's convincing arguments that the plaintiffs' case failed for several other reasons apparent on the record.[113]

It is understandable that the modern Supreme Court, which has a limited docket and has assumed a paramount function of law-clarifying and lawmaking, would tend to focus its energies on the aspect of a case that led it to grant certiorari, rather than attempting to wrap up the case itself.[114] The federal courts of appeals appear to be modeling their use of appellate remedies on the Supreme Court's practices, leading to

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107. Id. at 253. The case involved the venue of a commercial arbitration.

108. See Bruhl, Remand Power, supra note 95, at 184–85.

109. E.g., Adkisson v. Jacobs Eng'g Grp., Inc., 790 F.3d 641, 649 (6th Cir. 2015); Gustafson v. U.S. Bank N.A., 618 F. App'x 921, 922 (9th Cir. 2015).

110. E.g., Jerri v. Harran, 625 F. App'x 574, 578–79 (3d Cir. 2015); Giraldes v. Roche, 357 F. App'x 885, 886 (9th Cir. 2009); see also Mason v. Lafayette City-Par. Consol. Gov't, 806 F.3d 268, 285 (5th Cir. 2015) (Higginbotham, J., dissenting) (criticizing the majority for failing to resolve the legal issue of qualified immunity).

111. E.g., Sanchez v. United States, 247 F. App'x 194, 196 (11th Cir. 2007).

112. See, e.g., Vaughn v. Phoenix House N.Y. Inc., 722 F. App'x 4, 6 (2d Cir. 2018) (directing the district court to reinterpret the Fair Labor Standards Act in light of a precedent it failed to address).

113. See Sambrano v. United Airlines, Inc., No. 21-11159, 2022 WL 486610, at *13 (5th Cir. Feb. 17, 2022) (Smith, J., dissenting).

114. This Article does not address the legality of the Supreme Court's modern practice of deciding only small parts of a case, sometimes limiting its review to only a subset of the issues the petitioner requested. Professor Benjamin Johnson has recently called the legality of that practice into question. Benjamin Johnson, The Origins of Supreme Court Question Selection, 122 Colum. L. Rev. 793, 803–04 (2022). As explained in the main text, that practice coheres with the Supreme Court's self-conception. Even if the practice is permissible for the Supreme Court, it is not the only way an appellate court can act.

unnecessary remands to the district courts for further proceedings when the court of appeals could as a matter of law and should as a matter of efficiency just resolve the case.[115] The federal judiciary today features a sharp differentiation between trial and appellate courts, and the courts of appeals are choosing to emulate the most appellate court of them all. This differentiation of functions across courts contrasts with the equitable tradition, in which trial and appeal were merely earlier and later stages of one proceeding in search of a just and comprehensive disposition.[116]

In short: When it comes to appellate remedies, the federal courts are empowered to act like the Chancellor but generally choose the path of identifying error and then leaving the resolution to someone else.

D. *Timing of Review*

When it comes to the timing of review—whether an appellant must wait until a final judgment or may act earlier through interlocutory appeal—the practice in the federal courts defies the usual historical pattern, in which procedures start out as disparate and move toward uniformity. Here, the federal courts started by using the common law's approach for all cases, some variation then reemerged, and today we have ended up with what many call a mess[117] in which review is mostly limited to final judgments but with many exceptions.

The mess surrounding the timing of review can be rendered more comprehensible if one understands the historical differences and why it has been hard to suppress them. As just stated, the timing of review in federal courts initially followed the law model. Specifically, the 1789 Judiciary Act provided for review of *final* judgments and decrees only, regardless of the nature of the case as legal or equitable.[118] Limiting review to final decisions matched the common-law model under the writ of error, while English equity practice allowed interlocutory appeals.[119]

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115. See, e.g., Utah v. Su, 109 F.4th 313, 319–21 (5th Cir. 2024) (remanding for the district court to consider a question of law based on new precedent when neither party had so requested); United States v. Houston, 792 F.3d 663, 665 (6th Cir. 2015) (explaining its decision to remand by pointing out that the Supreme Court had done the same thing under similar circumstances).

116. See supra text accompanying notes 73–75.

117. See Rowland v. S. Health Partners, Inc., 4 F.4th 422, 428 (6th Cir. 2021) (describing the courts' "disjointed approach to appellate review" and the vagaries of the finality requirement); Bryan Lammon, Finality, Appealability, and the Scope of Interlocutory Review, 93 Wash. L. Rev. 1809, 1810 (2018) ("The law of federal appellate jurisdiction is widely regarded as a mess.").

118. Judiciary Act of 1789, ch. 20, §§ 21–22, 1 Stat. 73, 83–85.

119. See, e.g., Smith v. Vulcan Iron Works, 165 U.S. 518, 523–24 (1897); Carleton M. Crick, The Final Judgment as a Basis for Appeal, 41 Yale L.J. 539, 547–49 (1932). Some states had already taken this step by limiting appeals in law and equity to final decisions. Senator (and later Chief Justice) Oliver Ellsworth, chief architect of the Judiciary Act, may have been influenced by the practice in his state of Connecticut, where the writ of error was used for

Now, that is admittedly a simplification. To complicate the distinction between the timing rules in law and equity, recall some details of pre-merger English practice. It is basically correct to say that equity allowed interlocutory appeals and law did not, but one needs to guard against anachronism. In thinking about the timing and availability of review, it is natural to imagine a pyramid composed of functionally distinct bodies like "trial courts" and "appellate courts." But that image is misleading when thinking about interlocutory review in Chancery, for Chancery did not have separate trial and appellate bodies. Indeed, before the nineteenth century, there was just one judge, the Lord Chancellor himself, who was assisted by a deputy (the Master of the Rolls) and masters and others.[120] An initial hearing might lead the Chancellor to refer an issue to a master for factual inquiry or for an accounting (with testimony gathered by yet other officials and set down in writing for the master), followed by a hearing on the aggrieved party's exceptions to the master's report; more referrals to a master for more inquiry on some other topic; multiple decrees from time to time addressing various parts of the case; then more hearings and rehearings at which the evidence is read and read again—all leading, eventually, to a final decree of the Chancellor.[121]

As legal historian Michael Lobban puts it, "[A]lthough the work [of Chancery] was delegated downwards, there were endless appeals upwards. Dissatisfied parties could turn from the chief clerk to the master and, if unhappy with the master, up to the court. No decision of fact was final: it might always go back to the Chancellor."[122] The back-and-forth was not, however, an appeal from one court to another in the familiar sense; it was more that one responsible official was overseeing the work of his agents.[123]

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review in both law and equity. See 1 Julius Goebel, History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 458–59, 479 (1971); Crick, supra, at 548–49.

120. The Master of the Rolls was given the authority to make his own decrees by a 1729 statute (3 Geo. 2, c. 30), but only when the Chancellor was away, and his decrees remained subject to appeal to the Chancellor. See Baker, English Legal History, supra note 51, at 120; 3 Blackstone, supra note 40, at *450. It was not until the nineteenth century that Chancery become a genuinely multimember court with several vice-chancellors acting as first-instance judges. See Baker, English Legal History, supra note 51, at 122; 1 Holdsworth, supra note 49, at 442–44; Langbein et al., supra note 30, at 370. Under this new system, a decree could be reheard before the rendering judge and appealed to the Lord Chancellor. 3 Daniell, supra note 75, at 65–67. For our purposes, we can ignore local courts of equity, such as the chancery courts of the counties palatine, which had their own chancellors. See 1 A General Abridgment of Cases in Equity 137 (London, Lintot 1756); W.J. Jones, The Elizabethan Court of Chancery 348–77 (1967).

121. 9 Holdsworth, supra note 73, at 360–69; 3 Blackstone, supra note 40, at *454.

122. Michael Lobban, Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery (pt. 1), 22 Law & Hist. Rev. 389, 394 (2004).

123. Orfield, Appellate Procedure, supra note 82, at 574–75 ("It was natural that the Chancellor would review all interlocutory decrees and orders since at first he was the only chancery judge, the masters being regarded as clerks rather than as judges.").

Equity procedure, as Professor John Langbein memorably describes it, was not just a nonjury procedure but an extended "nontrial" procedure.[124]

In addition to referrals and rehearings within Chancery, which were certainly interlocutory but also intramural, something more recognizable to modern eyes as an appeal to a separate, higher court did eventually develop. The House of Lords firmly established appellate jurisdiction over Chancery cases in the seventeenth and eighteenth centuries.[125] Here too, as within Chancery, interlocutory appeal was allowed.[126] That was the opposite of the practice in cases at law, where the Lords reviewed final judgments by writ of error.[127] Commentators recognized that the reason for interlocutory appeal in equity was that interlocutory decisions could effectively decide important questions on the merits and that immediate appeal could therefore benefit the litigants.[128] Likewise, when New York, one of the states with a separate court of equity, created new equity judges to aid the chancellor, the new system provided for interlocutory appeals to the chancellor.[129]

To be fair, there is also a bit of simplification involved in saying that the common-law courts did not allow interlocutory review. True, a writ of error would lie only after a final judgment.[130] But before the time of American independence, the English common-law courts had developed both formal and informal mechanisms for trial judges to receive legal guidance before a final decision. Judges hearing cases outside of the capital could adjourn cases and reserve questions for consideration by the en banc court in Westminster, a procedure that was functionally similar to interlocutory review even though it all happened within the same court.[131] Special verdicts on the facts could be given, subject to the court's later resolution of a point of law.[132] Judges from one of the central benches

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124. John H. Langbein, The Disappearance of Civil Trial in the United States, 122 Yale L.J. 522, 529, 540 (2012).

125. Baker, English Legal History, supra note 51, at 151; Blom-Cooper & Drewry, supra note 52, at 18–22; 1 Holdsworth, supra note 49, at 372–75.

126. 1 Holdsworth, supra note 49, at 374–75.

127. 3 Daniell, supra note 75, at 77 (distinguishing the practice in the two systems).

128. Id.; Palmer, supra note 78, at 1.

129. N.Y. Const. art. V, §§ 1, 5 (1821); David Graham, Jr., A Treatise on the Organization and Jurisdiction of the Courts of Law and Equity, in the State of New York 579–80, 587–90, 611 (1839).

130. See supra note 119 and accompanying text.

131. See Baker, English Legal History, supra note 51, at 92, 148–51 (describing the common-law courts' practice of withholding judgment until points of law could be discussed); 1 Holdsworth, supra note 49, at 282 (noting that *nisi prius* cases could be adjourned to the central courts); see also Orfield, Criminal Appeals, supra note 56, at 27 (describing the practice of reserving questions in criminal cases).

132. 3 Blackstone, supra note 40, at *377–378.

could go across the hall to consult with colleagues from another court or consult with counsel at meals in the inns of court.[133]

This is the background against which the 1789 Judiciary Act operated when it limited review, whether in law *or* equity, to final judgments and decrees.[134] In that regard, Congress chose the legal model. But the law's dominance would not endure, as equity reasserted itself.

The most important reassertion came in 1891, with the creation of the modern courts of appeals, but there was some erosion of the final-judgment rule well before that. In 1802, Congress created the mechanism of the certificate of division, whereby a question of law that divided the two circuit judges in a case within their original jurisdiction could be certified to the Supreme Court, an early form of interlocutory review that was available in law and equity.[135] More notably for present purposes, the *Forgay* doctrine, which grew out of suits in equity involving the disposition of property, allowed appeals of interlocutory decrees dispossessing an owner, even if further proceedings such as an accounting before a master were contemplated.[136] The dispossession and risk of subsequent transfer constituted an irreparable injury to the plaintiff, such that the decree was made immediately appealable even though it was not final in the ordinary sense.[137]

The big legislative departure from the final-judgment rule, which came in the 1891 statute creating the federal courts of appeals, reinstated some of the Chancery tradition that the first Judiciary Act had discarded. The enactment, written in the era before the trial-level fusion of law and equity, provided for interlocutory appeals "where, upon a hearing *in equity* in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree."[138] In 1900, the

133. Baker, English Legal History, supra note 51, at 148–51.

134. Judiciary Act of 1789, ch. 20, §§ 21–22, 1 Stat. 73, 83–85.

135. Amendatory Act of 1802, ch. 31, § 6, 2 Stat. 156, 159; see also Jonathan Remy Nash & Michael G. Collins, The Certificate of Division and the Early Supreme Court, 94 S. Cal. L. Rev. 733, 740 (2021).

136. See Forgay v. Conrad, 47 U.S. (6 How.) 201, 203–04 (1848) (enslaved persons at issue); Ray v. Law, 7 U.S. (3 Cranch) 179, 180 (1805) (deeming a decree ordering the sale of mortgaged property an appealable final decree); see also 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3910 (3d ed. 2022) (describing the *Forgay* "hardship" exception to finality without noting its roots in equity cases). But see Barnard v. Gibson, 48 U.S. (7 How.) 650, 657–58 (1849) (refusing to extend *Forgay* to a patent case in which a permanent injunction had been issued and the matter referred to a master for ascertainment of damages; suggesting in dicta that the court below should stay the injunction until entry of a final judgment assessing the damages).

137. *Forgay*, 47 U.S. at 204–05.

138. Act of Mar. 3, 1891, ch. 517, § 7, 26 Stat. 826, 828 (emphasis added) (codified as amended at 28 U.S.C. § 1292 (2018)). For the first few years, interlocutory appeals were available for grants of injunctions but not for denials. Provision for interlocutory appeal of denials was provided in 1895, removed (perhaps inadvertently) in 1900, then restored in 1901. S. Rep. No. 56-2206, at 1–2 (1901); H.R. Rep. No. 56-2849, at 1–2 (1901).

statute was amended to add interlocutory appeals of the appointment of receivers, receiverships being another traditional element of equity practice.[139] Then Congress added a third category of interlocutory appeals for admiralty, another subject that was outside of the common-law procedural tradition.[140] In England, admiralty had its own court, with practices inspired by the civil law and without juries, and in this country admiralty cases retained their own trial-level procedural rules well after the promulgation of the Federal Rules.[141] Looking at these exceptions to the final-judgment rule, then-Professor Armistead Dobie could write in 1928 that the exceptions involve "three classes of equitable proceedings which rather drastically control a litigant's conduct."[142] Like the *Forgay* doctrine, these allowances for interlocutory appeal reflected practical considerations of hardship, not just worship of the past.[143]

Some later allowances for interlocutory appeal derive from procedural mechanisms associated with equity's jurisdiction over complex litigation.[144] Notable in this regard are Rule 23(f), which allows interlocutory appeals of class certification orders (and replaces prior

139. Act of June 6, 1900, ch. 803, 31 Stat. 660 (codified as amended at 28 U.S.C. § 1292(a)(2)).

140. Act of April 3, 1926, ch. 102, 44 Stat. 233 (codified as amended at 28 U.S.C. § 1292(a)(3)).

141. See Baker, English Legal History, supra note 51, at 131–32 (describing the High Court of Admiralty and its procedure); 4 Charles Alan Wright, Arthur R. Miller & Adam N. Steinman, Federal Practice and Procedure § 1014 (4th ed. 2015) (describing unification of admiralty practice).

142. Armistead M. Dobie, Handbook of Federal Jurisdiction and Procedure 798 (1928).

143. Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955) (stating that "the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence").

144. See Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950) ("The liberalization of our practice to allow more issues and parties to be joined in one action and to expand the privilege of intervention . . . [increases] the danger of hardship and denial of justice through delay if each issue must await the determination of all issues as to all parties . . . ."). A few words about bankruptcy are in order. Countless courts have said that bankruptcy courts are courts of equity. E.g., Ex parte Foster, 9 F. Cas. 508, 512 (C.C.D. Mass. 1842) (No. 4,960) (Story, J.). The field has statutes authorizing interlocutory appeals and uses more flexible understandings of finality. See 16 Wright et al., supra note 104, § 3926. In that respect, bankruptcy fits the pattern of finding interlocutory appeals in equitable jurisdictions. But the nature and history of bankruptcy defies easy categorization. In England, the Lord Chancellor himself had bankruptcy jurisdiction from 1571, but it was exercised through commissioners, and the proceedings were not considered proceedings of the Court of Chancery. See 1 Holdsworth, supra note 49, at 470–72; John C. McCoid, II, Right to Jury Trial in Bankruptcy: *Granfinanciera, S.A. v. Nordberg*, 65 Am. Bankr. L.J. 15, 29–32 (1991). In the nineteenth century, Parliament created a court of bankruptcy that was described as a court of law and equity. 1 Holdsworth, supra note 49, at 443–44, 473. Early U.S. bankruptcy statutes provided for procedures that followed the equity model in some respects but provided for jury trials on some questions, likely beyond what the Seventh Amendment required. See Douglas G. Baird, The Seventh Amendment and Jury Trials in Bankruptcy, 1989 Sup. Ct. Rev. 261, 263; see also McCoid, supra, at 28–29, 33–34, 39 (tracing the history and concluding that a bankruptcy court is a court of both law and equity).

shortcuts like "death knell" finality and mandamus, which had achieved only limited success),[145] and Rule 54(b), which permits appeals when the district court enters a final judgment as to some but not all claims or parties.[146] (Conspicuously absent is a provision expressly allowing interlocutory appeals as of right in multidistrict litigation (MDL) under section 1407, which bears some functional similarity to class actions, though pretrial rulings in MDLs can sometimes be reviewed by mandamus.[147])

It would be an exaggeration to say that the old lines between law and equity exactly dictate when the modern federal courts allow interlocutory appeals. The statute authorizing interlocutory appeals of controlling issues of law in the discretion of the court of appeals is agnostic as between law and equity.[148] So too is the collateral-order doctrine, which allows appeals of various sorts of pretrial decisions without regard to the historical nature of the case as legal or equitable.[149] Even so, it is worth pointing out that some of the *need* for immediate review in cases that sound in law stems from features of post-merger litigation that themselves reflect the importation of extended, equitable procedures.[150]

Nonetheless, we can sum up this section by saying the following: that we now have a system that incorporates aspects of both traditions; that the exceptions to the final-judgment rule tended to arise first in areas within the traditional equity jurisdiction; and that, even today, the need for interlocutory appeal (or mandamus or other mechanisms) is largely driven by complexity and extended pretrial, which were defining features of equity as opposed to common law. If one is trying to determine whether an interlocutory appeal is permitted in a federal court today, one could do worse than looking to seventeenth- and eighteenth-century English practice for guidance.

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145. Fed. R. Civ. P. 23(f); see also In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1294–95, 1304 (7th Cir. 1995) (denying appellate jurisdiction over class certification but granting a writ of mandamus based on extraordinary circumstances).

146. See, e.g., Fed. R. Civ. P. 54 advisory committee's note on subdiv. (b) (1937) (stating that Rule 54(b) "provides for the separate judgment of equity and code practice").

147. E.g., In re Nat'l Prescription Opiate Litig., 956 F.3d 838, 845–46 (6th Cir. 2020) (granting writ of mandamus due to MDL court's plainly erroneous decision to permit late amendment of the pleadings).

148. See 28 U.S.C. § 1292(b) (2018).

149. See generally 15A Wright et al., supra note 136, § 3911 (describing the doctrine).

150. See, e.g., Behrens v. Pelletier, 516 U.S. 299, 308 (1996) (explaining that interlocutory appeal of orders denying qualified immunity is necessary in order to avoid not just liability or trial but the burdens of pretrial matters like discovery).

E. *Scope and Standard of Review*

The scope of review and standards of review also define the character of an appellate system.[151] The *scope* of review refers to which issues are subject to review. For purposes of comparing law and equity, the main question regarding scope of review is whether the facts as well as the law are reviewable. The *standard* of review then concerns how closely decisions are scrutinized for error.

The scope of review in today's federal courts encompasses both law and fact, but the standards of review for the two kinds of questions are very different. Federal appellate courts review questions of law de novo, without deference to the lower court.[152] Review of the facts is lighter, with the degree of scrutiny depending on who found them. For facts found by a jury, the Seventh Amendment limits review by prohibiting "reexamination" of the facts by either the trial court or appellate courts, although this bar on reexamination has long been understood to permit trial courts to order new trials and, more recently, to allow appellate courts to overturn a verdict and enter the opposite judgment based on a "legal" decision about what verdicts a rational jury could reach.[153] For facts found by judges, such as in a hearing on a preliminary injunction or in a bench trial, the review is more searching. Rule 52, in keeping with the Rules' transsubstantivity and merger of law and equity, provides a single standard of review for judge-made findings of fact in all cases regardless of their legal or equitable character.[154] That standard is "clear error": The trial judge's findings may not be set aside unless they are not merely wrong but *clearly wrong*.[155] A finding is clearly erroneous when the reviewing court is "left with the definite and firm conviction that a mistake has been committed."[156]

What is the provenance of this merged standard of clear error—is it a product of law, equity, or something else? The 1937 Advisory Committee Note states that the clear-error standard "accords with the decisions on the

151. See Harry T. Edwards & Linda A. Elliott, Federal Courts Standards of Review: Review of District Court Decisions and Agency Actions, at vii–viii (2007) (stating that "[s]tandards of review may not be everything, but they are critically important in determining the parameters of appellate review and in allocating authority" between different courts).

152. See Salve Regina Coll. v. Russell, 499 U.S. 225, 231–32 (1991).

153. See, e.g., Balt. & Carolina Line v. Redman, 295 U.S. 654, 656–61 (1935) (upholding constitutionality of appellate entry of judgment for defendant after verdict for plaintiff); Baker, English Legal History, supra note 51, at 92–93 (discussing the development of the motion for a new trial in English courts of common law). For discussion of the historical development of new trials, directed verdicts, and judgments notwithstanding the verdict, see generally Renée Lettow Lerner, The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938, 45 Geo. Wash. L. Rev. 219 (2013).

154. Fed. R. Civ. P. 52(a)(6).

155. Id.

156. United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

scope of the review in modern federal equity practice."[157] Notice that it refers to what was then the "modern" practice, as Rule 52 did not purport to reestablish the historical practice in equity. But Rule 52's standard does not exactly reflect the then-modern equity practice the rulemakers claimed to codify. Rule 52's clear-error standard represents a point between the two traditions, which themselves had changed over time in response to shifting modes of proof and court structures. To appreciate how the current standard combines the traditions and, in an important respect, defies them, it will be necessary to begin with the English practices and trace important developments in the federal courts stretching from 1789 to 1985.

The traditional Chancery practice was that an appeal was a rehearing of the law and facts, without deference to prior factual findings.[158] So it should be, given that the appeal was, "as it were, an original equity jurisdiction" aimed at doing justice, notwithstanding whatever had happened below.[159] Full reconsideration of the case on appeal may sound nightmarish to a modern reader making assumptions about institutional competencies, but it makes sense when one considers the structure of the Chancery, its traditional factfinding procedures, and its mindset. There was no jury in Chancery, of course, but there was no modern bench trial either.[160] The Chancellor generally did not watch witnesses testify, observe them under the pressure of cross-examination, or preside over what we would recognize as a trial at all, and neither did his deputy or the masters in equity to whom matters were referred for preliminary decision.[161] Rather, examination of witnesses was generally delegated to still other officials or ad hoc commissioners who asked the witnesses, in private, a series of questions written by counsel ahead of time and then recorded the testimony in writing.[162] Later on, a master would read the testimony of the witnesses (or have it read aloud), but his findings had no demeanor-based claim to deference from his boss. The Chancellor could read or listen to a

157. Fed. R. Civ. P. 52 advisory committee's note (1937).

158. See Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796) (opinion of Ellsworth, C.J.); 9 Holdsworth, supra note 73, at 368–69.

159. Diffenderffer v. Winder, 3 G. & J. 311, 348 (Md. 1831); see also supra section I.B (describing the goal of the equitable appeal).

160. See Langbein et al., supra note 30, at 299 (discussing the nature of the hearing in a contested Chancery proceeding).

161. See 9 Holdsworth, supra note 73, at 353–54; Langbein et al., supra note 30, at 298–99.

162. 2 Edmund Robert Daniell, A Treatise on the Practice of the High Court of Chancery 466–67, 474–75, 489–90 (London, J. & W.T. Clark. Lescure 1838); 9 Holdsworth, supra note 73, at 353–54; Langbein et al., supra note 30, at 291–92, 297–99, 372; see also 4 St. George Tucker, Blackstone's Commentaries *437 n.8, *448 n.24 (Philadelphia, Birch & Small 1803) (comparing English and early Virginia practice regarding examination of witnesses).

reading of the same depositions and other materials. With reaching a just decision the goal, he could hardly defer to someone else's conscience.[163]

One might wonder how such a system could deal with a real factual dispute, such as when witnesses disagree over who did what. Such factual disputes might not come within the equitable jurisdiction as often as they came before the courts of law, but if there was a closely contested question of fact, that question (not the whole case) could be sent out for a jury trial in the law courts, the answer to be returned to Chancery.[164] That is, equity could recognize the weakness of its mode of factfinding and turn elsewhere for help.

Turning to the legal tradition, appellate review runs up against the fact of the jury and the limited nature of the writ of error. Recall that the writ of error was for review of errors of law on the record, and that the record was not a modern verbatim transcript containing the trial proceedings.[165] The goal of a writ of error was to affirm or set aside a judgment for legal error evident on the record, not to get things right, and certainly not to get things right on the facts of the matter.

The Constitution permitted but did not require the persistence of these divergent practices. When the Constitution gave the Supreme Court "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make,"[166] that provision contemplated the permissibility of de novo rehearing in suits in equity. The chief objection to the Court's appellate jurisdiction from the Constitution's doubters was that conferring appellate jurisdiction "as to . . . Fact" permitted interference with jury verdicts even in cases at common law, especially given that civil juries were not safeguarded anywhere in the original document.[167] Supporters of the Constitution

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163. See 3 Daniell, supra note 75, at 68 (explaining that the Chancellor is not "a mere ministerial officer, oblig[ed] . . . to affix his signature to a decree of an inferior Judge, whether he approves of it or not").

164. Using the device of the "feigned issue," parties would make a fictitious wager on the disputed fact and try this case by jury in one of the courts of common law. See 9 Holdsworth, supra note 73, at 357; Stephen E. Sachs, The Feigned Issue in the Federal System 6 (Nov. 26, 2007) https://ssrn.com/abstract=1032682 [https://perma.cc/73E8-3BHY] (unpublished manuscript). The chancellor or masters could, on rare occasions, order live examination before them on some contested point. Jones, supra note 120, at 253–54.

165. See supra note 78 and accompanying text.

166. U.S. Const. art. III, § 2.

167. See Luther Martin, The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia, *in* 2 The Complete Anti-Federalist 19, 70–71 (Herbert J. Storing ed., 1981); Essays of Brutus XIV, *in* The Complete Anti-Federalist, supra, at 358, 431–33; Letters from the Federal Farmer to the Republican XV, *in* The Complete Anti-Federalist, supra, at 223, 319–22. Brutus also complained that if the Supreme Court would exercise its jurisdiction over the facts by holding its own successive jury trial, that would be almost as bad, as it would require parties and witnesses to travel to the seat of government for the retrial. See Brutus XIV, *in* The Complete Anti-Federalist, supra, at 433–37.

responded that the Constitution did not by itself abolish civil juries and that Congress could be trusted to preserve jury trials and safeguard verdicts when appropriate.[168] They did not deny that the Supreme Court's appellate jurisdiction in equity cases could, as far as the Constitution was concerned, extend to the traditional full rehearing; the position was rather that Congress could limit the extent of appellate review in equity if it found it expedient to do so.[169]

The Seventh Amendment, adopted in response to continuing criticisms of the Constitution and jealousy of jury rights, protected jury verdicts against reexamination except as permitted by common law.[170] It said nothing about the scope of appeals in equity or the standards of review to be used in them. The outcome, then, was that the Constitution as amended both preserved the constricted model of review for the common law and permitted full rehearing for suits in equity.[171]

The first Congress departed in multiple respects from the English model of divided, distinctive benches. The same federal judges would hear cases sounding in common law, equity, and admiralty, plus criminal cases, eliminating a personnel-based support for the persistence of differentiated procedures.[172] The inferior courts Congress created enjoyed significantly greater relative status vis-à-vis their superiors than had the masters and the other functionaries of the English Chancery. Recall that the Chancery was a one-judge court until the nineteenth century, with the various masters and others merely supporting the Chancellor's work toward his decree.[173] In such a system, frequent intervention by the judge into his functionaries' acts is understandable.[174] But in Article III courts, all of the judges from top to bottom have the same tenure protections, guaranteed pay, and

168. The Federalist No. 81, at 488–91 (Alexander Hamilton) (Clinton Rossiter ed., 1961); John Marshall, Remarks to the Virginia Ratifying Convention (June 20, 1788), *in* Debates and Other Proceedings of the Convention of Virginia 391, 397–99 (Richmond, Enquirer-Press 2d ed. 1805); James Wilson, State House Yard Speech (Oct. 6, 1787), *in* 1 Collected Works of James Wilson, supra note 89, at 171, 172–73.

169. The Federalist No. 81, supra note 168, at 490 (Alexander Hamilton); James Wilson, Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States, *in* 1 Collected Works of James Wilson, supra note 89, at 178, 250.

170. U.S. Const. amend. VII; see also United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (Story, J.) (explaining that the Seventh Amendment was adopted to address concerns that the Supreme Court would be permitted to retry the facts through its appellate jurisdiction).

171. On whether the Constitution not only permits the equity appeal but requires it, see infra section II.A.

172. See Judiciary Act of 1789, ch. 20, §§ 9, 11–12, 1 Stat. 73, 76–80 (conferring jurisdiction on the inferior federal courts over law, equity, admiralty, and criminal cases).

173. See supra note 120 and accompanying text.

174. See Crick, supra note 119, at 547–48 (making the connection between the staffing of Chancery and Chancery's lack of the common law's final-judgment rule).

presidential commission.[175] The judges of one level are not appointed by, and do not work for, those at the level above.[176]

Beyond those structural features that tended to dampen differentiation, Congress legislated directly on the modes of appellate review, often siding against equity practices even when the substantive law derived from equity. Congress authorized appeals from the district courts to the circuit courts in limited circumstances, and this was understood to allow trial de novo.[177] But the Judiciary Act provided for the Supreme Court to use the writ of error when reviewing cases from state or federal courts without drawing any evident distinction among heads of jurisdiction.[178] Buttressing this provision, the Act called for the circuit courts in equity and admiralty cases to set out the facts upon which their decrees were based, as opposed to transmitting a decree and a mass of potentially conflicting depositions and other documents said to support it.[179] From these features of the Judiciary Act, the Supreme Court drew the conclusion that Congress had departed from tradition and had limited the Supreme Court's review to errors of law alone, even in admiralty and equity cases.[180]

Further, the First Congress regulated trial practice in a way that undermined the basis for the traditional appellate rehearing. Specifically, the Judiciary Act provided that the federal courts would take live testimony

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175. U.S. Const. art. II, § 2; id. art. III, § 1.

176. Id. art. II, § 2. The practice from the start has been that judges of the inferior courts are, like Supreme Court Justices, appointed by the President with the advice and consent of the Senate. For the argument that inferior-court judges are "inferior officers" whose appointment may be vested elsewhere, see Tuan Samahon, The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent, 67 Ohio St. L.J. 783, 841–47 (2006).

177. See Judiciary Act of 1789, ch. 20, § 21, 1 Stat. 73, 83–84 (authorizing appeals from district courts in admiralty and maritime cases, where the disputed sum exceeded three hundred dollars); Irvine v. The Hesper, 122 U.S. 256, 266 (1887) ("[A]n appeal in admiralty from the district court to the circuit court . . . is tried *de novo* in the circuit court."); The Lucille, 86 U.S. (19 Wall.) 73, 74 (1873) (similar).

178. See Judiciary Act of 1789, ch. 20, §§ 22, 25, 1 Stat. 73, 84–87.

179. See id. § 19, 1 Stat. at 83.

180. See Blaine v. Ship Charles Carter, 4 U.S. (4 Dall.) 22, 22 (1800) (holding that the removal of cases of any nature to the Supreme Court requires a writ of error); Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796) (opinion of Ellsworth, C.J.); see also 8 The Documentary History of the Supreme Court of the United States, 1789–1800, at 314–19 (Maeva Marcus ed., 2007) (discussing *Blaine*). For Ellsworth, lead author of the Judiciary Act, it made sense to make the lower court's version of the facts conclusive in the Supreme Court. The lower courts were certainly competent to find the facts, while the special contribution of the Court's appellate jurisdiction was to "preserve unity of principle, in the administration of justice throughout the United States." *Wiscart*, 3 U.S. (3 Dall.) at 329–30. Plus, the traditional appeal would involve the "private and public inconveniency" of the Court reviewing a huge pile of materials and witnesses traveling to the capital. Id. Justice Wilson dissented and would have permitted the traditional appeal in equity. Id. at 326–27 (Wilson, J., dissenting); see also infra section II.A (evaluating Wilson's argument).

in open court in all cases.[181] This early but important attempt at procedural merger again favored the common law by departing from the historic practice of Chancery, in which the court received evidence in written form.[182]

As had happened with the timing of review, equity practice soon began reasserting itself. An 1802 statute provided that the trial court in equity could, in its discretion and upon the request of either party, fall back on the chancery practice of written depositions in those states that adhered to that traditional practice.[183] A year later, Congress returned to the historical norm by providing for appeals to the Supreme Court from the circuit courts in equity and admiralty cases, though it left in place the writ of error for review of cases coming from the state courts.[184] This switch from error to appeal opened up the facts as well as the law, so the Supreme Court received evidence along with the record; the statute even allowed the introduction of new evidence in the Supreme Court in admiralty and prize cases.[185] Equity's rehearing had made a partial comeback.

In the following decades, distinctions between the scope of review in law and in equity remained and, in some respects, intensified. Through the 1822 Equity Rules, the Supreme Court reinforced the return to out-of-court examinations yielding depositions for the court's use.[186] More generally, the Court's rules and its case law sought national uniformity in federal equity practice, with the High Court of Chancery serving as the model.[187] The advent of waiver of jury trials in cases at common law might

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181. Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 73, 88–90 ("That the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law.").

182. See Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 100 (1923) (calling this early decision "a great triumph for the anti-chancery party").

183. Act of Apr. 29, 1802, ch. 31, § 25, 2 Stat. 156, 166. Some states shifted to live in-court testimony very early, others much later. See, e.g., Act of Mar. 20, 1930, ch. 132, 1930 Va. Acts 346 (Virginia); Elias Merwin, The Principles of Equity and Equity Pleading 575–78 (H.C. Merwin ed., 1895) (Massachusetts); Kellen Funk, Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76, 36 J. Legal Hist. 152, 162 (2015) (New York).

184. Act of Mar. 3, 1803, ch. 40, § 2, 2 Stat. 244, 244. The changes were originally made in the short-lived Act of Feb. 13, 1801, ch. 75, 2 Stat. 89. The retention of the writ of error for state cases meant that review remained limited to law regardless of whether the state case was in its nature equitable or legal. Egan v. Hart, 165 U.S. 188, 189 (1897).

185. Act of Mar. 3, 1803, § 2, 2 Stat. at 244; see also The San Pedro, 15 U.S. (2 Wheat.) 132, 142 (1817) (describing the change in the scope of review of equity and admiralty cases brought about by 1803 Act). The Court eventually decided that it would not hear new evidence absent good cause. See The Mabey, 77 U.S. (10 Wall.) 419, 420 (1870).

186. The New Federal Equity Rules 40–41 (Hopkins ed. 1913) (1822 Equity Rules 25, 26, and 28).

187. See Kristin A. Collins, "A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts, 60 Duke L.J. 249, 272–74 (2010); see also Kellen

have provided an opportunity to align appellate review of those cases with review in equity cases, but it did not. The 1865 statute authorizing bench trials in law cases instead provided that the judge's findings would have the same effect as a jury verdict.[188] In other words, the standard of review followed the old law–equity line rather than diverging based on the identity of the decisionmaker.[189]

The expectation of a full rehearing of the law and facts eroded in the late nineteenth century. An 1875 statute, aimed at relieving the Supreme Court's heavy workload and worrisome backlog, preserved the opportunity for retrial in the circuit court but limited the Supreme Court's review to questions of law, essentially returning to the system of the first Judiciary Act.[190] That statute did not apply to cases in equity, but the Court was indirectly undermining rehearing in that jurisdiction as well. An 1893 amendment to the Equity Rules permitted trial courts in their discretion to take oral testimony in open court,[191] and Rule 46 of the Equity Rules of 1912 made in-court testimony the norm.[192]

Even without any formal change to the standards of review or switch between appeals and writs of error, the change in the mode of taking testimony meant that appellate review would have to fall short of a de novo rehearing. As Dobie's 1928 treatise put it, Equity Rule 46 did "not impair

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Funk, Equity's Federalism, 97 Notre Dame L. Rev. 2057, 2059 (2022) (describing the antebellum Supreme Court's efforts to wall off federal equity from state-level attempts at fusion).

188. Act of March 3, 1865, ch. 86, § 4, 13 Stat. 501, 501; see also Dirst v. Morris, 81 U.S. 484, 490–91 (1871) (distinguishing between review in jury-waived cases and equity review). In one way, the trial judge's findings had greater effect than a jury verdict, as a verdict was subject to review by the trial judge on a motion for a new trial. William Wirt Blume, Review of Facts in Non-Jury Cases, 20 J. Am. Judicature Soc'y 68, 70–71 (1936).

189. See Lumbermen's Tr. Co. v. Town of Ryegate, 61 F.2d 14, 15–16 (9th Cir. 1932); 8 Hughes, supra note 61, § 5816. Likewise maintaining the law–equity divide, but from the other direction, when a court in equity empaneled an advisory jury, that jury's findings did not bind the court but served only "to inform the conscience of the Chancellor." Watt v. Starke, 101 U.S. 247, 252 (1879); see also Basey v. Gallagher, 87 U.S. (20 Wall.) 670, 680 (1874) (stating that "all information presented to guide [the judge's decision in an equity case], whether obtained through masters' reports or findings of a jury, is merely advisory").

190. Act of Feb. 16, 1875, ch. 77, § 1, 18 Stat. 315, 315–16; see also The "Abbotsford", 98 U.S. 440, 445 (1878) (observing that the statute "relieve[s] us from the great labor of weighing and considering the mass of conflicting evidence which usually filled the records in this class of cases"); Munson S.S. Line v. Miramar S.S. Co., 167 F. 960, 964 (2d Cir. 1909) (explaining that the statute preserved retrial in the circuit court); Felix Frankfurter & James M. Landis, The Business of the Supreme Court at October Term, 1929, 44 Harv. L. Rev. 1, 26–35 (1930) (explaining the motives behind the statute). Even before the statute was enacted, the Court had taken steps to protect itself from resolving factual disputes. It adopted a "two-court rule" under which it would not upset a factual finding concurred in by both courts below except on the strongest showing of error. See The Marcellus, 66 U.S. (1 Black) 414, 417 (1861).

191. Fed. R. Equity 67 (as amended by the Supreme Court, 149 U.S. 793 (1893)); The New Federal Equity Rules, supra note 186, at 121.

192. Fed. R. Equity 46 (1912); The New Federal Equity Rules, supra note 186, at 173; Robert E. Bunker, The New Federal Equity Rules, 11 Mich. L. Rev. 435, 449 (1913).

the power of appellate courts to review findings of facts by the lower court; but doubtless such finding is now more binding, and will be less frequently disturbed, in view of the trial judge's opportunity to have the witnesses before him and to see and hear them."[193] To similar effect, Clark wrote that the switch to live testimony "remov[ed] . . . one of the most important arguments for the separate scope of review in equity."[194] He continued:

> [T]he fact that in equity cases the usual method of taking testimony had been by deposition, which being in written form could be examined by the appellate court as fairly and easily as by the trial court, had been at the base of the contention that in equity suits the review should proceed as a rehearing upon the written documents, since it did not involve questions as to the credibility or behavior under examination of witnesses.[195]

By the early twentieth century, therefore, federal courts of appeals hearing equity cases had begun recalibrating their standards of review, deferring more heavily when findings were based on conflicting witness testimony.[196]

A similar shift happened regarding trial courts' review of masters' reports. The federal rules of equity that the Supreme Court issued and revised during the nineteenth century did not address the standard of review applicable to a master's report.[197] Nonetheless, the standard that the courts actually applied depended on how the master received evidence, and deference increased during the nineteenth century, as masters increasingly heard live testimony rather than reading depositions.[198]

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193. Dobie, supra note 142, at 717; see also Am. Rotary Valve Co. v. Moorehead, 226 F. 202, 203 (7th Cir. 1915) (per curiam) ("[I]f the witnesses have been heard in open court, one element that rightly enters into the reviewing court's consideration of the evidence de novo is the opportunity of the trial judge to estimate the credibility of the witnesses by their appearance and demeanor on the stand." (citing Espenschied v. Baum, 115 F. 793 (1902))).

194. Charles E. Clark & Ferdinand F. Stone, Review of Findings of Fact, 4 U. Chi. L. Rev. 190, 204 (1937).

195. Id.

196. Id. at 207–08; 8 Hughes, supra note 61, § 5817; see also, e.g., The Coastwise, 68 F.2d 720, 721 (2d Cir. 1934) (noting that deference to the trial court was less justified when conflicting witness testimony had been taken by deposition); Rown v. Brake Testing Equip. Corp., 38 F.2d 220, 223–24 (9th Cir. 1930) (same); Hamburg-Amerikanische Packetfahrt AG v. Gye, 207 F. 247, 253 (5th Cir. 1913) (same in admiralty cases).

197. Kessler, Our Inquisitorial Tradition, supra note 20, at 1241–42. Providing a standard of review for a master's report first happened shortly before the promulgation of the Federal Rules, with the 1932 promulgation of Equity Rule 61½, which treated the master's report as presumptively correct, subject to revision "when the court in the exercise of its judgment is fully satisfied that error has been committed." Id. at 1242 (quoting Fed. R. Eq. 61½ (1932)).

198. Dobie, supra note 142, at 744–45; Kessler, Our Inquisitorial Tradition, supra note 20, at 1241; see also Tilghman v. Proctor, 125 U.S. 136, 149–50 (1888) ("[T]he conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly

Although the old equity rehearing had been much diminished, the standard of review of facts in equity nonetheless remained more searching than the standard in cases at law.[199] While jury verdicts could be reviewed for the "legal" matter of the sufficiency of the evidence, that meant that they should stand so long as merely some evidence could be found in support of the verdict.[200] And recall that the findings in jury-waived common-law cases were, by statute, given the same effect as jury verdicts, effectively preserving the law–equity divide on appeal regardless of the identity of the factfinder.[201] Even the 1928 statute formally abolishing the writ of error in favor of appeals failed to dislodge the traditional distinction between the factual review available in law versus equity.[202]

That brings us to the eve of the birth of the Federal Rules of Civil Procedure. Since the Federal Rules would largely merge trial practice, with the exception of jury rights properly invoked, commentators thought that cementing the merger required rationalization of appellate standards on terms other than the historic and resilient law–equity divide.[203] In the opinion of Charles Clark, leading rulemaker and future judge, "Probably the greatest obstacle to this union, next to the question of jury trial, is the traditional difference in method of review of equity and law cases."[204] But how to bridge that divide?

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appears to have been error or mistake on his part."); cf. John G. Henderson, Chancery Practice 726–32 (1904) (describing, primarily with reference to state practices, deference as varying according to the mode of proof).

199. See 8 Hughes, supra note 61, §§ 5816–18 (explaining that while appellate courts may "make findings of fact determinate of the controversy" in equity cases, "[i]t was expressly provided by statute that there shall be no reversal . . . upon a writ of error, for any error of fact" in suits at law).

200. See Balt. & Carolina Line v. Redman, 295 U.S. 654, 658–61 (1935) (holding sufficiency of the evidence is a question of law); Lancaster v. Collins, 115 U.S. 222, 225 (1885) ("This court cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered."); Boatmen's Bank v. Trower Bros. Co., 181 F. 804, 806 (8th Cir. 1910) (stating that a jury's finding of fact may be examined by a court only if there is "no substantial evidence to sustain it"); Taylor, supra note 79, at 695–97 (same).

201. 28 U.S.C. §§ 773, 875 (1925) (superseded by Fed. R. Civ. P. 38, 46, 52); McCaughn v. Real Est. Land Title & Tr. Co., 297 U.S. 606, 608 (1936); see also supra text accompanying notes 188–189.

202. See supra text accompanying notes 60–61.

203. See Advisory Comm. on Rules for Civ. Proc., Proposed Rules of Civil Procedure for the District Courts of the United States 149–50 (1937), https://www.uscourts.gov/sites/default/files/fr_import/CV04-1937.pdf [https://perma.cc/2MLF-ZQVY] (explaining that "a large measure of the advantage of that union [of law and equity] will thus be lost by retaining a divided practice on appeal").

204. Charles E. Clark, Power of the Supreme Court to Make Rules of Appellate Procedure, 49 Harv. L. Rev. 1303, 1319 (1936).

Clark wanted to apply the jury standard to everything, but that put him in the minority.[205] Disagreeing with Clark, the rulemaking committee instead chose a clear-error standard for all judge-made findings, as follows: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."[206] The committee said that this standard "accords with the decisions on the scope of the review in modern federal equity practice."[207] Whether that was true depends on how the rule is interpreted, which is difficult because the rule and its commentary are both susceptible of different constructions. On the one hand, and unlike then-prevailing equity practice, the rule does not expressly provide different standards for findings based on (for example) documentary evidence versus conflicting oral evidence. On the other hand, the reference to "due regard" suggests heightened deference when the trial judge assessed witness credibility. The committee's note is not especially helpful. After claiming that the rule accorded with then-prevailing equity practice, it stated that the clear-error standard applied to all kinds of findings.[208] Yet some of the cases it cited said that the clear-error standard did not apply to documentary or undisputed evidence.[209] A previous proposed version of the rule had provided that "[t]he findings of the court . . . shall have the same effect as that heretofore given to findings in suits in equity,"[210] which did not expressly articulate a standard but at least made clear the aim of continuing with existing law.

The rule was evidently not clear enough to stamp out the previously prevailing distinctions based on the nature of the evidence.[211] In the early decades after promulgation of the rules, some courts of appeals continued to treat findings based on depositions or other documents or findings

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205. Clark & Stone, supra note 194, at 191–92, 217; see also 5 Advisory Comm. on Rules for Civ. Proc., Proceedings of Meeting of Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States 1225–34 (1936), https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-february-1936-vol-v (on file with the *Columbia Law Review*) (reporting debate on this point).

206. Fed. R. Civ. P. 52 (1938).

207. Id. advisory committee's note (1937).

208. Id. ("[The standard] is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony.").

209. The note cites several cases in support of its claim that contemporary equity practice had deferential review, all of which involved disputed testimony. The note then uses a "compare" signal and cites Kaeser & Blair, Inc., v. Merchs.' Ass'n, 64 F.2d 575, 576 (6th Cir. 1933), and Dunn v. Trefry, 260 F. 147, 148 (1st Cir. 1919), which said that the clear-error standard did not apply to documentary evidence or inferences from undisputed facts, respectively. It would have been easy enough for the note to expressly preserve or reject those cases and the underlying distinctions, but it did neither. Fed. R. Civ. P. 52 advisory committee's note (1937).

210. Fed. R. Civ. P. 68 (Preliminary Draft 1936).

211. See supra notes 193–196 and accompanying text.

based on undisputed testimony as worthy of little or no deference, with some even saying Rule 52's standard was inapplicable.[212] Indeed, the Supreme Court itself hinted at such a distinction, while officially denying it.[213] Distinguished commentators could be found on either side, with Professor Charles Alan Wright contending that the rule required clear-error review for all findings and Professor James William Moore adhering to the old distinctions based on the nature of the evidence.[214]

The rulemakers sought to snuff out differentiated review, and so they amended Rule 52 in 1985. The amended rule modified "findings of fact" with the phrase "whether based on oral or documentary evidence."[215] As the rulemaking committee explained, its goal in amending the rule was to eliminate conflicting interpretations and bring practice into line with "the standard of review as literally stated in Rule 52(a)"—that is, clear error for all findings, including those based on documents.[216] They succeeded, at least in terms of the formal doctrine, as courts that previously adopted the variegated approach recognized that it had been repudiated.[217] So, today the standard of review is clear error, and clearly so, at least in theory.

To sum up, merger came late to the standard of review, and neither side totally won. Today's clear-error review of judge-found facts is not the rational-jury standard of the common law. But neither is it the de novo retrial of the law and facts that traditionally characterized the appeal. Nor is it, despite what the rulemakers claimed, a continuation of the pre-1938 equity practice, which differentiated between kinds of evidence and lingered on for decades until the rulemakers came back to put it down in 1985.

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212. See, e.g., Stevenot v. Norberg, 210 F.2d 615, 619 (9th Cir. 1954); Orvis v. Higgins, 180 F.2d 537, 539–40 (2d Cir. 1950); Pac. Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F.2d 541, 548 (9th Cir. 1949); Harris Stanley Coal & Land Co. v. Chesapeake & O. Ry. Co., 154 F.2d 450, 452 (6th Cir. 1946); Himmel Bros. Co. v. Serrick Corp., 122 F.2d 740, 742 (7th Cir. 1941); Carter Oil Co. v. McQuigg, 112 F.2d 275, 279 (7th Cir. 1940); United States v. Mitchell, 104 F.2d 343, 346 (8th Cir. 1939).

213. Compare United States v. Gen. Motors Corp., 384 U.S. 127, 141 n.16 (1966) (stating in dicta that the rationale for deferential review had little application to findings in a "paper case"), with United States v. U.S. Gypsum Co., 333 U.S. 364, 394 (1948) (explaining that Rule 52's "clear error" standard applies to inferences from documents and undisputed testimony).

214. See Note, Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence, 49 Va. L. Rev. 506, 516–36 (1963) (discussing contending interpretations).

215. 471 U.S. 1157, 1158 (1984); Fed. R. Civ. P. 52, advisory committee's note on 1985 Amendment. In the 2007 restyling of the rules, the reference to "oral or documentary evidence" became the "oral or other evidence" of today's rule, a change meant to be stylistic only. Advisory Comm. on Rules for Civ. Proc., Report of the Civil Rules Advisory Committee 141–42 (2006), https://www.uscourts.gov/sites/default/files/fr_import/CV06-2006.pdf [https://perma.cc/7Y8E-T76Y].

216. Fed. R. Civ. P. 52, advisory committee's note on 1985 Amendment.

217. See, e.g., Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 170–71 (2d Cir. 2001).

F. *Summary: Blended Merger*

Time to take stock. Compared to federal trial practice—which can be pretty fairly described as "equity procedures that are structured toward culminating in a jury trial that will almost never occur"—federal appellate practice is harder to characterize. As the discussion above has shown, some aspects of it mostly follow the model of equity, other aspects mostly follow the common law, and still others reflect an intermediate position or follow one model in theory and the other in practice.

Some prior commentators have identified modern appellate practice with one model or the other because they have focused too much on just one dimension. Consider the timing of review, for example. The baseline in the federal system is that appellate review awaits a final judgment.[218] If one emphasizes that feature, one would see an equity-based trial procedure coupled to a common-law appellate system.[219] The timing of review is indeed an important determinant of a system's character, and our general rule of timing follows the law model, but once one gets into the appellate courts, categorizations become hard. The standard of review for judicial factfinding in Rule 52 is officially described as following premerger equity practice—though, as we have seen, the rule does not exactly do that, instead following a standard in between law and equity.[220] Some error being found, the remedies available to appellate courts follow the flexible equity model rather than the constricted legal model.[221] With authority over facts and law, a full record (including transcripts) to review, and full remedial power, the federal appellate courts come close to possessing the power to do comprehensive justice, which had been the goal of the equitable appeal.[222] Yet the courts often seem reluctant to exercise all of that power, instead finding error and leaving it to others to sort out, thus recreating a limitation of the writ of error.[223]

Even when it comes to the timing of review, the dimension along which the common law shows the strongest influence, today's system is not pure. Despite the 1789 Judiciary Act's limitation of review to final judgments, the rules regarding the timing of review have managed to work themselves into a state of complexity. Certain categories of interlocutory orders are, either by statute or by rule, reviewable as of right or at the appellate court's election, often in situations that fall within the traditional

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218. See 28 U.S.C. § 1291 (2018); supra section I.D.

219. See, e.g., Melissa A. Waters, Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era, 80 N.C. L. Rev. 527, 591–93 (2002). But cf. Gavin, supra note 45, at 1122–24 (emphasizing the procedural discretion granted by the Federal Rules of Appellate Procedure to reach the conclusion that the system is primarily equitable).

220. See supra section I.E.

221. See supra section I.C.

222. See supra section I.B.

223. See supra text accompanying notes 108–113.

equity jurisdiction.[224] Moreover, with the judicially developed collateral-order doctrine, the courts have breached the final-judgment rule in needful cases of all sorts.[225] And mandamus (a prerogative writ, of all things) stands in reserve for a small yet ill-defined category of special cases.[226] No one could have designed this patchwork of practices and mismatched labels.

To conclude this assessment, consider an intangible way in which modern appellate procedure, or rather the operations of the federal appellate machinery, resembles the ways of Chancery: in its slide into bureaucracy. In the courts of appeals there are now clerks, staff attorneys, and appellate mediators arrayed around the judges, facilitating their work.[227] True, none of these assistants have formal decisionmaking power, but then neither did the masters in chancery and other staff who swelled chancery's ranks: All decrees ultimately came before the Chancellor, the keeper of the monarch's conscience, for approval.[228] The tension between, on the one hand, the aspiration to individualized justice tailored to the parties and dispensed by a real person and, on the other hand, the bureaucratic administration of justice, marks a feature shared by the present federal appellate system and traditional equity practice.

II. PATHWAYS FOR EVOLUTION

By exploring the roots of current federal appellate practice and identifying which aspects of it come from which tradition, Part I is not meant to provide a roadmap for "unmerging" appellate practice. But appreciating the way things used to be, the reasons for the old practices, and why the practices changed can nonetheless puncture any notion that our system's current resting point is inevitable. Kessler puts the matter well in her article on rehabilitating equity's tradition of inquisitorial trial procedure. "Because our sense of history shapes our sense of the possible," she explains, "history can offer the best antidote to the dangerous tendency to view reform—precisely because it changes the status quo—as 'alien.'"[229]

An example of how an appreciation of the past can make the seemingly strange more familiar comes from Professor Adam Zimmerman's recent proposal for "appellate class actions."[230] Today's

224. See supra section I.D.

225. See supra text accompanying note 149.

226. See supra text accompanying notes 66–67.

227. See Richman & Reynolds, supra note 92, at 97–114; see also Diane P. Wood & Zachary D. Clopton, Managerial Judging in the Courts of Appeals, 43 Rev. Litig. 87, 103 (2023) (describing staff attorneys as part of the "court bureaucracy").

228. See supra text accompanying notes 120–124.

229. Kessler, Our Inquisitorial Tradition, supra note 20, at 1193.

230. Adam S. Zimmerman, The Class Appeal, 89 U. Chi. L. Rev. 1419, 1426 (2022).

federal courts are strongly differentiated across levels of the hierarchy, such that "appellate class actions" seem anomalous, but that differentiation is a choice. In equity, the trial and appellate stages were not very distinct: Appellate courts in equity not only aimed at a just resolution of the whole dispute but could pursue that goal through new factfinding, amendments of the pleadings, and joinder of parties.[231] To be clear, Zimmerman's proposal for appellate class actions would not necessarily require courts of appeals to do all of those "trial-like" things themselves; they might instead initiate the class action and then transfer matters to district courts or agencies for factfinding, for example. But courts and commentators should hesitate before rejecting appellate class actions as "[in]compatible" with the "appellate mode of proceeding."[232]

In addition to fostering a sense of possibility, appreciating the former divergence between the appellate procedures of law and equity can reveal the functional value of some of those now-submerged distinctions. To be sure, historical accident explains plenty that logic cannot; the English court system was not for rationalists.[233] But some of the procedures developed or persisted for good functional reasons, and not all of those functional reasons disappeared even once the old law–equity distinction failed to track them. At the trial level, it is still the case that lay jurors would have trouble sorting out a complicated matter of accounting for trust profits, which is why a rational judicial system otherwise attracted to juries would give such matters to judges or masters in chancery, not ordinary jurors.[234] So too in appellate procedure, it may be that some abandoned practices were well founded. History can therefore suggest reforms that may be attractive today, and not just to antique hunters.

Furthermore, and aside from any suggestions of reform, the functional logic that used to underlie divergent appellate procedures can help to explain certain phenomena in today's federal judicial system. Just as equity practice reasserted itself in certain ways in the past, we can understand some present-day phenomena as reassertions of equity's logic.

With those prefatory comments in mind, this Part will present a few ways in which an understanding of the two formerly distinct traditions of

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231. See supra sections I.B, I.E.

232. Burns v. U.S. R.R. Ret. Bd., 701 F.2d 189, 191 (D.C. Cir. 1983); see also Zimmerman, supra note 230, at 1466 (critiquing *Burns*).

233. Bentham, as so often, can be counted on to state the matter with flair. See Jeremy Bentham, Bentham Manuscripts, box 168, folio 200, Univ. Coll. London, https://ucl.primo.exlibrisgroup.com/discovery/delivery/44UCL_INST:UCL_VU2/12359599080004761 (on file with the *Columbia Law Review*) (explaining that the division of law and equity did not reflect "any rational cause" but rather the "stupidity" of the English judges).

234. See Fed. R. Civ. P. 53(a)(1)(B)(ii) (permitting the appointment of a master to hold trial proceedings on the calculation of damages or to perform an accounting); Langbein et al., supra note 30, at 273–74 (describing responses to the weaknesses of jury factfinding in the early years of the rise of Chancery).

appellate procedure either suggests a potential pathway for change or helps to explain current pressures in the system. The common-law tradition could inspire certain reforms—such as stripping the Supreme Court of review of the facts,[235] which would be a throwback to the writ of error, albeit one motivated by contemporary concerns about the Court's power. But a greater appreciation of the equity tradition appears to offer more insight at the present time, and so the following material focuses on it.

A. *Constitutionalizing Equity's Appeal? A Path Not Taken and a Door Left Open*

Given the revival of interest in equity, we might start with the boldest potential claim for its revival in appellate procedure: that the Constitution not only permits but *requires* the equitable appeal with its rehearing of the law and the facts.[236] Put differently, this is the claim that Rule 52's clear-error standard of review, and maybe other restrictions as well, are unconstitutional when they are applied to appeals in equity.

Note that the present claim is more aggressive than Bray's argument that certain cases currently thought to fall within the Seventh Amendment's jury guarantee actually fall outside of its scope because they use procedures that were used by courts of equity.[237] Devices for aggregation of claims and parties were tools of chancery, and so, on Bray's account, the modern damages class action is not a "Suit[] at common law" for which the Seventh Amendment jury right is "preserved."[238] But Bray's argument does not *forbid* jury trial in such cases; the legislature could provide jury rights by statute even when the Seventh Amendment does not.[239] A closer analogue to the present argument that the equity appeal is constitutionally required would be the argument that certain cases are so complex that they not only fall outside of the Seventh Amendment jury guarantee but actually demand non-jury procedure in order to afford due process.[240] The argument on the table here is the appellate analogue: The Constitution sometimes demands the old-fashioned equity appeal.

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235. See Joseph Blocher & Brandon L. Garrett, Fact Stripping, 73 Duke L.J. 1, 12–13 (2023) (proposing limitations on the Supreme Court's jurisdiction over facts).

236. See supra text accompanying notes 17–23 (discussing revival of interest in equity); cf. Owen W. Gallogly, Equity's Constitutional Source, 132 Yale L.J. 1213, 1277 (2023) (describing equitable remedies as stemming from Article III rather than from statutes); Brooks M. Chupp, Note, "A Sword in the Bed": Bringing an End to the Fusion of Law and Equity, 98 Notre Dame L. Rev. 465, 467, 482–89 (2022) (urging the reestablishment of separate courts of equity at the trial level).

237. Bray, Seventh Amendment, supra note 19, at 497 (discussing interpleader and class action suits as falling outside of the Seventh Amendment's jury guarantee).

238. Id. at 499 (alteration in original) (quoting U.S. Const. amend. VII).

239. See id. at 507 ("The policy goal of increasing use of the jury could be achieved through legislation since there is no right not to have a jury trial.").

240. For a rare endorsement of this argument, see In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1086, 1089 (3d Cir. 1980) (noting that a court should deny jury trial

Despite its boldness, this claim is not as wild as it sounds. No less an authority than Justice (and framer) James Wilson endorsed it, albeit in dissent. And some states endorsed it as a matter of state law.[241] The argument merits a brief hearing before we reject it.

Wilson's endorsement came in *Wiscart v. Dauchy*, in which the majority interpreted the 1789 Judiciary Act's provision for the writ of error in equity and admiralty to mean that the Court could review only errors of law on the record.[242] The Judiciary Act thereby departed from traditional practice that provided for appeals on the law and facts in equity and admiralty.[243] Dissenting from the Court's approval of this innovation, Wilson insisted on the appeal. His dissent relied primarily on a traditionalist argument to the effect that Congress had not legislated clearly enough to banish the appeal. After that, however, he added this: "Even, indeed, if a positive restriction existed by [the statute], it would, in my judgment, be superseded by the superior authority of the constitutional provision" that endowed the Court with jurisdiction of law and fact.[244]

Wilson's single sentence of constitutional analysis does not furnish much to go on—"cavalier in the extreme," Professor David Currie called it[245]—but one can gather more about Wilson's concerns from elsewhere in the opinion and from his other writings. He was a defender of the jury trial, calling it superior to any other mode of trial, but only "in cases to which [jury trial] is applicable."[246] In particular, he was worried about the risk that juries, or at least unreviewable juries, posed to the fledging country's foreign relations, which were often at issue in admiralty cases.[247] "Would it not be in the power of a jury, by their verdict, to involve the whole Union in a war?" he asked at the Pennsylvania ratification convention. "They may condemn the property of a neutral, or otherwise infringe the law of nations; in this case, ought their verdict to be without

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on due process grounds "only in exceptional cases when the court, after careful inquiry into the factors contributing to complexity, determines that a jury would be unable to understand the case and decide it rationally").

241. See infra notes 250–252 and accompanying text.

242. Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327–28 (1796). Enslaved people were some of the property in dispute in the case.

243. See supra text accompanying notes 178–180.

244. *Wiscart*, 3 U.S. (3 Dall.) at 325 (Wilson, J., dissenting); see also U.S. Const. art. III, § 2. Justice William Paterson later indicated that he had agreed with Wilson's conclusion, for he would have "give[n] the most liberal construction to the act"; he did not address Wilson's constitutional proposition. The Perseverance, 3 U.S. (3 Dall.) 336, 337 (1797).

245. David Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789–1888, at 28 (1985).

246. James Wilson, Remarks in Pennsylvania Convention, *in* 1 Collected Works of James Wilson, supra note 89, at 270–71.

247. *Wiscart*, 3 U.S. (3 Dall.) at 327 ("[I]t is of moment to our domestic tranquility, and foreign relations, that causes of Admiralty and Maritime jurisdiction, should, in point of fact as well as of law, have all the authority of the decision of our highest tribunal . . . .").

revisal?"[248] Wilson's views may have been right as a matter of policy, as Congress restored the traditional appeal in equity and admiralty cases several years after *Wiscart*.[249]

Although Wilson's view of a constitutionally enshrined appellate procedure represents a path not taken in the federal system, some state courts found protections for the equitable appeal under their own constitutions. The Michigan Supreme Court thought that the "essential nature" of equitable rights required equitable procedures, and it rejected a "radical" legislative attempt at fusion in 1889.[250] "The right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury," the court wrote.[251] Several other state courts in the nineteenth century, relying on the appellate jurisdiction conferred by their state constitutions, also invalidated state legislative attempts to interfere with the full equitable rehearing.[252]

As a matter of federal constitutional law, though, Wilson was in dissent. And the *Wiscart* majority's view of congressional power to regulate the scope of review was reaffirmed a century later when Congress once again limited the Court's appellate jurisdiction in admiralty cases to review of the law only.[253] So two centuries of judicial precedent and congressional practice are firmly against Wilson's view.

In addition, the *Wiscart* majority's view of congressional power is persuasive on the merits. The Constitution conferred on the Court "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[254] The reference to "appellate Jurisdiction" is, so far as one can tell, a generic term for review, not a reference specifically to the vehicle of the equitable appeal and an exclusion of the writ of error or other vehicles.[255] As Chief Justice Oliver

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248. James Wilson, Remarks in Pennsylvania Convention, *in* 1 Collected Works of James Wilson, supra note 89, at 270–71. He appealed as well to the delegates' own experiences: "Those gentlemen who, during the late war, had their vessels retaken, know well what a poor chance they would have had when those vessels were taken in their states and tried by juries, and in what a situation they would have been if the Court of Appeals had not been possessed of authority to reconsider and set aside the verdicts of those juries." Id. at 250.

249. See supra note 184 and accompanying text.

250. Brown v. Kalamazoo Cir. Judge, 42 N.W. 827, 828–31 (Mich. 1889).

251. Id. at 830.

252. See, e.g., Sherwood v. Sherwood, 44 Iowa 192, 194–95 (1876); Carolina Nat. Bank v. Homestead Bldg. & Loan Ass'n, 33 S.E. 781, 786 (S.C. 1899) (Pope, J., dissenting); Catlin v. Henton, 9 Wis. 476, 492–93 (1859); see also M.T. Van Hecke, Trial by Jury in Equity Cases, 31 N.C. L. Rev. 157, 171–73 (1953) (addressing state constitutional rulings protecting nonjury trial in equity); Note, The Right to a Nonjury Trial, 74 Harv. L. Rev. 1176, 1178–79 (1961) (addressing state protections for equity procedure at the trial level).

253. The "Francis Wright", 105 U.S. 381, 384–87 (1881).

254. U.S. Const. art. III, § 2, cl. 2.

255. The Federalist No. 81, at 489 (Alexander Hamilton) (Clinton Rossiter ed., 1961); William Rawle, A View of the Constitution of the United States of America 226–27 (Philadelphia, H.C. Carey & I. Lea 1825).

Ellsworth explained in *Wiscart*, restricting or removing appellate review of the facts could be regarded as an exception to appellate jurisdiction like the amount-in-controversy requirement for appellate review, a requirement the first Congress also imposed.[256] Whatever limits there may be on congressional power to restrict the Court's appellate jurisdiction, removing appellate review of the facts does not violate them.[257] As regards the lower federal courts' powers of review, those courts and any appeals between them need not exist at all.[258] And this is not even to mention the realist hunch that the courts, being sensitive to their workloads, would have little interest in reinvigorating review of the facts as a categorical constitutional imperative (as opposed to occasional sub rosa scrutinizing).

Any remaining vitality in the argument that the Constitution enshrines the equitable appeal founders on the Seventh Amendment. One of the sharpest objections to the Constitution was that it did not expressly provide for jury trial and even implied, through the Supreme Court's appellate jurisdiction as to "Law *and Fact*," that verdicts were at risk.[259] In response, the Seventh Amendment then "preserved" civil juries and the force of their verdicts as at common law.[260] There was no corresponding public demand for constitutional protection of equity procedures like the rehearing on appeal. Some Founding-era states used juries in equity and restricted appellate review,[261] so it is not as if nobody could have conceived of a role for an equity-preserving amendment that was the inverse of the Seventh Amendment.

The best view of all of this, in sum, is that the Constitution does not entrench the equitable appeal. Put another way, the Constitution allowed separate systems of review, but it also allowed fusion, as lawmakers prefer. There is therefore room for creative thinking about what appeals should look like.

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256. Judiciary Act of 1789, ch. 20, §§ 21–22, 1 Stat. 73, 83–85; Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327–29 (1796) (opinion of Ellsworth, C.J.); see also Judiciary Act § 25 (conferring Supreme Court jurisdiction over state judgments against federal rights but not for judgments in favor of them).

257. For an overview of the doctrine and literature on congressional authority, see Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 295–345 (7th ed. 2015); see also Blocher & Garrett, supra note 235, 28–40 (proposing to strip the Supreme Court of review of the facts in certain categories of cases).

258. See U.S. Const. art. III, § 1 (referring to "such inferior Courts as the Congress may from time to time ordain and establish").

259. Id. § 2, cl. 2 (emphasis added); see also supra text accompanying notes 166–169 (describing this objection).

260. U.S. Const. amend. VII.

261. See Van Hecke, supra note 252, at 158–61 (describing provisions for jury trials in equity in the 1770s to 1790s); supra note 119 (describing Ellsworth's experience with Connecticut's use of the writ of error in equity cases).

B. *Explaining Pressures: Interlocutory Review*

As described in section I.D above, the federal system's basic rule about the timing of review—no appeal until a final judgment—follows the legal model rather than the equitable model. Yet as also explained there, our system has nonetheless come to tolerate quite a lot of interlocutory appeals and other exceptions, including in those circumstances that would have fallen within the traditional jurisdiction of equity. This section explains how an understanding of equity's tolerance of interlocutory review can help to make sense of some current pressures within the system of federal appellate procedure.

Equity's traditional tolerance for interlocutory review had a couple of supports. One structural support, that Chancery for a long time had just one judge and lots of functionaries doing his bidding,[262] is not much applicable to the federal judiciary, which is a genuine multilevel court system.

But other considerations also supported the tolerance for interlocutory appeals, namely that equity cases involved, in contrast to the concentrated, trial-focused procedure of the common law, a protracted pretrial (or, better, nontrial) procedure in which highly consequential rulings could come at any point along the long and winding way to a final decree.[263] Interlocutory appeal could therefore relieve erroneously imposed hardships and even promote efficient resolution of cases. "[T]he permitting of an Appeal in an early stage of the Proceedings [in equity,]" an early-nineteenth-century authority wrote, "frequently saves the Expence of prosecuting a suit further, which is often very considerable."[264] Save for the oddities of capitalization, a modern writer concerned with efficiency could write the same thing.

Modern federal practice on the timing of appeal has become a motley admixture, as functional considerations forced exceptions to the Judiciary Act's attempt to limit review to final judgments and decrees.[265] But the system may not be resting at an optimal point, as changes in the litigation landscape can require new balances of the competing interests. This observation has a specific form and a more general form.

First for the specific form. If one looks around the current landscape of federal procedure with an eye toward identifying unmet needs for interlocutory appeals, one's gaze is likely to land on multidistrict litigation (MDL).[266] An MDL has the look and feel of a proceeding in equity, with its multiplicity of parties and interests, risk of third-party impacts, and

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262. See supra text accompanying notes 120, 173–174.

263. See supra text accompanying notes 120–124.

264. Palmer, supra note 78, at 1.

265. See supra section I.D.

266. See 28 U.S.C. § 1407 (2018) (authorizing transfer and consolidation of similar cases pending in different districts).

frequent use of adjuncts like special masters to oversee discovery or administer claims.[267] Transfer to an MDL court for consolidated pretrial proceedings is usually the start of an extended *nontrial* procedure for case resolution.[268] The MDL judge makes highly consequential rulings, but except for those decisions that dispose of some or all claims, the rulings are generally not appealable when made or—if the case settles, as so many do—ever.[269] Not dissimilar reasoning motivated the adoption of Rule 23(f), providing interlocutory appeals for class certifications.[270] Given these features of MDL practice, and the similarity to class actions, it is not surprising that many thoughtful observers—and not just the Chamber of Commerce—have identified the value of expanding the opportunities for interlocutory review in MDL cases.[271]

At least for now, the Civil Rules Advisory Committee has decided against promulgating a rule authorizing interlocutory appeals in MDL cases.[272] One of the Committee's reasons for not doing so was the availability of other mechanisms under current law, including certification under section 1292(b), mandamus, and Rule 54.[273] Given the pressures for interlocutory review in MDL, one suspects those tools to get a workout, much the same way that litigants' forum shopping and judges' forum selling made an industry of mandamus petitions seeking transfers of venue out of small-town East Texas and the Waco Division of the Western District of Texas.[274]

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267. See Elizabeth Chamblee Burch & Margaret S. Williams, Judicial Adjuncts in Multidistrict Litigation, 120 Colum. L. Rev. 2129, 2153–62 (2020) (describing the use of masters, claims administrators, and other adjuncts in MDL).

268. See Abbe R. Gluck & Elizabeth Chamblee Burch, MDL Revolution, 96 N.Y.U. L. Rev. 1, 16 (2021) (noting that more than ninety-seven percent of cases transferred to an MDL court are resolved there).

269. Id. at 20; see also Elizabeth Chamblee Burch, Remanding Multidistrict Litigation, 75 La. L. Rev. 399, 400–02, 410 (2014) (noting ubiquity of settlements in MDLs).

270. Fed. R. Civ. P. 23 advisory committee's note on 1998 Amendment.

271. See, e.g., Gluck & Burch, supra note 268, at 59–60; Andrew S. Pollis, The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation, 79 Fordham L. Rev. 1643, 1685 (2011); Waters, supra note 219, at 591–93. Another approach, which recalls a solution to another instance of vesting extreme power in a single trial judge, is to assign MDLs to multijudge panels. See Brian T. Fitzpatrick, Many Minds, Many MDL Judges, 84 Law & Contemp. Probs. 107, 108–09, 115–19 (2021).

272. See Memorandum from Hon. John D. Bates, Chair, Comm. on Rules of Prac. & Proc., to Hon. Robert M. Dow, Jr., Chair, Advisory Comm. on Civ. Rules 15 (Dec. 9, 2020), https://www.uscourts.gov/sites/default/files/advisory_committee_on_civil_rules_-_december_2020_0.pdf [https://perma.cc/KLE9-9A2L].

273. Id. at 19.

274. See J. Jonas Anderson, Paul R. Gugliuzza & Jason A. Rantanen, Extraordinary Writ or Ordinary Remedy? Mandamus at the Federal Circuit, 100 Wash. U. L. Rev. 327, 333–34 (2022) (discussing how "judge shopping" has resulted in patent cases clustering in certain Texas jurisdictions); see also Daniel Klerman & Greg Reilly, Forum Selling, 89 S. Cal. L. Rev. 241, 242–43 (2016) (describing the phenomenon of "forum selling," in which judges make their courts magnets for particular kinds of litigation).

Now for the more general version of what equity's approach to the timing of review can illuminate about pressures in today's system. It turns out that MDL is like other modern federal litigation, only more so. In today's federal courts, only a tiny percentage of cases go to trial, and so the procedure of "trial courts" is largely a "pre-(non-)trial" procedure in which a judge manages a case toward settlement.[275] Limiting review to final judgments therefore has an entirely different impact than it would have in a system in which final judgments came fast. Professor Stephen Yeazell is especially instructive on how modern federal procedure creates the need for appeal but withholds the opportunity for it:

> [T]he power of the final judgment rule depends on the structure of the process preceding appeal. During eras in which a substantial proportion of trial court rulings produced judgments, the rule yielded prompt appellate review and tight appellate control. . . .
>
> Keeping the final judgment rule in place as the Rules provided for several new stages of pretrial proceedings, the Rules created a new procedural layer that extended the length of a lawsuit while creating the opportunity for important judicial rulings. The result was a set of lower court rulings that, while often significant, were as likely as not to be unreviewable. Creating such a set of rulings while holding appellate review constant effectively allocated more power to trial courts.[276]

As litigation in general becomes more like the temporally extended nontrial procedure of equity, the pressure for interlocutory appeal mounts, and so the question becomes when and where to let the pressure out. Hence the current patchwork of exceptions and safety valves and constant efforts at evasion of the final-judgment rule.[277]

Many scholars have presented ways to expand early access to appellate courts. Some such proposals work within the grooves of existing law, such as by creating a new category of appealable interlocutory orders.[278] But—and here it is useful to recall the classical definition of equity as the corrective to the law's generality—categorical approaches have trouble accommodating life's variety. Depending on the case, the crucial moment

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275. See Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 Harv. L. Rev. 924, 925–29 (2000) (noting that "judges are increasingly steering litigants away from seeking decisions and towards negotiated agreements").

276. Stephen C. Yeazell, The Misunderstood Consequences of Modern Civil Process, 1994 Wis. L. Rev. 631, 632–39, 660–61.

277. A popular appellate blog frequently covers attempts to create final judgments through "manufactured finality," despite what looked like the Supreme Court's attempt to terminate the tactic with prejudice. See, e.g., Bryan Lammon, The Ninth Circuit Limits *Baker*, Preserves Manufactured Finality, Final Decisions (Apr. 19, 2022), https://finaldecisions.org/the-ninth-circuit-limits-baker-preserves-manufactured-finality/ [https://perma.cc/Y46W-9NWB].

278. See, e.g., Pollis, supra note 271, at 1685–93 (suggesting a limited right of appeal from interlocutory legal rulings in MDL proceedings).

for review could come with different rulings (on jurisdiction, choice of law, discovery, or *Daubert*); and MDL, a problem area, lacks the single crucial decision point equivalent to class certification. Other approaches therefore deserve attention too. These include expanding opportunities for discretionary review—and lodging the discretion in the court of appeals, not the district court under review[279]—while avoiding abuses by harnessing the parties' own information. One might allow parties one request for interlocutory appeal at a time of their choosing, for example, and impose fee-shifting if it is unsuccessful.[280]

C. *A Modest Equity-Inspired Reform: Less Deference to Trial-Judge Findings (Herein of Nationwide Injunctions)*

This section suggests a modest change to appellate standards of review in certain kinds of cases. The reason to change is not that courts of equity used to do things differently. The choice of a standard of review is a complex matter with multiple inputs. The history is useful because it illuminates functional reasons that still apply today and dispels the sense of foreignness or impropriety that may be the first reaction to a proposed change.

Rule 52, which governs appellate review of judicial factfinding, makes no special provision for a case's posture, importance, or the nature of the evidence before the court. As revised in 1985 in an effort to drive home the point that the clear-error standard applies broadly, it states that the district judge's "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."[281]

Rule 52's broad, simple standard masks some complexity in the doctrine as applied, for the confining clear-error standard exerts pressure on the line between the things subject to it and things that are instead freely reviewable. Some courts have held that Rule 52's deferential standard applies only to adjudicative facts, not to legislative facts, which are generalized facts about the world that bear on policy formation.[282] The

279. See Pabellon v. Grace Line, Inc., 191 F.2d 169, 180–81 (2d Cir. 1951) (Frank, J., concurring) (proposing such a statutory amendment); 16 Wright et al., supra note 104, at iii (proposing discretionary interlocutory appeal for extraordinary cases, in place of mandamus); Waters, supra note 219, at 591–602 (urging broader use of mandamus).

280. See, e.g., Bryan Lammon, Three Ideas for Discretionary Appeals, 53 Akron L. Rev. 639, 652–53 (2019) (proposing ways to expand interlocutory review while controlling workload, such as to give each party one opportunity to petition for discretionary appeal).

281. Fed. R. Civ. P. 52(a)(6); see supra section I.E (explaining the background of the amendment).

282. See, e.g., Doe v. Prosecutor, 705 F.3d 694, 697 n.4 (7th Cir. 2013) (stating that "only adjudicative facts are entitled to the clearly erroneous standard of review"); United States v. Singleterry, 29 F.3d 733, 740 (1st Cir. 1994) (same). For a summary of judicial

old line between adjudicative and legislative facts is now coming under another round of pressure due to the growing importance—importance mandated by the Supreme Court's new emphasis on originalism—of facts about the past in judging the present constitutionality of matters such as regulation of guns and abortion.[283] As well, the courts have created the doctrine of "constitutional facts," which requires nondeferential appellate review of certain facts, whether found by a judge or a jury, that bear on the contours of constitutional rights.[284] Still other things that might look like facts are deemed to be questions of law reviewed de novo, largely for functional reasons such as uniformity and third-party effects.[285] In addition, there is of course the "mixed question of law and fact," which gets different levels of appellate scrutiny depending on the features of the question and various functional considerations surrounding it.[286] What the doctrines and disputes above have in common is the urge to apply different standards of review depending on the nature of the factual question or the systemic consequences of its resolution.

An appreciation of the ways of the equitable appeal suggests the wisdom of tailoring the standards of review in light of a different factor: the form of the evidence that gives rise to a finding of fact. Equity's old de novo rehearing and its evolution in the nineteenth and early twentieth centuries into a range of different standards of review responded to whether findings came from conflicting live testimony or instead derived from papers or inferences.[287] The appellate judges who continued to make those distinctions after 1938's merger of law and equity were not in thrall to outmoded historical curiosities; they were relying on functional, competence-based considerations that happened to remain valid. One leading decision championing differential standards for different kinds of evidence was *Orvis v. Higgins*, which was authored by realist icon Jerome Frank and joined by the eminently authoritative Augustus Hand, a

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approaches and a proposed new approach to legislative facts, see generally Haley N. Proctor, Rethinking Legislative Facts, 99 Notre Dame L. Rev. 955 (2024).

283. See United States v. Rahimi, 144 S. Ct. 1889, 1899–901 (2024) (describing the English and early American history of firearms regulation); Ryan C. Williams, Historical Fact, 99 Notre Dame L. Rev. 1585, 1602 (2024) (explaining that the historical facts relevant to originalist inquiries fit awkwardly into the traditional adjudicative–legislative divide).

284. See Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508 n.27 (1984); id. at 515 (Rehnquist, J., dissenting); see also United States v. Friday, 525 F.3d 938, 949–50 (10th Cir. 2008) (extending *Bose* to religious free exercise).

285. See, e.g., Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001) (amount of punitive damages); Markman v. Westview Instruments, Inc., 517 U.S. 370, 384–91 (1996) (construction of patent claims).

286. See, e.g., Miller v. Fenton, 474 U.S. 104, 109–18 (1985) (voluntariness of a confession); Arctic Cat Inc. v. Bombardier Recreational Prods. Inc., 876 F.3d 1350, 1358 (Fed. Cir. 2017) (obviousness of invention).

287. See supra text accompanying notes 162–163, 181–198.

combination that should cover all the bases.[288] *Orvis* explained that "[w]here a trial judge sits without a jury, the [standard of review] varies with the character of the evidence: . . . If he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding."[289] Other courts made the same point, either rejecting de novo review or "glossing" Rule 52 so as to make a finding of clear error easier to reach or harder to reach depending on the nature of the evidence.[290]

Some courts applied the *Orvis* approach to interlocutory appeals of preliminary-injunction rulings that had been decided without live testimony. Here, it was another Second Circuit luminary, Judge Henry Friendly, who had "been hammering away at this point for years," urging that the court of appeals may exercise "full review" in such appeals.[291] Acknowledging the general rule that grants or denials of preliminary injunctions were reviewed deferentially, the Second Circuit departed from that rule when appropriate: "[When] there was no evidentiary hearing in the District Court and the injunction was granted on a paper record containing only the affidavits, the pleadings and the briefs, we are . . . 'in as good a position as the district judge to read and interpret the pleadings, affidavits and depositions.'"[292]

These judges were adhering to a tradition of tailoring standards of review to the circumstances, and that tradition still makes sense. An important consideration in determining a standard of review is the relative abilities of trial judges and reviewing judges.[293] The chancellors of old did not use terms like "comparative institutional competence," but they understood the idea that the trial judge had little or no advantage over a

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288. 180 F.2d 537, 538 (2d Cir. 1950). On the authority of Augustus Hand and his more famous cousin Learned, see Robert H. Jackson, Assoc. Justice, U.S. Sup. Ct., Address, Why Learned and Augustus Hand Became Great, Robert H. Jackson Ctr. (Dec. 13, 1951), https://www.roberthjackson.org/wp-content/uploads/2020/06/why-learned-and-augustus-hand-became-great.pdf [https://perma.cc/F7KH-2UUA] ("[I]f I were to write a prescription for becoming the perfect district judge, it would be always to quote Learned and always to follow Gus.").

289. *Orvis*, 180 F.2d at 539.

290. See Note, supra note 214, at 516–36 (describing the different approaches); supra notes 196, 212 (citing cases).

291. Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755, 758 (2d Cir. 1979).

292. Id. (quoting Dopp v. Franklin Nat'l Bank, 461 F.2d 873, 879 (2d Cir. 1972)).

293. Chad M. Oldfather, Appellate Courts, Historical Facts, and the Civil-Criminal Distinction, 57 Vand. L. Rev. 437, 444–45 (2019); see also Adam Perry, Plainly Wrong, 86 Mod. L. Rev. 122, 123–24, 137–38 (2023) (explaining that a factual finding is "plainly wrong" when the appellate court is more confident that the finding is wrong than that the trial judge is an epistemic superior, and that one generalizable factor bearing on the latter is the form of the evidence); Adam N. Steinman, Rethinking Standards of Appellate Review, 96 Ind. L.J. 1, 20, 24, 27 (2020) (arguing that optimizing accuracy requires consideration of generalizable institutional advantages of different courts, such as the ability to observe witnesses, and case-specific indicia of reliability).

reviewing judge in reading depositions.[294] If anything, a panel of a federal court of appeals is likely in a better position than a single judge to correctly discern the law *and the facts and the balance of the equities* in a paper case.[295] Three judicial heads are generally better than one, whether due to the opportunity for deliberation or due to the simple mathematics of the Jury Theorem.[296]

Whatever Rule 52 may say, the functional considerations that balance differently across cases will strain for ways to express themselves. Thus, in *Bose Corp. v. Consumers Union of U.S., Inc.*, decided shortly before the 1985 amendment, the Supreme Court wrote that although "[t]he same 'clearly erroneous' standard applies to findings based on documentary evidence as to those based entirely on oral testimony, . . . the presumption [of correctness] has lesser force in the former situation than in the latter."[297] Pointing in particular to the case's First Amendment setting, the Court opined that "[r]egarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact."[298] The advantage of the lower court was low and the stakes were high; therefore, nondeferential review prevailed.

Whether or not one agrees with its particular choices for prioritization, *Bose Corp.* is not aberrational in tailoring deference to

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294. See, e.g., Delorac v. Conna, 46 N.W. 255, 261 (Neb. 1890) (stating that a trial court "has a decided advantage over a reviewing court" when assessing live testimony but that deferential review "has not the same application in a case tried upon depositions").

295. Maybe not only in paper cases. The main justification for deference to findings based on live testimony, which is the trial judge's opportunity to observe demeanor, faces some real challenges from modern social science. The supposed value of seeing the witness in order to judge credibility is at best wildly overstated. People are actually bad at judging credibility from appearances. Devoting some time to the study of a transcript may well be better. See Oldfather, supra note 293, at 451–59 ("[T]he largely oral nature of trials can lead juries to evaluate the evidence in a manner that is inconsistent with the rigorous, logical ideals of the legal system."); Olin Guy Wellborn III, Demeanor, 76 Cornell L. Rev. 1075, 1075 (1991) (citing empirical evidence showing that "observation of demeanor diminishes rather than enhances the accuracy of credibility judgments"). In the future, any on-the-scene demeanor-based advantages as may exist are likely to shrink in light of developments like video and, probably before long, high-fidelity holographic records. See Robert C. Owen & Melissa Mather, Thawing Out the "Cold Record": Some Thoughts on How Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review, 2 J. App. Prac. & Process 411, 412 (2000); McGlothlin Courtroom, Wm. & Mary L. Sch. Ctr. for Legal & Ct. Tech., https://legaltechcenter.net/about/mcglothlin-courtroom/ [https://perma.cc/743L-R7GC] (last visited Sept. 24, 2024) (reporting first known use of holographic testimony). But see State v. S.S., 162 A.3d 1058, 1065–70 (N.J. 2017) (overruling a prior case that had established a de novo standard for review of findings based solely on video evidence).

296. Cf. Chad M. Oldfather, Universal De Novo Review, 77 Geo. Wash. L. Rev. 308, 328–30 (2009) (citing both of these rationales, and identifying their limitations, for why three heads are better than one in the context of review of questions of law).

297. 466 U.S. 485, 500 (1984) (citation omitted).

298. Id. at 501 n.17.

variety. Even beyond the official exceptions to deferential review, there are doubtless many instances in which appellate courts, sub rosa, give a factual finding more searching scrutiny than the official standard permits or less than it requires.[299] As one well-placed commentator explains, "While clear error must be found to reverse, it is easier for an appellate court to find clear error when it has the same materials for decision as were available to the trial court."[300]

Relative competence is not the only factor that goes into standards of review, of course. Given that the calculus of relative competence, which long distinguished between different kinds of evidence, is unlikely to have changed in 1985, it is worth asking what factor *did* change in the period leading up to the rulemakers' flattening of the standard of review. What was different, it seems, was the "crisis of volume."[301] The federal courts of appeals faced particularly acute challenges at that time, and a wide range of reforms were entertained, from adding judges to restricting jurisdiction to changing internal procedures.[302] A major part of the problem for the courts of appeals was an increasing propensity to appeal, not just increasing filings in the trial level.[303] One way to dampen an increasing propensity to appeal is to make appeal less attractive to trial-court losers, and one way to do that is to make appeals less likely to succeed by using affirmance-friendly standards of review.[304] Indeed, the advisory committee

299. See Edward H. Cooper, Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review, 63 Notre Dame L. Rev. 645, 645 (1988) (praising the clear-error standard because it "has no intrinsic meaning" but is instead "elastic, capacious, malleable, and above all variable"). There are, of course, downsides to the flexibility of the standard. See, e.g., Bryan L. Adamson, Federal Rule of Civil Procedure 52(a) as an Ideological Weapon, 34 Fla. St. U. L. Rev. 1025, 1067–75 (2007) (describing the risk that judges will manipulate the standard to pursue ideological preferences).

300. Cooper, supra note 299, at 654.

301. For prominent sources using the phrase, see, e.g., Daniel J. Meador, Appellate Courts: Staff and Process in the Crisis of Volume (1974); Report of the Federal Courts Study Committee 109–10 (1990), https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf [https://perma.cc/5YBY-C2J2] [hereinafter, FCSC Report]. Writing on the eve of the 1985 amendment, Professor Judith Resnik observed a broader tendency to vaunt finality and reduce opportunities for further review across a range of fields, including in the Supreme Court's cases on habeas corpus. Judith Resnik, Tiers, 57 S. Cal. L. Rev. 837, 957–63 (1984); see also Warren E. Burger, Year-End Report on the Judiciary 1–10 (1981) (lamenting rising caseloads and proposing ways to reduce them).

302. See FCSC Report, supra note 301, at 109–31 (offering a formula for determining needed appellate judgeships and describing major structural alternatives to the appellate system to help alleviate the caseload crisis); Thomas E. Baker, Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals 106–286 (1994) [hereinafter Baker, Rationing Justice on Appeal] (describing "intramural" judge-made procedural reforms and "extramural" structural reforms that Congress could enact).

303. See FCSC Report, supra note 301, at 110.

304. See Paul D. Carrington, Daniel J. Meador & Maurice Rosenberg, Justice on Appeal 129–32 (1976) (noting that rational actors will appeal less if their chances of success are reduced by altering standards of review); Charles Alan Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751, 780–81 (1957) ("We may be sure that the

identified the reduction of appeals as a benefit of the amendment.[305] Furthermore, for appeals that do occur, less searching review of the facts probably takes less appellate effort than determining the true state of the facts. (Perhaps that is what the advisory committee meant when it cited "judicial economy" as a benefit of the change.[306]) The 1985 amendment of Rule 52 can therefore be understood as a rational response on the part of the judiciary to the appellate crisis of volume.

But times change, and the crisis of volume has abated. Caseloads in the federal courts of appeals are now lower than they were two decades ago.[307] The flood of filings that led to the perception of crisis was managed through reductions in oral argument, widespread use of nonprecedential opinions, and creation of a corps of staff attorneys, changes that have remained in place even after the high water receded.[308] Some observers have called this "rationing" or have said that it creates a "two-track" system of justice,[309] but we do better by thinking about the problem as one involving, to use Professor Marin Levy's terminology, the allocation of the scarce resource of judicial attention across a large and heterogeneous body of cases.[310] It may be that more judgeships should be created,[311] but, whatever the size of the pie, devoting equal effort to every case should not be the goal. All litigants merit respect, but not all cases have equal claims on appellate resources.

Given this understanding of the problem of judicial-resource allocation, the task is to decide which cases merit the most appellate attention. Or, put differently, *to what end* are we triaging? The answer is that the courts of appeals should deploy their resources where they will do the most good. Again, that is a complicated, multifactored analysis. But some generalizations are possible. From the perspective of accuracy,

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broadened scope of appellate review we have seen will mean an increase in the number of appeals.").

305. Fed. R. Civ. P. 52 advisory committee's note on 1985 Amendment.

306. Id.

307. See Judicial Caseload Indicators - Federal Judicial Caseload Statistics 2023, U.S. Cts., https://www.uscourts.gov/judicial-caseload-indicators-federal-judicial-caseload-statistics-2023 [https://perma.cc/26HF-JN2T] (last visited Aug. 15, 2024) (reporting changes since 2014); see also Federal Judicial Caseload Statistics, U.S. Cts. (March 31, 2009), https://www.uscourts.gov/statistics/table/jci/federal-judicial-caseload-statistics/2009/03/31 [https://perma.cc/P3YR-UU2D] (reporting data going back to 2000).

308. See Wood & Clopton, supra note 227, at 114 (noting the "incredible staying power" of streamlining mechanisms introduced in response to docket pressures).

309. See, e.g., Baker, Rationing Justice on Appeal, supra note 302, at ix; Richman & Reynolds, supra note 92, at xii, 117, 119–20.

310. Marin K. Levy, Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals, 81 Geo. Wash. L. Rev. 401, 405 (2013).

311. See generally Merritt E. McAlister, Rebuilding the Federal Circuit Courts, 116 Nw. U. L. Rev. 1137 (2022) (calling for an increase in circuit judgeships in a way that will more evenly distribute judicial capacity across circuits).

searching review has more value in paper cases than in those featuring conflicting testimony.[312] Within the category of paper cases, not all cases are equally strong candidates for expending the extra effort. The best candidates are likely to be cases with particularly high stakes (leaving that term vague for the moment), for several reasons. Correctness matters more in those cases. And the high stakes mean appeals are likely to be filed anyway, such that the standard of review will not induce more. Finally, the preexisting high likelihood of appeal also limits the damage to the more abstract goal that the district court remain "the main event."[313] These benefits come at a cost, of course, notably including the incremental effort of three judges engaging in careful rather than deferential review, though the reallocation could be done in a way that is neutral with regard to overall effort.[314]

Without attempting to assess every kind of case, and limiting the discussion to civil cases, it is worth highlighting one kind of high-stakes case in which searching review of paper-based decisions is especially likely to be beneficial on net.[315] By now it should not come as a surprise that the category would fit within the traditional equity jurisdiction. The category is appellate review of so-called "nationwide" (or national or universal) injunctions.[316]

The practical problems associated with nationwide injunctions stem in part from a structural feature of the federal judiciary. England had but one Chancellor, though even there appeals of his decrees to the Lords

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312. See supra notes 294–296 and accompanying text.

313. Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985) (internal quotation marks omitted) (quoting Wainwright v. Sykes, 433 U.S. 72, 90 (1977)).

314. There are any number of ways to offset increases in judicial effort here through reductions elsewhere. For example, reinvigorating doctrines of deference to agencies, doctrines that are currently deteriorating, would save the lower courts' time. See Aaron-Andrew P. Bruhl, Hierarchically Variable Deference to Agency Interpretations, 89 Notre Dame L. Rev. 727, 760–61 (2013) (arguing that courts toward the top of the judicial hierarchy should be less deferential than lower courts in administrative cases). Another small time-saver would be to limit defendants asserting qualified immunity to one interlocutory appeal per case. See Bryan Lammon, Reforming Qualified-Immunity Appeals, 87 Mo. L. Rev. 1137, 1201 (2022) (proposing this and other potential limitations).

315. For a consideration of other areas where more searching review is likely to be beneficial, with particular consideration of criminal cases, see, e.g., Oldfather, supra note 293, at 469–94. Different features of criminal cases point in different directions with regard to the benefits of heightened review. Serious criminal cases have high stakes and already have high rates of appeal, but fewer are paper cases, and acquittals on the facts are constitutionally unappealable.

316. The most common term used, "nationwide injunction," is misleading. The potentially problematic aspect of the injunctions (or declaratory judgments, for that matter) is not their geographic scope but the way they effectively extend relief against a law or policy to all potential challengers rather than limiting relief to the plaintiff(s). See Howard M. Wasserman, Concepts, Not Nomenclature: Universal Injunctions, Declaratory Judgments, Opinions, and Precedent, 91 U. Colo. L. Rev. 999, 1006 (2020) (identifying the problem as involving "who" rather than "where").

were found necessary once the system matured, as "it has been thought too much, that the chancellor should bind the whole property of the kingdom, without appeal."[317] But having a single decisionmaker at least had countervailing virtues of preventing inconsistent decisions and forum shopping. Rather than having just one court (or just one person) with injunctive power, we have a system in which every one of our seven hundred district judges is the Lord Chancellor and acts with only loose oversight.[318]

Even short of an outright ban, there are many ways to ameliorate the problems with national injunctions. Congress could limit forum shopping through amendments to the venue statutes,[319] and the judiciary itself could limit the phenomenon of judge shopping by changing case-assignment procedures.[320] More novel is Sam Heavenrich's proposal to amend the Federal Rules of Civil Procedure so that only a court of appeals (or the Supreme Court) could issue a national injunction against federal law.[321] Fewer courts of chancery, in other words. As compared to reinvigorating the institution of the three-judge district court, Heavenrich's proposal has the advantage of retaining the normal hierarchical structure and avoiding the many practical problems that led Congress to largely eliminate the three-judge district courts.[322] True, it would be unusual to differentiate the

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317. Geoffrey Gilbert, The History and Practice of the High Court of Chancery 191 (London, Henry Lintot 1758).

318. See Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 420 (2017) ("[I]n the federal courts of the United States, every judge is a 'Chancellor' in the sense of having power to issue equitable relief.").

319. See Amanda Frost, In Defense of Nationwide Injunctions, 93 N.Y.U. L. Rev. 1065, 1105 (2018); Kate Huddleston, Nationwide Injunctions: Venue Considerations, 127 Yale L.J. Forum 242, 245 (2017), https://www.yalelawjournal.org/pdf/Huddleston_8xcy32or.pdf [https://perma.cc/7GKM-ELR4]. Venue is regulated by statute, and legislation would therefore be required for major changes such as limiting venue to the District of Columbia for suits challenging federal statutes or regulations. See, e.g., 28 U.S.C. § 1391(e)(1) (2018) (providing venue rules for suits against agency heads in their official capacity).

320. The courts acting in their administrative capacity can go a long way toward preventing judge-shopping. See id. § 137(a) (giving district judges and the chief judge authority to divide work among the judges within a district); Jud. Conf. Comm. on Ct. Admin. & Case Mgmt., Guidance for Civil Case Assignments in District Courts (Mar. 2024), https://aboutblaw.com/bdc9 [https://perma.cc/FA29-HB89] (providing new nonbinding policy for case assignment).

321. Sam Heavenrich, An Appellate Solution to Nationwide Injunctions, 96 Ind. L.J. Supp. 1, 3 (2020), https://ilj.law.indiana.edu/articles/Heavenrich_An_Appellate_Solution_to_Nationwide_Injunctions.pdf [https://perma.cc/SBW5-NDLR]. Heavenrich's proposal would work by amending Rule 65. Id. at 10. There are other ways of getting similar results through judicial decisions, such as creating a presumption in favor of an automatic stay. See Ronald M. Levin, Vacatur, Nationwide Injunctions, and the Evolving APA, 98 Notre Dame L. Rev. 1997, 2027 (2023).

322. For prominent lamentations of the extreme complexity of the procedures surrounding the three-judge district courts, see David P. Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 13–77 (1964) (canvassing the many interpretive difficulties that had arisen under the three-judge statutes); Report of the Study

remedial powers of courts in this way, but it is not unprecedented.[323] Reducing the number of bodies with the authority to grant certain injunctions would in fact be consistent with the equitable tradition.

A modest doctrinal reform, which is both consistent with the equitable tradition described in this Article and (not coincidentally) also sensible on functional grounds, is to institute tougher appellate review of nationwide injunctions. Today, the usual standard of review for injunctions is abuse of discretion, with the supporting factual findings being reviewed only for clear error.[324] Yet a deferential standard of review is a poor fit for the reality of national injunctions. What is supposed to be a balancing of the equities often involves competing presumptions rather than factual specificities.[325] When the injunction is issued hastily, either because it is preliminary or because the court has advanced the decision on the merits to the preliminary hearing in light of some exigency,[326] the district judge cannot be said to have the advantage of "living with the case" and getting to know its factual nuances. What is more, many of the findings of fact supporting nationwide injunctions do not emerge from conflicting testimony but instead come from documents or reflect inferences from undisputed testimony.

Consider a few recent examples of the character of the "factfinding" that has supported national injunctions. One comes from the litigation in the Southern District of Texas challenging President Biden's vaccine requirement for federal employees.[327] The court held a telephone hearing

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Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 596–602 (1972) (recommending the abolition of three-judge courts because of the burdens they impose and the complexities of their processes).

323. See 8 U.S.C. § 1252(f)(1) (2018) (providing that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [this part of the immigration statutes]").

324. 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2962 (3d ed. 2013); see also City of Chicago v. Barr, 961 F. 3d 882, 918–20 (7th Cir. 2020) (treating the geographic scope of the injunction as a matter within the district court's discretion); E. Bay Sanctuary Covenant v. Garland, 994 F.3d 962, 974, 988 (9th Cir. 2020) (same); Rodgers v. Bryant, 942 F.3d 451, 457–58 (8th Cir. 2019) (same for defendant-oriented injunction against state law); Milan D. Smith, Jr., Only Where Justified: Toward Limits and Explanatory Requirements for Nationwide Injunctions, 95 Notre Dame L. Rev. 2013, 2018 (2020) ("[A] three-judge appellate panel is limited in the extent to which it can reevaluate the equities of a nationwide injunction absent clear legal standards by which the district court failed to abide.").

325. See Samuel L. Bray, The Purpose of the Preliminary Injunction, 78 Vand. L. Rev. (forthcoming 2025) (manuscript at 10–13), https://ssrn.com/abstract=4922379 [https://perma.cc/3354-77AN] (explaining that preliminary injunctions in public-law cases have come to focus on a prediction of the merits with little attention to the equities, in part due to rules that constitutional violations are irreparable and there is no public interest in the enforcement of unlawful policy).

326. See Fed. R. Civ. P. 65(a)(2).

327. Feds for Med. Freedom v. Biden, 581 F. Supp. 3d 826 (S.D. Tex. 2022), aff'd, 63 F.4th 366 (5th Cir. 2023) (en banc), vacated, 144 S. Ct. 480 (2023).

with no live witnesses (although with many affidavits and other documents submitted) and granted a nationwide preliminary injunction; the short section of the court's opinion addressing the balance of hardships cited just one piece of evidence, a press release.[328] Another recent example is the suit initiated by certain states against the Biden Administration's priorities for immigration enforcement.[329] Here the district court made 135 findings of fact in a lengthy opinion.[330] That sounds like some genuine factfinding, and indeed the court had before it thousands of pages of documents and declarations—and yet only three witnesses testified, all on the states' side, after expedited proceedings.[331] For a third example, the district judge that "stayed" the twenty-year-old FDA approval of mifepristone had before him many pages of documents but heard no live testimony from experts or fact witnesses.[332]

Requests for national injunctions are the kind of thing that merits use of the capacity that courts of appeals have freed up through dispensing with argument and published opinions for the bulk of their cases. From a competence perspective, three judges are as good or better than one at reviewing documentary evidence, drawing inferences from uncontested testimony, and weighing generalized equities derived from the same. Inducing more appeals through the prospect of reversal is not much of a risk for nationwide injunctions, given the high stakes. And a larger bench evens out judge shopping and individual idiosyncrasy.[333] Here, the history had it right.

From a rule-of-law perspective, formal amendment of Rule 52 or other enactments is the best approach to bringing about more searching review. Without that, it is predictable that evasions of the clear-error standard will occur in needful cases sub rosa or that more purported findings of fact will be categorized as something outside of Rule 52, such as legislative facts, mixed questions of law and fact, or the like.

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328. Id. at 836; see also Corrected Telephonic Hearing, *Feds for Med. Freedom*, 581 F. Supp. 3d 826 (No. 3:21-cv-356) (S.D. Tex. Jan. 21, 2022), ECF No. 31.

329. Texas v. United States, 606 F. Supp. 3d 437 (S.D. Tex. 2022), rev'd 143 S. Ct. 1964 (2023). More precisely, this case involved a universal vacatur of a policy on the grounds it was unlawful, not an injunction against the policy. Id. at 498–502.

330. Id. at 451–66.

331. Transcript of Proceedings at 29–47, *Texas*, 606 F. Supp. 3d 437 (No. 6:21-CV-00016), ECF No. 200. This was a final order, but it was entered after the court consolidated the decision on the merits with the request for preliminary relief. *Texas*, 606 F. Supp. 3d at 451 n.3.

332. Transcript of Telephonic Status Conference at 16–17, All. for Hippocratic Med. v. Fed. Drug Admin., 668 F. Supp. 3d 507 (N.D. Tex. 2023) (No. 2:22-cv-00223-Z), ECF No. 133; see also Fed. Drug Admin. v. All. for Hippocratic Med., 144 S. Ct. 1540, 1552 (2024) (determining that the doctors challenging the FDA approval lacked standing, without discussing the standard of review).

333. Cf. Elizabeth Thornburg, (Un)Conscious Judging, 76 Wash. & Lee L. Rev. 1567, 1570 (2019) (explaining that judicial inferences are often shaped by individual experience and the application of heuristics).

Note that it does not necessarily follow that the Supreme Court must apply the same searching standard as the court of appeals. For better or worse, the Court has acquired a distinctive role in our system, in which the law-declaring (or -unifying or -making) function predominates,[334] and there is accordingly a high opportunity cost to it engaging in factual review, at least of honest-to-goodness case-specific facts. The Court's specialization toward deciding important questions of federal law is reflected most significantly in the Court's certiorari criteria, which deprecate factual review,[335] but it also shows up in merits cases via devices like the "two-court rule" for factual findings[336] and deference to regional circuits on state law.[337]

D. *Using the Equitable Remedial Authority that Congress Has Given: Wrapping Up Cases on Appeal*

It only makes sense to end with appellate remedies. Recall the discussion of the differing goals of appellate review in the two traditions and the remedies that courts could wield to effectuate them.[338] To simplify, a court hearing an appeal in equity aimed at the same thing as the trial court: to reach a just resolution of the whole dispute. A court entertaining a writ of error, by contrast, reviewed the (skimpy) record for legal error and either affirmed or reversed, and, because of jury rights and the difficulty of assessing prejudice, the remedy for error was often a new trial. In crafting the remedial authority of the federal courts, Congress chose the equity path, empowering federal appellate courts to affirm, reverse, modify, or remand, as justice may require.[339] The chief limit on that power remains jury rights, but the Seventh Amendment is read to allow appellate courts to render judgments that rational juries would have to give, and

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334. See Paul D. Carrington, The Function of the Civil Appeal: A Late-Century View, 38 S.C. L. Rev. 411, 419–23 (1987) (explaining that discretionary jurisdiction shifted the Court's attention away from the details of cases and toward the resolution of public controversies); Arthur D. Hellman, The Shrunken Docket of the Rehnquist Court, 1996 Sup. Ct. Rev. 403, 429–38 (describing the Court's turn from "rectifying isolated errors in the lower courts" to "provid[ing] doctrinal guidance for the resolution of recurring issues").

335. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

336. See Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

337. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004) ("Our custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located."), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

338. See supra sections I.B–.C.

339. 28 U.S.C. § 2106 (2018).

extensive transcripts and other materials facilitate such determinations.[340] As a result, there are relatively few limitations on an appellate court's power to resolve a case fully and correctly, especially when there is no jury.

And yet despite having all of this authority, federal courts of appeals too often do not use their power to wrap up cases by entering or directing a final judgment.[341] They instead remand cases involving legal disputes that do not require further development of a factual record or implicate any jury rights, such as resolution of whether a complaint fails to state a claim.[342] Another recurring scenario involves interlocutory appeals from decisions granting or denying preliminary injunctions.[343] Suppose that when entertaining such an appeal, the court concludes that the plaintiff's claim underlying the request for preliminary relief is legally unsound. This conclusion should lead the court of appeals to reverse a grant of a preliminary injunction or affirm the denial of one, as the case may be, as a plaintiff with a faulty claim cannot show the requisite likelihood of success on the merits.[344] But going a step further, may the court of appeals hearing an interlocutory appeal of a preliminary injunction also order a final disposition of the case, such as dismissal of the plaintiff's case for failure to state a claim? The history of appellate procedure in equity says it may.[345] To be clear, dismissal on the merits will not be possible in every appeal of a preliminary injunction, including those with unresolved material facts. But today some courts of appeals refuse resolution of the whole case even when doing so is possible, relying on a broad reading of the final-judgment rule, a stingy reading of the doctrine of pendent

340. See Fed. R. Civ. P. 50(e); Weisgram v. Marley Co., 528 U.S. 440, 457 (2000) ("[T]he authority of courts of appeals to direct the entry of judgment as a matter of law extends to cases in which, on excision of testimony erroneously admitted, there remains insufficient evidence to support the jury's verdict.").

341. See supra section I.C.

342. See supra text accompanying note 109.

343. See 28 U.S.C. § 1292(a) (authorizing such appeals).

344. See, e.g., Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 8, 20–24 (2008) (describing the standard for obtaining preliminary injunction).

345. E.g., Smith v. Vulcan Iron Works, 165 U.S. 518, 525 (1897); Dobie, supra note 142, at 797, 801; 8 Hughes, supra note 61, § 5831; see also Joan Steinman, The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After *Swint*, 49 Hastings L.J. 1337, 1427 (1998) [hereinafter Steinman, Appellate Jurisdiction] (stating that "the interpretation of § 1292(a)(1) to empower the appellate courts to hear issues outside the literal scope of the injunctive matters described there has a very long pedigree"). The venerable old *Smith* case involved an appellate court ordering final judgment for the defendant, which would be the typical case. See *Smith*, 165 U.S. at 525. Directing judgment for the *plaintiff* is permissible as well, although it would be the unusual case in which the proceedings at the interlocutory stage would show the plaintiff's conclusive entitlement to prevail on the merits. See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 755–57 (1986); Hurwitz v. Directors Guild of Am., Inc., 364 F.2d 67, 70 (2d Cir. 1966); Dobie, supra note 142, at 801–02.

appellate jurisdiction, or the view that they should not be "courts of first view."[346]

The narrow approach was taken to an extreme in the Fifth Circuit's recent decision involving a challenge by some airline employees to their employer's vaccine requirement.[347] The district court had denied the employees' request for preliminary injunctive relief due to a lack of irreparable harm, one of the necessary elements for a preliminary injunction. A divided panel of the court of appeals reversed and remanded because it found that the district court had erred in failing to find in the plaintiffs' favor on the irreparable-harm issue.[348] In so doing, the majority did not dispute the dissent's convincing arguments that the plaintiffs' case failed for other reasons apparent on the record. The majority reasoned that since the grant or denial of preliminary relief is "within 'the sound discretion of the trial court,' the better course is to allow the district court to consider the other factors in the first instance."[349] That is, the district court should get the first shot at the whole preliminary-injunction analysis, which would then come up on appeal again (barring settlement, mootness, or some other eventuality). The majority's determination mixes up a deferential standard of review—abuse of discretion, though legal error itself constitutes an abuse—with a duty to give the district court the first crack at issues that are already in front of the court of appeals.[350]

Scenarios like those described in the preceding paragraphs do not implicate the Seventh Amendment or other limitations on appellate authority, so the justification for failing to wrap up such cases would need to draw on considerations of prudence and judicial economy. There are

346. Compare OFC Comm Baseball v. Markell, 579 F.3d 293, 298–300 (3d Cir. 2009) (taking the broad view of the scope of appeal), with Sambrano v. United Airlines, Inc., No. 21-11159, 2022 WL 486610, at *6 n.11, *9 n.17 (5th Cir. Feb. 17, 2022) (taking the narrow view and citing the "review, not first view" principle), and Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1043–44 (7th Cir. 2017) (taking the narrow view due to the risk of "swallow[ing] the final-judgment rule"). Some of the courts of appeals' reticence may stem from the Supreme Court's denial of pendent appellate jurisdiction in a collateral-order appeal in Swint v. Chambers Cnty. Comm'n, 514 U.S. 35 (1995), but Steinman persuasively explains that a broad reading of *Swint* would clash with precedent and impair judicial economy. Steinman, Appellate Jurisdiction, supra note 345, at 1393–428.

347. See *Sambrano*, 2022 WL 486610; supra section I.C.

348. *Sambrano*, 2022 WL 486610, at *1.

349. Id. at *9 n.17 (quoting White v. Carlucci, 682 F.2d 1209, 1210 n.1, 1211 (5th Cir. 1989)). When further factual development is necessary, remand is appropriate, but the dissent provided alternative grounds for affirmance that were *legal* in nature.

350. Cf. Sec. Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943) (distinguishing between situations in which it would be "wasteful" to remand because the case may be decided "on another ground within the power of the appellate court to formulate" and those in which decisionmaking authority is restricted to a jury or an administrative agency).

too many factors to address all of them here,[351] but it is possible to highlight a recurring mistake that leads the courts of appeals to wrap up too few cases. This is the troublesome proposition, cited in a number of unnecessary remands, that the courts of appeals are "court[s] of *re*view, not first view."[352] Taken one way, it is just a truism about being an appellate court. Taken in the sense in which the courts of appeals often use it—as preventing them from resolving any issue not decided below—it is an invasive transplant from its origin in the Supreme Court.[353] The Supreme Court has come to have a special role of unifying and superintending federal law, and it has been given (or, to some degree, has seized) tools of discretionary jurisdiction and question selection to facilitate that narrow but important task, the ordinary judicial activity of dispute resolution having been left far behind.[354] That is not a model for the courts of appeals, whose jurisdiction is largely mandatory and extends to the judgment under review rather than a single question it picks; for them, the case-resolution function plays a relatively greater role.[355] So when these courts can resolve a case on appeal, as when factfinding is not required and the parties have been heard on the matter, they presumptively should.

There are any number of ways one could (re)enforce the duty to resolve, including ways that distinguish between courts at different levels. The Texas Rules of Appellate Procedure, for instance, provide that the intermediate courts of appeals "must render the judgment that the trial court should have rendered" except when a remand is necessary, while allowing the state supreme court the flexibility to remand "in the interest of justice . . . even if a rendition of judgment is otherwise appropriate."[356]

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351. For a thorough consideration of the many factors that bear on whether a court of appeals should decide an issue in the first instance, see Joan Steinman, Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance, 87 Notre Dame L. Rev. 1521, 1602–16 (2012).

352. Utah v. Su, 109 F.4th 313, 318 (5th Cir. 2024); see also *Sambrano*, 2022 WL 486610, at *9 n.17 (quoting Montano v. Texas, 867 F.3d 540, 546 (5th Cir. 2017)).

353. The brocard originated in Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), though of course the sentiment preceded *Cutter*.

354. See Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill, 100 Colum. L. Rev. 1643, 1704–13, 1730–37 (2000) (describing the rise of discretionary aspects of the Court's jurisdiction and the decline of its dispute-resolution function); see also Hellman, supra note 334, at 429–38 (describing the Court's "Olympian" tendencies and self-conception); Johnson, supra note 114 (questioning the legality of the Court's practice of selecting questions for review rather than cases).

355. See Meador, Appellate Courts in the United States, supra note 71, at 17 (describing the differing primary roles of intermediate and supreme courts); Bruhl, Remand Power, supra note 95, at 184–85, 245–46 (observing that the courts of appeals are improperly emulating the Supreme Court by moving toward a law-declaration model). Given the different roles of the Supreme Court and courts of appeals, the claim that the courts of appeals are overusing the "court of review" mantra is not inconsistent with Vladeck's claim that today's Supreme Court is too often failing to honor it. Vladeck, supra note 2, at 2.

356. Tex. R. App. P. 43.3, 60.3.

CONCLUSION

Let's return to where we started. Things are strange in the appellate hierarchy: national injunctions all over, the shadow docket and certiorari before judgment, the Supreme Court being criticized for making factual findings. A natural tendency is to respond by looking backwards for a proper understanding of the roles of different courts. Consider again Senator Whitehouse's comments, in which he criticized the Supreme Court's factfinding as contrary to traditions of appellate practice.[357] Well, yes and no. There are multiple traditions, and they do not stand still. The Supreme Court's actions in the cases that Whitehouse criticized may have been wrong, but when we look for guidance from traditional practice, we find not simple answers but complexity and possibility.

Sections II.C and II.D suggested a few reforms to federal appellate practice but did not claim that tradition or original understanding compels them. Something like that would have been Justice Wilson's position in *Wiscart*.[358] Better is to say that the law permits rather than requires the changes and that history shows some of their wisdom. As the great historian of English law Frederic William Maitland said of the study of legal history, its utility lies in liberating us from preconceptions and teaching us "that [we] have free hands."[359] Whether the changes addressed here are desirable depends mostly on whether they are desirable in our current circumstances.

357. See supra text accompanying notes 6–10.

358. See supra section II.A.

359. Letter from F.W. Maitland to A.V. Dicey (c. 1896), *in* 2 The Letters of Frederic William Maitland 104, 105 (P.N.R. Zutshi ed., 1995).

NOTES

COUNTERING A PHOBIC FRAME: UNDERSTANDING AND ADDRESSING GENDER-AFFIRMING CARE BANS

*Sohum Pal**

Legislatures, courts, and media outlets have manufactured legal and scientific uncertainty around gender-affirming care. This is the result of a phobic frame that vanishes the perspectives of minors and reduces decisionmakers' confidence. This Note identifies that gender-affirming care bans should not be understood primarily as forms of sex discrimination, but instead as a form of unjustified impairment of minors' self-determination. The solution, necessarily, must question and overturn assumptions about decisionmaking competency for minors, rather than relying on equal protection or a sex discrimination analysis like Bostock v. Clayton County. *This Note argues that courts need only inquire into whether a minor is competent to decide about gender-affirming medical intervention because restrictions on minors' bodily autonomy must be justified rather than accepted at face value.*

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INTRODUCTION

In a speech at the Conservative Political Action Conference in 2023, commentator Michael Knowles claimed that "[f]or the good of society, transgenderism must be eradicated from public life entirely," though he later claimed he had not been calling for a genocide.[1] Reviewing a preliminary injunction from the Middle District of Alabama in August 2023, the Eleventh Circuit found that bans on gender-affirming care for trans youth did not violate the Equal Protection Clause.[2] On March 2, 2023, the Tennessee legislature passed Senate Bill 0001, prohibiting healthcare providers from providing gender-affirming care (including puberty blockers and hormone replacement therapy) to minors.[3] An analysis by NPR found state legislators had collectively introduced 306 bills targeting trans people, the vast majority focused on transgender youth.[4]

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1. Kelly McClure, CPAC Speaker Says, "Transgenderism Must Be Eradicated," While Claiming It Doesn't Exist, Salon (Mar. 4, 2023), https://www.salon.com/2023/03/04/cpac-speaker-says-transgenderism-must-be-eradicated-while-claiming-it-doesnt-exist/ [https://perma.cc/F7RK-62L5] (internal quotation marks omitted) (quoting Michael J. Knowles). Knowles had also denied his language amounted to a call for genocide during his show, claiming "[T]ransgender people is not a real ontological category. It's not a legitimate category of being . . . . They are laboring under a delusion and so we need to correct that delusion." Michael Knowles Show, 'The Trans Card' Is a Weapon for Libs and Criminals, SoundCloud, at 06:28–06:45 (Feb. 28, 2023), https://soundcloud.com/michaelknowlesshow/ep1192 (on file with the *Columbia Law Review*).

2. See Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1227 (11th Cir. 2023).

3. See Adam Polaski, Tennessee Governor Signs Bill Banning Access to Lifesaving Medical Care for Transgender Youth, Campaign for S. Equal. (Mar. 3, 2023), https://southernequality.org/tennessee-governor-signs-bill-banning-access-to-lifesaving-medical-care-for-transgender-youth/ [https://perma.cc/U76P-B7GQ].

4. Koko Nakajima & Connie Hanzhang Jin, Bills Targeting Trans Youth Are Growing More Common—And Radically Reshaping Lives, NPR (Nov. 28, 2022), https://www.npr.org/2022/11/28/1138396067/transgender-youth-bills-trans-sports [https://perma.cc/NW23-GHM9] ("[O]ver the past two years, state lawmakers introduced at least 306 bills targeting trans people, more than in any previous period. A majority of this legislation, 86%, focuses on trans youth.").

An observer might conclude that skepticism and hostility toward trans youth is the spirit of the times.

Such intense focus on youth should prompt pause: More general laws targeting the provision of gender-affirming care would include minors as well, but general laws targeting all trans people are a small portion of the laws being passed.[5] Instead, legislators focus on youth because minors' autonomy is limited, subject to the wills of parents and guardians as well as the wills of institutional actors (such as school officials, social workers, and so on).[6] One rationale for that may be that "children's ongoing development is understood to compromise their ability to make good judgments on their own behalves."[7] The result, then, is a law governing children that affords children nearly no authority over themselves. This materializes more precisely in the legal challenges surrounding trans youth, a space wherein legislators can ignore the voices of the most-affected population—trans minors with virtually no access to democratic processes except as mediated through their caretakers or other adults who are willing to listen.

This Note addresses this silencing by offering a paradigm for considering the rights and competencies of minors in decisions around gender-affirming care. This Note also seeks to address and unify two regulatory domains: the domain of state action, in which states are legislating against gender-affirming care, and the domain of parental rights, in which parents' wishes trump their children's. Part I provides historical and doctrinal context on the rights and duties of minors and parents, drawing on *Bellotti v. Baird*[8] and *Planned Parenthood v. Danforth*.[9]

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5. Id.

6. See Laura A. Rosenbury, Between Home and School, 155 U. Pa. L. Rev. 833, 833 (2007) (noting that authority over the lives of children is distributed across parents, the state, and children themselves).

7. Emily Buss, Allocating Developmental Control Among Parent, Child and the State, 2004 U. Chi. Legal F. 27, 35.

8. 443 U.S. 622 (1979) (plurality opinion).

9. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976). Some definitions are in order: Transphobia can provisionally be described as "negative attitudes (hate, contempt, disapproval) directed toward trans people because of their being trans. . . . Transphobia occurs in a broader social context that systematically disadvantages trans people and promotes and rewards antitrans sentiment. It therefore has a kind of rationality to it, grounded in a larger cisgenderist social context." Talia Mae Bettcher, Transphobia, 1 Transgender Stud. Q. 249, 249 (2014) (citation omitted) (citing Patrick Hopkins, Gender Treachery: Homophobia, Masculinity, and Threatened Identities, *in* Rethinking Masculinity: Philosophical Explorations in Light of Feminism 95 (Larry May & Robert A. Strikwerda eds., 1996)).

Gender-affirming care "affirms diversity in gender identity and assists individuals in defining, exploring, and actualizing their gender identity, allowing for exploration without judgments or assumptions. . . . Gender-affirming care . . . [can include] psychoeducation about gender and sexuality (appropriate to age and developmental level), parental and family support, social interventions, and gender-affirming medical interventions." Kareen M. Matouk & Melina Wald, Gender-Affirming Care Saves Lives, Colum. Univ. Dep't

Part II offers "the phobic frame" as a framework for analyzing the public discourse over minors seeking gender-affirming care. Part III argues that minors' rights to gender-affirming care should be expansive and offers a test for courts to employ in deciding whether to judicially bypass a parent's veto.

I. CONTESTED PARENTS' AND MINORS' RIGHTS IN A PHOBIC FRAME

This Part offers a brief overview of the legal and normative background on parental rights. Section I.A describes the dissolution of what family law scholars Anne C. Dailey and Laura A. Rosenbury call "child coverture," that system by which fathers (and later, parents) could historically stand in for the legal personalities of their children.[10] Section I.B considers the normative values that might weigh in favor of or against strong parental rights. Section I.C then describes what this Note calls the "phobic frame," how the timbre of the present discourses around parents' rights in relation to children's gender identities both obfuscates the settled science behind gender-affirming care and continually shores up a view of parental rights as under attack from without, rather than being internally contradictory.

A. *Parents' Rights, Minors' Needs*

Most of United States history has seen parents exercise nearly unlimited control over their children (legally speaking, even infanticide did not necessarily constitute a limit).[11] This was borne of a proprietarian view of children as the assets of their fathers and of the persistent collapsing of children's personalities into those of fathers dating from mid-seventeenth century English law.[12] But by the eighteenth century, as William Blackstone was writing, the law had come to recognize fathers' authority as following from duties owed to their natural children (including illegitimate children), namely duties of maintenance,

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Psychiatry, (Mar. 30, 2022), https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives [https://perma.cc/9BUU-FQ3T]. This Note, unless otherwise qualified, uses children and minors interchangeably because the questions here regarding transition and rights specifically refer to the transition and rights of minors. Moreover, the age of pubertal onset may lead minors to make choices at an age when they may be considered a "child," "teen," or "young adult," while there is no clear standard by which to make the distinction.

10. Anne C. Dailey & Laura A. Rosenbury, The New Parental Rights, 71 Duke L.J. 75, 90 (2021).

11. See Barbara Bennett Woodhouse, From Property to Personhood: A Child-Centered Perspective on Parents' Rights, 5 Geo. J. on Fighting Poverty 313, 314 (1998) ("As recently as in 1920 a parent who killed a child in the course of punishment could claim a legal excuse for homicide in no fewer than nine states.").

12. See Dailey & Rosenbury, supra note 10, at 88–90; see also 1 William Blackstone, Commentaries on the Laws of England *440–441; Woodhouse, supra note 11, at 314.

protection, and education.[13] If parents abandoned their children or failed to provide for their children's maintenance, Blackstone writes, a church could confiscate a parent's estate and dispose of it in support of the child; in the particular case that a Catholic parent sought to compel a Protestant child to convert through withholding maintenance, a (presumably older) child could go to court to compel a father to satisfy his duty of maintenance.[14] As a correlative, children owed parents "subjection and obedience during [their] minority, and honour and reverence ever after," and both protection and maintenance to their parents "in the infirmity of their age."[15] By statute, even a "wicked and unnatural progenitor" could haul a child to court to vindicate these obligations.[16]

The American system has been less inclined to see parents and children as mutually bound by duties.[17] For example, the twentieth-century American cases *Yoder* and *Pierce* recognize a nearly unlimited right for parents to direct their children's educations, which states have scrupulously recognized by unqualifiedly protecting homeschooling and passing laws that allow parents line-item vetoes of school curricula, with limited attention paid to the adequacy of the education.[18] Some states have even civilly immunized parents in the name of protecting parental prerogative, developing doctrines of parental tort immunity to prevent children's private recovery when injured by their parents.[19]

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13. 1 Blackstone, supra note 12, at *436–441.

14. Id. at *436–437. This remark clarifies that parental rights were bound up in and partly constrained by government policies, such as the nineteenth-century British bias against Catholics.

15. Id. at *441.

16. Id. at *442.

17. There is, however, some sense of reciprocity in *rights* between parents and children. See, e.g., Bennett v. Jeffreys, 356 N.E.2d 277, 281 (N.Y. 1976) ("The parent has a 'right' to rear its child, and the child has a 'right' to be reared by its parent."). In a Hohfeldian conception, it would appear that those rights imply correlative duties, see Wesley Newcomb Hohfeld, Fundamental Legal Conceptions: As Applied in Judicial Reasoning 36 (Walter Wheeler Cook ed., 1978) (arguing that rights are correlative with duties), but as David Lyons has recognized, any correlation between rights and duties may not be general, for "the implications between them vary substantially with the kind of right in question; it is not clear that all rights imply duties; and even if they do, to emphasize the common elements is to obscure important differences among the 'correlations.'" David Lyons, The Correlativity of Rights and Duties, 4 Noûs 45, 45–46 (1970).

18. Jill Elaine Hasday, Family Law Reimagined 152–53 (2014) (discussing Wisconsin v. Yoder, 406 U.S. 205 (1972), and Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).

19. Id. at 154. Of course, parents may still be criminally liable for abuse or related crimes. Id. at 155. Courts have also recognized basic requirements for parents to be able to assert their rights and have often used the power to terminate parental rights to violent effect. See Jennifer Wriggins, Parental Rights Termination Jurisprudence: Questioning the Framework, 52 S.C. L. Rev. 241, 241–43 (2000) (describing Supreme Court decisions that narrowed parental rights); see also Anne C. Dailey, In Loco Reipublicae, Yale L.J. 419, 451 (2023) ("[T]he definition and scope of parental rights turns on underlying assumptions about the parental role. Increasingly, those who fulfill the role—in other words, those who assume (or intend to assume) parental duties—enjoy parental rights.").

The language of parental rights, however, signifies two separate relationships. First, parental rights may refer to parents' rights to make individual decisions for their children, rather than allowing the state to decide. Second, however, parental rights may refer to parents' ability to make individual decisions for their children *instead of allowing their children to make those decisions*. Scholars, particularly those critical of the child welfare/family policing system, have noted that parental rights are racialized, that white parents are afforded the right to make choices for their children, but the decisions of Black and other nonwhite parents are heavily scrutinized and sometimes overridden by state actors.[20] Scholars critical of children's rights have noted that the rhetoric of children's rights can serve as a smokescreen for the motives of adults.[21] This Note focuses on the relationship between parents and children and the rights negotiated between them, in part because parental rights against states are more often implicated in questions around the state's educational capacities interfacing with parents' roles as educators of their own children,[22] whereas this Note is more concerned with the private life of a child, their parents, and how gender develops in that interface, which the twentieth-century pediatric psychoanalyst D.W. Winnicott might have called the cultural space.[23]

B. *Normative Foundations for Parental Rights*

The earliest cases have tended to frame the developments of parental rights as promoting the freedom of families by reducing the role of the state in the parent–child relationship and in family life more generally.[24]

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20. See, e.g., Dorothy Roberts, Shattered Bonds: The Color of Child Welfare 59 (2002) [hereinafter Roberts, Shattered Bonds] ("From the outset, most Black families diverge from the [white heteropatriarchal] ideal because they are headed by unmarried mothers. . . . The Black community's cultural traditions of sharing parenting responsibilities among kin have been mistaken as parental neglect.").

21. See Martin Guggenheim, What's Wrong With Children's Rights, at xii–xiii (2005). This approach creates a strawman wherein Guggenheim and others need not actually address the substance of what it would mean to empower children to make decisions for themselves and instead need only focus on children's rights as a smokescreen.

22. Latoya Baldwin Clark, The Critical Racialization of Parents' Rights, 132 Yale L.J. 2139, 2200 (2023) (describing how parents' rights rhetoric has been used to narrow school curricula in the name of excluding "critical race theory"); Mary Ziegler, Maxine Eichner & Naomi Cahn, The New Law and Politics of Parental Rights, 123 Mich. L. Rev. (forthcoming 2024) (manuscript at 21–22), https://ssrn.com/abstract=4552363 [https://perma.cc/H35C-NL84] (noting that the parental-rights movement has "mobilized parental-rights rhetoric to restrict what schools can cover relating to gender identity").

23. See D. W. Winnicott, Playing and Reality 135 (Routledge 2010) (1971) ("The place where cultural experience is located is in the *potential space* between the individual and the environment (originally the object). The same can be said of playing. Cultural experience begins with creative living first manifested in play.").

24. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (noting that the Due Process Clause protects "the right of the individual to . . . establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to

This may be normatively preferable: State intervention often harms families in poverty, families of color, and families that do not adhere to white, middle-class heteropatriarchal norms.[25] Moreover, scholars argue, parents' more specific knowledge of their children and their needs give parents a natural advantage in providing for their children's development.[26] Finally, limited state involvement can promote the development of families with diverse values and traditions, serving and preserving normative preferences for social pluralism.[27]

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enjoy those privileges . . . essential to the orderly pursuit of happiness by free men"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

25. See Note, Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis, 102 Harv. L. Rev. 617, 617 (1989) ("[S]ome state courts deny custody to parents who are labeled, by themselves or by their ex-spouses, 'homosexual.' These courts reason that custody with such parents might result in stigmatization or harassment, harm the children's moral well-being, or adversely affect their sexual orientation." (footnote omitted)); see also Roberts, Shattered Bonds, supra note 20, at 59–60 ("Caseworkers often misinterpret Black parents' cultural traditions, demeanor, and . . . means of handling family distress as neglect. . . . Because these mothers do not fit the middle-class norm of a primary caregiver supported by her husband and paid child care, they are perceived as having abrogated their duty toward their children.").

26. See, e.g., Buss, supra note 7, at 27 ("If we knew absolutely nothing about the pathways of developmental influence, or had no reason to prefer some developmental outcomes over others, we would be wise to leave the upbringing of children entirely to private actors . . . with the greatest direct stake and investment in a child . . . ."); Clare Huntington & Elizabeth Scott, The Enduring Importance of Parental Rights, 90 Fordham L. Rev. 2529, 2529 (2022) ("[P]arental rights ensure that parents, rather than a . . . state actor . . . make decisions about what advances a child's interests. The legal system defers to parents' decisions . . . because parents are well positioned to know what an individual child needs . . . .").

27. See Buss, supra note 7, at 27 (noting that expansive parental rights "would comport with our commitment to pluralism by allowing one generation to perpetuate its own diversity, and even expand upon it, in the next generation"); Dorothy E. Roberts, Child Welfare and Civil Rights, 2003 U. Ill. L. Rev. 171, 178 ("Parents' freedom to raise their children is important not only to individuals but also to the welfare or even survival of ethnic, cultural, and religious groups."). This Note operates under the position that pluralism is a worthwhile goal for American society. One persuasive reason is offered by the political theorist Carla Yumatle:

> [Pluralist commitment] puts a specific form of normative deliberation at the core of human experience. Insofar as ethical evaluation cannot be reduced to one single goal set for us beforehand, or to any calculation of the most efficient means to achieve one overarching value, pluralism is an antidote to instrumental rationality, a reminder that value decisions will never escape us and that we are bound to normatively orient ourselves unceasingly.

Carla Yumatle, Pluralism, *in* The Encyclopedia of Political Thought 2724, 2740 (Michael T. Gibbons ed., 2015). In this sense, pluralism keeps us on our toes and forces us to remain open and responsive to the difference as it presents itself in the world. For a historically situated discussion of an American normative preference for pluralism, see generally John G. Gunnell, The Genealogy of American Pluralism: From Madison to Behavioralism, 17 Int'l Pol. Sci. Rev. 253 (1996) ("Pluralism has been the dominant ideology of democracy in

But the structure of developmental control, as Emily Buss has argued, is not bipolar, but is instead triangular, control of children's development being allocated among parents, the state, and children themselves.[28] Both institutional actors and scholars often assume that parents' preferences and children's preferences coincide;[29] in this view, children presumptively lack the developmental capacity to identify and satisfy their own needs, whereas parents have better capacities for both relative to their children.[30] Consequently, the law normatively produces parents with supreme authority who may flagrantly disregard children's objections, limited only by parents' own sense of compunction and projected fears about how such disregard may sour a future parent–child relationship.

But this abstract legal view flattens the obvious reality that parents and children disagree constantly, demonstrating divergence between parents' perspectives and children's views on children's needs and how best to satisfy them. The frequency of this disagreement might encourage pause or even suspension of the belief that parents' knowledge is superior in every context. In infancy, children will refuse to eat, retain bowel movements, and cry for reasons that evade even attentive caretakers.[31] As children get older, they begin to contest parental control in more ideological ways, seeking knowledge that parents and teachers may deem inappropriate, seeking the company of friends their parents disapprove of (and perhaps *because* those friends draw parental opprobrium), and developing political views parents find illogical and even unthinkable. By the end, a child has sloughed off most (but, a parent may hope, not all!) dependencies; parents "los[e] [their children] to the world. Which is the point of your children growing up. If you do a good job, they go out into that world and make a life."[32] That is, one view of parenting's end goal might be to encourage children's differentiation from their parents—this,

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twentieth-century American political science as well as one of the discipline's central research programs.").

28. See Buss, supra note 7, at 30 ("There is another, often overlooked, private competitor for developmental control whose claims have not always been subrogated to those of parent and state: the child, in asserting the right to make choices for herself, asserts a claim for developmental control.").

29. See, e.g., discussion of Wisconsin v. Yoder, 406 U.S. 205 (1972) in Hasday, supra note 18, at 153 ("Only one of the Amish children at issue, Frieda Yoder, even testified during the course of the lawsuit . . . . Both sides in the litigation ignored the other Amish children, who were never asked whether and why they wanted to leave school after eighth grade.").

30. See Hillary Rodham, Children Under the Law, 43 Harv. Ed. Rev. 487, 492 (1973) ("Even when a child cannot or will not recognize the identity of his interests with his parents', the law ordinarily does so, confident that children usually do not know what is best for themselves.").

31. See, e.g., Sigmund Freud, Three Essays on the Theory of Sexuality, *in* 7 The Standard Edition of the Complete Psychological Works of Sigmund Freud 125, 186 (James Strachey, Anna Freud, Alix Strachey & Alan Tyson eds. and trans., 1959) (describing anal retention).

32. Helene Stapinski, Opinion, Rediscovering My Daughter Through Instagram, N.Y. Times (Dec. 8, 2018), https://www.nytimes.com/2018/12/08/opinion/sunday/parenting-instagram-adolescence.html (on file with the *Columbia Law Review*).

too, might accord with any normative commitments to pluralism. The state typically privileges parents in these disagreements; the key exceptions, discussed in section II.C, are (reproductive) healthcare decisions, cases in which the law allows that healthcare is so closely tied up with a minor's individual body that parents may not have rights to override minors' decisions.

C. *Conforming Factors, Counterconforming Factors, and Phobic Frames*

While tolerance in the abstract sounds like a hallmark of social and political liberalism,[33] abstract commitments to tolerance may encounter a roadblock in apparently radical otherness. For some cisgender parents, this radical otherness appears in their transgender children.[34] In pointing out how gender can be a site of contestation between parents and children, the purpose is not to delegitimize children's genuine experiences of gender dysphoria, but instead to recognize that gender is always contested, that it is a domain of symbols and meanings in which parents, children, and others (such as the state[35] or healthcare workers[36]) make claims, encouraging the performance of binary gender roles and creating gendered expectations.[37]

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33. See, e.g., Kok-Chor Tan, Liberal Toleration in Rawls's *Law of Peoples*, 108 Ethics 276, 289 (1998) ("The idea of toleration is, of course, shared by all liberals. It is a central liberal belief that the state ought not to discriminate between individuals' genuinely private conceptions of the good life.").

34. This sense of radical otherness could be linked to the destabilizing of contained gender and sexual binaries, concordances that dictate what genitals dictate what sex, which dictates what gender. A more capacious sense of gender, "of large numbers of possible combinations of bodies, gender expressions and sexual orientations borders on the sublime—it confronts us all with a vision of potentially infinite specific possibilities for being human," and produces a kind of overwhelm, the "sensory dimension of the experience of the sublime— . . . shutting down is a form of psychical protection against the terror of boundary collapse at the edge of limitlessness." T. Benjamin Singer, From the Medical Gaze to Sublime Mutations: The Ethics of (Re)Viewing Non-Normative Body Images, *in* The Transgender Studies Reader 601, 616 (Susan Stryker & Stephen Whittle eds., 2006). Singer's explanation is useful too, as a necessary complement to "the phobic frame" described infra notes 51–52 and accompanying text. In Singer's view, "[t]he sublime effect of exceeding the cognitive limit is produced, to a significant degree, by the collapse of the medical gaze's epistemological frame. In that sublime moment of rupture, bodies that literally and metaphorically exceed two-dimensional medical images step into a new social context, and make new ethical claims." Id.

35. See Buss, supra note 7, at 30 ("[T]he legal challenges regarding parental identity focus on the allocation of authority between genetic parents and the state in assigning that identity.").

36. See Saru Matambanadzo, Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law, 12 Cardozo J.L. & Gender 213, 213 (2005) ("Immediately after birth the sexing begins as Josephine is wrapped in a pink blanket and Joseph is wrapped in a blue one, as a doctor or midwife declares the child's sex to its parents.").

37. While it is tempting to some to locate this insight in the work of radical Western feminists such as Judith Butler (Bodies that Matter: On the Discursive Limits of Sex xii (2d ed. 2011) ("'Sex' is, thus, not simply what one has, or a static description of what one is: it will be one of the norms . . . that . . . qualifies a body for life within the domain of cultural

This contest is negotiated amidst a field of conforming factors, those factors that urge children to adopt certain understandings of gender conformity. For example, laws granting parents all-but-absolute authority over their children enable parents' claims about their children's genders to have more weight. Practices by which medical professionals announce infants' sex with the language of gender ("It's a boy!" or "You have a baby girl!"), or perform procedures on the genitalia of intersex infants to produce conformity with a binary sex and corresponding gender identity make children into boys or girls, decisions that parents often direct or collude in.[38] Parents go on to dress, speak to, and construct projections of

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intelligibility.")) and Simone de Beauvoir (The Second Sex 273 (H.M. Parshley ed. and trans., Jonathan Cape 1956) (1949) ("One is not born, but rather becomes, a woman.")), the reality is that the hegemony of the gender–sex equation has seen challenges in cross-dressing, nonbinary genders ranging from the *hijras* of South Asia (see Jessica Hinchy, Governing Gender and Sexuality in Colonial India: The Hijra, c.1850–1900, at 1 (2019) (introducing the persecution and characteristics of the Hijra)) to the Fa'Afafines of Samoa (see Johanna Schmidt, Redefining Fa'afafine: Western Discourses and the Construction of Transgenderism in Samoa, Intersections: Gender, Hist. & Culture Asian Context, Aug. 2001), to intersex lives (see Nico Mara-McKay, Becoming Gendered: Two Medieval Approaches to Intersex Gender Assignment, 7 Prandium: J. Hist. Stud., no. 1, 2018, at 1, 1 ("The methods for determining gender differ between Christian and Muslim contexts, and a comparison between their approaches to sex designation reveals the varied ways that gender was constructed and the social functions it served.")), and in eunuchry (see Shadab Bano, Eunuchs in Mughal Household and Court, 69 Proc. Indian Hist. Cong. 417, 422 (2008) ("Often the resentment against any eunuch-officers harped upon his physical deformity, his effeminate characterstics [sic], his closeness to womanly nature and association with women etc.")) globally throughout recorded history. Yet:

> [I]f what we call gender identity turns out to have a material foundation in the body for some but not for others—would that somehow invalidate the existence of people whose self-avowed gender identity or gender expression has no bearing on the biological circumstances of their birth? Instead of establishing an ontological foundation for sex reclassification—as if the presence of gender non-normative people requires a justification or even an explanation[,]

we may be better served by interrogating the very need for sex and gender classifications, what need the insistence on reifying the con- and discordances of so-called "sex" and so-called "gender" serves. See Paisley Currah, Sex Is as Sex Does: Governing Transgender Identity, at xvii (2022).

38. See Kevin G. Behrens, A Principled Ethical Approach to Intersex Paediatric Surgeries, 21 BMC Med. Ethics, no. 108, 2020, at 1, 2–3 (concluding that physicians' views are often dispositive in surgical decisions for intersex infants); Alyssa Connell Lareau, Note, Who Decides? Genital-Normalizing Surgery on Intersexed Infants, 92 Geo. L.J. 129, 130–31 (2003) ("Once physicians obtain parental consent . . . physicians shift responsibility for making the decision . . . to the parents. This shift in focus leaves unanswered the antecedent question . . . Whether parents have the legal right to consent to surgery on their infants that is irreversible, essentially cosmetic, and most often medically unnecessary."). Professor Frances E. Olsen offers a less objectionable account of gender differentiation than most:

> Gender differentiation serves a useful human purpose analogous to that served by religion. The gradual shifts that have taken place in our understanding of maleness and femaleness can be seen as reflections of an historical process resulting in deeper self-knowledge. The historical progress of gender differentiation consists in recognizing that what was

their children as cisgender and heterosexual and then act in accordance with those projections.[39] Teachers and peers do the same, further developing children's understanding of gender both personally and conceptually.[40] Later in life, parents, friends, and others may express disapproval about trans people and may directly insist to youth that they are not transgender, because they are too young to know, or because parents conflate other mental illnesses with gender dysphoria.[41] Medical professionals may refuse to provide patients with gender-affirming medical care, either on their own volition or because of laws penalizing medical professionals for doing so.[42]

But there are also counterconforming factors: those factors that, rather than urge conformity, create space for alternatives to that cisgenderist concordance. Perhaps most self-evident is the fact that greater visibility for trans people has meant that today's Americans are more likely to report knowing a trans person (and consequently, to be trans themselves).[43] Why might this be? While far-right opponents of trans rights have suggested that youth are vulnerable to a kind of "social contagion" termed "rapid-onset gender dysphoria," that view has been debunked.[44]

> previously considered immutable is contingent and subject to human control. The division of human beings into male and female could be judged to have been a useful device for enabling us to become conscious of the wide range of human possibilities.

Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497, 1571 (1983). This parallels the defense of pluralism offered by Carla Yumatle, supra note 27.

39. See Heidi M. Gansen & Karin A. Martin, Becoming Gendered, *in* Handbook of the Sociology of Gender 83, 84–85 (Barbara J. Risman, Carissa M. Froyum & William J. Scarborough eds., 2d ed. 2018) ("Parents gender their children as they choose toys, activities, décor, and clothing, and in their expectations for behaviors . . . .").

40. See id. at 85–89 ("Teachers affect the construction of gender in preschool through implementing hidden curricula, which construct and reconstruct gendered bodies." (citation omitted)).

41. See, e.g., Katie J.M. Baker, When Students Change Gender Identity, and Parents Don't Know, N.Y. Times (Jan. 22, 2023), https://www.nytimes.com/2023/01/22/us/gender-identity-students-parents.html (on file with the *Columbia Law Review*) (reporting a parent's response that "I'm afraid of medicalization. I'm afraid of long term health. I'm afraid of the fact that my child might change their mind." (internal quotation marks omitted)).

42. See Polaski, supra note 3 (reporting on state laws in Tennessee, Utah, Mississippi, and South Dakota that limit youth access to gender-affirming health care).

43. Robert P. Jones, Natalie Jackson, Maxine Najle, Oyindamola Bola & Daniel Greenberg, Pub. Religion Rsch. Inst., America's Growing Support for Transgender Rights 1, 16 (2019), https://www.prri.org/wp-content/uploads/2019/06/PRRI_Jun_2019_LGBT-Survey-1.pdf [https://perma.cc/L56N-BNDA] ("Less than one-quarter (24%) of Americans report having a close friend or family member who is transgender . . . . Notably, the proportion of Americans who say they have a close friend or family member who is transgender has more than doubled since 2011 (11%).").

44. See Greta R. Bauer, Margaret L. Lawson & Daniel L. Metzger, Do Clinical Data from Transgender Adolescents Support the Phenomenon of "Rapid Onset Gender Dysphoria"?, 243 J. Pediatrics 224, 225 (2022) ("We did not find support within a clinical population for a new etiologic phenomenon of rapid onset gender dysphoria during

Rather, as clinical psychologist Diane Ehrensaft suggests, "[i]t is not rapid-onset gender dysphoria, . . . [i]t's rapid-onset parental discovery" when parents learn of their children's gender identity after children have already grappled with it for months or even years.[45]

Trans visibility produces a meaningful benefit: Seeing trans lives in media and in real life "acts as a staging ground for the types of life that are permitted to become real and to shape reality in turn."[46] In other words, trans visibility can also make trans life viable, in part because it produces space for youth to interrogate their own gender identities, "to imagine other ways of being gendered in their everyday lives," and to lay their own claims to the contested fields of their genders.[47] Similarly, trans visibility makes it possible for minors to seek community with other minors who are interrogating their own gender identities or have already developed a sense of themselves as trans.[48] Supportive environments in schools, homes,

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adolescence."); see also Arjee Javellana Restar, Methodological Critique of Littman's (2018) Parental-Respondents Accounts of "Rapid-Onset Gender Dysphoria," 49 Archives Sexual Behav. 61, 65 (2020) (rejecting Littman's theory of "rapid-onset gender dysphoria"); Timmy Broderick, Evidence Undermines 'Rapid Onset Gender Dysphoria' Claims, Sci. Am. (Aug. 24, 2023), https://www.scientificamerican.com/article/evidence-undermines-rapid-onset-gender-dysphoria-claims/ [https://perma.cc/BPK3-9PN8] (explaining that a recent study claiming to describe more many "rapid-onset gender dysphoria" cases was retracted for failing to obtain ethics approval).

45. Broderick, supra note 44 (internal quotation marks omitted) (quoting Diane Ehrensaft).

46. Cáel M. Keegan, Laura Horak & Eliza Steinbock, Cinematic/Trans*/Bodies Now (and Then, and to Come), 8 Somatechnics 1, 7 (2018). Despite how trans visibility can make trans life viable, it can also make trans life unviable because (visible) transness exposes one to danger. See, e.g., Harmony Rodriguez, We Can't Let Increased Transgender Visibility Lead to More Vulnerability, The Guardian (Aug. 21, 2015), https://www.theguardian.com/commentisfree/2015/aug/21/transgender-visibility-vulnerability [https://perma.cc/Y3QT-FW8W] ("Paradoxically, when a person or group is hypervisible they may also be invisible, in the sense that they are treated as irrelevant by society. This hypervisibility puts marginalized groups at risk. . . . Hypervisibility is what turns trans women's lives into spectacle.").

47. Eve Shapiro, Drag Kinging and the Transformation of Gender Identities, 21 Gender & Soc'y 250, 260 (2007). This process of imagining other lives is most common in children, of course; it is, at least in one view, constitutive of childhood. See Sigmund Freud, Creative Writers and Day-Dreaming, *in* 9 The Standard Edition of the Complete Psychological Works of Sigmund Freud 141, 143–44 (James Strachey, Anna Freud, Alix Strachey & Alan Tyson eds., and trans., 1959). Adulthood may be marked by "ceas[ing] to play, and . . . seem[ing to] give up the yield of pleasure which they gained from playing. . . . [But] we can never give anything up; we only exchange one thing for another." Id. at 145.

48. See, e.g., Yolanda N. Evans, Samantha J. Gridley, Julia Crouch, Alicia Wang, Megan A. Moreno, Kym Ahrens & David J. Breland, Understanding Online Resource Use by Transgender Youth and Caregivers: A Qualitative Study, 2 Transgender Health 129, 134 (2017) (noting that trans youth sought out first-person autobiographical narratives of gender questioning and transition to fill knowledge gaps and sought out friends online in different stages of gender interrogation "to contextualize or normalize their own" experiences); see also Ben Kesslen, How the Idea of a "Transgender Contagion" Went Viral—and Caused Untold Harm, MIT Tech. Rev. (Aug. 18, 2022), https://www.technologyreview.com/2022/08/18/1057135/transgender-contagion-gender-dysphoria/ [https://perma.cc/NP6C-NVLF] ("Growing up, Jay—like a lot of queer and

and social organizations can make trans youth more resilient to broader social currents of transphobia and produce space to interrogate gender identity with some sense of stability and safety.[49] It is vital to note that these factors do not *urge* gender nonconformity. Rather, they create space and provide opportunities for individuals to interrogate their gender, to experience it and understand it on their own terms, and to ultimately provide their own theories of being gendered. Cisgender boys and cisgender girls, too, necessarily have their own understandings of their cisgender identities and a process of gender interrogation *can also shore these up*.[50] That is, these factors work by a fundamentally different mechanism than the conforming factors identified above; thus, it is most appropriate to call these factors counterconforming factors rather than, for example, anticonforming factors or nonconforming factors.

The social environment around gender cannot be cleaved so cleanly, however. Beyond conforming and counterconforming factors, there is a question of framing: How do parents, lawmakers, and others receive information about gender conformity and counterconformity? How do they assemble and assimilate it into their own decisionmaking structures? This Note identifies the present frame as a phobic one.[51] This is a frame that denies consensus on the benefits of gender-affirming care and excludes minors' voices, instead treating their parents' perspectives as

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trans kids—had trouble making friends. Online, he had room to explore his identity while living in a home where he wasn't embraced.").

49. See Anneliese A. Singh, Sarah E. Meng & Anthony W. Hansen, "I Am My Own Gender": Resilience Strategies of Trans Youth, 92 J. Counseling & Dev. 208, 211–13 (2014) ("Some participants described counseling, community, and family as supportive sites where they could have specific conversations about how they were defining their gender and, for many, the fluidity involved in this process.").

50. One necessary implication of these arguments is that gender is essentially a continuum, that there is a range of experiences that children might have while considering themselves cisgender; similarly, a range of experiences exist within which children understand themselves as transgender. See Christel Baltes-Löhr, What Are We Speaking About When We Speak About Gender? Gender as a Continuum, 6 J. Cultural Religious Stud. 1, 20 (2018) ("[F]or all dimensions of gender as a continuum, binary attributions apply neither to Jill nor to some of the other so-called girls and so-called boys."). In thinking of gender not within the terms of a male/female or cis/trans binary, gender can be understood more as an identity that is affirmed or weakened by both one's environment and one's careful contemplation of their own relation to gender. An example of such an exercise in contemplation might be John F. Strang et al., The Gender Self-Report: A Multidimensional Gender Characterization Tool for Gender-Diverse and Cisgender Youth and Adults, 78 Am. Psych. 886 (2023).

51. Phobic frame is a novel coinage. It draws on the word "phobic," which like phobia,

> derives from the Greek word 'phobos' meaning panic-fear and terror, and from the deity of the same name who provoked fear and panic in one's enemies. . . . [It refers to] an intense fear which is out of proportion to the apparent stimulus. Such fear cannot be explained or reasoned away and leads to avoidance of the feared situation where possible.

Isaac M. Marks, The Classification of Phobic Disorders, 116 Brit. J. Psychiatry 377, 377 (1970).

central. In a phobic frame, there can be no space for questioning or interrogation—the irrationality of phobia takes hold, provoking panic and defensiveness. The phobic frame makes counterconforming factors look like pressures toward gender nonconformity. In the phobic frame, "anyone who dares utter the possibility that children have desires"[52] (that are different from their parents') threatens children's innocence and parents' "right[] coupled with the high duty" to "direct [children's] destin[ies]."[53]

Where did this phobic frame come from? It is not difficult to see that the phobic frame currently applied to transness has historically been used against queer sexualities—the view of trans children being the victims of indoctrination follows the historical discourse that gay people are grooming or assaulting children.[54] But this Note also names the *New York Times*'s coverage as key to developing this phobic frame,[55] focusing on two particular articles: *The Battle Over Gender Therapy* by lawyer and journalist Emily Bazelon[56] and *When Students Change Gender Identity, and Parents Don't Know* by reporter Katie J.M. Baker.[57]

Bazelon's piece was originally published on June 15, 2022; its abstract claimed that there is deep division within the medical community about

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52. Kevin Ohi, Molestation 101: Child Abuse, Homophobia, and the Boys of St. Vincent, 6 GLQ: J. Lesbian & Gay Stud. 195, 196 (2000).

53. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535–36 (1925).

54. Professor William Eskridge makes this point, almost in passing, in The Brian Lehrer Show, How the Political Right Shifted Its Focus From Homophobia to Transphobia, WNYC, at 16:01 (June 1, 2022), https://www.wnyc.org/story/how-political-right-shifted-its-focus-homophobia-transphobia/ (on file with the *Columbia Law Review*); see also Frank Bruni, Opinion, Republicans' Fresh Fixation on Vintage Homophobia, N.Y. Times, (Apr. 7, 2022), https://www.nytimes.com/2022/04/07/opinion/republican-homophobia-grooming-gay.html (on file with *Columbia Law Review*) ("[P]erhaps the cruelest of the lies about us . . . was that many gay men were child molesters. . . . To leave us alone with children was to give us an opportunity to groom them into sexual activity, so we had to be watched. We had to be stopped.").

55. The critique of the *New York Times* that it provides cover to antitrans disinformation in the name of "journalistic neutrality" is not new; journalist Evan Urquhart's media watchdog site *Assigned Media* has reported on the *Times*' antitrans coverage. See Evan Urquhart, Is the NYT an Anti-Trans Paper?, Assigned (Dec. 6, 2022), https://www.assignedmedia.org/breaking-news/nyt-now-widely-thought-of-as-anti-trans-paper [https://perma.cc/D39Y-WGWQ]. The trans media watchdog site *Translash* produced a podcast, The Anti-Trans Hate Machine: A Plot Against Equality, whose Season 1 Episode 5, "Capturing *The New York Times*," focused on ascertaining the roots of the Times' anti-trans bias, locating it in publisher A.G. Sulzberger's desire to make the paper more appealing to conservative readers. See The Anti-Trans Hate Machine: A Plot Against Equality, Capturing the *New York Times*, Translash (July 13, 2021), https://translash.org/projects/the-anti-trans-hate-machine/ [https://perma.cc/Q6D2-TLFA].

56. Emily Bazelon, The Battle Over Gender Therapy, N.Y. Times Mag. (June 15, 2022), https://www.nytimes.com/2022/06/15/magazine/gender-therapy.html (on file with the *Columbia Law Review*).

57. Baker, supra note 41.

"why" more teens are seeking to transition and how to support them.[58] This is not quite true—a review on the state of gender-affirming care found "a robust international consensus in the peer-reviewed literature that gender transition, including medical treatments such as hormone therapy and surgeries, improves the overall well-being of transgender individuals."[59]

The Battle Over Gender Therapy also suffered from oversimplifications bordering on error. Bazelon's piece quoted extensively from a detransitioning[60] youth named Catherine and defined detransitioners as those who "stop identifying as transgender."[61] This simplistic definition belied the scholarly finding that detransition is more complex, often driven by external pressures (such as transphobia, lack of family support, and so on) and that many patients who stop transitioning often continue to identify as trans and continue to desire gender affirmation.[62] While Bazelon highlighted that "the Endocrine Society, the American Psychological Association, the American Psychiatric Association and the American Academy of Pediatrics have endorsed gender-affirming care as the only acceptable approach," Bazelon also characterized the groups as speaking in "broadly supportive terms without specifying how providers should actually do it."[63] In reality, the guidelines by the Endocrine Society are unequivocal and specific about how to treat trans youth, recommending different forms of assessment and treatment for each age group.[64] In grasping for an imagined middle ground, Bazelon's piece abandons scientific consensus and mischaracterizes the facts.

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58. Bazelon, supra note 56.

59. What We Know Project, What Does the Scholarly Research Say About the Effect of Gender Transition on Transgender Well-Being?, Ctr. for the Study of Ineq. at Cornell Univ. (2018), https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-well-being-of-transgender-people/ [https://perma.cc/4KW8-ZPUA].

60. Detransitioners are those who begin transitioning socially or otherwise before deciding not to proceed. See Jack L. Turban, Stephanie S. Loo, Anthony N. Almazan & Alex S. Keuroghlian, Factors Leading to "Detransition" Among Transgender and Gender Diverse People in the United States: A Mixed-Methods Analysis, 8 LGBT Health 273, 273 (2021) [hereinafter Turban et al., Factors Leading to "Detransition"] ("Some [transgender and gender diverse (TGD)] people will 'detransition,' a process through which a person discontinues some or all aspects of gender affirmation.").

61. Bazelon, supra note 56; see also Turban et al., Factors Leading to "Detransition", supra note 60, at 273 ("Of note, as with the term 'transition,' the term 'detransition' has become less acceptable to TGD communities, due to its incorrect implication that gender identity is contingent upon gender affirmation processes.").

62. Turban et al., Factors Leading to "Detransition", supra note 60, at 273, 277 ("These experiences did not necessarily reflect regret regarding past gender affirmation, and were presumably temporary, as all of these respondents subsequently identified as TGD, an eligibility requirement for study participation.").

63. Bazelon, supra note 56.

64. Wylie C. Hembree et al., Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline, 102 J. Clinical

In a now-deleted series of tweets, Bazelon claimed that "[m]uch of the criticism of my piece reflects a profound disagreement over the role of journalism on a controversial topic involving a vulnerable group. To me, being a journalist means following the facts where they lead. It isn't advocacy."[65] This defensiveness is archetypal of the phobic frame. In an effort to avoid "advocacy," Bazelon indulges in false balancing,[66] suggesting division when there is actually consensus among credible experts (notably, the main group that Bazelon cites as offering an alternative to the scientific consensus is Genspect, a group that seeks to ban gender transition for anyone).[67]

Beyond obscuring the reality of scientific consensus on best practices for treating transgender youth, Bazelon also chides activists who point out that medical transition reduces suicide risk for trans teens, writing that "[i]n the overheated political moment, however, parents were getting the terrifying message that if they didn't quickly agree to puberty suppressants or hormone treatments, their children would be at severe risk," and noting that the evidence does not demonstrate a causal link between gender transition and decreased risk of suicide.[68] Emphasizing the "overheated"

Endocrinology & Metabolism 3869, 3871 (2017) ("We suggest that adolescents who meet diagnostic criteria for [gender dysphoria (GD)]/gender incongruence, fulfill criteria for treatment, and are requesting treatment should initially undergo treatment to suppress pubertal development.").

65. Andrea James, Emily Bazelon's Responses Following 2022 Transgender Youth Article, Transgender Map, https://www.transgendermap.com/politics/media/emily-bazelon/replies/ [https://perma.cc/V6W3-YKS2] (last visited Aug. 14, 2024) (quoting now-deleted tweets by Emily Bazelon on June 15, 2022).

66. Derek J. Koehler, Can Journalistic "False Balance" Distort Public Perception of Consensus in Expert Opinion?, 22 J. Experimental Psych.: Applied 24, 24 (2016) (investigating "how 'balanced' presentation of conflicting comments" can influence public perception on "the overall distribution of expert opinion on an issue").

67. See, e.g., Ernie Piper, 'Focus Relentlessly on Under 25': Leaked Chats Reveal Influential Gender-Critical Group's Plan to Use Children to Push for Bans on Transitioning, Daily Dot (July 25, 2023), https://www.dailydot.com/debug/genspect/ [https://perma.cc/WAN9-M8T9] (last updated July 30, 2023) (noting that Genspect's public-facing language positions it as a group of advocates for gender nonconforming youth, but that it privately operates a forum trafficking in transphobia connected with numerous far-right political organizations); see also Lee Leveille, Leaked Audio Confirms Genspect Director as Anti-Trans Conversion Therapist Targeting Youth, Health Liberation Now! (Apr. 2, 2022) https://healthliberationnow.com/2022/04/02/leaked-audio-confirms-genspect-director-as-anti-trans-conversion-therapist-targeting-youth/ [https://perma.cc/DZN7-NXCA] (demonstrating that Genspect's director is explicitly targeting trans youth and believes that pornography is responsible for youth being trans, a far-right conspiracy theory).

68. Bazelon, supra note 56. Bazelon cites "Christine Yu Moutier, a psychiatrist and the chief medical officer for the American Foundation for Suicide Prevention" as raising doubts about the connection between suicide risk and gender-affirming care, but Bazelon does not note whether Moutier had access to the *Standards of Care* eighth edition that Bazelon was reporting on, or whether either Bazelon or Moutier had seen Statement 12.21, recommending that "health care professionals maintain existing hormone therapy if the transgender and gender diverse individual's mental health deteriorates and assess the reason for the deterioration, unless contraindicated." E. Coleman et al., Standards of Care

moment and the "terrifying message," Bazelon frames pushes for gender-affirming care as driven by irrational passions rather than reason, and parents who have mediated access to that care as capitulating to fear rather than making considered decisions. [69]

As Derek Koehler suggests, journalistic false balance muddies the waters of public knowledge by obscuring the reality of expert consensus with uncertainty and disagreement.[70] This manufactured obscurity leads decisionmakers (legislators, parents, and others) to feel less confident in the choices they make.[71] Koehler finds that "the mere presence of disagreement" in coverage "may trigger the perception of conflict that in turn produces a sense of general uncertainty . . . mak[ing] it more difficult to form a coherent representation (i.e., a 'good story') of the issue in question, and consequently diminish[ing] confidence in any inferences made regarding that issue."[72] In insisting on disagreement, Bazelon's reporting heightened the sense of uncertainty that readers might feel around gender-affirming care and diminished confidence in readers' decisions about minors seeking to transition, in some sense satisfying the aims of a phobic framing.

Politicians have capitalized on this uncertainty, with the Missouri Attorney General promulgating an emergency rule that framed gender-affirming interventions as "experimental" while explicitly citing Bazelon's reporting.[73] In the same vein, several states, including Missouri and Texas, submitted an amicus brief to the Eleventh Circuit in the case of *Eknes-Tucker v. Governor of Alabama* citing Bazelon's article (and other *New York Times* coverage) as evidence of the "controversy."[74] However much

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for the Health of Transgender and Gender Diverse People, Version 8, 23 Int'l J. Transgender Health S1, S126 (2022) [hereinafter SOC8]. It is also unclear why Bazelon directly contradicted the elaboration of that statement:

> [A] recent systematic review found pubertal suppression in TGD adolescents was associated with an improved social life, decreased suicidality in adulthood, improved psychological functioning and quality of life. Because evidence suggests hormone therapy is directly linked to decreased symptoms of depression and anxiety, the practice of withholding hormone therapy until these symptoms are treated with traditional psychiatry is considered to have iatrogenic effects.

Id. (citations omitted). Although three separate updates were made to Bazelon's article, the last in March 2023, no update addressed this omission from Bazelon's account. Bazelon, supra note 56.

69. Bazelon, supra note 56.

70. Koehler, supra note 66, at 24.

71. Id. at 34.

72. Id. at 26.

73. Mo. Code Regs. Ann. tit. 15, § 60-17.010(2)(D) n.32 (2023) (terminated May 16, 2023).

74. Brief of the States of Arkansas et al. as Amici Curiae Supporting Defendants-Appellants at 4, Eknes-Tucker v. Governor of Ala., 80 F.4th 1205 (11th Cir. 2023) (No. 22-11707), 2022 WL 2669151.

Bazelon and her ilk claim to be "following the facts where they lead,"[75] the impact is the same—stories like Bazelon's are constructing a phobic frame that supports transphobic legislation and litigation.

Where Bazelon's feature centered on purported disagreement about clinical guidelines, Katie J.M. Baker's *When Students Change Gender Identity and Parents Don't Know* is far more explicit about its normative commitments. Baker's article describes parents whose children began socially transitioning at school, a step that may involve using a different name than the one parents use or using a different set of pronouns.[76] In Baker's account, "how schools should address gender identity cuts through the liberal and conservative divide. Parents of all political persuasions have found themselves unsettled by what schools know and don't reveal."[77] That is, there is no safe harbor for a reader of Baker's article: Every parent should worry about schools' overreaching influence and interference with parental rights. Baker highlights one student's mental comorbidities, including diagnoses of ADHD, autism spectrum disorder, PTSD, and anxiety. While dedicating two short paragraphs to a student's perspective,[78] Baker provides more space to parents.[79] Baker's article quotes one parent in closing, "'The school is telling me that I have to jump on the bandwagon and be completely supportive,' Mrs. Bradshaw said. 'There is only so much and so far that I'm willing to go right now and I would hope that, as a parent, that would be my decision.'"[80] The claim that a student's gender identity should be a parent's decision, not the school's, reflects the oft-misapprehended nature of developmental control; if traditional views of children and child coverture reflect presumed unity between parents' interests and children's interests, it is worth noting how Bradshaw's statement (quoted in Baker above) vanishes her trans child's perspective, one in clear disagreement with his mother.

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75. James, supra note 65 (internal quotation marks omitted) (quoting Emily Bazelon (@emilybazelon), Twitter (June 15, 2022), https://web.archive.org/web/20220623154206/https://twitter.com/emilybazelon (on file with the *Columbia Law Review*)).

76. Baker, supra note 41.

77. Id. Baker suggests that "internet support groups for 'skeptical' parents of transgender children," where "some want to ban gender-affirming care for minors, or have amplified the voices of people who call transgender advocates 'groomers'" are "some of the only places [for parents] to ask questions and air their concerns." Id. Baker notes that detractors call these groups transphobic but suggests that these are the only places for open questioning, apparently denying the existence of groups that seek to support trans youth *and* their parents with accurate information. See Evans et al., supra note 48, at 134–35 (noting that both trans youth and their caregivers found that online support groups had offered information and a feeling of camaraderie).

78. There, the student noted that he had "tried to come out to his parents before . . . but they didn't take it seriously, which is why he asked his school for support." Baker, supra note 41. Like his parents, Baker apparently did not take this account seriously either. Id.

79. Id.

80. Id. (quoting Jessica Bradshaw).

This allows for a clear view of the phobic frame and its constituent parts. From birth, children are typically peppered with pressures urging conformity to the cisgender gender-sex equation, what this paper calls conforming factors.[81] On the other hand are counterconforming factors, elements of life such as trans visibility and resources for individuals to critically interrogate their gender identifications.[82] Within the phobic frame, counterconforming pressures appear not to open space for gender interrogation so much as they appear to threaten parents' ability (and rights) to raise their children. The frame is marked by its denial of consensus on the benefits of gender-affirming care for minors,[83] its exclusion of minors' voices, and its treatment of parents' perspectives as central.[84]

II. SEX DISCRIMINATION AND MINORS' RIGHTS IN DOCTRINE

This Part argues that the present doctrinal landscape is inadequate for protecting minors' access to gender-affirming care. Section II.A summarizes the legislative environment for laws banning different forms of gender-affirming care and policy and frames those laws as part of a broader project to eradicate trans life. Section II.B considers the decision in *Bostock* and finds it insufficient for protecting trans minors, in part because of its narrow scope addressing Title VII. Subsequently, section II.C argues that the abortion rights cases *Bellotti v. Baird* and *Planned Parenthood v. Danforth* provide a broader theory of how minors and parents negotiate parental rights even beyond the context of abortion.

A. *Laws Interrupting Minors' Access to Gender-Affirming Care*

As of this writing, twenty-four states have banned the provision of best-practice medical care for trans youth.[85] Twenty-five states prevent trans youth from participating on sports teams that align with their gender identity.[86] Thirteen states have implemented bans on trans youths' access to bathrooms—and the state of Florida has made it a criminal offense for

81. See supra notes 37–41 and accompanying text.

82. See supra notes 42–49 and accompanying text.

83. See supra notes 55–79 and accompanying text.

84. See supra note 78 and accompanying text.

85. See Movement Advancement Project, Equality Maps: Bans on Best Practice Medical Care for Transgender Youth 3 (2024) https://www.lgbtmap.org/img/maps/citations-youth-medical-care-bans.pdf [https://perma.cc/9KJ2-R8SQ] [hereinafter MAP, Bans on Medical Care for Trans Youth] (summarizing state policies banning best-practice medical care for trans youth). Such best-practice care includes puberty blockers and surgery, except in Arizona, where only surgery is affected. Id.

86. See Movement Advancement Project, Equality Maps: Bans on Transgender Youth Participation in Sports 3 (2024) https://www.lgbtmap.org/img/maps/citations-sports-participation-bans.pdf [https://perma.cc/ZC7G-V75B] [hereinafter MAP, Bans on Trans Youth in Sports] (summarizing trans youth participation bans in sports in the United States).

any trans person to use the facilities consistent with their gender identity.[87] Taking a broad view of gender-affirming care to include social transition, bans on gender affirming care like those described in section I.A create obstacles for minors in nearly every facet of their lives: In addition to worse mental health outcomes,[88] minors in states with gender-affirming care bans may find themselves unable to play sports with their peers,[89] unable to use bathrooms that align with their gender identities,[90] faced with the prospect of moving states[91] or of being forcefully outed to parents,[92] and even subject to invasive medical examinations.[93] That these laws target youth in particular might be understood in two different ways—first, for the reasons set out above:[94] States are able to exercise interests in minors' lives under the veil of parens patriae,[95] leading states to deprivations of rights that would be harder to swallow if the rights of adults were at stake, rather than those of minors.

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87. Movement Advancement Project, Equality Maps: Bans on Transgender People's Use of Bathrooms & Facilities in Government-Owned Buildings & Spaces 3 (2024), https://www.lgbtmap.org/img/maps/citations-bathroom-facilities-bans.pdf [https://perma.cc/BCS2-UP74] [hereinafter MAP, Bans on Trans Bathroom Access] (summarizing bans on trans people's access to bathrooms that align with their gender identities).

88. See Amy Novotney, 'The Young People Feel It': A Look at the Mental Health Impact of Transgender Legislation, Am. Psych. Ass'n (June 29, 2023), https://www.apa.org/topics/lgbtq/mental-health-anti-transgender-legislation. [https://perma.cc/J7LT-F4NR] (last updated June 3, 2024) ("Research overwhelmingly shows these bills and laws, which target access to health care, sports participation, and school policies, have resulted in heightened levels of anxiety, depression, and suicide risk among LGBTQ+ youth.").

89. See MAP, Bans on Trans Youth in Sports, supra note 86.

90. See MAP, Bans on Trans Bathroom Access, supra note 87, at 3.

91. See Novotney, supra note 88 ("[F]amilies fear for the safety of their trans and nonbinary youth and are fleeing states where these bills are being passed."); see also Kiara Alfonseca, "Genocidal": Transgender People Begin to Flee States With Anti-LGBTQ Laws, ABC News (June 11, 2023), https://abcnews.go.com/US/genocidal-transgender-people-begin-flee-states-anti-lgbtq/story?id=99909913 [https://perma.cc/4L29-VV6U] (detailing the stories of several individuals who moved states after laws restricted gender-affirming care in their home state).

92. Movement Advancement Project, Equality Maps: Forced Outing of Transgender Youth in Schools 2 (2024), www.mapresearch.org/equality-maps/youth/forced_outing [https://perma.cc/X36E-FZFP] [hereinafter MAP, Forced Outing] (describing how eight states require the disclosure of students' trans identities to families and five other states promote such outing).

93. See MAP, Bans on Trans Youth in Sports, supra note 86, at 5–6 (describing how youth must provide evidence of their sex at birth, which may include original birth certificates, affidavits from parents, and/or affidavits signed by physicians after conducting physical exams of youth's genitalia).

94. See supra notes 5–6 and accompanying text.

95. See Parens patriae doctrine, Ballentine's Law Dictionary (3d ed. 1969) ("The doctrine that all orphans, dependent children, and incompetent persons, are within the special protection, and under the control, of the state."); see also Parham v. J.R., 442 U.S. 584, 603 (1979) (noting that states may constrain parental discretion in dealing with children whose physical or mental health is jeopardized).

Second, as some scholars and writers have argued, the nature of anti-trans legislation and discourses might meet the general United Nations definition of genocide.[96] That the United Nations' definition of genocide (codified in 1948 in the wake of the Shoah)[97] does not consider gender-based violence as a kind of genocide does not preclude the value of genocide as an interpretive framing for examining transphobic violence. Contemporary genocide scholars have begun to consider how the "gendered study of genocide" requires understanding how perpetrators understand power through gender; how gender organizes both perpetrator and victim societies; "the gendered strategies pursued in the course of group destruction; . . . the use of gender in propaganda and in denial strategies; the gendered inflection of justice systems; and so forth."[98] More precisely, anti-trans legislation and anti-trans violence "are not isolated incidents . . . but instead share the common impetus of the perpetrators' desiring to eradicate a group of people who violate a widely held and popularly reinforced norm of binary gender with a connection to heteronormative sexuality."[99] Laws that target trans youth and force youth to detransition[100] not only force youth to disidentify from their trans identities (akin to the forcible group transfer that constitutes genocide), but at their logical end could lead trans youth to suicide or severe mental distress, preventing trans youth from becoming trans adults—or from

96. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 279; Jeremy D. Kidd & Tarynn M. Witten, Transgender and Transsexual Identities: The Next Strange Fruit—Hate Crimes, Violence and Genocide Against the Global Trans-Communities, 6 J. Hate Stud., no. 1, 2007, at 31, 32 ("[T]he treatment of the transgender population, with respect to violence and abuse, could be viewed, . . . as crimes of genocide against the transgender-community members in the U.S. and other countries."); see also Katelyn Burns, Opinion, Greg Abbott's Death Wish for Trans Kids, MSNBC (Mar. 3, 2023), https://www.msnbc.com/opinion/msnbc-opinion/texas-twisted-attack-trans-kids-just-got-worse-n1290792 [https://perma.cc/VF87-Q7E6] (arguing the same).

97. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 279. Article II of the Convention reads, in full:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

98. Elisa von Joeden-Forgey, Gender and the Future of Genocide Studies and Prevention, *in* Genocide and Gender in the Twentieth Century: A Comparative Survey 298, 300 (Amy E. Randall ed., 2015).

99. Kidd & Witten, supra note 96, at 51.

100. See MAP, Bans on Medical Care for Trans Youth, supra note 85, at 3 (noting that most of the states banning gender-affirming care require youth, where not "grandfathered in," to "wean" off puberty blockers or cross-sex hormones, forcing those youth to detransition).

becoming adults at all. The purpose of this discussion is to suggest that lawmakers' focus on trans youth should not allow the frame to become underdetermined; laws targeting trans youth are not about parental rights or children's health but instead partially constitute a coordinated plan for eradicating trans gender possibilities.

B. *Harms Accruing to Minors Because of Denial of Care*

Much of the research focusing on risks accruing to trans minors centers on the risk of suicide. This is for good reason: Some studies have found lifetime suicide attempt rates among trans youth to be nearly five times that of their cisgender peers.[101] Receiving gender-affirming hormone therapy when a trans youth wants it demonstrably reduces the risk of suicide and experiences of suicidality.[102] In that vein, rates of self-harm among trans youth are roughly three times that of cisgender peers.[103]

But those dire mental health harms are not the only harms resulting from denial of gender-affirming care, particularly when gender-affirming care is defined broadly to include forms of social intervention (such as being permitted to use bathrooms that align with one's identity, being referred to with appropriate names and pronouns, etc.). Trans teens are more likely to leave school because of discrimination and to be verbally or physically assaulted.[104] Trans women of color are more likely to become

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101. See Nastasja M. de Graaf et al., Suicidality in Clinic-Referred Transgender Adolescents, 31 Eur. Child Adolesc. Psychiatry 67, 68 (2022) ("For self-reported suicide attempts over the past 12 months, the percentage for the transgender students was 19.8% in Clark et al. and 34.6% ($n = 1069$) in Johns et al. compared to 4.1% and 7.4% ($n = 67{,}711$), respectively, in the non-transgender students." (citations omitted)).

102. See Amy E. Green, Jonah P. DeChants, Myeshia N. Price, Carrie K. Davis, Association of Gender-Affirming Hormone Therapy With Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth, 70 J. Adolesc. Health 643, 647 (2022) (showing that teens using puberty blockers had lower rates of suicidal contemplation).

103. See Terryann C. Clark, Mathijs F. G. Lucassen, Pat Bullen, Simon J. Denny, Theresa M. Fleming, Elizabeth M. Robinson, & Fiona V. Rossen, The Health and Well-Being of Transgender High School Students: Results From the New Zealand Adolescent Health Survey (Youth '12), 55 J. Adolesc. Health 93, 98 tbl.4 (2014) (showing that transgender youths' self-harm rates are around twenty-two points higher than non-transgender youth); de Graaf et al., supra note 101, at 68 ("In two studies, self-reported self-harm over the past 12 months for transgender students was 45.3% (total n = 95) and 55.0% (total n = 1941) . . . compared to 23.4% (total n = 7710) and 14.3% (total n = 74,134) for the non-transgender students, respectively." (citations omitted)).

104. See Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, Nat'l Ctr. for Transgender Equal., The Report of the 2015 U.S. Transgender Survey 131 (2016) https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/B848-U9TF] ("Fifty-four percent (54%) of people who were out or perceived as transgender in K–12 were verbally harassed, and 24% were physically attacked. Seventeen percent (17%) . . . left a K–12 school because the mistreatment was so bad, and 6% were expelled.").

homeless and to be denied an apartment than their cisgender peers.[105] Trans people of color are more likely to have been harassed, assaulted, or raped by police,[106] and trans women of color generally (but Black trans women in particular) are more likely to be incarcerated.[107] While gender-affirming care is not a panacea to the array of discrimination that trans people face, it is clear that these forms of discrimination are interlinked (housing security, educational attainment, and law enforcement involvement, for example). Legal security for gender-affirming care might do two things: First, to the extent that one's experience of gender dysphoria can create distress, forms of care such as using preferred names, permission to use the bathroom aligned with one's identity, and so on, may reduce that distress.[108] Second, securing gender-affirming care may reduce transphobic bias among individuals in society, much as the legalization of gay marriage has accelerated the decrease in anti-gay bias.[109]

There may also be a broader developmental harm in failing to provide minors the ability to interrogate and solidify their own genders. Pediatric research has observed that children's independent play—without either parental involvement or supervision—significantly improves children's psychological well-being.[110] Similar research found that teens with part-time jobs (many away from their parents) were happier than unemployed

105. See id. at 178–79; see also The Trevor Project, Homelessness and Housing Instability Among LGBTQ Youth 1, 12 (2022), https://www.thetrevorproject.org/wp-content/uploads/2022/02/Trevor-Project-Homelessness-Report.pdf [https://perma.cc/3SU4-SKEX] ("Transgender women and girls represent 2% of youth who had not experienced housing instability but 4% of youth who reported past housing instability and 6% of youth who reported being currently homeless.").

106. See James et al., supra note 104, at 186–87 ("More than half (58%) of respondents who interacted with a law enforcement officer who thought or knew that they were transgender were verbally harassed, physically or sexually assaulted, or mistreated in another way in the past year.").

107. See id. at 190 ("Transgender women of color, including Black (9%) and American Indian (6%) women, were more likely to have been incarcerated in the past year . . . ."); see also Kris Rosentel, Ileana López-Martínez, Richard A. Crosby, Laura F. Salazar & Brandon J. Hill, Black Transgender Women and the School-to-Prison Pipeline: Exploring the Relationship Between Anti-Trans Experiences in School and Adverse Criminal-Legal System Outcomes, 18 Sexuality Rsch. Soc. Pol'y 481, 488 (2021) (noting that young Black transgender women who had been excluded from school due to being transgender were over nine times more likely to be incarcerated).

108. It is worth noting that these are utterly fundamental components of social dignity.

109. See Eugene K. Ofosu, Michelle K. Chambers, Jacqueline M. Chen & Eric Hehman, Same-Sex Marriage Legalization Associated With Reduced Implicit and Explicit Antigay Bias, 116 Proc. Nat'l. Acad. Scis. 8846, 8846 (2019) ("While antigay bias had been decreasing over time, following local same-sex marriage legalization antigay bias decreased at roughly double the rate . . . .").

110. See Peter Gray, David F. Lancy & David F. Bjorklund, Decline in Independent Activity as a Cause of Decline in Children's Mental Well-Being: Summary of the Evidence, 260 J. Pediatrics, 113352, 2023, at 1, 2 (noting that "the implicit understanding shifted from that of children as competent, responsible, and resilient to the opposite, as advice focused increasingly on children's needs for supervision and protection").

peers and attributed their happiness to both the money they received and their feelings of independence.[111] The broader implication is well supported by research: The freedom to act independently and the belief that one has control over their own life (a strong sense of an internal locus of control) is associated with psychological well-being in children and adults alike.[112] Conversely, as Gray and colleagues suggest, "If children have little experience taking control of their own lives, they are unlikely to develop a strong sense that they can exert such control,"[113] an insight that accords with Buss's intuition that "children's experience exercising decisionmaking control will likely facilitate their development of decisionmaking skills, and hence, increase their competence as rights exercisers in adulthood."[114] Minors' ability to freely interrogate their gender identities and to consolidate them over the course of their lives might be understood as a vital part of a minor's sense of an internal locus of control, perhaps even more so than a child's ability to choose whether they will have chocolate or vanilla ice cream for dessert. This does not mean that parents must remain hands-off as their children explore their genders—parents can be, in matters of gender as elsewhere, adaptive and open to surprise. Perhaps most importantly, as one study has found, parents can remain supportive, affectionate, open, and curious as their children experiment with and consolidate their gender identities.[115]

But does the failure to do so constitute a harm?[116] Legally, the question has yet to be answered authoritatively; in civil law, parenthood imposes a duty of care only in particular situations (such as sexual

111. See Lyn Robinson, Austl. Council for Educ. Rsch., The Effects of Part-Time Work on School Students, at v (1999), https://research.acer.edu.au/cgi/viewcontent.cgi?article=1017&context=lsay_research [https://perma.cc/JKL3-JL8C] (noting that employed students were more likely to be happy with aspects of their lives, such as their wages, social life, and sense of independence, relative to unemployed peers).

112. Gray et al., supra note 110, at 3 (highlighting that "over the same decades that children's opportunities for independent activity have declined greatly, so has children's mental health").

113. Id. at 5.

114. Buss, supra note 7, at 35.

115. See Arthur E. Hale, Solana Y. Chertow, Yingjie Weng, Andrea Tabuenca & Tandy Aye, Perceptions of Support Among Transgender and Gender-Expansive Adolescents and Their Parents, 68 J. Adolesc. Health 1075, 1078 (2021) (describing the most significant forms of parental support as adopting minors' preferred names and pronouns and general affection (hugs, kisses, etc.)).

116. California's AB-957 (2023) sought to amend § 3011 of the California Family Code to instruct courts making custody determinations to consider "a parent's affirmation of the child's gender identity or gender expression" in its determination. Assemb. B. 957, 2023–2024 Leg., Reg. Sess. (Cal. 2023). Governor Gavin Newsom vetoed the bill, citing the possibility that attempts to "dictate—in prescriptive terms that single out one characteristic—legal standards for the Judicial branch to apply" could lead other elected officials to "diminish the civil rights of vulnerable communities." Veto Message, Gavin Newsom, Off. Governor, to Members of the California State Assemb. (Sept. 22, 2023), https://www.gov.ca.gov/wp-content/uploads/2023/09/AB-957-Veto-Message.pdf [https://perma.cc/UQN9-DQY6].

violence).[117] The Children and the Law Restatement has a to-be-drafted section on minors' access to puberty-blocking medication, section 19.4, but broadly authorizes parents to make medical decisions for their children.[118] Certainly, depriving children of the capacity to develop an autonomous understanding of gender might be disfavored on the grounds of being suboptimal, but that would not rise to the level of a legal violation. Yet the above discussion might hint at another possibility for thinking through parents' responsibilities. In the Restatement's fourth Tentative Draft, section 1.20 smacks of Blackstone[119] in stating that:

> Parents have a duty to ensure that their children receive a sound, basic education. A sound, basic education is one that enables children to acquire the knowledge and skills necessary to prepare them to participate effectively and responsibly as adults in the economy, in society, and in a democratic system of self-governance.[120]

While schools have taken a central role in some of the debate around gender affirmation (because of both schools' roles in teaching youth about gender and sexuality and in offering a place for social transition), the duty of education specifically falls to parents. This Note reads the call to knowledge broadly in light of the reality that the education one receives in schools is insufficient for an effective and responsible adult life. In a world in which gender continues to be an organizing principle for society, one might conceive of the ability to understand one's own gender deeply and on one's own terms as necessary for effective and responsible

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117. See Romualdo P. Eclavea, Annotation, Liability of Parent for Injury to Unemancipated Child Caused by Parent's Negligence—Modern Cases, 6 A.L.R.4th 1066, § 3 (1981) ("In a number of cases . . . it has been held or recognized . . . that a parent . . . is immune from liability for personal injuries suffered by such child because of the negligence of the parent . . . at least in the absence of various special circumstances . . . .").

118. Restatement of the Law, Children and the Law § 2.30 (Am. L. Inst., Tentative Draft No. 1, 2018). ("(1) Authority. (a) A parent or guardian has broad authority to make medical decisions for a child. . . . (2) Responsibility. (a) A parent, guardian, custodian, or temporary caregiver has a duty to provide necessary medical care for the child."). This Note relies on the Restatements as a reasonable stand-in for the diversity of common-law approaches across the United States and its jurisdictions, following the claim that "the [American Law] Institute, beginning with its Restatements . . . [contributed] to unifying as well as simplifying and clarifying the law, primarily (although not exclusively) state law." Michael Traynor, The First Restatements and the Vision of the American Law Institute, Then and Now, 32 S. Ill. U. L.J. 145, 146 (2007). This is not without some caution, since the Restatements' ability to reflect the reality of common law is refracted by the interpretive acts of the judges and other interpretive legal bodies that use them. See Shyamkrishna Balganesh, Relying on Restatements, 122 Colum. L. Rev. 2119, 2122 (2022) ("[W]oefully little is known about the techniques and methods employed by courts in their use of Restatements . . . . [C]ourts are required to engage in the task of *interpretation*, a process that has itself been the subject of rather significant methodological disagreement."). § 19.4 of the Restatement of the Law, Children and the Law remains unpublished as of this writing.

119. See supra note 12 and accompanying text.

120. Restatement of the Law, Children and the Law § 1.20 (Am. L. Inst., Tentative Draft No. 4, 2022).

participation in society and vital to developing competence in exercising gendered rights in the future (rights around reproduction, sports, family organization among them). If parents fail to provide this kind of education, one might ask whether that education was satisfactory and whether such parents have satisfied their duties, at least as described in the Restatement. There are, of course, risks and harms that accrue from allowing states to monitor parental behavior and maintain a periscope into family life.[121] But if there is a parental duty to educate one's children to develop the capacity for maintaining steadiness in the face of trans gender possibilities, this at least bars states from preventing parents from fulfilling their duty and perhaps produces a constellation of normative lodestars to guide parental thinking on the appropriate course of action when faced with a child who expresses gender curiosity or creativity.

C. Bostock*'s Inadequacy to Protect Trans Minors*

Understandably, LGBTQ+ advocates cheered the Supreme Court's 2020 decision in *Bostock v. Clayton County*, which held that firing someone for being transgender or gay violated Title VII of the Civil Rights Act of 1964.[122] The Court's embrace of the "sweeping standard" of but-for causation in gender discrimination led to its conclusion that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[123] In its simplest form, *Bostock* affirms the proposition that "anti-LGBT discrimination punishes individuals for not adhering to sex stereotypes and is therefore a form of sex discrimination"[124] and that discrimination against trans people requires sex discrimination.

Although the Court maintained that its conclusion only applied to Title VII employment discrimination because those were the only facts at

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121. See Erin Sugrue, Evidence Base for Avoiding Family Separation in Child Welfare Practice 8–10 (2019), https://www.ncsc.org/__data/assets/pdf_file/0031/18985/alia-research-brief.pdf [https://perma.cc/7P27-J5K4] (summarizing outcomes for minors who were removed from their homes in the course of child protective proceedings, finding mixed outcomes at best and harms at worst).

122. See Bostock v. Clayton County, 140 S. Ct. 1731, 1745 (2020) ("But, as we've seen, an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules."); Julie Moreau, Supreme Court's LGBTQ Ruling Could Have "Broad Implications," Legal Experts Say, NBC News (June 23, 2020), https://www.nbcnews.com/feature/nbc-out/supreme-court-s-lgbtq-ruling-could-have-broad-implications-legal-n1231779 (on file with the *Columbia Law Review*) ("The Supreme Court's landmark ruling in Bostock v. Clayton County, Georgia—which was widely praised by LGBTQ advocates but condemned by social conservatives—will likely have broad ramifications that go far beyond employment protections, according to several legal experts.").

123. *Bostock*, 140 S. Ct. at 1739, 1741.

124. Erik Fredericksen, Note, Protecting Transgender Youth After *Bostock*: Sex Classification, Sex Stereotypes, and the Future of Equal Protection, 132 Yale L.J. 1149, 1156 (2023).

bar,[125] courts since *Bostock* have interpreted its logic to be more broadly applicable in Title IX cases and elsewhere.[126] In cases involving trans minors, Title IX cases are particularly relevant because of schools' roles in social transition, and numerous federal courts have cited *Bostock*, noting that their decisions either accorded with *Bostock* or adopted its persuasive logic.[127] *Bostock* may have its place as precedent in cases like those that have cited it: cases in which schools are involved in denying minors access to gender affirmation either through medical care or through social transition, creating a statutory violation.

The more controversial question is whether *Bostock*'s analysis should hold weight in the equal protection context. Theoretically, *Bostock*'s logic might protect trans youth from state laws discriminating on the basis of gender identity: In states where cis youth experiencing precocious puberty[128] could lawfully receive puberty blockers, state laws preventing

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125. See *Bostock*, 140 S. Ct. at 1753 (specifying that the holding today is about the actions of employers).

126. See, e.g., Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27984, 27985 (May 25, 2021) (codified at 45 C.F.R. pts. 86, 92) ("[C]onsistent with the Supreme Court's decision in *Bostock* and Title IX, . . . [the HHS] will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1) Discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity."); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020) ("Although Bostock interprets Title VII of the Civil Rights Act of 1964, it guides our evaluation of claims under Title IX." (citation omitted)); Memorandum from Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., C.R. Div., DOJ, to Fed. Agency C.R. Dirs. & Gen. Couns. (Mar. 26, 2021), https://www.justice.gov/crt/page/file/1383026/dl [https://perma.cc/K4ZX-2K5F] ("[L]ike Title VII, Title IX applies to sex discrimination against individuals. The *Bostock* Court focused on this feature of Title VII in reaching its holding."). But see Neese v. Becerra, 640 F. Supp. 3d 668, 676 (N.D. Tex. 2022) (holding that *Bostock* does not control beyond the Title VII context).

127. See, e.g., *Grimm*, 972 F.3d at 616–17 (relying on *Bostock* in holding that refusing to allow Grimm to access the bathroom appropriate for his gender violated Title IX); Brandt v. Rutledge, 551 F. Supp. 3d 882, 889–92 (E.D. Ark. 2021) (enjoining the enforcement of Act 626, an Arkansas law that banned gender-affirming care for minors, and citing *Grimm* while noting its accord with *Bostock*); Hecox v. Little, 479 F. Supp. 3d 930, 974 (D. Idaho 2020) (noting that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex" in enjoining a ban on trans women's participation in women's sports (alteration in original) (internal quotation marks omitted) (quoting *Bostock*, 140 S. Ct. at 1741)), vacated in part, 104 F.4th 1061 (9th Cir. 2024).

128. The class of drugs delaying puberty in trans youth are used to the same effect as the standard treatment for treating precocious puberty in cis youth. See Jadranka Popovic, Mitchell E. Geffner, Alan D. Rogol, Lawrence A. Silverman, Paul B. Kaplowitz, Nelly Mauras, Philip Zeitler, Erica A. Eugster & Karen O. Klein, Gonadotropin-Releasing Hormone Analog Therapies for Children with Central Precocious Puberty in the United States, 10 Frontiers in Pediatrics at 1, 2 (2022) ("Gonadotropin-releasing hormone (GnRH) agonists (GnRHa's) are standard treatment for CPP." (citation omitted)); see also Puberty Blockers for Transgender and Gender-Diverse Youth, Mayo Clinic (June 14, 2023), https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/in-depth/pubertal-blockers/art-20459075 [https://perma.cc/V5A5-Y4PR] ("Puberty blockers can be used to delay the changes of puberty in transgender and gender-diverse youth who have started

trans youth from accessing puberty blockers seem to deny trans minors equal protection of the laws on the basis of sex. The argument might proceed by saying that trans youth are being discriminated against because their trans gender expression does not match with stereotypical expectations about that youth's gender expression based on that youth's perceived "sex," thus constituting discrimination on the basis of sex.[129] Both the Sixth and Eleventh Circuits have rejected comparable arguments.[130] Further challenges are likely to fail on the basis that gender-affirming care bans do not constitute discrimination on the basis of sex but instead constitute discrimination on only the basis of age, with its consequent lower burden on the discriminator.[131] This points again to the

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puberty. The medicines most often used for this purpose are called gonadotropin-releasing hormone (GnRH) analogues.").

129. This is, of course, one of the arguments put forth by Eknes-Tucker. See Response Brief for Plaintiffs-Appellees at 24–25, Eknes-Tucker v. Governor of Ala., 80 F.4th 1205 (11th Cir. 2023) (No. 22-11707) 2022 WL 3369279 ("The Act cuts off adolescents' medically needed care and exposes parents and medical professionals to criminal consequences for the parents' exercise of their constitutional rights to seek established care for their minor children."). Fredericksen similarly argues that state laws banning gender-affirming care rely on a sex stereotype of the "confused transgender child." Fredericksen, supra note 124, at 1190 (explaining that "[t]his is based on a longstanding stereotype: queer or transgender identity is for minors a confused and temporary phase, while cisgender and heterosexual identity is not"). Fredericksen goes further:

> [Opponents] do not voice any doubts about the decisions of presumed cisgender minors to choose medical interventions into their sexual development that align with their sex assigned at birth. . . . The law thus punishes . . . those who deviate from the state's own normative judgment as to how a child should mature sexually . . . based on the stereotype . . . that transgender minors are generally confused or misled about their own identity.

Id. at 1200.

130. See *Eknes-Tucker*, 80 F.4th at 1224–25 ("[W]ithout any historical analysis specifically tied to the medications at issue, Plaintiffs have not shown it to be likely that the Due Process Clause of the Constitution guarantees a fundamental 'right to treat [one's] children with transitioning medications subject to medically accepted standards.'" (alteration in original) (quoting *Eknes-Tucker*, 603 F. Supp. 3d. at 1145)); see also L.W. ex. rel. Williams v. Skrmetti, 73 F.4th 408, 420–21 (6th Cir. 2023) ("*Bostock v. Clayton County* does not change the analysis. . . . *Smith v. City of Salem* does not move the needle either. . . . It did not hold that every claim of transgender discrimination requires heightened scrutiny, least of all . . . whether a State may limit irreversible medical treatments to minors facing gender dysphoria." (first citing *Bostock*, 140 S. Ct. 1731, then citing Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004)), cert. granted sub nom. United States v. Skrmetti, 144 S. Ct. 2679 (2024). Notably, all the (minor) plaintiffs in *Skrmetti* were only seeking hormonal therapies (puberty-blockers or cross-sex hormone therapy). See Complaint for Declaratory and Injunctive Relief ¶¶ 97, 113–115, 129, *Skrmetti*, 679 F. Supp. 3d. 668 (M.D. Tenn. 2023) (No. 23CV00376), 2023 WL 3034949. This is in line with physicians' recommendations. See Hembree, supra note 64, at 3871; see also SOC8, supra note 68, at S111. Both forms of cross-sex hormone therapy are reversible (puberty-blockers entirely so and cross-sex hormones mostly so), see SOC8, supra note 68, at S43, so *Skrmetti*'s ruling relies on a fundamental misunderstanding of the facts.

131. These were the findings, after all, of the courts in *Eknes-Tucker*, 80 F.4th at 1227 ("[W]e agree with Alabama that section 4(a)(1)–(3) is best understood as a law that targets

insidious brilliance of gender-affirming care bans that target youth; the bans are not presumptively unreasonable sex discrimination, but instead presumptively reasonable age discrimination. The success of this framing is in part a testament to the phobic frame's success, that gender-affirming care can be framed as an issue primarily about protecting children (whose voices are largely excluded from court opinions) rather than seen for what it is: an unscientific element of a broader plan to restrict gender expression and trans gender possibilities. This suggests that any workable argument against gender-affirming care bans must directly address minors' rights *as minors*.

The broader problems, then, are twofold: First, *Bostock*, as a Title VII case, is rightly lauded but not broad enough to do all that advocates might hope it can do. That is, *Bostock* might secure for trans people the negative liberty to be free from certain forms of institutional discrimination, but it does not cover the more fundamental question of whether trans people will be afforded the same rights as cis people to live in the gender of their choice, a right that remains unelaborated and beyond the scope of *Bostock*. The second problem is that the gender-affirming care bans have so far been considered as reasonable cases of age discrimination in which a state's interest in the welfare of its children faces off with the particularized interests of a parent in their own child. States and parents theoretically have compatible interests in children: Both are interested in the welfare of children, en masse and as individuals respectively, and have different, incommensurable types of knowledge.[132] As a result of this incommensurability, there is no tie-breaking interest. Under a theory of child coverture that suggests that children's interests are united with those of their parents, parents' rights seek to fill this lacuna but will not do so as completely as the child might if able to verbalize their interests themselves.[133]

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specific medical interventions for minors, not one that classifies on the basis of any suspect characteristic under the Equal Protection Clause. Section 4(a)(1)–(3) is therefore subject only to rational basis review . . . .") and *Skrmetti*, 83 F.4th at 485 ("[T]he laws . . . deny the same medical treatments to all children facing gender dysphoria if they are 17 or under, then permit all of these treatments after they reach the age of majority. A concern about potentially irreversible medical procedures for a child is not a form of stereotyping.").

132. States, as Buss argues, have the capacity and competence to marshal expertise about population-wide effects. Buss, supra note 7, at 34 ("[R]egulation of harmful conduct should be limited to contexts where the harm is conceived as universal (such as child abuse), rather than child-specific (as it is in the relational context)."). Parents, by contrast, are "generally more competent than the state at assessing, and acting on, their [own] children's best interests . . . in part because they know their children better, in part because they care about them more, and in part because their own interests are tied more tightly to the interests of their children." Id. at 31.

133. Buss, for her part, suggests that the child exercises control "simply by being the developmental subject," through her reactions to the environment as it is shaped by the state and by parents. Id. at 34. This is a thin vision of control, though—as Buss notes later on—there is a good developmental justification for affording children rights under appropriate circumstances. Id. at 35; see also supra notes 110–121.

Hinging the argument for minors' access to gender-affirming care on parental rights also fails on two counts: First, the minors who are arguably most in need of gender-affirming care (that is, minors who are most likely to be lacking support from family, teachers, or peers) are those minors whose parents oppose their receiving gender-affirming care.[134] These minors are not served by strengthened parental rights. Second, parental rights cut both ways—parents have made claims on the basis of parental rights that they should be able to provide gender-affirming care to their children;[135] parents have also claimed that their parental rights allow them to deny gender-affirming care to their children.[136] As noted in section I.C, this discourse operates in a phobic frame, allowing parental claims to entirely eclipse children's needs and desires. The solution, this Note argues, is to move toward recognition of the more complete interests of minors in their own bodily autonomy, a right that has been elaborated in the abortion context.

D. Bellotti, Danforth, *and the Divergent Interests of Parents and Children*

One narrow area in which the law has recognized the fact that minors' interests may differ from their parents is the question of abortion access. *Bellotti v. Baird* invalidated a Massachusetts statute that required parents to consent to a minor's abortion on the basis that a minor's desire for an abortion should outweigh their parents' objections.[137] Under the invalidated statute, a minor could obtain judicial consent to an abortion when a judge "finds 'that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion,' [but the judge] is entitled to withhold consent 'in circumstances where [the judge] determines that the best interests of the minor will not be served by an

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134. Cf. Bruna L. Seibel et al., The Impact of the Parental Support on Risk Factors in the Process of Gender Affirmation of Transgender and Gender Diverse People, 9 Frontiers Psychology 399 (2018) ("[P]arental support was associated with self-esteem. In addition, low family acceptance can be related to the necessity of moving home, and becoming homeless could prevent access to hormonal therapy and sex reassignment surgery, further impairing the self-esteem of TGD individuals.").

135. See Complaint for Injunctive and Declaratory Relief, supra note 130, ¶ 152 ("The Ban also discriminates against the parents of Minor Plaintiffs, denying them the same ability to secure urgently-needed medical care for their children that other parents can obtain, and does so on the basis of transgender status- and sex-based grounds.")

136. See John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 78 F.4th 622, 623 (4th Cir. 2023) (exemplifying parent-plaintiffs who sought to prevent schools from providing social transition to children); Regino v. Staley, No. 2:23-cv-00032-JAM-DMC, 2023 WL 4464845, at *1–2 (E.D. Cal. July 10, 2023), appeal docketed (U.S. App. LEXIS 19361 (9th Cir. Aug. 2, 2024)) (exemplifying a parent-plaintiff suing school board on the grounds that socially transitioning plaintiff's child violated her parental rights).

137. See Bellotti v. Baird, 443 U.S. 622, 650 (1979) (plurality opinion) ("We therefore agree with the District Court that § 12S cannot constitutionally permit judicial disregard of the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made.").

abortion.'"[138] That is, the judge could overrule the decision of a minor *even when* the minor has demonstrated the capacity to give informed consent. At the district level, the court immediately recognized that the statute did not seek to protect minors, but to recognize "independent rights of parents . . . . The question comes, accordingly, do parents possess, apart from right to counsel and guide, competing rights of their own [to decide the question of abortion for their children]?"[139] The Supreme Court found no such right, either for parents or for courts, noting that "if the minor satisfies a court that she has attained sufficient maturity to make a fully informed decision, she then is entitled to make her abortion decision independently."[140] In *Planned Parenthood v. Danforth*, the court noted that it could not "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy"[141] and similarly on the question of minors' rights to an abortion that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."[142] Mutatis mutandis, one might educe from this that minors may assert a similar right to gender transition:[143] If a minor has demonstrated the capacity for understanding the impact of gender transition and appreciation for the consequences (positive and negative), neither the state nor parents should have the right of an absolute veto.

An approach to ensuring the right to gender-affirming care that centers the analytical moves of *Bellotti*, however, encounters a key difficulty: *Bellotti* is largely abrogated by the Court's decision in *Dobbs*, which found no constitutional right to abortion for individuals of any age.[144] The *Bellotti* decision was premised on *Roe*'s finding of a constitutional right to abortion and on cases such as *Danforth*, which did not see interests beyond ensuring

138. Id. at 630 (quoting Baird v. Att'y Gen., 360 N.E.2d 288, 293 (Mass. 1977)).

139. Baird v. Bellotti, 393 F. Supp. 847, 856 (D. Mass. 1975), aff'd sub nom. Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion).

140. *Bellotti*, 443 U.S. at 650.

141. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976) (internal quotation marks omitted) (quoting Planned Parenthood of Cent. Mo. v. Danforth, 392 F. Supp. 1362, 1375 (E.D. Mo. 1975)). The statute in *Danforth* was similar to that in *Bellotti*, requiring minors to get parental permission for abortions, though the statute in *Danforth* also required married women to get permission from their husbands. Id. at 58.

142. Id. at 74.

143. Canadian legal scholar Florence Ashley has written about the analogy between gender transition and reproductive rights. See Florence Ashley, Adolescent Medical Transition Is Ethical: An Analogy With Reproductive Health, 32 Kennedy Inst. Ethics J. 127, 128 (2022) [hereinafter Ashley, Adolescent Medical Transition Is Ethical] ("Birth control, abortion, and adolescent medical transition are analogous insofar as they intervene on healthy physiological states such as puberty, sexual traits, fertility, and pregnancy, by reason of the person's fundamental self-conception and desired life.").

144. See Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–43 (2022) (reversing earlier decisions that found a federal right to an abortion).

the capacity to give informed consent as outweighing a person's decision to abort their pregnancy for either adult women or minors.[145] Moreover, the *Bellotti* court repeatedly emphasized the "unique" nature of the decision to have an abortion,[146] which leaves questions as to its applicability in other contexts.

While the analysis of abortion rights has been abrogated by the *Dobbs* decision, *Bellotti* and *Danforth* should also be understood as cases concerned with the rights of minors over their own bodies—rights of bodily autonomy that adults continue to have outside of the abortion context when it comes to gender transition. While states have sought to curb access to gender-affirming care based on the state's interest in the welfare of children, states have been less able to restrict access to gender-affirming care for adults.[147] One might read *Bellotti* and *Danforth* (opinions that were issued together) as about what justifies the distinctions between the rights allowed to adults and those allowed to children.

> [O]ne could not seriously argue that a minor must submit to an abortion if her parents insist, and [the dissenting district court judge] could not see "why she would not be entitled to the same right of self-determination now explicitly accorded to adult women, provided she is sufficiently mature to understand the procedure and to make an intelligent assessment of her circumstances with the advice of her physician."[148]

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145. See Bellotti v. Baird, 443 U.S. 622, 639 (1979) (plurality opinion) (noting that the statute in controversy tried to reconcile a pregnant person's interest in termination with interest of the State in encouraging a minor to seek the advice of their parents).

146. Id. at 643 (referencing "the unique nature and consequences of the abortion decision"); id. at 650 ("But we are concerned here with the exercise of a constitutional right of unique character.").

147. See Azeen Ghorayshi, Many States Are Trying to Restrict Gender Treatments for Adults, Too, N.Y. Times (Apr. 22, 2023), https://www.nytimes.com/2023/04/22/health/transgender-adults-treatment-bans.html (on file with the *Columbia Law Review*) (explaining that while some states are attempting to restrict adult access to gender-affirming care, these efforts are more contentious and face greater legal challenges compared to restrictions on care for minors). This fact may allow one to infer that even trans-hostile states recognize that there are strong autonomy interests in individuals' ability to live as the gender they wish to and that restrictions are less easily explained for adults than they are for children (where reference is made to the limited evidence base for certain trans-affirming medical interventions). But see Ashley, Adolescent Medical Transition is Ethical, supra note 143, at 128 (arguing that the "limited evidence base" for gender-affirming care should not override the autonomy concerns for gender-affirming care). Among the autonomy interests, vital in both the context of abortion and gender transition is that "[t]he decision to undergo medical transition, like the decision to undergo an abortion, fundamentally shapes what life you lead and what kind of person you get to be. . . . Wanting to 'be yourself' is a legitimate desire, one that deserves respect and support even if it comes at the cost of marginalization." Id. at 136.

148. Planned Parenthood v. Danforth, 428 U.S. 52, 73–74 (1976) (internal quotation marks omitted) (quoting Planned Parenthood of Cent. Mo. v. Danforth, 392 F. Supp. 1362, 1376 (E.D. Mo. 1975)).

That is, restrictions on minors cannot exist for their own sake or for the simple fact of minority; rather, those restrictions must be justifiable. In *Bellotti*, the court found "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[149] The Court examined whether any of these three reasons might justify the restrictions at issue and found no permissible justification.[150] The analysis that follows, infra Part III, takes up these three reasons and the question of whether gender transition is similar enough to abortion to justify a result comparable to *Bellotti* and *Danforth*—that is, whether "the abortion decision" is not unique, but one of a class of decisions that justify greater deference to the rights and needs of minors than they are typically afforded.[151]

III. TOWARD A CHILD'S RIGHT TO GENDER-AFFIRMING CARE

This Part, following from the above discussion, lays out a different paradigm for thinking about children's rights and their exercise of them in the context of gender-affirming care.

A. *The Right, Simply*

Children, as explained above, develop a sense of their own genders amidst a field of conforming and counterconforming factors.[152] Children, cisgender and transgender, internally develop understandings of their own gender and, where safe to do so, will express this gender identity. The

149. *Bellotti*, 443 U.S. at 634–39.

150. See id. It is noteworthy that the analysis of all three factors only described negative cases where a child's preferences could be rightfully subordinated to that of the state. Arguably, *Bellotti* continued its vulnerability analysis when the Court considered the minor's "probable education, employment skills, financial resources, and emotional maturity" in concluding that "unwanted motherhood may be exceptionally burdensome for a minor," id. at 642, and clarified its stance on parental interests in noting that parents have no more right to an absolute veto over a minor's abortion than any other third party would. Id. at 654.

In *Danforth*, the Court offered a more thorough analysis of the parental interest, questioning whether the statute there might provide for the parental interest in the "safeguarding of the family unit and of parental authority" but concluded that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." 428 U.S. at 75.

151. Admittedly, broader normative questions continue to hang in the air unanswered: First, why it is that children's needs and rights are presumptively subordinate to those of their parents? Second, do lawmakers' understanding of minors' competency match the actual competency of those minors? The answer to the second question, at least, is a tentative no, since the law's general character forces it to assume a certain average competency for minors, which some minors will exceed and of which others will fall short. A fuller response is beyond the scope of this short Note, however.

152. See supra section I.C.

difference in their experiences, socially speaking, will be whether parents and other institutional actors accept the gender identity of the child, and whether it will be safe for a child to express their gender. This Note argues that the right to gender-affirming care amounts to the right to live in an environment where, first, it is safe for children to express their gender, and second, children are afforded the capacity to live comfortably in their developing gender expression.

Who should have this right? At present, cis-identified children both presume to have this right and are free to exercise it. Despite parents' concerns that children are being urged into trans identification,[153] the reality is that children are witnessing and experiencing counterconforming factors that illuminate the multiple possibilities for gender and gender expression and express that gender is not immutable but instead an orientation to the world that one cultivates.[154] The description of a child's entitlement to safe gender expression and development as a right speaks to its universal character, as well as its basis in the law.

Where can this right come from? In reading *Bellotti* and *Danforth* as primarily about age discrimination and the relationship between parents and children, there are several bodies of law from which the right to gender-affirming care might arise. One might be the common law tradition; as discussed in the context of Blackstone and the Restatement, the common law has historically required parents to provide for their children, not only in terms of maintenance but also in terms of education and protection.[155] Parents can also become liable when they fail to provide necessary medical care to children.[156] Regardless of whether a court finds that gender-affirming care falls into one of the above categories of education, protection, or medical care, a court may also find that the harms accruing to minors who are denied gender affirmation[157] might trigger a comparable duty of protection and care. Alternatively, a court might look to *Danforth*, finding that in any jurisdiction where adults are permitted to transition, minors must have the right to do the same so long as they are able to demonstrate competence.[158] This is particularly justifiable on prudential grounds, since denying access to puberty blockers can lead to changes that require surgical intervention to reverse,[159] whereas the effects of puberty blockers are reversible, making it more

153. See Baker, supra note 41, and accompanying text.

154. See supra notes 43–50 and accompanying text.

155. See supra notes 13, 117–119 and accompanying text.

156. See Restatement of the Law, Children & the Law § 2.25 (Am. L. Inst. Tentative Draft No. 6, 2022).

157. See supra section II.B.

158. See infra section III.C.

159. See Jack L. Turban, Dana King, Jeremi M. Carswell & Alex S. Keuroghlian, Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation, Pediatrics, Feb. 2020, e20191725, at 89, 92 [hereinafter Turban et al., Pubertal Suppression].

prudent to permit access. While *Dobbs*'s analysis casts doubt on the "right of privacy" that *Danforth* envisions,[160] *Danforth* and *Bellotti* are more properly understood as examining the question of what independent rights parents might have on which to ground a veto to transition (a question *Danforth* answered in the abortion context with "none") and what kinds of justifications might allow age discrimination when it comes to definitional medical care.[161]

B. *Addressing Justifications for Age Discrimination as Laid Out in* Bellotti

Two key concerns broadly animate objections to minors' rights to gender-affirming care—elements mapping onto the vulnerability and decisionmaking capacity concerns elaborated in *Bellotti*. First, there are concerns about comorbidities.[162] Those concerns are meaningful: One meta-analysis found that 21% of the sample of a gender identity clinic's patients had an anxiety disorder, 7.8% had co-occurring Autism Spectrum Disorder (ASD), and "9.3% of the sample had attempted suicide."[163] But that same meta-analysis reflected the consensus and reality that at least some of the psychiatric conditions (such as anxiety and depression) that develop among trans youth are the result of gender dysphoria or related social difficulties.[164] Medical consensus also indicates that treating gender dysphoria with puberty blockers or cross-sex hormone therapy improves mental health outlooks for patients,[165] and clinical practice guidelines counsel against interrupting gender dysphoria treatment when mental health changes occur.[166]

A second concern is that minors might change their mind about their gender. Indeed, the literature on "desisters" or "detransitioners" suggests that some percentage of trans-identified youth will not ultimately become

160. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2267–68 (2022) (arguing that the Court's holdings invoking privacy as a rationale for the right to have an abortion had "conflated two very different meanings of the term" and cited cases that "involved personal decisions that were obviously very, very far afield.").

161. See supra notes 148–150. While *Bellotti* offers three possibilities, these do not generally apply in the question of gender-affirming care. See infra section III.B.

162. See, e.g., Baker, supra note 41 (noting that the son of one family had been previously diagnosed "as being on the autism spectrum, as well as with attention deficit hyperactivity disorder, PTSD and anxiety" and that his mother "said she resented the fact that the school had made her feel like a bad parent").

163. Tabitha Frew, Clare Watsford & Iain Walker, Gender Dysphoria and Psychiatric Comorbidities in Childhood: A Systematic Review, 73 Austl. J. Psych. 255, 259 (2021).

164. Id.

165. Brett Dolotina & Jack L. Turban, A Multipronged, Evidence-Based Approach to Improving Mental Health Among Transgender and Gender-Diverse Youth, JAMA Network Open, Feb. 25, 2022, at 1, 1.

166. See SOC8, supra note 68, at S126.

trans adults.[167] There are three reasons that this concern should not act as an obstacle to minors' access to gender-affirming care.

First, as defined in this Note and elsewhere in the literature, gender-affirming care refers to the broad set of interventions that allow individuals to live comfortably in the gender that they identify with.[168] While medical interventions such as puberty blockers, cross-sex hormone therapy, and gender-affirmation surgery are important elements of gender-affirming care, they are only components of the broader ethos, which emphasizes an individual's ability to self-determine their gender through open-ended reflection.[169] Some state bans on gender-affirming care target nonmedical interventions, such as changing names or pronouns or using bathrooms

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167. While for ethical reasons it is preferable not to cite directly to the literature on detransition, one might find purported rates for regret or detransition in meta-analyses such as Rowan Hildebrand-Chupp, More Than 'Canaries in the Gender Coal Mine': A Transfeminist Approach to Research on Detransition, 68 Socio. Rev. 800, 805–06 (2020); see also Florence Ashley, The Clinical Irrelevance of "Desistance" Research for Transgender and Gender Creative Youth, 9 Psych. Sexual Orientation & Gender Diversity 387, 391 (2022) (arguing that "desistance" research should not underdetermine the possibility of providing gender-affirming care to trans youth).

168. See Matouk & Wald, supra note 9 ("Gender-affirming care is highly individualized and focuses on the needs of each individual by including psychoeducation about gender and sexuality (appropriate to age and developmental level), parental and family support, social interventions, and gender-affirming medical interventions.").

169. See supra notes 42–49 and accompanying text; see also Currah, supra note 37, at 11–13 (citing Eve Kosofsky Sedgwick, Epistemology of the Closet 1 (1st ed. 1990)). Currah argues that while the minoritizing view, according to Eve Sedgwick, "would understand state rules for sex classification as harmful only to a very small and distinct population of people," according to which the "policing of sex definitions does not pose problems for the vast majority of people: those who develop and hold fast throughout their life course to a gender identity that conforms to expectations for the sex stamped on their birth certificate." Currah, supra note 37, at 11. A more universalizing view would recognize that "the barriers to sex reclassification that transgender people face reinforce the credibility of sex as a metric of identity for everyone," id. at 12, a fact laid bare in recent years by racist transphobia directed at several cis women Olympic athletes, including Imane Khelif and Caster Semenya. See, e.g., Gerald Imray, The Scrutiny Khelif and Lin Face Over Their Sex at the Olympics Is a Repeating Problem in Sports, AP News, https://apnews.com/article/olympics-2024-gender-sports-khelif-lin-semenya-b0075988d5e67b0e5ccd7ad284e5033c [https://perma.cc/9THE-2FU9] (last updated Aug. 9, 2024) ("Female athletes of color have historically faced disproportionate scrutiny and discrimination when it comes to sex testing . . . ."); see also Claire Rudy Foster, Opinion, White Fragility & the Ruling Against Caster Semenya, Allure (Sep. 11, 2020) https://www.allure.com/story/caster-semenya-ruling-op-ed (on file with the *Columbia Law Review*) ("'These kind of people [like Caster Semenya] should not run with us,' Elisa Cusma of Italy . . . said in a post-race interview with Italian journalists . . . . 'For me, she's not a woman. She's a man.'"). The resonance of the language of racism ("these kind of people") with transphobic language that underdetermines gender only affirms the work of scholars of race and gender that have pointed at the co-constitution of gender binarism and whiteness; for examples, see Marquis Bey, Anarcho-Blackness: Notes Toward a Black Anarchism 92–114 (2020); Sally Markowitz, The Gender Binary and the Invention of Race 47–87 (2024).

that accord with an individual's gender identity.[170] Bans on these nonmedical forms of gender-affirming care are likely to do three things: intimidate and harass non-cis youth and supportive families,[171] create significant psychological and physical distress for non-cis youth,[172] and foster an environment that sanctions increasing hostility toward gender counterconformity.[173] Concerns over detransition in the context of medical interventions have no prudential bearing on social forms of gender-affirming care.

Second, the primary form of gender-affirming care for minors aged roughly nine to sixteen is puberty blockers,[174] a medical intervention that has been used for cis and trans youth and is reversible; discontinuing puberty blockers will typically allow for the initiation of endogenous puberty (when cross-sex hormones are not used) or for the initiation of exogenous puberty (when cross-sex hormones are used for treatment).[175]

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170. See, e.g., Fla. Stat. Ann. § 1000.071 (West 2024) (declaring sex an immutable biological trait and banning the use of gender pronouns that do not correspond to a person's sex); see also id. § 553.865(3)(l), 11(b) (defining sex as "classification of a person as either female or male based on the organization of the body of such person for a specific reproductive role" and making it a misdemeanor for a person of one sex to enter the facility of another sex in public buildings); Ind. Code Ann. § 20-33-7.5-2 (West 2024) (requiring schools to notify parents when a student wishes to change their name or pronouns). Parental notification constrains gender counterconformity by preventing students from being able to meaningfully interrogate what it might feel like, for example, to be referred to with a different name or different pronouns, since it immediately triggers parental notification (and forces students into making decisions without having enough experience to know if shifting identities will stick). While it does not amount to a complete ban like the Florida statute, statutes like Indiana's create a veto power and are likely to create fractures between parents and children, an interest that discouraged the Court in Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976) (noting that it is not likely that "veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure").

171. See Roberto L. Abreu, Jules P. Sostre, Kirsten A. Gonzalez, Gabriel M. Lockett, Em Matsuno & Della V. Mosley, Impact of Gender-Affirming Care Bans on Transgender and Gender Diverse Youth: Parental Figures' Perspective, 36 J. Fam. Psych. 643, 649 (2022) ("Participants expressed concern over how legalized discrimination would increase anti-TGD sentiment, violence, and further invalidate the existence of TGD people everywhere.").

172. See id. at 647–48 ("Thirty-four parental figures discussed how these law and bills would decrease the safety of TGD youth and the TGD community overall such as increasing exposure to antitransgender sentiment, violence, and discrimination.").

173. See id. Like the use of counterconforming factors above, this term indicates only resistance to foreclosing possibilities in gender identity and expression.

174. See SOC8, supra note 68, at S112–14 (encouraging physicians to prescribe gonadotropin releasing hormone agonists for adolescents at Tanner Stage 2). For descriptions of the Tanner Stages and their rough corresponding ages, see generally Jean Claude A. Guidi & Amit Sapra, Physiology, Sexual Maturity Rating, *in* StatPearls (2022), https://www.ncbi.nlm.nih.gov/books/NBK551691/ [https://perma.cc/22HH-2ZHA] (outlining the Sexual Maturity Rating's stages throughout puberty and its implications for sexual development).

175. See Turban et al., Pubertal Suppression, supra note 159, at 90 ("GnRHa therapy is unique among gender-affirming medical interventions in that the resultant pubertal

By contrast, not using puberty blockers and allowing endogenous puberty to proceed leads to pronounced and irreversible changes in "bone structure, voice changes, breast development, and body hair growth" that are likely to worsen minors' feelings of gender dysmorphia and increase psychological distress.[176] In light of this, given the irreversibility of endogenous puberty versus the reversibility of puberty-blocking treatment—in conjunction with the distress that endogenous puberty can create versus the reduced risk of psychological distress when puberty-blocking treatment is offered[177]—puberty blockers clearly win out on balance, even if youth later decide to discontinue puberty blockers and experience endogenous puberty unabated. This constitutes a prudential rationale for allowing easy, rights-based access to puberty-blocking treatment.

Finally, there are normative concerns as well. "[A]ccess to irreversible endogenous puberty requires no evaluation and is available to adolescents who have never given the matter any thought at all," as bioethicists B.R. George and Danielle Wenner have argued.[178] By contrast, the Standards of Care recommend adolescents receive hormone therapy only when an adolescent's "experience of gender diversity/incongruence is marked and sustained over time" and only after undergoing a "comprehensive biopsychosocial assessment," treatment of mental health concerns, and counseling about fertility and its preservation.[179] While it might be partially justified on the grounds that exogenous puberty is a medical intervention and requires patients to give informed consent, the exceptionally high bar needed for access to puberty blockers alone exceeds informed consent, and creates an ethically problematic double standard with endogenous puberty.[180] Concern over future detransition also ignores the circularity that at least partially underpins many detransitioners' experiences: Large pluralities of detransitioners cited pressure from family members, difficulties finding employment, and social stigma as reasons for

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suppression is fully reversible, with the resumption of endogenous puberty after their discontinuation.").

176. Id. at 92 ("[W]hen comparing those who received pubertal suppression with those who did not, receiving pubertal suppression was associated with decreased odds of past-year suicidal ideation, lifetime suicidal ideation, and past-month severe psychological distress." (citation omitted)).

177. See id. at 5 ("Treatment with pubertal suppression among those who wanted it was associated with lower odds of lifetime suicidal ideation when compared with those who wanted pubertal suppression but did not receive it.").

178. B.R. George & Danielle M. Wenner, Puberty-Blocking Treatment and the Rights of Bad Candidates, Am. J. Bioethics, Feb. 2019, at 80, 81.

179. SOC8, supra note 173, at S48, S50, S60.

180. See Ashley, Adolescent Medical Transition Is Ethical, supra note 143, at 131–34 ("Applying different standards to comparable situations is a paradigmatic form of injustice, violating the formal principle of justice that likes must be treated alike." (citing Stefan Gosepath, Equality, Stan. Encyc. Phil. (Edward N. Zalta ed., Mar. 27, 2001), https://plato.stanford.edu/entries/equality/ (on file with the *Columbia Law Review*) (last updated Apr. 26, 2021))).

detransition. A large majority (82.5%) cited at least one external factor as contributing to their decision to detransition, compared to only 15.9% of individuals who cited at least one internal factor such as uncertainty around gender.[181] That is, detransition happens largely because transitioning is so difficult, not necessarily because gender dysphoria is not a real felt problem. The authors of that study concluded that so-called desisters may seek gender affirmation at some point in the future, implicitly in a future that is less trans-antagonistic.[182]

On these bases, then, a state's prudential and normative analyses would weigh against bans on gender-affirming care for minors.

C. *Minors and Competent Decisionmaking*

If the above section addresses the question of whether a state should prevent a family unit from accessing gender-affirming care, one question remains about what to do when parents and children disagree: When a child wants to transition, but the parents disagree, what should the outcome be? In Statement 6.12.c, the World Professional Association for Transgender Health's Standards of Care provide that adolescents must demonstrate "the emotional and cognitive maturity required to provide informed consent/assent" for any medical interventions (puberty blockers, cross-sex hormone therapy, surgery where indicated).[183] Decisionmaking capacity as described in the Standards of Care draws on the work of Paul Appelbaum and Petronella Grootens-Wiegers, requiring (1) the capacity to communicate and express a choice; (2) the ability to understand the information provided about a treatment; (3) the ability to identify and weigh risks and benefits; and (4) the ability to appreciate the nature and relevance of different options to the situation at hand.[184] While this might allow for assessment of capacity tout court, it doesn't necessarily provide a framework for assessing the particular decisionmaking capacities needed to consent to gender-affirming care. Florence Ashley suggests the following criteria: "(1) the patient is guided by their gender subjectivity and other values, cares, and commitments; (2) they act based on reasons prescribed by their gender subjectivity, values, cares, and commitments; (3) they are open to seeing reasons to the contrary."[185] That is, an individual should be able to connect the particular gender-affirming medical intervention to their desire to live as a particular gender and should be able to see and understand (though it is not necessary to accept)

181. Turban et al., Factors Leading to "Detransition", supra note 60, at 277.

182. Id. at 277.

183. SOC8, supra note 68, at S48–50, S61.

184. Id.; Petronella Grootens-Wiegers, Irma M. Hein, Jos M. van den Broek & Martine C. de Vries, Medical Decision-Making in Children and Adolescents: Developmental and Neuroscientific Aspects, 17 BMC Pediatrics, no. 120, 2017, at 1, 3–4.

185. Florence Ashley, Youth Should Decide: The Principle of Subsidiarity in Paediatric Transgender Healthcare, 49 J. Med. Ethics 110, 112 (2023).

the reasons weighing against an intervention. Neither of these frameworks is prophylactic against regret, but that is in the nature of decisionmaking itself, nor are mistakes the exclusive province of adults. To the extent that any adult might regret a tattoo or piercing, an abortion or having children, transitioning or not, it is not the role of government to protect even children from the consequences of their decisions.

Here, *Danforth* becomes useful again. Like abortion, the decision to access gender-affirming medical interventions is a form of "definitional medical care."[186] It is fundamentally a question of identity—does an adolescent wish to live as a pregnant person or not? Does an adolescent wish to be a mother? Does an adolescent wish to live as a cisgender boy or a transgender girl? If a minor is competent to become pregnant (presumably, through consensual sex), the Court in *Danforth* suggested, that minor must be afforded a right to privacy that allows them to make decisions without the input of anyone but their physician.[187] Similarly, if a minor has developed the capacity to articulate their gender identity and wishes to transition guided by their own gender subjectivity, that minor should be permitted to initiate the process of arresting puberty in like fashion, through consultation with their physician.

This leads even well-intentioned jurists to a quagmire: If the trans minor should, as in *Bellotti* and its successive statutes, go to court to seek a judicial bypass to secure either puberty-blocking or cross-sex hormone treatment, how does this not merely allow the state to stand in and override parental decisionmaking? The key in *Bellotti* was that courts could answer up to two questions: First, was the minor competent to make the decision themselves? If yes, then the court had no further right beyond affirming the minor's decision. If the minor was not competent to make that decision, then the court was to assess whether an abortion was in the best interests of the minor. Yet, drawing on the above framework for capacity developed by Ashley, this Note argues that only the first question need be apposite. If a minor has the capacity to articulate their gender subjectivity and their desire to either arrest puberty or go on cross-sex hormone therapy and then goes to court in search of a judicial bypass, the minor is likely competent enough to make the decision in consultation with their physician and without third-party input, though a court might record the consideration for procedure's sake.

If a child has secured a judicial bypass, parents may object and may even make life difficult for their trans child—parents may kick their children out of their homes (as they already do)[188] or otherwise harm their

186. See Ashley, Adolescent Medical Transition Is Ethical, supra note 143, at 133 (internal quotation marks omitted).

187. See Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976) (holding that it is unlawful to require a "special-consent provision" as a prerequisite for a minor seeking an abortion).

188. The Trevor Project, supra note 105, at 10, 12 (showing that trans and nonbinary youth experience higher rates of homelessness and housing insecurity than their cis peers,

child (as they already do).[189] But a minor who opts to pursue gender-affirming medical and social interventions in the face of these risks has already demonstrated the depth of their commitment to living in their gender. As in *Danforth*, it does not strengthen the family or parental rights to prevent a minor from pursuing puberty blockers or gender transition; the very transness of the child already has fractured the family structure.[190]

CONCLUSION

Legislatures, courts, and media outlets have manufactured legal and scientific uncertainty around gender-affirming care. This is the result of a phobic frame that vanishes the perspectives of minors and reduces decisionmakers' confidence. Gender-affirming care bans for minors should not be understood primarily as forms of sex discrimination, but instead as a form of age discrimination; governed properly by precedent, such age discrimination cannot stand. The solution, necessarily, must question and overturn assumptions about decisionmaking competency for minors, rather than relying on an equal protection or a sex discrimination analysis like that in *Bostock*. This Note argues that courts need only inquire into whether a minor can articulate their gender subjectivity and understand the consequences of gender-affirming treatment in allowing for judicial bypass of parental opposition to minors receiving gender-affirming care.

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and that significant percentages of LGBTQ+ youth attribute their homelessness or insecurity to being kicked out by parents or mistreatment/fear of mistreatment by parents related to their identity).

189. See Brian C. Thoma, Taylor L. Rezeppa, Sophia Choukas-Bradley, Rachel H. Salk & Michael P. Marshal, Disparities in Childhood Abuse Between Transgender and Cisgender Adolescents, Pediatrics, Aug. 2021, at 22, 27 (finding trans adolescents "are more likely to report psychological, physical, and sexual abuse during childhood compared with heterosexual" cisgender adolescents).

190. This is, of course, a paraphrase of the observation in *Danforth* that "the very existence of the pregnancy already has fractured the family structure." 428 U.S. at 75.

CONSULAR NONREVIEWABILITY AFTER *DEPARTMENT OF STATE V. MUÑOZ*: REQUIRING FACTUAL AND TIMELY EXPLANATIONS FOR VISA DENIALS

*Jake Stuebner**

The visa application process is laden with discretion and reinforced by consular nonreviewability—an extensive form of judicial deference. Until recently, courts recognized a small exception to consular nonreviewability. Under this exception, courts engaged in limited review of a consular officer's decision when visa denials implicated the fundamental rights of U.S. citizens.

The Court curtailed this exception in United States Department of State v. Muñoz, *anointing consular officers with nearly complete power over visa decisions. This deference jeopardizes the integrity and fairness of the immigration system, leaving visa applicants and their U.S. citizen sponsors at the mercy of consular officers. This not only fosters an arbitrary visa system but also conflicts with broader immigration system and administrative law trends.*

This Note traces the accidental history of consular nonreviewability—from its racially motivated origins to its full-fledged indoctrination in Muñoz. *This Note proposes an amendment to the Immigration and Nationality Act: Consular officers should be required to provide factual and timely explanations for visa denials. Such a requirement would inject greater fairness into the visa application process and better align it with broader immigration law—without sacrificing the values underpinning consular nonreviewability.*

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INTRODUCTION

In 1995, fourteen-year-old Edvin Colindres Juarez, a Guatemalan citizen, crossed the United States border without inspection.[1] He lived in New York with his family for a few years before moving to Florida, where he worked for a pool-finishing company.[2] In 2006, he married Kristen, a U.S. citizen; two years later, the couple welcomed a daughter.[3] Mr. Colindres built a life in the United States, all the while lacking

1. See Final Opening Brief of Appellants at 1, Colindres v. U.S. Dep't of State, 71 F.4th 1018 (D.C. Cir. 2023) (No. 22-5009), 2023 WL 1816861 [hereinafter *Colindres*, Brief of Appellants].

2. Id. at 4.

3. Colindres v. U.S. Dep't of State, 575 F. Supp. 3d 121, 127 (D.D.C. 2021).

documentation to be legally in the country.[4] To stabilize his precarious foundation, he hoped to secure a visa and fix his immigration status.[5] People "unlawfully present" are ordinarily not issued visas,[6] but the Attorney General waived this prohibition as applied to Mr. Colindres in 2015, finding that the Colindres family would face extreme hardship without Mr. Colindres in the United States.[7] In June 2019, Mr. Colindres traveled to Guatemala to complete the final step of the visa process: an interview with a consular officer.[8] He packed lightly, expecting a quick trip.[9]

He was wrong. After multiple interviews, a clean criminal record check, and almost a year's delay, a consular officer denied Mr. Colindres's application.[10] The officer claimed that "'there [was] reason to believe' that he was 'a member of a known criminal organization.'"[11] The embassy provided no evidence to support this assertion,[12] leaving Mr. Colindres to speculate how the officer could believe he was "seek[ing] to enter the United States to engage . . . in . . . unlawful activity"[13] when he had a clean criminal record and had been peacefully living in the United States for

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4. See *Colindres*, 71 F.4th at 1020 (noting that Mr. Colindres "did not have permission to live or work in the United States").

5. Id.

6. See Unlawful Presence and Inadmissibility, USCIS, https://www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-inadmissibility [https://perma.cc/97C3-MG6P] (last updated June 24, 2022) (summarizing standards for the admissibility of noncitizens who have accrued unlawful presence). This policy is currently in flux: On June 18, 2024, President Joe Biden announced a new policy permitting undocumented spouses of U.S. citizens who have been living in the United States for more than ten years to apply for lawful permanent residence status without leaving the country. See Press Release, White House, Fact Sheet: President Biden Announces New Actions to Keep Families Together (June 18, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/06/18/fact-sheet-president-biden-announces-new-actions-to-keep-families-together/ [https://perma.cc/4GQ4-SVQ4]. It seems likely that this policy will be reversed in the upcoming Trump Administration. See Camilo Montoya-Galvez, Judge Declares Biden Immigration Program for Spouses of U.S. Citizens Illegal, CBS News (Nov. 8, 2024), https://www.cbsnews.com/news/judge-declares-biden-immigration-program-for-spouses-of-u-s-citizens-illegal/ [https://perma.cc/9ZRC-SRAR] (predicting that "the Keeping Families Together program is likely to be in the crosshairs of the incoming administration of Trump").

7. *Colindres*, 71 F.4th at 1020 (noting that the Attorney General has this authority under 8 U.S.C. § 1182(a)(9)(B)(v) (2018)).

8. Id.

9. *Colindres*, Brief of Appellants, supra note 1, at 1.

10. *Colindres*, 71 F.4th at 1020.

11. Id. (alteration in original) (quoting Joint Appendix at 242–43, *Colindres*, 71 F.4th 1018 (No. 22-5009)).

12. Petition for a Writ of Certiorari at 6, Colindres v. U.S. Dep't of State, 144 S. Ct. 2716 (No. 23-348), 2023 WL 6517286 [hereinafter *Colindres* Petition].

13. 8 U.S.C. § 1182(a)(3)(A)(ii).

twenty-four years.[14] The officer's reasoning did not matter: When Mr. and Mrs. Colindres appealed the visa denial, the court dismissed the case for failure to state a claim, holding that the consular nonreviewability doctrine barred review of the officer's decision.[15] Mr. Colindres voluntarily trusted the immigration system to adjust his status. In response, the U.S. government labeled him a criminal and banned him from his home of more than two decades.[16]

Mr. Colindres's story highlights the immense, unchecked power of consular officers over the visa process.[17] Immigration to the United States almost always requires a visa,[18] and consular officers determine who is eligible to receive one.[19] Consular officers churn through hundreds of applicants in a day, making "judgement call[s]" after minutes-long interviews.[20] In such a pressure-packed environment with limited information, bias creeps in and mistakes are inevitable.[21] At its worst, this discretion enables consular officers to exploit their positions for personal gain or to promote racist ideologies.[22] But even in ordinary applications, the discretion still creates arbitrary results. Visa acceptance rates vary widely by officer and location.[23] The unfortunate reality of the visa process

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14. *Colindres* Petition, supra note 12; see also Gabriela Baca, Comment, Visa Denied: Why Courts Should Review a Consular Officer's Denial of a U.S.-Citizen Family Member's Visa, 64 Am. U. L. Rev. 591, 596 (2015) ("Without any formal recourse, the [parties] are left wondering why the consular officer denied the application despite USCIS's approval . . . .").

15. Colindres v. U.S. Dep't of State, 575 F. Supp. 3d 121, 126 (D.D.C. 2021); see also *Colindres*, 71 F.4th at 1019–20. Consular nonreviewability is a new doctrine—at least as recognized in the Supreme Court. See Trump v. Hawaii, 138 S. Ct. 2392, 2407 (2018) (labeling consular nonreviewability a "doctrine" for the first time). Using the term "doctrine" leads to consequences, invoking a "religious overtone." See Allison Orr Larsen, Becoming a Doctrine, 76 Fla. L. Rev. 1, 18, 52 (2024) ("Doctrinizing a concept, in other words, will change it, compress it, and simplify it."). To avoid overstating consular nonreviewability's permanence, this Note refers to it simply as "consular nonreviewability."

16. See *Colindres*, Brief of Appellants, supra note 1, at 4–6 (describing how Mr. Colindres's attempt to obtain lawful immigration status forced him to leave the United States).

17. See infra section II.C.1.

18. See 8 U.S.C. § 1181 (carving out small exceptions for "returning resident immigrants" and people "admitted as refugees").

19. See id. § 1101(a)(16).

20. Christopher Richardson, Opinion, Visa Officers Aren't Racist—They're Just Enforcing the Law, Wash. Post (Feb. 21, 2019), https://www.washingtonpost.com/opinions/2019/02/22/visa-officers-arent-racist-theyre-just-enforcing-law/ (on file with the *Columbia Law Review*).

21. See James A.R. Nafziger, Review of Visa Denials by Consular Officers, 66 Wash. L. Rev. 1, 54 (1991) ("[A]ny exercise of discretion is potentially fallible."); see also Donald S. Dobkin, Challenging the Doctrine of Consular Nonreviewability in Immigration Cases, 24 Geo. Immigr. L.J. 113, 119 (2010) ("Racial discrimination can easily work its way into consular decisions because many of those decisions rely upon subjective factors.").

22. See infra note 251 and accompanying text.

23. See Nafziger, supra note 21, at 69 (describing the variation in acceptance rates at a particular consulate and between posts).

is that Mr. Colindres's rejection was likely influenced more by the officer adjudicating his application than the merits of his case.[24]

Notwithstanding the potential for error, visa denials are almost impossible to challenge in court.[25] When reviewing visa decisions, courts apply consular nonreviewability—an extensive form of deference originating from the racially motivated *Chinese Exclusion Case* of 1889.[26] Under consular nonreviewability, judges do not second-guess consular visa decisions. Historically, there has been a small exception when a decision "allegedly burdens the constitutional rights of a U.S. citizen."[27] Even then, the courts limit its review to only consider whether the consular officer gave a "facially legitimate and bona fide reason" for the denial.[28]

Despite an increase in judicial scrutiny over other areas of immigration law[29] and broader antideference and antidelegation trends,[30]

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24. See David Lindsey, Delegated Diplomacy: How Ambassadors Establish Trust in International Relations 34–37 (2023) ("[T]he cumulative exercise of visa discretion is one of the largest influences on global migration patterns.").

25. See Eric Lee & Sabrina Damast, Why Everyone Should Care About the "Doctrine of Consular Nonreviewability", AILA Blog: Think Immigr. (Nov. 22, 2022), https://thinkimmigration.org/blog/2022/11/22/why-everyone-should-care-about-the-doctrine-of-consular-nonreviewability/ [https://perma.cc/7FAU-R5N5] (highlighting *Muñoz* as the first federal court decision to find a consular officer's explanation inadequate).

26. See infra section I.A.1.

27. U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1821 (2024) (internal quotation marks omitted) (quoting Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018)); see also Kleindienst v. Mandel, 408 U.S. 753, 768–70 (1972) (articulating this exception).

28. *Muñoz*, 144 S. Ct. at 1821 (internal quotation marks omitted) (quoting Kerry v. Din, 576 U.S. 86, 103–04 (2015) (Kennedy, J., concurring in the judgment)).

29. See Kevin R. Johnson, Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism, 68 Okla. L. Rev. 57, 62 (2015) [hereinafter Johnson, Immigration in the Supreme Court] ("[I]mmigration matters regularly comprise a bread-and-butter part of [the Supreme Court's] docket."); Catherine Y. Kim, Plenary Power in the Modern Administrative State, 96 N.C. L. Rev. 77, 88 (2017) (highlighting that the Supreme Court "has granted certiorari in at least one immigration case every term since 2009 and vacated a government immigration decision roughly every other year"); cf. Karla McKanders, Deconstructing Invisible Walls: Sotomayor's Dissents in an Era of Immigration Exceptionalism, 27 Wm. & Mary J. Race, Gender & Soc. Just. 95, 96 (2020) (describing the "many different theories accounting for the proliferation of immigration cases on the Supreme Court's docket").

30. See, e.g., Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024) (overruling *Chevron* deference); Gundy v. United States, 139 S. Ct. 2116, 2133–35 (2019) (Gorsuch, J., dissenting) ("The legislative cannot transfer the power of making laws to any other hands . . . ." (internal quotation marks omitted) (quoting John Locke, The Second Treatise of Government and a Letter Concerning Toleration § 141 (1947))); Michigan v. Env't Prot. Agency, 576 U.S. 743, 762 (2015) (Thomas, J., concurring) ("Such a transfer is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies." (citing U.S. Const. art. III, § 1)); Thomas W. Merrill, Response, *Chevron*'s Ghost Rides Again, 103 B.U. L. Rev. 1717, 1729–34 (2023) (outlining constitutional objections to *Chevron* deference).

consular nonreviewability remains robust.[31] In fact, days before overturning *Chevron* deference,[32] the Court expanded the discretion of consular officers over visa decisions.[33] In *United States Department of State v. Muñoz*, the Court reversed a successful visa denial challenge[34] and curtailed consular nonreviewability's already limited exception.[35]

The *Muñoz* decision has enormous implications both for the families involved in the visa process[36] and the prevalence of judicial review in immigration law.[37] Every year, hundreds of thousands of people rely on the spousal visa process to establish lawful permanent resident status in the United States.[38] For people like Mr. Colindres, who are denied a visa based on a mere citation to a catch-all statutory provision, judicial review makes the ultimate difference.[39] And given broader trends in immigration and administrative law, it is worth questioning the logic of empowering unelected administrative officials with such unchecked authority.[40]

This Note discusses the future of consular nonreviewability after *Muñoz* and its implications for the immigration system. Part I provides a history of consular nonreviewability, explaining its theoretical foundation, legal development, and application to spousal unity cases. Part II introduces the Ninth Circuit's short-lived *Muñoz* exception, discusses how the Supreme Court struck it down, and describes the consequences of this decision for the visa system and broader administrative law. Recognizing the practical impossibility of judicial review, Part III charts a path forward. By requiring consular officers to provide factual and timely explanations for visa denials, Congress can inject greater fairness into the visa

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31. See *Muñoz*, 144 S. Ct. at 1820 ("The Judicial Branch has no role to play 'unless expressly authorized by law.' . . . This principle is known as the doctrine of consular nonreviewability." (quoting United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950))); see also Trump v. Hawaii, 138 S. Ct. 2392, 2407 (2018) (mentioning "the doctrine of consular nonreviewability" for the first time in a Supreme Court opinion).

32. See *Loper Bright Enters.*, 144 S. Ct. at 2265 (rejecting *Chevron* deference).

33. See *Muñoz*, 144 S. Ct. at 1821, 1826 (holding "that a citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country" and noting that "*Mandel* does *not* hold that citizens have procedural due process rights in the visa proceedings of others").

34. See Muñoz v. U.S. Dep't of State, 50 F.4th 906, 923–24 (9th Cir. 2022) (holding "that the government did not meet the notice requirements of due process"), rev'd, 144 S. Ct. 1812 (2024).

35. *Muñoz*, 144 S. Ct. at 1826 (curtailing the scope of the *Mandel* exception).

36. See *Colindres* Petition, supra note 12, at 39 ("The Colindres Family is in dire straits.").

37. See *Muñoz*, 144 S. Ct. at 1819 ("Visa denials are insulated from judicial review by the doctrine of consular nonreviewability.").

38. See infra note 132 and accompanying text.

39. See Merrill, supra note 30, at 1726 ("[T]hese various exercises in deference to the conclusions of others are often critical to whether the rights of individuals are sustained or denied.").

40. See Harry N. Rosenfield, Consular Non-Reviewability: A Case Study in Administrative Absolutism, 41 ABA J. 1109, 1110 (1955) (describing consular nonreviewability as an "anomaly in American jurisprudence").

application process and better align consular nonreviewability with broader immigration and administrative law—while respecting national security concerns, consular and judicial efficiency, and immigration exceptionalism.

I. THE ORIGINS OF CONSULAR NONREVIEWABILITY

Navigating the United States immigration process is notoriously difficult.[41] Yet, the consular officer's approval is an especially prominent pain point.[42] Not only are consular decisions highly subjective, but they are also nearly impossible to challenge under consular nonreviewability, which states that courts ordinarily will not "look behind" a decision.[43] Section I.A outlines Congress's immigration plenary power and how it was delegated to consular officers over time. After tracing this history, section I.B explains the mechanics of today's visa process and introduces the *Mandel* exception to consular nonreviewability. Finally, section I.C describes the application of this exception to spousal unity cases, which ultimately led to the Court's grant of certiorari in *Muñoz*.

A. *Delegation of Congress's Plenary Power to Consular Officers*

1. *Scope of the Plenary Power.* — Consular nonreviewability is rooted in the legislature's immigration plenary power—Congress's absolute authority "to make policies and rules for [the] exclusion of" noncitizens.[44] In fact, case law is clear that "[o]ver no conceivable subject is the legislative power of Congress more complete than it is" on the decision to admit or

41. See Emily C. Callan & JohnPaul Callan, The Guards May Still Guard Themselves: An Analysis of How *Kerry v. Din* Further Entrenches the Doctrine of Consular Nonreviewability, 44 Cap. U. L. Rev. 303, 306 (2016) ("[I]mmigration procedures stand as some of the most administratively burdensome applications in the body of U.S. law."); Nasim Emamdjomeh, Comment, Walking Through the U.S. Immigration System and Its Missing Right to Counsel, 59 Hous. L. Rev. 673, 677 (2022) (noting that "the U.S. immigration system is incredibly complex and confusing"); see also Steven Rattner & Maureen White, Opinion, How to Fix America's Immigration Crisis, N.Y. Times (Jan. 9, 2024), https://www.nytimes.com/interactive/2024/01/09/opinion/immigration-in-one-chart.html (on file with the *Columbia Law Review*) (describing "an underfunded immigration apparatus that is swaddled in bureaucracy, complicated beyond imagination").

42. See, e.g., Gerald L. Neuman, Discretionary Deportation, 20 Geo. Immigr. L.J. 611, 617–18 (2006) ("The arbitrariness of consuls is proverbial. Immigration lawyers generally prefer the Scylla of the adjustment of status process, despite its discretionary character, to the Charybdis of the consul.").

43. Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

44. Id. at 769; see also Kerry v. Din, 576 U.S. 86, 103 (2015) (Kennedy, J., concurring) (arguing that "[t]he reasoning and holding of *Mandel* control" (citing *Mandel*, 408 U.S. at 753)); Kit Johnson, *Chae Chan Ping* at 125: An Introduction, 68 Okla. L. Rev. 3, 3–4 (2015) (defining plenary power as the idea that "any law passed by Congress with respect to immigration, even those that would be unconstitutional if applied to citizens, is not subject to judicial challenge"); Plenary, Merriam-Webster, https://www.merriam-webster.com/dictionary/plenary [https://perma.cc/RPR9-DYM3] (last visited Aug. 18, 2024) (defining plenary as "absolute" or "unqualified").

deny immigrants.[45] The plenary power is closely linked to immigration exceptionalism—the idea that "government action that would be unacceptable if applied to citizens" is permissible over noncitizens.[46] The Constitution assigns the power over immigration to the legislative branch via the Naturalization Clause, which specifies that "the Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization."[47] The Constitutional Convention incorporated this text without recorded controversy, perhaps suggesting that the Framers perceived the regulation of immigration as an obvious legislative task.[48]

The strength of the immigration plenary power comes from its philosophical and practical rationales. Philosophically, the immigration plenary power is rooted in what it means to be a nation.[49] Stemming from "ancient principles of the international law of nation-states,"[50] "[t]he power to admit or exclude is a sovereign prerogative."[51] Indeed, the ability to "regulate the flow of non-citizens entering the country . . . is an inherent power of any sovereign nation."[52] This idea traces as far back as the Roman Empire and "received recognition during the Constitutional Convention."[53] Practically, a strong immigration power helps maintain a

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45. *Mandel*, 408 U.S. at 766 (internal quotation marks omitted) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

46. See David S. Rubenstein & Pratheepan Gulasekaram, Immigration Exceptionalism, 111 Nw. U. L. Rev. 583, 584–85 (2017); see also Peter H. Schuck, The Transformation of Immigration Law, 84 Colum. L. Rev. 1, 1 (1984) ("Immigration has long been a maverick, a wild card, in our public law.").

47. U.S. Const. art. I, § 8, cl. 4; see Leon Wildes, Review of Visa Denials: The American Consul as 20th Century Absolute Monarch, 26 San Diego L. Rev. 887, 891 (1989) ("Congress's enumerated powers over foreign commerce, naturalization, and war powers, supplemented by the 'necessary and proper' clause, were first cited by the Court in 1892 as the sources of the implied congressional power . . . .").

48. See James E. Pfander & Theresa R. Wardon, Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency, 96 Va. L. Rev. 359, 385–86 (2010) ("The Convention did not take any special notice of the provision at that time but simply submitted it to the Committee of Detail . . . .").

49. See Kim, supra note 29, at 126 (noting that the immigration plenary power is crucial to "democratic self-determination").

50. *Mandel*, 408 U.S. at 765; see also Saavedra Bruno v. Albright, 197 F.3d 1153, 1158 n.4 (D.C. Cir. 1999) (citing Edwin M. Borchard, Diplomatic Protection of Citizens Abroad or the Law of International Claims 33, 44–48 (1915)).

51. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (internal quotation marks omitted) (quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982)).

52. Shawn E. Fields, The Unreviewable Executive? National Security and the Limits of Plenary Power, 84 Tenn. L. Rev. 731, 737 (2017); see also Schuck, supra note 46, at 1 (noting that "a country's power to decide unilaterally who may enter its domain . . . has been regarded as an essential precondition of its independence and sovereignty").

53. *Saavedra Bruno*, 197 F.3d at 1158; see also 4 The Writings of James Madison 150 (Gaillard Hunt ed., 1903) (quoting Gouverneur Morris as saying during the Convention that "every Society from a great nation down to a club has the right of declaring the conditions on which new members should be admitted").

consistent approach to foreign affairs and national security.[54] To promote uniform policymaking, the government must "speak with one voice."[55] Vesting exclusive control over immigration with Congress, therefore, permits the United States to maintain a consistent approach to foreign relations.[56]

The plenary power lay mostly dormant during the United States's first century because "Congress did not meaningfully restrict immigration . . . until the 1880s."[57] After Congress passed a series of acts excluding and expelling Chinese laborers, the Supreme Court considered the scope of Congress's immigration power in *Chae Chan Ping v. United States* (*The Chinese Exclusion Case*).[58] In upholding the restrictive acts, the Court leaned on the logic of the plenary power, reasoning that "[j]urisdiction over its own territory . . . is an incident of every independent nation. . . . If it could not exclude [noncitizens] it would be to that extent subject to the control of another power."[59] Therefore, the ability to enter the United States "is held at the will of the government, revocable at any time, at its pleasure."[60] Crucially for the development of consular nonreviewability, the Court concluded that evaluations of Congress's immigration decisions "are not questions for judicial determination" because "the political department of our government . . . is alone competent to act upon the subject."[61] Thus, the Court concluded that Congress has absolute authority

54. See Fields, supra note 52, at 733–34 (explaining that the immigration plenary power is justified by the "recognition of the linkage between foreign affairs and national security . . . and immigration controls"); Kim, supra note 29, at 127 (highlighting the "need for a uniform policy toward foreign nations").

55. Kim, supra note 29, at 127; see also David A. Martin, Why Immigration's Plenary Power Doctrine Endures, 68 Okla. L. Rev. 29, 37 (2015) (identifying federalism as a justification for the immigration plenary power and noting the "requirement that the nation speak with one voice on the world stage" as opposed to individual state voices).

56. See Kim, supra note 29, at 127; see also Trump v. Hawaii, 138 S. Ct. 2392, 2407 (2018) (internal quotation marks omitted) (quoting Mathews v. Diaz, 426 U.S. 67, 81 (1976)) (reasoning that immigration decisions "may implicate relations with foreign powers or involve classifications defined in the light of changing political and economic circumstances"); *Saavedra Bruno*, 197 F.3d at 1159 ("[T]he power to exclude [noncitizens] [is] . . . 'necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers . . . .'" (quoting Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 609 (1889))).

57. Kim, supra note 29, at 95 n.85 (citing Gerald L. Neuman, The Lost Century of American Immigration Law (1776–1875), 93 Colum. L. Rev. 1833, 1834–35 (1993)); see also U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1823 (2024) (explaining that "[t]he United States had relatively open borders until the late 19th century"); Wildes, supra note 47, at 890 (noting that "Congress's first effort to restrict immigration" came in 1862 via a law "prohibiting the importation of [Chinese] slave labor").

58. 130 U.S. at 582.

59. Id. at 603–04.

60. Id. at 609.

61. Id.

over immigration matters that, when exercised, is not subject to judicial interference.[62]

Because it upheld racist immigration policies, *The Chinese Exclusion Case* is highly criticized and "commonly analogized to other 'anti-canon' cases like *Plessy v. Ferguson*."[63] Unlike *Plessy*, however, *The Chinese Exclusion Case* remains extremely influential, especially as a defense of consular nonreviewability.[64]

2. *Delegation of the Plenary Power.* — Understanding the plenary power's continued role in consular decisions requires exploring how this power was delegated from Congress to the executive branch and then from the executive branch to consular officers. *The Chinese Exclusion Case* placed the immigration plenary power with Congress, emphasizing that decisions the government makes "through its *legislative department* . . . [are] conclusive upon the judiciary."[65] Four years after *The Chinese Exclusion Case*, the Court "held that Congress had the power to delegate its immigration powers . . . and . . . much of its immunity from judicial scrutiny" to the Executive branch.[66]

In *Nishimura Ekiu v. United States*, the Court explained that Congress could delegate investigation and factfinding on immigration matters to either the courts or to executive officers.[67] If Congress assigned these duties to executive officers, courts could not intervene unless directed to

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62. Id.; see also Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) ("It is not within the province of the judiciary to [reverse immigration decisions] . . . in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government.").

63. See Fields, supra note 52, at 739 (footnote omitted); see also Gabriel J. Chin, Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration, 46 UCLA L. Rev. 1, 12 (1998) (concluding that the plenary power "has been so thoroughly undermined by its creation to service white supremacy, changes in international law, and changes in the Court's understanding of judicial review, that there is virtually nothing left of the foundational cases"); Michael Scaperlanda, Scalia's Short Reply to 125 Years of Plenary Power, 68 Okla. L. Rev. 119, 121 & n.10 (2015) (arguing that *The Chinese Exclusion Case* was a "misinterpretation of the 'ancient principles of international law of the nation-states'" (quoting Fiallo v. Bell, 430 U.S. 787, 797 (1977))); Peter J. Spiro, Opinion, Trump's Anti-Muslim Plan Is Awful. And Constitutional., N.Y. Times (Dec. 8, 2015), https://www.nytimes.com/2015/12/10/opinion/trumps-anti-muslim-plan-is-awful-and-constitutional.html (on file with the *Columbia Law Review*) ("Unlike other bygone constitutional curiosities that offend our contemporary sensibilities, the Chinese Exclusion case has never been overturned.").

64. See, e.g., Muñoz v. U.S. Dep't of State, 73 F.4th 769, 775 (9th Cir. 2023) (declining to hear en banc) (Bumatay, J., dissenting), rev'd, 144 S. Ct. 1812 (2024); Baan Rao Thai Rest. v. Pompeo, 985 F.3d 1020, 1026 (D.C. Cir. 2021) (same).

65. *The Chinese Exclusion Case*, 130 U.S. at 606 (emphasis added); see also Kim, supra note 29, at 94 (noting that the immigration plenary power "was identified as a power belonging to Congress" in *The Chinese Exclusion Case*).

66. Wildes, supra note 47, at 892.

67. 142 U.S. at 660; see also Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) (affirming that regulations established by Congress could "be executed by the executive authority").

by Congress.[68] When Congress delegated authority to the executive branch, the executive branch inherited the "powers expressly conferred by [C]ongress."[69] The Court reasoned that executive decisions made under this authority "are due process of law."[70] *Nishimura Ekiu* extended the immigration plenary power to administrative officials executing Congress's directions.[71]

Still, *Nishimura Ekiu*'s deference was limited—especially compared to what courts afford consular officers today.[72] During the late 1800s, "immigration officials . . . enjoyed only limited statutory authority," and "Congress was understood to make all substantive rules."[73] Yet, after the Court extended judicial deference to executive and administrative officials making immigration decisions, the jurisprudence was primed for a "historical accident" that led to unchecked consular authority.[74]

In 1917, World War I security concerns prompted the United States to institute its first visa requirement.[75] President Woodrow Wilson issued an executive order instructing consular officers to verify United States passports and issue visas.[76] The consular officer's role remained purely advisory; the authority to decide if a noncitizen would be admitted "rest[ed] with the immigration authorities in the United States."[77] Consular officers were only responsible for providing "due warning" when

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68. *Nishimura Ekiu*, 142 U.S. at 660 ("[N]o other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence . . . .").

69. Id.

70. Id.

71. See Kim, supra note 29, at 94 (stating that in rejecting *Nishimura*'s challenge of "the *agency's* conclusion . . . , the Supreme Court extended the plenary power doctrine to immunize the administrative finding").

72. Compare id. at 95, with infra section II.C.1.

73. Kim, supra note 29, at 95.

74. Rosenfield, supra note 40, at 1181.

75. See Wildes, supra note 47, at 892; see also General Instructions from the Acting Secretary of State to the Diplomatic and Consular Officers (July 26, 1917), *in* Papers Relating to the Foreign Relations of the United States, 1918, Supplement 2, The World War 794 (Joseph V. Fuller & Tyler Dennett eds., 1933) [hereinafter Joint Order] ("For the proper defense of the United States in the present war it is imperative that complete information be furnished . . . in order that it may be possible to control travel and prevent the admission of those whose attitude might be inimical and whose presence might constitute a danger.").

76. Exec. Order No. 2619, *in* Papers Relating to the Foreign Relations of the United States, 1918, Supplement 2, The World War 791–92 (Joseph V. Fuller & Tyler Dennett eds., 1933); see also Joint Order, supra note 76, at 796 (mandating that "[e]ach passport of [a noncitizen] must be visaed by an American consul").

77. Joint Order, supra note 75, at 795; see also Saavedra Bruno v. Albright, 197 F.3d 1153, 1156 (D.C. Cir. 1999) (explaining that consuls initially played an advisory role in the visa process, "leaving the determination of excludability to immigration officers at the port of entry").

a prospective entrant was "liable to be excluded" under immigration laws, but they had "no power to exclude a prospective immigrant."[78]

After the war, the government lifted many security measures,[79] but the visa requirement remained—perhaps because it was financially lucrative.[80] In 1921, Congress's appropriation of diplomatic and consular services expressly mentioned "requiring passports and vis[a]s,"[81] even though Congress had never before "require[d] these documents."[82] Three years later, with the Immigration Act of 1924, Congress statutorily codified the visa requirement for the first time.[83]

In addition to codifying the visa requirement, the Immigration Act of 1924 elevated the role of consular officers in the visa process.[84] Whereas officers had played a limited, advisory role before the Act, consular officers under the new scheme had "responsibility for determining the admissibility" of immigrants.[85] Congress made this change to solve a problem that had emerged in the immigration process: Because consular officers could only refuse visas for a narrow range of reasons,[86] there were "large numbers of foreigners making the arduous trip to the United States only to be detained at the border and then excluded."[87] In response, Congress "transferr[ed] the responsibility for determining . . . admissibility . . . from the Secretary of State to consular officers."[88] In less than ten years, the visa requirement emerged and settled into the domain of consular officers.

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78. Joint Order, supra note 75, at 794.

79. See Administrative Timeline of the Department of State 1920–1929, Off. Historian, https://history.state.gov/departmenthistory/timeline/1920-1929 [https://perma.cc/8S9X-APKN] (last visited Aug. 18, 2024) (describing a March 3, 1921, "Joint Resolution terminating various wartime emergency laws . . . [and] travel restrictions imposed during World War I").

80. See Wildes, supra note 47, at 893 (arguing that "the visa requirement would have been phased out . . . were it not for the fact that a fee of one dollar was then being charged").

81. Expenses, Passport Control Act, ch. 113, 41 Stat. 1217 (1921) (repealed 1952).

82. Wildes, supra note 47, at 894 ("Despite the fact that the 1918 Act did not mention passports or visas, let alone require these documents, the 1921 Act extending it did.").

83. Immigration Act of 1924, sec. 2, 43 Stat. 153 (codified at 8 U.S.C. § 202 (2018)); see also Rosenfield, supra note 40, at 1109 (noting that the visa requirement "was written into the basic immigration law in 1924"); Wildes, supra note 47, at 894 ("The requirement that [noncitizens] seeking admission to the United States possess visas issued by United States consular officers first made its permanent entry on the statute books with the Immigration Act of 1924.").

84. See Saavedra Bruno v. Albright, 197 F.3d 1153, 1156–57 (D.C. Cir. 1999).

85. 3 Green Haywood Hackworth, Digest of International Law 742 (1942). For a detailed account of this development, see generally id. at 741–50. The only reasons a consular officer could refuse a visa were if immigration quotas had been reached or the applicant fit within one of the conditions specified in the 1918 Act. Id. at 741.

86. See 3 Hackworth, supra note 85, at 741–50.

87. *Saavedra Bruno*, 197 F.3d at 1156.

88. Id.

Shortly after Congress delegated visa decisionmaking to consular officers, applicants began challenging consular authority.[89] Courts largely adopted and extended the immigration plenary power when interpreting the consular officer's role.[90] In 1926, a noncitizen seeking to visit her children in New York City protested the visa requirement.[91] The Second Circuit denied Ms. London's challenge, holding that the visa requirement was valid.[92] The court continued, rejecting Ms. London's argument that providing a visa was a "ministerial act, which the consul was bound to perform."[93] Instead, the Second Circuit found that because the visa process required "some determination of fact[,] . . . [w]hether the consul has acted reasonably . . . [was] beyond the jurisdiction of the court."[94] As a result, consular officers received the judicial acquiescence characteristic of the immigration plenary power.[95]

3. *Height (and Decline?) of the Plenary Power.* — In the 1950s, the Supreme Court decided two cases, *United States ex rel. Knauff v. Shaughnessy*[96] and *Shaughnessy v. United States ex rel. Mezei*,[97] that represent the height of the immigration plenary power.[98] *Knauff* began as a love story: Ellen and Kurt Knauff met and married while they were working as civilian employees of the United States in Germany.[99] Although he was a United States citizen, she was not.[100] Unfortunately for the couple, when she tried to enter the United States, immigration officers "recommended

89. See United States ex rel. Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir. 1929); United States ex rel. London v. Phelps, 22 F.2d 288 (2d Cir. 1927).

90. See Baca, supra note 14, at 596 ("[C]onsular nonreviewability[] is deeply rooted in the legislative and the executive branches' plenary power over immigration matters.").

91. *London*, 22 F.2d at 289. The preceding District Court opinion provides a bit more context: Ms. London came with three other visitors who had similarly had their visas denied, in an attempt to "present[] a test case" to the visa requirement and consular decision process. United States ex rel. Johanson v. Phelps, 14 F.2d 679, 679, 681 (D. Vt. 1926).

92. *London*, 22 F.2d at 290.

93. Id.; see also Wildes, supra note 47, at 895 (labeling this language "clearly dicta" and noting that the court's only citation was 3 Moore's Digest 996, "more a work on diplomatic history than what would be considered a law book today").

94. *London*, 22 F.2d at 290.

95. Id.; see also United States ex rel. Ulrich v. Kellogg, 30 F.2d 984, 986 (D.C. Cir. 1929) (holding that "the authority to issue a visa is committed to 'consular' officers"). But see Wildes, supra note 47, at 897 (explaining that *Kellogg* "actually review[ed] and uph[eld] the substantive merits of the consul's determination to deny the visa").

96. 338 U.S. 537 (1950), superseded by statute, 66 Stat. 279, 280, as recognized in Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1980 (2020).

97. 345 U.S. 206 (1953), superseded by statute, 66 Stat. 279, 280, as recognized in *Thuraissigiam*, 140 S. Ct. 1959.

98. Kim, supra note 29, at 87 ("By the 1950s . . . the plenary power principles extended so far as to sustain even the prolonged and potentially permanent detention of noncitizens without hearing.").

99. *Knauff*, 338 U.S. at 539.

100. Id.

that she be permanently excluded."[101] Reviewing this decision, the Supreme Court affirmed that the United States could exclude Mrs. Knauff solely based on the Attorney General's finding.[102] The Court reasoned that a prospective immigrant "may not [seek admission] under any claim of right" because admission "is a privilege granted . . . only upon such terms as the United States shall prescribe."[103] The Court referenced the plenary power, citing *Nishimura Ekiu* and explaining that "exclusion . . . is a fundamental act of sovereignty."[104] Because immigration is a privilege, prospective immigrants cannot challenge the procedures outlined by Congress.[105] These "procedure[s] . . . [are] due process as far as [the noncitizen] . . . is concerned."[106]

In *Mezei*, the Court went further, holding that Congress could permissibly detain a noncitizen indefinitely without a hearing.[107] When Mr. Mezei attempted to enter the United States, immigration officers "temporarily excluded" him.[108] After confidential information revealed that Mr. Mezei was a security risk, the Attorney General decided to exclude him permanently from the country.[109] When no other country welcomed him, he remained in detention.[110] The Court declined to review the Attorney General's decision, concluding that a "respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate."[111] *Mezei* and *Knauff* characterize the apex of the immigration plenary power: By denying noncitizens any entitlement to enter the country, the Court foreclosed judicial review of their mistreatment.[112]

These cases also defended the delegation of the plenary power to the executive branch.[113] *Knauff* began with the reasoning articulated in

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101. Id.

102. Id. at 547.

103. Id. at 542.

104. Id. (citing Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892)).

105. Id. at 544.

106. Id.

107. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 214–15 (1953) (concluding that "the Attorney General may lawfully exclude respondent without a hearing as authorized by" Congress); see also Kim, supra note 29, at 87 (noting that *Mezei* affirmed "prolonged and potentially permanent detention" of noncitizens).

108. *Mezei*, 345 U.S. at 208.

109. Id.

110. Id. at 209 ("In short, respondent sat on Ellis Island because this country shut him out and others were unwilling to take him in."); see also Kim, supra note 29, at 87 ("Because no other country was willing to repatriate him, Mezei was placed in detention . . . .").

111. *Mezei*, 345 U.S. at 216 (citing Harisiades v. Shaughnessy, 342 U.S. 580, 590–91 (1952)).

112. See Kim, supra note 29, at 87 ("By the 1950s . . . the plenary power principles extended so far as to sustain even the prolonged and potentially permanent detention of noncitizens without hearing.").

113. See *Mezei*, 345 U.S. at 210–11 n.7 ("That delegation of authority has been upheld."); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950).

Nishimura Ekiu: Given that the executive had been properly delegated authority to carry out immigration procedures, "[t]he action of the executive officer . . . [was] final and conclusive"—just as it would be if Congress were the actor.[114] The Court expanded upon this logic, reasoning that the executive branch's right to exclude noncitizens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."[115] Because the executive branch was acting with this dual authority, there was limited room for judicial scrutiny.[116]

In the years since *Knauff* and *Mezei*, the importance of the immigration plenary power has arguably waned.[117] "Today, federal courts routinely exercise close scrutiny over immigration decisions, often without mentioning plenary power at all."[118] Scholars point to different phenomena to explain this decline. One theory "attribute[s] [the decline] to broader public law developments expanding the scope of constitutionally protected individual rights."[119] Since *Mathews v. Eldridge* established a "flexible" due process,[120] courts have extended procedural protections in immigration matters.[121] Another theory posits that the

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114. *Knauff*, 338 U.S. at 543 (citing Nishimura Ekiu v. United States, 142 U.S. 651, 659–60 (1892)).

115. Id. at 542.

116. See Josh Blackman, Five Unanswered Questions From *Trump v. Hawaii*, 51 Case W. Rsrv. J. Int'l L. 139, 150 (2019) ("[B]ecause the President is acting with a combination of his own inherent powers, combined with the co-extensive powers delegated from Congress, judicial scrutiny is at a minimum."). Ironically, Justice Robert Jackson—who developed the tripartite framework for analyzing executive power that Blackman referenced—dissented in *Knauff*. He objected not to "the constitutional power of Congress to authorize immigration authorities" to make decisions but to the "abrupt and brutal exclusion of the wife of an American citizen without a hearing." *Knauff*, 338 U.S. at 550 (Jackson, J., dissenting). His dissent raised a question that remained unanswered until *United States Department of State v. Muñoz*: Do United States citizens have a due process right to live in the United States with their spouse? See 144 S. Ct. 1812, 1822–23 (2024) (holding that there is no protected liberty interest in spousal unity).

117. See Johnson, Immigration in the Supreme Court, supra note 29, at 61 ("[T]he trend . . . suggests that the plenary power doctrine . . . is once again heading toward its ultimate demise.").

118. Kim, supra note 29, at 87–88.

119. Id. at 79; see also McKanders, supra note 29, at 97 (highlighting how immigration jurisprudence "privilege[s] borders over our most sacred legal commitments—fundamental rights under the constitution and adherence to rule of law" (emphasis omitted)); Rubenstein & Gulasekaram, supra note 46, at 651–54 (suggesting a holistic approach to immigration exceptionalism).

120. 424 U.S. 319, 334 (1976) (internal quotation marks omitted) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

121. See Joseph Landau, Due Process and the Non-Citizen: A Revolution Reconsidered, 47 Conn. L. Rev. 879, 882 (2015) ("[T]he '*Mathews*ization' of immigration . . . is laying a new foundation of constitutional due process that has produced, and will likely continue to produce, greater and more concrete protections . . . ."); see also T. Alexander Aleinikoff, Detaining Plenary Power: The Meaning and Impact of *Zadvydas v. Davis*, 16 Geo. Immigr. L.J. 365, 366 (2002) (highlighting Justice Stephen Breyer's statement "that Congress'

plenary power's decline is driven by delegation concerns: While courts have continued "to defer to the immigration decisions of Congress and the President," they have "den[ied] such deference to lower-level administrative officials."[122] This theory is consistent with the rising fear of administrative agencies and the corresponding movement revitalizing the nondelegation doctrine.[123]

Despite talk of its demise, the plenary power remains stalwart in at least one aspect of immigration law: consular visa decisionmaking.[124] Cases that have been heavily criticized,[125] such as *The Chinese Exclusion Case*[126] and *Knauff*,[127] continue to sway consular nonreviewability jurisprudence.[128]

B. *The Visa Process, Consular Nonreviewability, and the* Mandel *Exception*

1. *The Visa Process.* — Immigrating to the United States and obtaining lawful permanent resident status almost always requires navigating the visa process.[129] The State Department issues both nonimmigrant visas (for

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immigration power 'is subject to important constitutional limitations'" and pondering its significance (quoting Zadvydas v. Davis, 533 U.S. 678, 695 (2001))); Chin, supra note 63, at 54–56 ("The plenary power of today is different from the plenary power of the Gilded Age."); Peter L. Markowitz, Deportation is Different, 13 U. Pa. J. Const. L. 1299, 1301 (2011) (highlighting how *Padilla v. Kentucky* offered a "modern, more refined, and ultimately more persuasive understanding of deportation [that] will allow courts to . . . plot a course for the more robust judicial protection of the rights of immigrants").

122. Kim, supra note 29, at 125.

123. Compare Gundy v. United States, 139 S. Ct. 2116, 2134–35 (2019) (Gorsuch, J., dissenting) ("The legislative cannot transfer the power of making laws to any other hands . . . ." (internal quotation marks omitted) (quoting Locke, supra note 30, § 141)), with Kim, supra note 29, at 96 ("The Immigration and Nationality Act . . . delegates exceedingly broad authority to develop policies governing the admission, detention, and deportation of noncitizens to a vast and sprawling immigration bureaucracy . . . .").

124. See, e.g., Kerry v. Din, 576 U.S. 86, 86 (2015) (highlighting the "particular force" of the plenary power in upholding the consular officer's decision); see also Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (noting that because "'[t]he power to admit or exclude [noncitizens] is a sovereign prerogative' . . . the Constitution gives 'the political departments of the government' plenary authority to decide which [noncitizens] to admit" (first quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982); then quoting Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892))); Kleindienst v. Mandel, 408 U.S 753, 769–70 (1972) (affirming that the "plenary congressional power to make policies and rules for exclusion of [noncitizens] has long been firmly established").

125. See supra note 63 and accompanying text.

126. Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889).

127. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950).

128. See, e.g., U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1820 (2024) ("The Judicial Branch has no role to play 'unless expressly authorized by law.' . . . [A]s a rule, the federal courts cannot review [visa] decisions. This principle is known as the doctrine of consular nonreviewability." (footnote omitted) (quoting *Knauff*, 338 U.S. at 543)); Baan Rao Thai Rest. v. Pompeo, 985 F.3d 1020, 1026 (D.C. Cir. 2021) ("[C]onsular reviewability is no procedural matter. . . . Accordingly, it is 'a power to be exercised exclusively by the political branches of government' . . . ." (quoting *The Chinese Exclusion Case*, 130 U.S. at 609)).

129. See 8 U.S.C. § 1181 (2018) (carving out small exceptions for "returning resident immigrants" and people "admitted as refugees").

people seeking to enter the United States temporarily) and immigrant visas (for those hoping to establish permanent residence).[130] The majority of immigrant visas are bifurcated into two categories: employment based and family sponsored.[131] In 2022, of over a million people receiving lawful permanent residence status, roughly forty percent did so as immediate relatives of U.S. citizens.[132] These numbers represent the successful few: those who successfully navigated the complex and lengthy application process.[133] As Mr. Colindres's story showcases, many people are not so lucky.[134]

The final hurdle to securing a visa is a consular interview.[135] The consular officer has three options: "approve the visa, request more information from the applicant, or deny the visa."[136] When denying an application, the officer has a statutory duty to cite the legal provision that made the applicant ineligible—except when the reason is a terrorism or national security concern.[137] Section 1182 enumerates criteria that disqualify an applicant from admission.[138] Some of these provisions are specific; section 1182(a)(6)(E), for example, bars people who have "encouraged, induced, assisted, abetted, or aided [others] . . . to enter the United States in violation of law."[139] Other criteria are broad, catch-all clauses—such as the provision that disqualified Mr. Colindres ("enter[ing] . . . to engage solely, principally, or incidentally in . . . any other unlawful activity").[140]

After a visa is denied, the applicant has limited recourse. Under State Department regulations, supervisory officers review all denials.[141] To the

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130. Directory of Visa Categories, Bureau Consular Affs., https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/all-visa-categories.html [https://perma.cc/AHE2-FQSN] (last visited Aug. 16, 2024).

131. Id.

132. See Off. of Homeland Sec. Stats., DHS, 2022 Yearbook of Immigration Statistics 18 tbl.6 (2023), https://ohss.dhs.gov/sites/default/files/2024-03/2023_0818_plcy_yearbook_immigration_statistics_fy2022.pdf [https://perma.cc/WL3D-HKXJ] (showing that 238,632 people secured status based on a U.S. citizen spouse in 2022).

133. See Baca, supra note 14, at 599–601 (outlining the process of securing a visa).

134. See supra notes 10–16 and accompanying text.

135. See 8 U.S.C. § 1101(a)(16) (2018); see also Baca, supra note 14, at 601 ("The interview with a consular officer is the last step in the series of administrative procedures.").

136. Baca, supra note 14, at 601.

137. 8 U.S.C. § 1182(b)(1) (stating that when denying a visa application, "the officer shall provide the [noncitizen] with a timely written notice that (A) states the determination, and (B) lists the specific provision or provisions of law under which the [noncitizen] is inadmissible"); id. § 1182(b)(3) (stating that this duty does not apply to cases involving terrorism or national security).

138. Id. § 1182(a).

139. Id. § 1182(a)(6)(E).

140. Id. § 1182(a)(3)(A)–(a)(3)(A)(ii); see also *Colindres* Petition, supra note 12, at 6.

141. Baca, supra note 14, at 602.

extent "these procedures actually occur,"[142] they are obscured from the applicant.[143] Even if applicants somehow discovered noncompliance, they would have no ability to challenge it because the review requirement is only a State Department policy and is not legally binding.[144] An applicant is entitled to present evidence disputing the consular officer's finding within one year of the denial,[145] but, given the subjectivity and limited visibility into visa decisions, applicants—such as Mr. Colindres—can only speculate as to what could change the officer's mind.[146] Applicants rely on the mercy of their consular officer's discretion.

2. *Consular Nonreviewability's Limited Exception.* — Given the sizeable influence wielded by consular officers, their almost complete immunity from judicial review is surprising.[147] Under consular nonreviewability, courts rarely "look behind" an officer's decision.[148] For the past fifty years, courts have recognized one small exception.[149]

In *Kleindienst v. Mandel*, the Court faced the question of whether visa decisions could be reviewed when they allegedly violated the rights of American citizens.[150] Ernest Mandel was a Belgian journalist and a self-described "revolutionary Marxist."[151] Several universities and conferences invited him to speak, but as a communist, he could not obtain a visa.[152] U.S. citizen professors claimed that the visa denial violated their First Amendment rights because they were "prevent[ed] . . . from hearing and meeting with Mandel in person."[153] The Court affirmed what it had said in

142. Id.; see also U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1831 (2024) (Sotomayor, J., dissenting) ("Supervisors are required by the State Department to review a certain percentage of visa denials but often fail to do so."); Callan & Callan, supra note 41, at 313 (noting that "officers are not following the U.S. Department of State's Foreign Affairs Manual").

143. The applicant is not involved in the supervisory review process. See U.S. Dep't of State, 9 Foreign Affairs Manual 504.11-3(A)(2)(a) (2023) [hereinafter Foreign Affairs Manual] (establishing standard procedures of review that do not involve the applicant).

144. See id. ("The CFR does not mandate reviewing . . . refusals, but CA considers that to be a prudent practice and leaves to supervisors' discretion . . . ."); see also Baca, supra note 14, at 602 n.41 (questioning whether a "court would find a document like this legally binding").

145. Baca, supra note 14, at 603 ("[T]he State Department will consider any new evidence . . . within one year of the visa denial.").

146. *Colindres* Petition, supra note 12, at 6; see also Baca, supra note 14, at 603 (explaining that submitting additional evidence "is possible only when the applicant knows the basis for the denial").

147. See, e.g., Wildes, supra note 47, at 888 (lamenting consular nonreviewability as "one of the major outrages of the American immigration system").

148. Kleindienst v. Mandel, 408 U.S 753, 770 (1972).

149. See Baca, supra note 14, at 608 ("Despite longstanding adherence to consular nonreviewability, in 1972, the Supreme Court in *Mandel* first recognized that a denial of a visa waiver might sometimes merit limited judicial review.").

150. *Mandel*, 408 U.S. at 754.

151. Id. at 756 (internal quotation marks omitted) (quoting Ernest Mandel, Revolutionary Strategy in the Imperialist Countries (1969)).

152. Id. at 757–60.

153. Id. at 760.

Knauff: "[A]s an unadmitted and nonresident [noncitizen], [Mandel] had no constitutional right of entry."[154] The Court reiterated the "plenary congressional power to make policies and rules for exclusion" and noted that the power had been "delegated conditional[ly] . . . to the Executive."[155] The Court concluded that when a decision is made for "a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against" other rights.[156] Although the Court affirmed Mandel's denial, the decision birthed a narrow exception: A visa denial that "allegedly burdens the constitutional rights of a U.S. citizen" can be reviewed, but the review is limited to whether the administrator gave a "'facially legitimate and bona fide' reason."[157]

C. *Applying* Mandel *to Spousal Unity Cases*

Although *Mandel* established a carve-out to consular nonreviewability, the Court provided slim guidance on when it applied.[158] One area in which litigation ensued was whether a noncitizen's visa denial could implicate their spouse's fundamental rights.[159] Over the next forty years, a circuit split developed on the topic.[160]

In 2015, the Supreme Court granted certiorari to address whether a noncitizen's visa denial burdened their spouse's liberty interests.[161] Fauzia Din, a U.S. citizen, sued the government for denying the visa of her Afghan husband, Kanishka Berashk.[162] Mr. Berashk's consular officer cited a

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154. Id. at 762.

155. Id. at 769–70.

156. Id. at 770.

157. Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018) (quoting *Mandel*, 408 U.S. at 769); see also Allen v. Milas, 896 F.3d 1094, 1105 (9th Cir. 2018) ("Rejecting Mandel's request for an 'arbitrary and capricious' standard of review, the Court recognized an exception to the rule of consular nonreviewability for review of constitutional claims." (citing *Mandel*, 408 U.S. at 760)); cf. Callan & Callan, supra note 41, at 312 (noting that the *Mandel* exception exists "only because *later* courts have attributed an exception").

158. See Baca, supra note 14, at 611 ("The Court neither limited nor elaborated on what other rights would trigger review.").

159. See, e.g., Burrafato v. U.S. Dep't of State, 523 F.2d 554, 555 (2d Cir. 1975).

160. Compare id. (rejecting plaintiff's claim that her husband's visa denial violated her fundamental rights), Udugampola v. Jacobs, 795 F. Supp. 2d 96, 105 (D.D.C. 2011) ("Courts have repeatedly held that these constitutional rights are not implicated when one spouse is removed or denied entry into the United States . . . ." (citing Swartz v. Rogers, 254 F.2d 338, 339 (D.C. Cir. 1958))), and Hermina Sague v. United States, 416 F. Supp. 217, 220 (D.P.R. 1976) (finding that "there is no constitutional right of a citizen spouse, who voluntarily chooses to marry [a noncitizen] outside the jurisdiction of the United States, to have her [noncitizen] spouse enter the United States"), with Bustamante v. Mukasey, 531 F.3d 1059, 1062 (9th Cir. 2008) (claiming that "[f]reedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause"). For a thorough account of these cases, consider Baca, supra note 14, at 611–16.

161. Kerry v. Din, 576 U.S. 86, 90 (2015).

162. Id. at 88.

statute for his inadmissibility "but provided no further explanation."[163] The statute, 8 U.S.C. § 1182(a)(3)(B), bars people who have "engaged in a terrorist activity" or have some connection to terrorism from receiving visas.[164] The Ninth Circuit recognized that Din had a protected liberty interest in Mr. Berashk's visa decision and held that the consular officer's citation did not constitute a "facially legitimate ground for denying Berashk's visa."[165] The Supreme Court granted certiorari to consider "whether the denial of Berashk's visa application deprived Din of" her liberty interests[166] and if so, "whether the reasons given by the Government satisf[ied] *Mandel*'s 'facially legitimate and bona fide' standard."[167]

The Court failed to reach a majority.[168] Justice Antonin Scalia, joined by two other justices, held that citizens have no "constitutional right to live in the United States with [their] spouse."[169] Justice Anthony Kennedy, joined by Justice Samuel Alito, concurred in the judgment, resolving the case on narrower grounds.[170] Justice Kennedy reasoned that, assuming that there was a protected interest in spousal unity, the consular officer's citation had satisfied due process because it "specifie[d] discrete factual predicates."[171] Without a clear holding, the spousal-unity circuit split persisted unresolved.[172]

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163. Id. at 90.

164. 8 U.S.C. § 1182(a)(3)(B) (2018). Mr. Berashk previously worked a civil service position within the Taliban-controlled Afghanistan government. *Din*, 576 U.S. at 88.

165. Din v. Kerry, 718 F.3d 856, 863 (9th Cir. 2013).

166. *Din*, 576 U.S. at 90.

167. Id. at 104 (Kennedy, J., concurring in the judgment).

168. Id. at 88 (plurality opinion).

169. Id.

170. Id. at 102 (Kennedy, J., concurring in the judgment) ("Today's disposition should not be interpreted as deciding whether a citizen has a protected liberty interest in the visa application of her [noncitizen] spouse. The Court need not decide that issue . . . .").

171. Id. at 105.

172. The *Din* Court also avoided opining on consular nonreviewability. See Kate Aschenbrenner Rodriguez, Eroding Immigration Exceptionalism: Administrative Law in the Supreme Court's Immigration Jurisprudence, 86 U. Cin. L. Rev. 215, 227–28 (2018). Despite briefing by each side on the issue, "[n]one of the Court's opinions . . . argued strongly in favor of [consular nonreviewability]." Id. at 227; see also Brief for the Petitioners at 15, *Din*, 576 U.S. 86 (No. 13-1402), 2014 WL 6706838 (contending that judicial review cannot "be reconciled with the deeply rooted doctrine of consular nonreviewability"). In fact, a majority of the justices "were engaged in some level of review." Aschenbrenner Rodriguez, supra, at 227. The Supreme Court did not explicitly mention consular nonreviewability until 2018, when it adjudicated *Trump v. Hawaii*. 138 S. Ct. 2392 (2018).

II. CONSULAR NONREVIEWABILITY'S BRIEF DECLINE AND RAPID RESURGENCE

Following *Din*, disagreement continued among circuit courts on whether U.S. citizens had a protected interest in spousal unity.[173] This circuit split led to the Supreme Court's grant of certiorari in *United States Department of State v. Muñoz* to reconsider the question presented in *Din*.[174] Section II.A compares two post-*Din* circuit court decisions arising out of the D.C. and Ninth Circuits. Section II.B examines the *Muñoz* Supreme Court decision, explaining its implications for spousal unity and the *Mandel* exception. Section II.C concludes by highlighting the consequences of the *Muñoz* decision, arguing that unfettered consular discretion jeopardizes the fairness and integrity of the immigration system and is inconsistent with broader immigration and administrative law.

A. *The Spousal Unity Circuit Split After* Din

1. *The D.C. Circuit Applies Consular Nonreviewability.* — After a consular officer denied Mr. Colindres's visa application by citing to a vague statute, the Colindres family searched for answers.[175] In 2023, the D.C. Circuit heard their case.[176] The court first addressed whether Mrs. Colindres had a protected interest in her husband's visa application.[177] Citing "Congress's 'long practice of regulating spousal immigration,'" the D.C. Circuit concluded that "citizens have no fundamental right to live in America with their spouses."[178] Put simply, the court determined that there is no protected liberty interest in spousal unity.

But even if Mrs. Colindres had such an interest, the court concluded that her claim would still fail because the consular officer had provided a "facially legitimate and bona fide reason."[179] The D.C. Circuit explained that "[t]o survive judicial review, the Government need only cite a statute listing a factual basis for denying a visa."[180] The consular officer found that Mr. Colindres was ineligible under § 1182(a)(3)(A)(ii), which declares people "seek[ing] to enter the United States to engage [in] . . . any other unlawful activity" inadmissible for a visa.[181] The D.C. Circuit conceded that this statute did not "specify the type of lawbreaking that will trigger a visa

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173. Compare Colindres v. U.S. Dep't of State, 71 F.4th 1018, 1022–23 (D.C. Cir. 2023) (finding no protected interest), with Muñoz v. U.S. Dep't of State, 50 F.4th 906, 918, 921 (9th Cir. 2022), rev'd, 144 S. Ct. 1812 (2024) (recognizing a protected interest).

174. See U.S. Dep't of State v. Muñoz, 144 S. Ct. 679 (2024) (mem.).

175. See supra notes 1–16 and accompanying text.

176. See *Colindres*, 71 F.4th 1018.

177. Id. at 1021–24.

178. Id. at 1023 (quoting Kerry v. Din, 576 U.S. 86, 95 (2015)).

179. Id. at 1024 (internal quotation marks omitted) (quoting Kleindienst v. Mandel, 408 U.S 753, 770 (1972)).

180. Id. at 1020.

181. 8 U.S.C. § 1182(a)(3)(A)(ii) (2018).

denial" but concluded that citing the statute still provided the denied applicant and his spouse with adequate notice.[182]

The court relied on Justice Kennedy's concurrence in *Din* to reach its determination.[183] In particular, the court deemed the terrorism statute in *Din* to be analogous to the "any other unlawful activity" statute.[184] The court reasoned that, like the terrorism statute, § 1182(a)(3)(A)(ii) "specifies a factual predicate for denying a visa"—namely, "seek[ing] to enter the United States to engage . . . [in] unlawful activity."[185] Given that both this phrase and the terrorism provision were "written in the same general terms," the court determined that Kennedy's analysis should control.[186] Finding a factual basis for the denial, the court ruled against the Colindres family.[187]

2. *The Ninth Circuit Holds that Consular Nonreviewability Does Not Apply.* — Faced with similar facts,[188] the Ninth Circuit arrived at different conclusions in *Muñoz v. U.S. Dep't of State*.[189] In 2005, Luis Asencio-Cordero, an El Salvadorean citizen, immigrated to the United States without documentation.[190] Five years later, he married Sandra Muñoz, a U.S. citizen with whom he has a child.[191] Mrs. Muñoz "filed an immigrant-relative petition" for Mr. Asencio-Cordero "which was approved along with an inadmissibility waiver."[192] When Mr. Asencio-Cordero returned to El Salvador to obtain his visa, the consular officer denied his application, believing that Mr. Asencio-Cordero was "seek[ing] to enter the United States to engage solely, principally, or incidentally in . . . unlawful activity."[193] Just like Mr. Colindres, Mr. Asencio-Cordero believes that the consular officer denied his visa because of his tattoos.[194] Mrs. Muñoz sued to challenge the decision, claiming she was entitled to a factual basis for her husband's denial.[195] The Central District of California granted

182. *Colindres*, 71 F.4th at 1024 (quoting Muñoz v. U.S. Dep't of State, 50 F.4th 906, 917 (9th Cir. 2022)).

183. Id. at 1024–25.

184. Id. at 1020 ("And that provision is written in the same general terms as the provision at issue here.").

185. Id. at 1024 (quoting 8 U.S.C. § 1182(a)(3)(A)(ii)).

186. Id. at 1024–25.

187. Id. at 1025 ("The Colindreses' challenge thus fails on the merits.").

188. Compare infra notes 190–195 and accompanying text, with supra notes 1–16 and accompanying text.

189. 50 F.4th 906 (9th Cir. 2022), rev'd, 144 S. Ct. 1812 (2024).

190. Id. at 910.

191. Id.

192. Id.

193. Id. (quoting 8 U.S.C. § 1182(a)(3)(A)(ii) (2018)).

194. See U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1819 (2024) (recognizing that Mr. Asencio-Cordero's consular officer "conclud[ed] that his tattoos signified gang membership"); see also *Muñoz*, 50 F.4th at 911 ("He has no criminal history and is not a gang member.").

195. *Muñoz*, 50 F.4th at 911.

summary judgment for the government, finding that the consular officer provided a "facially legitimate and bona fide reason" for denying Asencio-Cordero's visa.[196]

The Ninth Circuit reversed. The court first determined that Muñoz had a protected liberty interest in the visa application of her husband.[197] Having established that a U.S. citizen's fundamental rights were at stake, the court proceeded to consider "whether the government provided a 'facially legitimate and bona fide reason'" for the visa denial.[198] The Ninth Circuit agreed with the D.C. Circuit that a consular officer must have "specif[ied] discrete factual predicates."[199] However, the court did not think a mere citation to the "other unlawful activity" statute satisfied due process in the case.[200]

In reaching this conclusion, the Ninth Circuit also relied on Justice Kennedy's *Din* analysis.[201] The court read his opinion as a testament to the importance of providing factual notice.[202] Although the terrorism provision at issue in *Din* may have granted sufficient notice, the "other unlawful activity" statute at issue in *Muñoz* did not.[203] Still, the court determined that the State Department had provided Mrs. Muñoz with a factual basis for the denial because law enforcement believed that Mr. Asencio-Cordero belonged to MS-13.[204] This holding, however, did not end the case.[205]

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196. Muñoz v. U.S. Dep't of State, 526 F. Supp. 3d 709, 719 (C.D. Cal. 2021) (internal quotation marks omitted) (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)).

197. *Muñoz*, 50 F.4th at 915–16.

198. Id. at 916.

199. Id. at 909 (internal quotation marks omitted) (quoting Khachatryan v. Blinken, 4 F.4th 841, 851 (9th Cir. 2021)). Specifically, the court explained that to meet the "facially legitimate and bona fide" standard, the officer must cite "a valid statute of inadmissibility," which either "specified discrete factual predicates" or there must have been "a fact in the record that provides at least a facial connection to the statutory ground of inadmissibility." Id. (internal quotation marks omitted) (quoting *Khachatryan*, 4 F.4th at 851).

200. See id. at 917–18 (remarking that Section 1182(a)(3)(A)(ii) "does not specify the type of lawbreaking that will trigger a visa denial" and that "a consular officer's belief that an applicant seeks to enter the United States for general . . . lawbreaking is not a 'discrete' factual predicate").

201. See id. (concluding that the government "misread[]" Justice Kennedy's opinion concurring in the judgment in *Din*).

202. See id. at 918 ("Indeed, it was critical in both *Din* and *Mandel* that the government identified the factual basis for the denial . . . .").

203. See id. at 917–18 ("But the government's argument misreads *Din*, where the statutory citation to § 1182(a)(3)(B) was deemed sufficient *because* that statute contains discrete factual predicates.").

204. Id. at 918 (internal quotation marks omitted).

205. See id. at 920 (considering appellants' argument "that the government's failure to provide them with 'the specific factual basis of the denial *at the time of the denial*'" rendered the notice "insufficient to satisfy the 'facially legitimate and bona fide reason' requirement").

Instead, the court reasoned that the substance and timing of visa denial explanations are closely linked.[206] The purpose of requiring a factual basis—according to Justice Kennedy's *Din* concurrence—is to enable an applicant to "mount a challenge to [the] visa denial."[207] Without receiving the reason for the denial in a timely manner, "[s]uch a challenge is impossible."[208] In *Muñoz*, because the government "waited almost three years" to provide it and "did so only when prompted by judicial proceedings," the notice was inadequate.[209] Thus, consular nonreviewability did not bar Mrs. Muñoz's challenge; it was subject to judicial review.[210] Enter the *Muñoz* requirement.

B. *The Supreme Court Reverses the Ninth Circuit*

The Ninth Circuit *Muñoz* decision expanded the scope of the *Mandel* exception, holding that when "the adjudication of a non-citizen's visa application implicates the constitutional rights of a citizen, due process requires that the government provide the citizen with timely and adequate notice of a decision that will deprive the citizen of that interest."[211] The Supreme Court granted certiorari to consider (1) whether a U.S. citizen has a fundamental interest in their spouse's visa adjudication and, (2) if so, what a consular officer must provide to satisfy the "facially legitimate and bona fide reason" standard.[212] The Court held that a U.S. citizen does not have a fundamental interest in their spouse's visa adjudication, closing the door on both the newly christened *Muñoz* requirement and the decades-old *Mandel* exception.[213]

1. *No Fundamental Interest in a U.S. Citizen Spouse's Visa Adjudication.* — Writing for the majority, Justice Amy Coney Barrett began by discussing

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206. See id. at 921 ("[W]here the adjudication of a non-citizen's visa application implicates the constitutional rights of a citizen, due process requires that the government provide the citizen with timely and adequate notice of a decision that will deprive the citizen of that interest.").

207. Id. (alteration in original) (quoting Kerry v. Din, 576 U.S. 86, 105 (2015) (Kennedy, J., concurring in the judgment)).

208. Id. As to what qualifies as reasonable timeliness, *Muñoz* did not establish a concrete standard but did suggest that it should be "informed by the 30-day period in which visa denials must be submitted for internal review and the 1-year period in which reconsideration is available upon the submission of additional evidence." Id. at 923.

209. Id. at 920.

210. Id. at 924 ("This failure [to provide timely notice] means that the government is not entitled to invoke consular nonreviewability to shield its visa decision from judicial review. The district court may 'look behind' the government's decision." (quoting Kleindienst v. Mandel, 408 U.S. 753, 771 (1972))).

211. Id. at 921.

212. U.S. Dep't of State v. Muñoz, 144 S. Ct. 679 (2024); Petition for a Writ of Certiorari at I, U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812 (2024) (No. 23-334), 2023 WL 6390749 [hereinafter Muñoz Petition].

213. See *Muñoz*, 144 S. Ct. at 1826 ("Lest there be any doubt, *Mandel* does *not* hold that citizens have procedural due process rights in the visa proceedings of others.").

the immigration plenary power.[214] She stressed that "[f]or more than a century, [the] Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute.'"[215] She recognized that "Congress may delegate to executive officials the discretionary authority to admit noncitizens" and that "[w]hen it does so, the action of an executive officer . . . 'is final and conclusive.'"[216] Under the "doctrine of consular nonreviewability," "the federal courts cannot review those decisions."[217]

The Court noted that Mrs. Muñoz's asserted right—"to live with her spouse in her country of citizenship"—has only been recognized by the Ninth Circuit and has been rejected by several other circuits.[218] The Court

214. See id. at 1820 (examining the history of consular nonreviewability).

215. Id. (internal quotation marks omitted) (quoting Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018)).

216. Id. (quoting United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950)).

217. Id. In *Trump v. Hawaii*, the Court "assume[d] without deciding that plaintiffs' statutory claims [were] reviewable." 138 S. Ct. at 2407. While *Trump v. Hawaii* did not address whether consular nonreviewability applied, *Muñoz* concluded that courts could not review claims. See *Muñoz*, 144 S. Ct. at 1820 ("The Immigration and Nationality Act (INA) does not authorize judicial review of a consular officer's denial of a visa; thus, as a rule, the federal courts cannot review those decisions."). The Court arrived at this conclusion using a negative inference. Id. In *Loper Bright Enterprises v. Raimondo*, the Court cautioned against presumptions that fail to "approximate reality." 144 S. Ct. 2244, 2265 (2024) ("In neither case does an ambiguity necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question.").

218. *Muñoz*, 144 S. Ct. at 1821 ("The Ninth Circuit is the only Court of Appeals to have embraced this asserted right—every other Circuit to consider the issue has rejected it."). While true, this statement obscures the high volume of immigration litigation handled by the Ninth Circuit. Justice Barrett correctly asserts that the Ninth Circuit sits alone in recognizing this right, but she ignores the fact that almost a quarter of district court cases and nearly forty percent of appellate cases discussing consular nonreviewability are adjudicated in the Ninth Circuit. See Search Results, Westlaw, https://1.next.westlaw.com (In the search bar, enter: "advanced: ("consular nonreviewability" "consular non-reviewability" "consular absolutism")") (last visited Nov. 11, 2024).

	DISTRICT COURT		COURT OF APPEALS		TOTAL	
	Cases	%	Cases	%	Cases	%
D.C.	121	28.9%	7	11.1%	128	26.6%
First	18	4.3%	1	1.6%	19	3.9%
Second	69	16.5%	5	7.9%	74	15.4%
Third	14	3.3%	2	3.2%	16	3.3%
Fourth	19	4.5%	6	9.5%	25	5.2%
Fifth	17	4.1%	1	1.6%	18	3.7%
Sixth	9	2.1%	2	3.2%	11	2.3%
Seventh	22	5.3%	8	12.7%	30	6.2%
Eighth	8	1.9%	0	0.0%	8	1.7%
Ninth	102	24.3%	25	39.7%	127	26.3%
Tenth	3	0.7%	1	1.6%	4	0.8%
Eleventh	17	4.1%	5	7.9%	22	4.6%

reversed the Ninth Circuit's approach, holding that no such right existed and that Mrs. Muñoz had failed to establish that "the right to bring a noncitizen spouse to the United States is 'deeply rooted in this Nation's history and tradition.'"[219]

Several justices disagreed with the majority's broad holding. Justice Neil Gorsuch authored a separate opinion, explaining that the Court should have avoided "the constitutional questions presented by the government" because "[w]hether or not Mrs. Muñoz had a constitutional right to the information she wanted, the government gave it to her."[220] The dissenting justices agreed with Justice Gorsuch that the "majority could have resolved this case on narrow grounds."[221]

The dissent also objected to the majority's holding that Mr. Asencio-Cordero's visa denial did not burden a fundamental right. Justice Sonia Sotomayor would have held that U.S. citizens' fundamental rights are implicated by their noncitizens visa denials.[222] To reach this conclusion, she characterized the implicated interest more generally than the majority: The case concerned Mrs. Muñoz's "right to marry,"[223] not her right "to live with her spouse in her country of citizenship."[224] The majority, Sotomayor claimed, "makes the same fatal error it made in *Dobbs*: requiring too 'careful [a] description of the asserted fundamental liberty interest.'"[225] Likewise, Sotomayor rejected the notion that the fundamental right was vindicated because Mrs. Muñoz and Mr. Asencio-Cordero could live together in El Salvador.[226] She feared that the "majority's holding will also extend to those couples who, like the Lovings

TOTAL	419	100%	63	100%	482	100%

219. *Muñoz*, 144 S. Ct. at 1822–23 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). There has been significant commentary on whether there is a fundamental interest in spousal unity. See generally Callan & Callan, supra note 41 (rejecting consular nonreviewability and lamenting the Court's missed opportunity to repudiate it in Kerry v. Din, 576 U.S. 86, 105 (2015)); Desirée C. Schmitt, The Doctrine of Consular Nonreviewability in the Travel Ban Cases: *Kerry v. Din* Revisited, 33 Geo. Immigr. L.J. 55 (2019) (applying the reasoning of *Din* to the travel ban cases); Baca, supra note 14 (arguing that liberty interests in marriage and cohabitation entitle U.S. citizen spouses to judicial review).

220. *Muñoz*, 144 S. Ct. at 1827 (Gorsuch, J., concurring in the judgment).

221. Id. at 1828 (Sotomayor, J., dissenting) (criticizing the majority for "choos[ing] a broad holding on marriage over a narrow one on procedure").

222. Id. at 1827 (noting that "[t]he right to marry is fundamental as a matter of history and tradition" (internal quotation marks omitted) (quoting Obergefell v. Hodges, 576 U.S. 644, 671 (2015))).

223. Id.

224. Id. at 1821 (majority opinion).

225. Id. at 1834 (Sotomayor, J., dissenting) (alteration in original) (quoting id. at 1822 (majority opinion)) (critiquing the Court's analysis in Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)).

226. Id. at 1835 ("This Court has never required that plaintiffs be fully prevented from exercising their right to marriage before invoking it.").

and the Obergefells, depend on American law for their marriages' validity."[227]

2. *The End of the* Mandel *Exception.* — The Court could have stopped after concluding that Mrs. Muñoz lacked a fundamental interest, but it continued to address the viability of the *Mandel* exception.[228] Justice Barrett first summarized the *Mandel* exception: The Court has "assumed that a narrow exception to [consular nonreviewability] exists 'when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen.'"[229]

She continued to clarify *Mandel*'s holding, explaining that its discussion of a "'facially legitimate and bona fide reason' . . . was the justification for avoiding a difficult question of statutory interpretation [and] had nothing to do with procedural due process."[230] The professors in *Mandel* argued that "the denial of Mandel's visa directly deprived them of their First Amendment rights, *not* that their First Amendment rights entitled them to procedural protections in Mandel's visa application process."[231] Because "a procedural due process claim was not even before the Court," *Mandel* did "not hold that a citizen's independent constitutional right . . . gives that citizen a procedural due process right to a 'facially legitimate and bona fide reason' for why someone else's visa was denied."[232] Thus, the *Mandel* exception, long wrestled with by circuit courts,[233] apparently is inconsequential.

Justice Sotomayor disagreed with the majority's discussion of *Mandel*.[234] By "not[ing] that 'the Attorney General did inform Mandel's counsel of the reason for refusing him a waiver,'" *Mandel* established a "minimal requirement."[235] This requirement "ensures that courts do not unduly intrude on 'the Government's sovereign authority to set the terms governing the admission and exclusion of noncitizens,' while also ensuring that the Government does not arbitrarily burden citizens' constitutional rights."[236] Justice Sotomayor criticized the majority for rejecting the *Mandel* test—which the "Court has repeatedly relied on . . . in the immigration context."[237] Justice Sotomayor summed up her disagreement by stating, "[T]here is no question that excluding a citizen's

227. Id.
228. Id. at 1821 (majority opinion) (discussing the *Mandel* exception).
229. Id. (quoting Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018)).
230. Id. at 1826.
231. Id. at 1827.
232. Id. at 1826–27.
233. See supra notes 158–160 and accompanying text.
234. See *Muñoz*, 144 S. Ct. at 1836–39 (2024) (Sotomayor, J., dissenting).
235. Id. at 1836–37 (quoting Kleindienst v. Mandel, 408 U.S 753, 769 (1972)).
236. Id. at 1837 (quoting id. at 1816 (majority opinion)).
237. Id. at 1837.

spouse burdens her right to marriage, and that burden requires the Government to provide at least a factual basis for its decision."[238]

Regardless of the dissent's objections, after *Muñoz*, couples such as Mrs. Muñoz and Mr. Asencio-Cordero and the Colindreses have no judicial recourse when a consular officer denies their visa applications without explanation.

C. *Implications of Unchecked Consular Authority After* Muñoz

In holding that a spouse's fundamental rights are not burdened by her spouse's visa denial, *Muñoz* bolstered consular nonreviewability. And by curtailing the *Mandel* exception, the Court granted consular officers unmitigated deference. This broad deference impacts the many immigrants applying for visas and conflicts with trends in immigration and administrative law.[239]

1. *Fairness and Integrity of the Visa System.* — Every year hundreds of thousands of people apply for visas, requiring interviews with consular officers.[240] Over these visa decision, consular officers wield almost absolute discretion.[241] This discretion invites inconsistent procedures and unconscious bias.[242] Faced with subjective decisions and broad statutes, consular officers adopt their own procedures for reviewing visa decisions.[243] Officers—like all humans—have inherent biases that lead them to favor some applicants over others.[244] These different procedures and biases lead to "widely disparate decisions."[245] For example, "[d]uring a sample day at one post in Mexico," the visa acceptance rate ranged by officer from twenty-two to sixty percent.[246] In addition to varying among officers at the same posts, acceptance rates differ dramatically between

238. Id. at 1829.

239. See infra sections II.C.1–.2.

240. See supra note 132.

241. See supra Part I (discussing the current process and the *Mandel* exception).

242. See infra notes 250–256 and accompanying text.

243. See Lindsey, supra note 24, at 34–37 ("[C]onsular officers take markedly different approaches to their work."); see also Kim R. Anderson & David A. Gifford, Consular Discretion in the Immigrant Visa-Issuing Process, 16 San Diego L. Rev. 87, 88 (1978) ("Differing values and influences can cause individual law-enforcers to reach widely disparate decisions. This disparity leads to nonuniform, unpredictable application of the law.").

244. See Callan & Callan, supra note 41, at 312 ("[T]hey are using racially and ethnically motivated prejudice to deny visa applications."); Lindsey, supra note 24, at 37 (describing how "laziness and snap stereotyping" led to the admission of a known terrorist).

245. Anderson & Gifford, supra note 243, at 88; see also Richardson, supra note 20 (noting that he "left the Foreign Service" because it "is a predominantly white institution . . . tasked with making judgments about predominantly brown and poor applicants").

246. Nafziger, supra note 21, at 68.

posts.[247] These variations are not a consequence of inadequate training;[248] rather, they reflect the reality that "any exercise of discretion is potentially fallible."[249]

The discrepancies in visa acceptance rates are the result of the system's design and not the consular officers' fault[250]—though occasionally, consular officers have exploited their positions for personal gain.[251] The system is stressful, designed to churn through a plethora of applicants.[252] Strained for finances and resources, "[m]any consulates . . . cannot devote much time and expert judgment to a single applicant."[253] As a former officer describes, after a "five-minute interview (and sometimes less), an officer must make a judgment call on the applicant's story. Interviews are conducted through bulletproof glass, often in a language other than English."[254] These decisions are tough, and officers often must deny people who lack a valid legal basis for a visa even after they share heart-wrenching stories.[255] After each interview, "[o]fficers have no time to decompress," because the next applicant is waiting for review.[256]

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247. Within Mexico, for example, acceptance rates ranged from 84.1% in Mexico City to 59.4% in Guadalajara. Across countries, this effect was even more pronounced, spanning from 48.4% in Warsaw, Poland to 99.7% in Naha, Japan. Id.

248. Id. at 53 ("Consular officers are well trained . . . possess[ing] high levels of competence and morale."); see also U.S. Dep't of State, Foreign Service Officer and Specialist Attributes, https://careers.state.gov/career-paths/foreign-service/dimensions/ [https://perma.cc/GW6P-WUNS] (last updated Sept. 2023). But see Rosenfield, supra note 40, at 1112 (noting that in 1955 "only 3 per cent of our visa-issuing officers ha[d] law degrees and only 1 per cent of them were practicing lawyers").

249. Nafziger, supra note 21, at 54.

250. Still, consular officers are quick to be blamed when mistakes are made. See Richardson, supra note 20.

251. See, e.g., Press Release, United States Attorney's Office: District of Columbia, DOJ, U.S. Consulate Official Pleads Guilty to Receiving More Than $3 Million in Bribes in Exchange for Visas-Scheme Allegedly Generated More Than $9 Million in Bribes (Nov. 6, 2013), https://www.justice.gov/usao-dc/pr/us-consulate-official-pleads-guilty-receiving-more-3-million-bribes-exchange-visas-scheme [https://perma.cc/M8L4-AH2V] (noting that a consular officer "pled guilty . . . to conspiracy, bribery, and money laundering charges in a scheme in which he accepted more than $3 million to process visas for non-immigrants seeking entry to the United States"); see also Charles J. Ogletree, Jr., America's Schizophrenic Immigration Policy: Race, Class, and Reason, 41 Immigr. & Nat'y L. Rev. 755, 763 (2000) (describing how "some consular officers openly admitted to using racial criteria").

252. See Richardson, supra note 20 ("Consular officers . . . are expected to interview as many as 120 people in a day seeking to enter the United States."); see also Nafziger, supra note 21, at 69 (exhibiting how on a sample day at a consulate post, five officers reviewed a total of 630 visa applications).

253. Nafziger, supra note 21, at 54.

254. See Richardson, supra note 20.

255. See id. ("[T]here are many categories of visas, but sympathy visas and 'feel good story' visas are not among them.").

256. Id.

Increasingly, consular officers rely on law enforcement databases to make determinations—especially to screen for "unlawful activity."[257] These databases are problematic because they are updated infrequently and often contain errors.[258] To make matters worse, consular officers avoid questioning database results because of pressure from law enforcement, limited data transparency, and fear of inadvertently admitting a dangerous person to the country.[259]

The combination of tremendous discretion, inadequate resources, and overreliance on databases yields arbitrary visa decisions.[260] This arbitrariness has dramatic effects—both for the individual applicant and on global migration patterns.[261] At the individual level, visa denials impact the lives of countless noncitizens such as Mr. Colindres, who was denied the ability to continue to live with his family because of an officer's determination that he was a criminal.[262] These arbitrary decisions erode faith in the immigration system; as migrants perceive the system as unfair, it will increasingly lose its legitimacy.[263] On a macro level, "the cumulative exercise of visa discretion is one of the largest influences on global migration patterns."[264] As one former consular officer surmised, "[p]erhaps being a consular officer is far too much power for one individual."[265]

2. *Inconsistency With Immigration and Administrative Law.*— The discretion afforded consular officers not only fosters an arbitrary visa

257. Brief of Amici Curiae Former Consular Officers in Support of Respondent at 23, Kerry v. Din, 576 U.S. 86 (2015) (No. 13–1402), 2015 WL 294670 ("[D]atabases and watchlists have in some regular instances displaced the traditional role of consular officers in visa adjudications.").

258. Id. at 24 (explaining that "errors reverberate through the watchlisting system undetected or, worse, impervious to attempts to purge them").

259. See id. at 9–10 (noting that "questioning the national-security basis . . . would not be well received" and that the "decision often is the product of information the consular officer has never seen"); see also Richardson, supra note 20 ("[C]onsular officers . . . are often the first blamed when a visa is denied.").

260. See Callan & Callan, supra note 41, at 312 (noting that "according to numerous sources, consular officers *are* making erroneous and arbitrary decisions"); supra notes 250–259 and accompanying text.

261. See Lindsey, supra note 24, at 34–37 ("[T]he cumulative exercise of visa discretion is one of the largest influences on global migration patterns. Even a single visa officer operating in a systematic fashion can skew the structure of international movement.").

262. Colindres v. U.S. Dep't of State, 71 F.4th 1018, 1020 (D.C. Cir. 2023).

263. See, e.g., Marcela Valdes, Why Can't We Stop Unauthorized Immigration? Because It Works., N.Y. Times Mag. (Oct. 1, 2023), https://www.nytimes.com/2023/10/01/magazine/economy-illegal-immigration.html (on file with the *Columbia Law Review*) (last updated Oct. 5, 2023) ("[T]rying the legal immigration system as an alternative to immigrating illegally is like playing Powerball as an alternative to saving for retirement." (internal quotation marks omitted) (quoting David J. Bier)).

264. Lindsey, supra note 24, at 34–37; see also Kim, supra note 29, at 101 ("[T]he power to promulgate national immigration policy is increasingly exercised less by Congress, and more by the officials populating our nation's administrative agencies.").

265. See Richardson, supra note 20.

system but also contradicts the broader immigration system. While the State Department governs consular processing, the Department of Homeland Security (DHS) presides over asylum applications and removal proceedings.[266] Due process protections constrain the DHS, but consular processing is a free-for-all.[267]

Although "DHS officers and consular officers make admission determinations under the same substantive laws, in reality, a noncitizen seeking admission via consular processing faces a far higher risk of arbitrary denial with far less opportunity for review than a noncitizen seeking admission from DHS."[268] Put simply, noncitizens have fewer due process rights when they voluntarily attempt to establish status than when they face removal or apply for asylum.[269]

The adjustment-of-status process provides a helpful analogy.[270] When a noncitizen is "denied adjustment of status," they "must receive notice and the reasons for a denial."[271] The noncitizen has the opportunity to "renew his application in removal proceedings before an immigration

266. See U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1830 (2024) (Sotomayor, J., dissenting) (noting that "[c]onsular officers fall under the State Department, see [8 U.S.C.] § 1104(a), not DHS, which oversees USCIS, see 6 U.S.C. § 271(a)").

267. Id. ("DHS officers are constrained by a framework of required process that does not apply to consular processing.").

268. Id. (citation omitted).

269. See id. at 1831 ("When the Government requires one spouse to leave the country to apply for immigration status based on his marriage, it therefore asks him to give up the process he would receive in the United States and subject himself to the black box of consular processing."); see also Judulang v. Holder, 565 U.S. 42, 45 (2011) (finding that the "Board of Immigration Appeals' (BIA or Board) policy for deciding when resident [noncitizens]" could apply for discretionary "relief from deportation" was "arbitrary and capricious"); Wilson v. Garland, No. 22-1060, 2024 WL 2237686, at *1–2 (9th Cir. May 17, 2024) (reviewing the immigration judge and BIA official's decisions denying asylum and withholding removal); Kim, supra note 29, at 106–08 ("The Supreme Court has been particularly active in employing administrative law rules to exercise review over, and ultimately circumscribe, agency discretion to deport legal permanent residents with criminal convictions . . . ."). When considering these appeals, courts "review for substantial evidence the BIA's determination that a petitioner has failed to establish eligibility for asylum or withholding of removal." Sharma v. Garland, 9 F.4th 1052, 1060 (9th Cir. 2021). The standard is "highly deferential," with the court "grant[ing] a petition only if the petitioner shows that the evidence '*compels* the conclusion' that the BIA's decision was incorrect." Id. (internal quotation marks omitted) (first quoting Pedro-Mateo v. Immigr. & Naturalization Serv., 224 F.3d 1147, 1150 (9th Cir. 2014); then quoting He v. Holder, 749 F.3d 792, 795 (9th Cir. 2014)).

270. "Adjustment of status is the process that [a noncitizen] can use to apply for lawful permanent resident status . . . without having to return to [their] home country to complete visa processing." Adjustment of Status, USCIS, https://www.uscis.gov/green-card/green-card-processes-and-procedures/adjustment-of-status [https://perma.cc/63FG-7HQF] (last visited Aug. 29, 2024).

271. *Muñoz*, 144 S. Ct. at 1830 (Sotomayor, J., dissenting). Noncitizens are not entitled to judicial review of adjustment of status discretionary decisions. See Patel v. Garland, 142 S. Ct. 1614, 1627 (2022) (noting that "[f]ederal courts lack jurisdiction to review facts found as part of discretionary-relief proceedings" regarding adjustment of status).

court, where DHS must present any evidence against him in adversarial proceedings."[272] If the noncitizen loses in these proceedings, they "can petition for review to the Board of Immigration Appeals (BIA), and, ultimately, a federal court of appeals."[273] Noncitizens are entitled to these procedural due process rights even when they have been convicted of a crime.[274]

Against the backdrop of immigration law, the lack of review for consular officers is surprising.[275] Immigration statutes contain language limiting judicial review of asylum and deportation decisions but not regarding judicial review of consular officers.[276] Strangely, noncitizens who have lived in the United States for years—people such as Mr. Asencio-Cordero and Mr. Colindres—have fewer rights when they pursue a visa voluntarily than if they were deported.[277]

In addition to the due process rights of noncitizens in the United States, courts routinely weigh in on matters of immigration policy.[278] Consider Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). The Southern District of Texas issued an injunction, blocking the DAPA program.[279] After the Fifth Circuit

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272. *Muñoz*, 144 S. Ct. at 1830–31 (citations omitted).

273. Id. at 1831 (citations omitted).

274. Nasrallah v. Barr, 140 S. Ct. 1683, 1688 (2020) (holding that "in a case involving a noncitizen who committed a crime" enumerated in statute, "the court of appeals should review factual challenges to the [Convention Against Torture] order deferentially"); see also Landon v. Plasencia, 459 U.S. 21, 32 (1982) (extending due process to a permanent resident); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) ("[O]nce [a noncitizen] lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution . . . . Such rights include those protected by . . . the Fifth Amendment[] and by the due process clause of the Fourteenth Amendment." (internal quotation marks omitted) (quoting Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring))).

275. See Neuman, supra note 42, at 617–18 (explaining that "[t]he arbitrariness of consuls is proverbial").

276. See 8 U.S.C. §§ 1158(a)(3), 1158(b)(2)(D), 1252(a)(2) (2018) (denying jurisdiction to reviewing courts). The only provision that could arguably refer to judicial review for consular officers is 6 U.S.C. § 236(f) (2018) ("Nothing in this section shall be construed to create or authorize a private right of action to challenge a decision of a consular officer or other United States official or employee to grant or deny a visa.").

277. *Muñoz*, 144 S. Ct. at 1831 (Sotomayor, J., dissenting) ("When the Government requires one spouse to leave the country to apply for immigration status based on his marriage, it therefore asks him to give up the process he would receive in the United States and subject himself to the black box of consular processing.").

278. See Johnson, Immigration in the Supreme Court, supra note 29, at 62 (finding that "immigration matters regularly comprise a bread-and-butter part of [the Supreme Court's] docket"); see also Kim, supra note 29, at 88 (noting that the Supreme Court "has granted certiorari in at least one immigration case every term since 2009 and vacated a government immigration decision roughly every other year"); cf. McKanders, supra note 29, at 96 (describing the "many different theories accounting for the proliferation of immigration cases on the Supreme Court's docket").

279. Texas v. United States, 809 F.3d 134, 150 (5th Cir. 2015), aff'd, 579 U.S. 547 (2016) (4-4 decision) ("The [district] court temporarily enjoined DAPA's implementation

affirmed,[280] the Supreme Court granted certiorari.[281] Not only did the Court agree to hear the case, it also asked the parties to brief an additional question.[282] Admittedly, addressing a constitutional question is different than reviewing a factual determination. Even still, the fact that the Court hears questions regarding national immigration policy undermines the common refrain supporting consular nonreviewability—that immigration matters are best left to the political branches.[283]

DAPA is just one of many instances in which courts have weighed in on immigration policy decisions.[284] Other examples include the Supreme Court's application of rational basis review to President Donald Trump's travel ban[285] and the Eastern District of Texas's recent imposition of an administrative stay on President Joe Biden's Keeping Families Together plan.[286] When evaluating these decisions, courts exude deference to the President or executive agencies.[287] But even rational basis review is more stringent than the complete nonreviewability granted to consular officers.

This complete deference is also inconsistent with current administrative law trends. Days after upholding consular nonreviewability and curtailing its already limited exception, the Court overturned *Chevron*

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after determining that Texas had shown a substantial likelihood of success on its claim that the program must undergo notice and comment." (citing Texas v. United States, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015))).

280. Id. at 187–88 (holding that "[t]he public interest easily favors an injunction").

281. See United States v. Texas, 577 U.S. 1101 (2016).

282. Id. ("In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: 'Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3.'").

283. See, e.g., U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1820 (2024) (explaining that "this Court has recognized that the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control" (internal quotation marks omitted) (quoting Trump v. Hawaii, 138 S. Ct. 2392, 2402 (2018))).

284. See infra notes 285 and 286 and accompanying text.

285. *Trump*, 138 S. Ct. at 2420 ("For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review.").

286. See Texas v. U.S. Dep't of Homeland Sec., No. 6:24-cv-00306, LEXIS 153604, at *6–7 (E.D. Tex. Aug. 26, 2024) (determining plaintiffs' claims to be "substantial" and worthy of "closer consideration"); Miriam Jordan, Hamed Aleaziz & Serge F. Kovaleski, Judge Pauses Biden Administration Program that Aids Undocumented Spouses, N.Y. Times (Aug. 26, 2024), https://nytimes.com/2024/08/26/us/undocumented-spouses-biden-administration.html?smid=nytcore-ios-share&referringSource=articleShare&sgrp=c-cb (on file with the *Columbia Law Review*) (summarizing the state plaintiffs' claims and the consequences of the administrative stay). President Biden's immigration policies have been subject to challenges from both sides of the aisle. See, e.g., Press Release, ACLU, Immigrants' Rights Groups Sue Biden Administration Over New Anti-Asylum Rule (June 12, 2024), https://www.aclu.org/press-releases/immigrants-rights-groups-sue-biden-administration-over-new-anti-asylum-rule [https://perma.cc/NV3F-4MYB] (describing lawsuits against President Biden's asylum rule).

287. See, e.g., *Trump*, 138 S. Ct. at 2420 (applying rational basis review to former President Trump's travel ban).

deference in *Loper Bright Enterprises v. Raimondo*.[288] While acknowledging that "exercising independent judgment is consistent with the 'respect' historically given to Executive Branch interpretations," the Court critiqued *Chevron* deference for "demand[ing] that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time."[289] The Court recognized that courts, not agencies, have "special competence in resolving statutory ambiguities."[290] The question of whether an individual seeks entry to the United States to engage in unlawful activity involves both factual and legal inquiries.[291] Even still, consular officers are permitted to decide for themselves what constitutes "unlawful activity."[292]

In *Loper Bright*, the Court rejected various rationales for deference, including respecting agencies' "subject matter expertise," promoting "uniform construction of federal law," and preferencing the "policymaking" judgment of "political actors."[293] The Court concluded that "none of these considerations justifies *Chevron*'s sweeping presumption of congressional intent."[294] As the Supreme Court continues to question broad delegations and extensive grants of discretion,[295] consular nonreviewability's robust deference is an anomaly.[296]

III. THE FUTURE OF CONSULAR NONREVIEWABILITY

With the curtailing of the *Mandel* exception, consular visa decisions are more protected than ever. Options for judicial review are now practically foreclosed,[297] so the baton passes to Congress. This Part

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288. 144 S. Ct. 2244, 2265 (2024).

289. Id (quoting Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827)).

290. Id. at 2266.

291. As Justice Sotomayor explained, "'[U]nlawful activity' could mean anything from jaywalking to murder." U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1832 (2024) (Sotomayor, J., dissenting) (alteration in original).

292. Id.

293. *Loper Bright Enters.*, 144 S. Ct. at 2266.

294. Id. at 2266–67. The Court further noted that the "better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statues, with due respect for the views of the Executive Branch." Id. at 2267.

295. See supra note 30.

296. Consider, for example, how far the visa power has been delegated: Congress delegated the plenary power to the executive, who delegated it to consular officers, who have now—in some cases—delegated it to other agencies (through deference to law enforcement databases). See supra notes 257–260.

297. *Muñoz* clarified that *Mandel* did not articulate a procedural due process right to an explanation in consular visa denials. 144 S. Ct. at 1827 ("Whatever else it may stand for, *Mandel* does not hold that a citizen's independent constitutional right . . . gives that citizen a procedural due process right to a 'facially legitimate and bona fide reason' for why someone else's visa was denied."). Plaintiffs can likely still challenge delays in consular processing if a final decision has not been made. See Baygan v. Blinken, No. 23-2840 (JDB), 2024 WL 3723714, at *8 (D.D.C. Aug. 8, 2024) (noting that the Supreme Court "said

suggests an amendment to the Immigration and Nationality Act, modeled after the short-lived *Muñoz* requirement adopted by the Ninth Circuit. Section III.A explains why requiring a factual and timely explanation for visa denials would inject greater fairness into the visa process and better align consular processing with immigration and administrative law. After explaining the benefits of an amendment, section III.B argues that such a requirement would not undermine the values that support consular nonreviewability: national security concerns, consular and judicial efficiency, and immigration exceptionalism.

A. *Benefits of Requiring a Factual and Timely Explanation for Visa Denials*

To protect the interests of United States citizens such as Mrs. Colindres and Mrs. Muñoz,[298] Congress should amend the Immigration and Nationality Act to require consular officers to provide factual and timely explanations for *all* visa denials.[299] In the vast majority of cases, this would require nothing of consular officers because most applicants are denied under states with distinct factual predicates.[300] When consular officers fail to offer such an explanation, their decisions should be subject to judicial review. Imposing this requirement would have benefits both for

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nothing about whether courts are precluded from reviewing the delay related to processing visa applications").

If *Mandel*'s exception to consular nonreviewability permits a substantive due process claim, it is unclear what substantive right would qualify. In dicta, *Muñoz* rejected a substantive claim based on a right to spousal unity. Id. at 1827 (noting that such an argument "cannot succeed . . . because the asserted right is not a longstanding and 'deeply rooted' tradition in this country" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))).

The *Mandel* exception may still exist in the First Amendment context. Under the *Mandel* line of cases, courts have assumed that a plaintiff is entitled to a factually legitimate and bona fide reason when their First Amendment rights are infringed. See Baca, supra note 14, at 611–13 (describing cases). A U.S. citizen could, therefore, argue that their freedom of expression is violated by the denial of a visa to their spouse. Justice Alito alluded this possibility in a hypothetical during oral arguments. See Oral Argument at 22:22, *Muñoz*, 144 S. Ct. 1812 (No. 23-334), https://www.oyez.org/cases/2023/23-334 (on file with the *Columbia Law Review*). To be successful, a plaintiff would need to establish that a visa denial "directly deprived them of their First Amendment rights." *Muñoz*, 144 S. Ct. at 1827.

298. While the Supreme Court has expressly explained that a U.S. citizen does not have a substantive due process interest in their spouse's visa adjudication, see supra section II.B.1, there is no question that a spouse has an interest in a nonlegal sense.

299. This Note is not the first to call on Congress to solve the problems posed by consular nonreviewability. See, e.g., Callan & Callan, supra note 41, at 322–23 (arguing that "[c]ongressional action is clearly necessary to not only open the door to judicial review but also to craft fair and just procedures"). Practically, such an amendment may be unlikely because of congressional inaction on immigration matters. See id. at 321 ("In the United States, the prospect of congressional action on this issue is extremely unlikely."). But if Congress chooses to act, it should require consular officers to provide factual and timely explanations for their visa denials to address the problems posed by consular nonreviewability, see supra sections II.C.1–.2.

300. See infra notes 344–346 and accompanying text.

the fairness of consular processing and the consistency of the visa system within immigration and administrative law.

1. *Thoughtful Decisionmaking*. — Requiring a factual and timely explanation for visa denials would address the criticism that the consular visa process produces arbitrary—and sometimes erroneous—results in two ways.[301] First, requiring officers to provide a factual explanation when denying visas encourages more thoughtful decisions.[302] Rather than relying on "snap stereotyping,"[303] consular officers would have to explain their logic, knowing that unsupported determinations might be reviewed by courts.[304] Justice Sotomayor acknowledged that consular officers sometimes make poor decisions.[305] She cited to an amicus brief filed on behalf of former consular officers who warned that "lack of accountability, coupled with deficient information and inconsistent training, means decisions often 'rely on stereotypes or tropes,' even 'bias or bad faith.'"[306] While bias would inevitably still affect visa decisions, requiring officers to provide a brief explanation would encourage thoughtful reflection.

Second, an explanation requirement introduces a limited, but meaningful, opportunity for review when mistakes do happen. Although many people found ineligible can offer additional evidence to overcome the finding, people who are denied under vague statutes without explanation do not know where to start.[307] The Ninth Circuit explained that it is impossible to make a challenge "if the petitioner is not timely provided with the reason for the denial."[308] While most people would resolve their grievances through the consular office,[309] judicial review would provide an opportunity to compel disclosure of the reasons for a

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301. See supra section II.C.

302. See Callan & Callan, supra note 41, at 320 ("[P]ermitting judicial review will likely result in fewer unfair decisions from consular officers . . . .").

303. Lindsey, supra note 24, at 37.

304. See Callan & Callan, supra note 41, at 320–21 (quoting Dobkin, supra note 21, at 121) (noting that "the mere prospect of review . . . encourages the initial decision-maker to examine cases more carefully").

305. U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1831 (2024) (Sotomayor, J., dissenting).

306. Id. (quoting Brief of Amici Curiae Former Consular Officers in Support of Respondent at 8, *Muñoz*, 144 S. Ct. 1812 (No. 23-334), 2024 WL 1420959).

307. See Muñoz v. U.S. Dep't of State, 50 F.4th 906, 922 (9th Cir. 2022) (stating that the U.S. citizen's "ability to vindicate her liberty interest . . . depends on *timely* and adequate notice of the reasons underlying the initial denial"), rev'd, 144 S. Ct. 1812 (2024); see also Baca, supra note 14, at 603 (noting that challenging a consular officer's decision "is possible only when the applicant knows the basis for the denial and knows how to produce evidence to refute the government's evidence").

308. *Muñoz*, 50 F.4th at 921; see also Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (identifying timely notice as a crucial element of due process).

309. See Callan & Callan, supra note 41, at 320 ("By . . . holding officers accountable . . . the majority of denied applicants will not feel the need to resort to the court system because they know the officer handed down the decision with full knowledge that she could be required to explain the decision in a court of law.").

visa denial.[310] Requiring a factual and timely explanation from consular officers would promote more thoughtful decisions and provide mechanisms for review, increasing the legitimacy of the consular visa process.[311]

This analysis is consistent with patterns in immigration data. In 2023, consular officers made over three million ineligibility findings, with roughly 263,000 coming from immigrant visa-related services.[312] Many people overcame these determinations by providing additional information or applying again—in fact, almost eighty-five percent of these ineligibility findings were overcome.[313] This high rate of reversal shows that consular officers are often wrong and highlights the importance of providing applicants an opportunity to correct consular decisions.[314] Still, not all denied applicants have the chance to correct mistakes. For example, of the forty-two people in 2023 who were deemed ineligible under the "other unlawful activity" provision, no one successfully overcame the finding.[315] This is a testament to what the Ninth Circuit articulated in *Muñoz*: It is nearly impossible to mount a meaningful challenge to a determination when one does not know why that determination was made.[316]

2. *Consistency With Administrative and Immigration Law.* — A factual and timely explanation requirement would also alleviate the second criticism of the current visa process: that consular nonreviewability is incongruent

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310. This is what happened in the *Muñoz* case. See *Muñoz*, 144 S. Ct. at 1828 (Sotomayor, J., dissenting) (explaining that "after protracted litigation, the Government finally explained that it denied Muñoz's husband a visa because of its belief that he had connections to the gang MS–13").

311. See Callan & Callan, supra note 41, at 319 (noting that "no other governmental actions are protected from all meaningful review").

312. U.S. Dep't of State, Report of the Visa Office 2023: Table XIX: Immigrant and Nonimmigrant Visa Ineligibilities 3 (2023), https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2023AnnualReport/FY2023_AR_TableXIX.pdf [https://perma.cc/438N-PKZA] [hereinafter 2023 Immigrant and Nonimmigrant Visa Ineligibilities] (indicating that in 2023 there were 3,125,820 nonimmigrant ineligibility findings and 263,212 ineligibility findings from immigrant visa applications). The data has some limitations. For example, an individual can be recorded multiple times under different denial codes. Additionally, the count of "Ineligibility Overcome" includes people who were refused in previous years. However, the data clearly shows the high hurdle faced by the "other unlawful activity" determination.

313. See id. (noting that applicants overcame 221,198 of 263,212 ineligibility determinations for visa-related services).

314. See supra note 260 and accompanying text.

315. 2023 Immigrant and Nonimmigrant Visa Ineligibilities, supra note 312, at 1. This is consistent with the 2022 data. See U.S. Dep't of State, Report of the Visa Office 2022: Table XIX: Immigrant and Nonimmigrant Visa Ineligibilities 1 (2022), https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2022AnnualReport/FY22_TableXIX_vF.pdf [https://perma.cc/R8FM-GRZB] (showing that of fifty-one people, zero overcame the finding).

316. Muñoz v. U.S. Dep't of State, 50 F.4th 906, 922 (9th Cir. 2022) ("Such a challenge is impossible if the petitioner is not provided with the reason for the denial."), rev'd, 144 S. Ct. 1812 (2024).

with broader trends in immigration and administrative law.[317] For one, the *Muñoz* requirement better aligns the judicial review of the consular visa process with the scrutiny of other areas of immigration law—such as adjustment of status, asylum, and removal.[318] The Supreme Court has noted that "[noncitizens] receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."[319] It is odd to provide due process rights for a noncitizen in removal proceedings but not for a person who has been living in the United States for years—such as Mr. Colindres[320]—who voluntarily attempts to secure a visa through the designated processes.[321]

Mandating a factual and timely explanation for visa denials would also bring consular nonreviewability within the orbit of broader administrative law. *Loper Bright* warned against "courts mechanically afford[ing] *binding* deference to agency interpretations."[322] Although consular officers' factual determinations deserve deference, the judiciary is the proper channel for questions of law.[323] A limited explanation requirement would also address delegation concerns.[324] Consider how far the visa power has been delegated: Congress delegated the plenary power to the executive, who delegated it to consular officers, who have now—in some cases—delegated it to other agencies (through deference to law enforcement databases).[325] Limiting consular nonreviewability to cases in which

317. See Callan & Callan, supra note 41, at 319–20 ("[J]udges 'have been unable to point to any evidence . . . to support an exemption from the usual rules that govern judicial review of administrative decisions.'" (second alteration in original) (quoting Dobkin, supra note 21, at 117) (misquotation)).

318. See supra section II.C.2.

319. United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

320. Colindres v. U.S. Dep't of State, 71 F.4th 1018, 1020 (D.C. Cir. 2023).

321. See supra section II.C.2.

322. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024).

323. As a further reason for providing reasonable notice, consider that courts have explained that agencies that make decisions without notice are not entitled to deference in other areas of law. See Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 437 F.3d 75, 77 (D.C. Cir. 2006) ("[Courts] owe no deference to [an agency's] purported expertise because we cannot discern it."); see also Fox v. Clinton, 684 F.3d 67, 75 (D.C. Cir. 2012) (finding that agency action was not entitled to deference when its explanation "lacks any coherence").

324. Recent Supreme Court administrative law jurisprudence and constitutional law scholarship exemplify these delegation concerns. See, e.g., Loper Bright Enters., 144 S. Ct. at 2265 (rejecting *Chevron* deference); Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) ("The legislative cannot transfer the power of making laws to any other hands . . . ." (internal quotation marks omitted) (quoting Locke, supra note 30, at § 141)); Michigan v. Env't Prot. Agency, 576 U.S. 743, 762 (2015) (Thomas, J., concurring) ("Such a transfer is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies." (citing U.S. Const. art. III, § 1)); Merrill, supra note 30, at 1729–34 (outlining constitutional objections to *Chevron* deference).

325. See supra section I.A.2.

consular officers provide factual and timely explanations would permit courts to police the extensive delegation of the visa power.[326]

B. *Vindicating the Interests Underpinning Consular Nonreviewability*

Amending the INA to require consular officers to provide a factual and timely explanation for their visa denials would not undermine national security concerns, consular or judicial efficiency, or immigration exceptionalism.

1. *National Security Concerns.* — Proponents of consular nonreviewability argue that, to maintain national security, the government cannot be required to provide reasons for its denials.[327] This argument is rooted in the historical language of the plenary power, specifically that denying a visa is the government's sovereign prerogative.[328] In restricting immigration, the government might be relying on confidential information.[329] Forcing consular officers to provide an explanation for visa denials would jeopardize national security by interfering with intelligence efforts and ongoing investigations.[330]

This argument is both empirically and logically problematic. Empirically, the data show that immigration cases rarely "implicate national security or foreign affairs."[331] Just "thirteen of every hundred

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326. See Brief of Amici Curiae Law School Professors in Support of Respondent at 29, Kerry v. Din, 576 U.S. 86 (2015) (No. 13–1402), 2015 WL 272368 (arguing that "the court has an obligation to ensure that the agency is acting within the scope of Congress' authority").

327. See Muñoz v. U.S. Dep't of State, 73 F.4th 769, 783 (9th Cir. 2023) (declining to hear en banc) (Bumatay, J., dissenting) ("Respect for the government's interest in protecting our security should give us more pause before inventing new due process regimes."), rev'd, 144 S. Ct. 1812 (2024).

328. See Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) ("[T]he power to admit or exclude [noncitizens] is a sovereign prerogative." (internal quotation marks omitted) (quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982))); Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty . . . cannot be granted away or restrained on behalf of any one.").

329. Muñoz v. U.S. Dep't of State, 50 F.4th 906, 926 (9th Cir. 2022) (Lee, J., dissenting) (noting that the government should not have to provide evidence to support a visa denial because it "may be relying on confidential information derived from, say, a covert operation . . . or perhaps it is acting based on a secret diplomatic initiative"), rev'd, 144 S. Ct. 1812; see also *Muñoz*, 144 S. Ct. at 1824 (referencing a visa denial "based on 'information of a confidential nature, the disclosure of which would be prejudicial to the public interest'" (quoting United States ex. rel. Knauff v. Shaughnessy, 338 U.S. 537, 541 (1952))).

330. See *Muñoz*, 144 S. Ct. at 1825 (describing the power to exclude or expel noncitizens as "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers" (internal quotation marks omitted) (quoting Kleindienst v. Mandel, 408 U.S. 753, 765 (1972))).

331. See Anthony J. DeMattee, Matthew J. Lindsay & Hallie Ludsin, An Unreasonable Presumption: The National Security/Foreign Affairs Nexus in Immigration Law, 88 Brook. L. Rev. 747, 751–52 (2023) (showing that only 0.013% of removal cases involve national security or foreign affairs issues).

thousand immigration cases . . . implicate national security or foreign affairs," suggesting that "the basic warrant for extraordinary judicial deference in immigration cases . . . is demonstrably false."[332] Allowing a small minority of cases "to dictate the standard of judicial review" for the vast majority is bad policy.[333] A better solution would be to adopt "the same substantive, judicially enforceable norms that apply" when the government intends "to detain a criminal suspect or mentally ill person."[334] Undoubtedly, these cases occasionally touch upon concerns of national security, but even with an explanation requirement, the government "retain[s] broad latitude" to balance its interests.[335]

Furthermore, adopting broad judicial deference towards consular officers based on a small minority of cases that touch upon national security issues presents a "dangerous" slippery slope.[336] In today's geopolitical landscape, "literally everything can be construed as touching upon national security," so this argument "write[s] the government a blank check."[337]

The Court has recognized this risk and has not embraced the argument that national security concerns should overwhelm individual liberty interests in other areas of law.[338] This logic applies with even more force when consular officers—not the President or Congress—are making decisions.

2. *Consular and Judicial Efficiency.* — On a more practical matter, skeptics point out that a factual-and-timely requirement is logistically

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332. Id. at 751.

333. Id.

334. Id.

335. Id.; see also Brief of the American Civil Liberties Union as Amici Curiae in Support of Respondent at 27, Kerry v. Din, 576 U.S. 86 (2015) (No. 13-1402), 2015 WL 294680 [hereinafter ACLU Brief as Amici Curiae] (noting that "the federal courts have a diversity of tools to ensure that the government's legitimate secrets are not disseminated inappropriately"); see also Webster v. Doe, 486 U.S. 592, 604 (1988) ("[T]he District Court has the latitude to control any discovery process . . . against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission.").

336. See Schmitt, supra note 219, at 88–89 (explaining that this deference "would mean the end of judicial review in cases where the government acts under a pretext of national security").

337. Id.

338. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 539 (2004) ("We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns."); Zadvydas v. Davis, 533 U.S. 678, 695 (2001).

problematic.[339] Consulates review hundreds of applications per day.[340] Perhaps instituting an additional requirement would add undue stress on the process.[341] But complying with such a requirement would not be unduly burdensome given the internal records already kept.[342] When a visa is refused, applicants can present "further evidence" within a year "to overcome the ground of ineligibility on which the refusal was based."[343] In addition to this external review, the Foreign Affairs Manual outlines a mandatory internal supervisory review process.[344] To comply with these reviews, officers are undoubtedly recording their rationales for denying visas. Thus, the factual and timely explanation requirement would only require consulate officers to share upon request that which they are already recording internally. Moreover, most applicants are denied under statutory provisions with factual predicates that would not require further explanation. In 2022 and 2023, for instance, consular officers only denied forty-two and fifty-one applicants respectively under the broad catch-all category of "any other unlawful activity."[345] But perhaps the best evidence that a factual-and-timely requirement would not be prohibitively inefficient comes from former consular officers who filed an amicus brief in support of Mrs. Muñoz and Mr. Asencio-Cordero in *Muñoz* arguing that "judicial oversight is . . . needed."[346]

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339. The *Muñoz* Ninth Circuit dissenters also critiqued the muddiness of the "reasonable timeliness" standard. Muñoz v. U.S. Dep't of State, 50 F.4th 906, 927 (9th Cir. 2022) (Lee, J., dissenting), rev'd, 144 S. Ct. 1812 (2024). Considering the prevalence of reasonableness standards in the law and the direction provided by the majority opinion, this argument is unconvincing.

340. See Nafziger, supra note 21, at 69 (exhibiting how on a sample day at a consulate post, five officers reviewed a total of 630 visa applications); Richardson, supra note 20 ("During what amounts to a five-minute interview (and sometimes less), an officer must make a judgment call on the applicant's story.").

341. But see ACLU Brief as Amici Curiae, supra note 335, at 22 ("History suggests that the more significant danger is not that judicial review under *Mandel* will lead to a flood of new lawsuits, but that the absence of review will lead to unauthorized but unexamined visa denials that abridge the constitutional rights of U.S. citizens.").

342. See *Muñoz*, 50 F.4th at 922 (describing the current process and timeline under which an applicant may overcome an initial denial).

343. 22 C.F.R. § 42.81(e) (2024).

344. Foreign Affairs Manual, supra note 143, at 504.11-3(A)(2)(b).

345. See supra note 315 and accompanying text.

346. Brief of Amici Curiae for Former Consular Officers in Support of Respondents, supra note 306, at 3–4 (decrying the fact that the "overwhelming majority of visa adjudications involve the exercise of individual consular officers' wide discretion"); see also Brief of Amici Curiae Former Consular Officers in Support of Respondent, supra note 257, at 3 (arguing for judicial review because "visa denials that rely on database and watchlist information frequently involve no consular discretion and are compelled by conclusory statements").

Defenders of consular nonreviewability also fear a floodgate of litigation.[347] This argument is misplaced for two reasons. First, because "filing a lawsuit in federal court is an expensive and time-consuming process," "only a very small number of denied applicants would take advantage of the judicial remedy."[348] Given the high rate of applicants overcoming ineligibility findings at the consulate,[349] review would be limited to the small number of people denied for vague reasons who also have connections to U.S. citizens. Second, "permitting judicial review will likely result in fewer unfair decisions from consular officers, thereby further decreasing the need and demand for judicial review."[350] This has proved true in several "European countries [that] allow judicial review . . . . [T]heir court systems have not come to a grinding halt."[351]

3. *Immigration Exceptionalism.* — In addition, opponents of an exception to consular nonreviewability contend that because immigration is a "privilege," due process protections are not applicable.[352] Although there may not be a constitutional entitlement to due process, Congress can still choose to legislate such a requirement.[353] In today's global world, extending limited due process rights to immigrants seeking visas might be beneficial. The world is increasingly global, and immigrants represent a significant force of the United States economy.[354] Many people applying for visas—like Mr. Colindres—are already living in the United States or at least already have some connection to the country.[355] Given the role

347. See Callan & Callan, supra note 41, at 320 (stating that "supporters . . . argue against these proposals, citing fears that allowing lawsuits would open the gates and flood federal court dockets").

348. Id.

349. See supra note 313 and accompanying text (highlighting that roughly eighty-five percent of ineligibility findings were overcome for immigration-visa-related services).

350. Callan & Callan, supra note 41, at 320.

351. Dobkin, supra note 21, at 121.

352. See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542, 544 (1950) (explaining that "procedure[s] . . . [are] due process as far as [the noncitizen] denied entry is concerned"). This notion of immigration exceptionalism—the idea that special doctrines within immigration "enable government action that would be unacceptable if applied to citizens"—departs from the reality that courts are already wading into immigration matters. See Rubenstein & Gulasekaram, supra note 46, at 584–85; supra notes 267–287 and accompanying text.

353. U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1825 (2024) ("To be sure, Congress can use its authority over immigration to prioritize the unity of the immigrant family. . . . But the Constitution does not *require* this result . . . .").

354. Immigrants make up a large part of the U.S. economy: "Immigrants in the United States make up approximately 1-in-7 residents, 1-in-6 workers and create about 1-in-4 of new businesses." Joint Econ. Comm., 117th Cong., Immigrants Are Vital to the U.S. Economy 1 (2021), https://www.jec.senate.gov/public/index.cfm/democrats/2021/4/immigrants-are-vital-to-the-u-s-economy [https://perma.cc/NX44-A7ET].

355. See, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (explaining that "[noncitizens] receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"); Landon v. Plasencia, 459 U.S. 21, 32 (1982) (noting that "once a[] [noncitizen]

immigrants play in the economy and society, it is crucial to incentivize a legitimate means for entry.[356] When they are denied a meaningful chance at immigrate, people will not stop attempting to enter the United States; rather, they will circumvent the system through extralegal methods.[357] Immigration exceptionalism—like national security and efficiency concerns—fails to foreclose adoption of a factual-and-timely requirement.

CONCLUSION

Mr. Colindres immigrated from Central America, building a life and family within the United States.[358] To protect the roots he established, he chose to engage in the visa process, voluntarily conceding his undocumented status.[359] His application was seamless—albeit slow—until its final stage. After leaving the country for final approval, a consular officer abruptly denied his visa, leaving him marooned in a country he had not lived in for years.[360] Now, the Colindres family is in "dire straits."[361] His story will not be the last. With the *Muñoz* decision denying judicial review to families like the Colindreses, the visa process remains risky, arbitrary, and anomalous.

Personal stories like that of Mr. Colindres illustrate the debate over whether consular nonreviewability remains viable in today's jurisprudence. Consular nonreviewability is inconsistent with broader immigration and administrative trends.[362] Most importantly, it precludes families from being together.[363] The short-lived Ninth Circuit's *Muñoz*

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gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly"); Kwong Hai Chew v. Colding, 344 U.S. 590, 596–97 n.5 (1953) ("The [noncitizen], to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity within our society." (quoting Johnson v. Eisentrager, 339 U.S. 763, 770–71 (1950))); Ibrahim v. Dep't of Homeland Sec., 62 F. Supp. 3d 909, 912 (N.D. Cal. 2014) (stating that the plaintiff had "such a connection" because of ties to the United States); see also Diana G. Li, Note, Due Process in Removal Proceedings After *Thuraissigiam*, 74 Stan. L. Rev. 793, 797, 826 (2022) (arguing that the *Thuraissigiam* decision "should be limited to its narrow facts" and "physical entry is the touchstone for determining whether someone has procedural due process rights"). But see Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982–83 (2020) (concluding that an asylum seeker does not have due process rights because he had not "effected an entry" and therefore he had "only those rights regarding admission that Congress has provided by statute").

356. See Philip Hamburger, Beyond Protection, 109 Colum. L. Rev. 1823, 1970 (2009) (arguing that immigrants should receive protection when "the government acquiesces in their remaining within the United States").

357. See, e.g., Valdes, supra note 263.

358. Colindres v. U.S. Dep't of State, 71 F.4th 1018, 1020 (D.C. Cir. 2023).

359. Id.

360. Id.

361. *Colindres* Petition, supra note 12, at 39.

362. See supra section II.B.2.

363. See *Colindres* Petition, supra note 12, at 38 (describing "a prolonged and potentially endless separation of a close-knit and loving family").

factual-and-timely requirement offers a template for congressional action—injecting fairness, consistency, and humanity into the visa process while protecting the core values motivating consular nonreviewability.[364] The Supreme Court may have rejected the Ninth Circuit's *Muñoz* requirement, but Congress can revive it by instructing consular officers to provide a factual and timely explanation for all visa denials.

364. See supra Part III.

ESSAY

PARTICIPATORY EXPUNGEMENT

*Brian M. Murray**

Most jurisdictions that permit expungement draw the line at certain crimes—usually those implicating one or more victims, serious risks to public safety, corruption, or breach of the public trust. This is unsurprising given how these crimes relate to the moral underpinnings of the criminal law in a democratic society. This Essay explores, given the overall direction of expungement reform, whether expungement should reach more offenses and by what procedural means.

More specifically, it suggests the community's interest in adjudicating expungement increases with the seriousness of the criminal record, whereas for lower-level criminal records, the petitioner's interest in reintegration can outweigh the preference for community involvement. As expungement reform climbs the ladder of offense seriousness, a dose of community involvement becomes more justifiable.

Given that expungement relates to the propriety of ongoing stigma and punishment, exempting the community from adjudication becomes increasingly problematic on political, ethical, and legal grounds as the severity of the criminal record increases. In a democratic legal system, the community must have the ability to express its will about the purposes and functions of the criminal law through adjudication. Second, the American constitutional tradition prefers community involvement in criminal matters. Third, communities should be involved in shaping and creating second-chance norms when they are desirable. "Participatory expungement" is warranted when the most significant normative questions relating to the criminal law are present, leaving room for development of a culture of second chances when the community thinks it is justified.

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* Professor of Law, Seton Hall Law School. Thank you to the Hon. Stephanos Bibas for encouraging me to study expungement and the role of community participation after criminal adjudication and my former colleagues at Community Legal Services, who introduced me to the practice of expungement law. Thank you to Darryl Brown, Jenny Carroll, Jessica Eaglin, Brenner Fissell, Thea Johnson, Justin Murray, Jenny Roberts, participants at CrimFest 2022, the faculties at New York Law School and Notre Dame Law School, and my colleagues at Seton Hall Law School for comments on this project. Finally, thank you to my wife, Katherine, for her continuous support, and my children, Elizabeth, Eleanor, George, John, Lucy, and Anna, for their inspiring curiosity, wonder, and zealous love for life.

INTRODUCTION

Less than twenty years ago, few states permitted the expungement of convictions.[1] Executive pardons were the way to erase convictions, characterized by lengthy petition-based processes that traditionally

1. See Restoration Rts. Project, 50-State Comparison: Expungement, Sealing & Other Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside-2-2/ [https://perma.cc/6XZZ-92S4] [hereinafter Collateral Consequences Res. Ctr., 50-State Comparison] (last updated July 2024) (providing "state-by-state summaries of record relief laws, with links to more detailed analysis and legal citations"). I am grateful for the extensive work done by the Center that details the variation in state approaches to expungement. Much of Part II builds on the Center's exceptional work.

culminated in a judgment by a Governor or other executive official.[2] As others have highlighted, pardon processes are fraught with procedural and substantive problems, not to mention political implications.[3] And even if achieved, pardons tend to be for relatively minor crimes and, overall, barely make a dent in the quantity of conviction records in individual states and nationwide.[4] Meanwhile, criminal repositories maintain tens of thousands of conviction records in something close to perpetuity, permitting ongoing stigma and punitive effects that undercut cardinal and ordinal principles of proportionality by any measure.[5]

The punitive effects of conviction records have led to more than a decade of significant reform, with many states expanding expungement relief to convictions.[6] These legislative activities broaden the range of convictions eligible for expungement and the number of petitioners eligible for relief.[7] Automated expungement, also known as "Clean Slate" relief,[8] promises easier expungement of convictions by eliminating the manual petitions that were traditionally required and that contributed to

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2. See Rachel E. Barkow, The Politics of Forgiveness: Reconceptualizing Clemency, 21 Fed. Sent'g Rep. 153, 153–55 (2009) (referencing how the state pardon power requires gubernatorial decisionmaking); Kathleen C. Ridolfi & Seth Gordon, Gubernatorial Clemency Powers: Justice or Mercy?, 24 Crim. Just., Fall 2009, at 26, 29–30 (discussing how states historically allocated authority to executive officials to pardon).

3. See, e.g., Margaret Colgate Love, Of Pardons, Politics, and Collar Buttons: Reflections on the President's Duty to Be Merciful, 27 Fordham Urb. L.J. 1483, 1485–87 (2000) ("[Pardons] enable [the President] to deal expeditiously with situations involving political upheavals or emergencies."); Margaret Colgate Love, The Twilight of the Pardon Power, 100 J. Crim. L. & Criminology 1169, 1193–203 (2010) ("After 1980, presidential pardoning went into a decline . . . because the retributivist theory of 'just deserts' and the politics of the 'war on crime' together made pardon seem . . . useless and dangerous.").

4. See Off. of the Pardon Att'y, DOJ, Clemency Statistics, https://www.justice.gov/pardon/clemency-statistics [https://perma.cc/KW76-MALK] (last updated Aug. 7, 2024) (providing data on the number of pardons received, denied, and granted by U.S. Presidents since 1900).

5. See James B. Jacobs, The Eternal Criminal Record 209–19 (2015) (explaining the repercussions of a system that allows for publicly accessible criminal records and questioning its justification under theories of punishment); Sarah Esther Lageson, Digital Punishment: Privacy, Stigma, and the Harms of Data-Driven Criminal Justice 6–9 (2020) ("[D]igital punishment is an enduring form of criminal stigma that travels across mugshot websites, background check services, and Google search results."); Jenny Roberts, Expunging America's Rap Sheet in the Information Age, 2015 Wis. L. Rev. 321, 326–29 (discussing quantity of arrests and records in various databases).

6. See Collateral Consequences Res. Ctr., 50-State Comparison, supra note 1 (providing lists of, and data on, states that authorize the expungement of convictions for different levels of felonies and misdemeanors).

7. See id.

8. See, e.g., Clean Slate in the States, About CSI, Clean Slate Initiative, https://www.cleanslateinitiative.org/states [https://perma.cc/HN67-6RZU] (last visited Nov. 24, 2024) ("The Clean Slate Initiative passes and implements laws that automatically clear eligible records for people who have completed their sentence and remained crime-free, and expands who is eligible for clearance." (emphasis omitted)).

what Professors J.J. Prescott and Sonja Starr referred to as the expungement "uptake gap."[9]

Yet these reforms have been accompanied by a large caveat: The remedy has been extended to a patchwork of lower-level convictions and only after extensive waiting periods. That is to say, the expanded relief has limits. Legislatures have erected procedural hurdles and shown a strong unwillingness to extend expungement beyond a subset of crimes.

This Essay explores the limits of conviction-based expungement enacted by states, the purported rationales underlying those limits, and the arguments that might support extending the remedy further. In doing so, it highlights how the move to allow expungement of convictions rests on two interwoven premises related to the maintenance of public criminal records: (1) the recognition that public criminal records stretch the boundaries of permissible state punishment and permit privately-inflicted punishment through collateral consequences;[10] and (2) the reality that existing legal structures do not adequately mitigate extra punishment stemming from public criminal records.[11]

Enabling the expungement of arrests and lower-level convictions carries less risk of undercutting moral and social norms because the extent to which those offenses implicate such norms is more attenuated.[12] Add

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9. J.J. Prescott & Sonja B. Starr, Expungement of Criminal Convictions: An Empirical Study, 133 Harv. L. Rev. 2460, 2501–07 (2020) [hereinafter Prescott & Starr, Expungement of Criminal Convictions]; see also Colleen Chien, America's Paper Prisons: The Second Chance Gap, 119 Mich. L. Rev. 519, 541–42 (2020) (noting gaps in expungement relief).

10. See Alessandro Corda, More Justice and Less Harm: Reinventing Access to Criminal History Records, 60 How. L.J. 1, 15–19 (2016) (detailing the connection between public criminal records and punishment theory and punitive consequences); Brian M. Murray, Retributive Expungement, 169 U. Pa. L. Rev. 665, 673–80 (2021) [hereinafter Murray, Retributive Expungement] (describing collateral consequences for individuals with public criminal records resulting from the decisionmaking of non-state actors); Jeremy Travis, Invisible Punishment: An Instrument of Social Exclusion, *in* Invisible Punishment: The Collateral Consequences of Mass Imprisonment 15, 17–21 (Marc Mauer & Meda Chesney-Lind eds., 2002) ("In this brave new world, punishment for the original offense is no longer enough; one's debt to society is never paid."); see also Simone Ispa-Landa & Charles E. Loeffler, Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement-Seekers in Illinois, 54 Criminology 387, 389–91 (2016) (describing how "widely available criminal records" restrict access to a variety of privileges, including "employment opportunities, voting rights, access to public housing, student financial aid, and social service benefits").

11. See Jacobs, supra note 5, at 209–19 (describing the accessibility of criminal records); Lageson, supra note 5, at 163–82 (detailing the inadequacy of various legal structures).

12. For instance, consider that an arrest may rest solely on the judgment of one lower-level executive official without prior review by a judicial officer. See Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."). Similarly, many lower-level convictions are the product of plea deals. See Ram Subramanian, Léon Digard, Melvin Washington II & Stephanie Sorage, In the Shadows: A Review of the Research on Plea

the administrative impulses driving criminal law reform more broadly and the justification for administrative record-clearing emerges. Administrative record deletion, either manually or automatically, has become the response to administrative record creation on the front end for low-level crimes.[13]

Simultaneously, states have set up moderate conviction-based expungement regimes while remaining reluctant to include higher-level crimes.[14] This Essay suggests this hesitation has deep roots, stemming from the continued legislative acceptance of a simple, yet traditional, belief: that the criminal law—its scope and limits—involves the reaffirmation of community norms through the condemnation of moral and social wrongdoing.[15] Put simply, the most serious crimes implicate the most serious social norms and enforcement of the criminal law—and maintenance of records showing as much—has expressive value.[16]

The expungement of convictions potentially undercuts that purpose. Whereas criminal law arguably aims to "restitch" the social fabric,[17] expungement might be thought to "unstitch" it if not accomplished carefully.[18] Legislatures also might conceive ongoing stigma and associated

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Bargaining 6 (2020), https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf [https://perma.cc/KW2T-L8FD] (emphasizing the overwhelming amount of guilty pleas at the trial court level). Alternatively, higher-level convictions might involve lengthier investigations by multiple executive officials, perhaps implicating the judiciary due to the requirements of constitutional criminal procedure. See U.S. Const. amend. V (requiring grand jury indictment for capital or infamous crime); DOJ, Just. Manual § 9-11.120 (2020) (discussing the powers and limitations of grand juries).

13. See, e.g., Clean Slate Initiative, Our Strategy to Unlock Opportunity for Up to 14 Million Additional People 8 (n.d.), https://static1.squarespace.com/static/62cd94419c528e34ea4093ef/t/66bb5bac1fd7ca3c98cc5da3/1723554734777/CSI+Strategic+Plan.pdf [https://perma.cc/TE4C-QCMH] (last visited Sept. 21, 2024) (outlining a strategy to implement legislation across all fifty states that would make millions of Americans eligible for automatic full or partial record clearance).

14. See infra sections II.A–.B.

15. See Joshua Kleinfeld, Reconstructivism: The Place of Criminal Law in Ethical Life, 129 Harv. L. Rev. 1485, 1513–18 (2016) [hereinafter Kleinfeld, Reconstructivism] (describing the function of punishment); Brian M. Murray, Restorative Retributivism, 75 U. Mia. L. Rev. 855, 882–87 (2021) [hereinafter Murray, Restorative Retributivism] (same).

16. Of course, whether the criminal law has expressive purposes for certain values is a separate question from whether the values it chooses to express are fully just. The moral and social underpinnings of many parts of the criminal law have changed due to increased understanding about the values the law purports to serve. Additionally, just because the criminal law aims to further certain values does not mean it accomplishes that task well.

17. Kleinfeld, Reconstructivism, supra note 15, at 1538.

18. See Brian M. Murray, Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement, 86 Fordham L. Rev. 2821, 2852–53 (2018) (explaining that prosecutors might see the expungement as an unstitching of the social fabric if there is not significant justification that aligns with their policy objectives for the expungement).

collateral consequences as deserved for higher-level offenses.[19] Further, legislative authorization is fraught with political and social difficulties given the severity of these offenses, especially if the decision is either unilateral by a judge or automatic. In other words, legislators are reluctant to let judges or automated processes unilaterally expunge higher-level convictions, in the same way that the pardon process evolved to typically involve multiple, fragmented layers of government.[20]

While nearly half of the states permit expungement of convictions, almost all restrict such relief to nonviolent offenses or crimes when social harm is less immediately visible or apparent.[21] Given this legal reality, which has stalled the extension of expungement, criminal records reformers are at a crossroads: Should they recognize the limits of expungement reform and move to other pastures for criminal records reform,[22] or should they push for expansion of expungement reform to even higher-level convictions? At the same time, expungement skeptics wonder if the past decade of reform has gone too far and requires pause.[23] Put differently, the narrow question is whether expungement should reach higher-level offenses. The broader question is, if so, *who should decide* when expungement might be appropriate given the normative fabric of the criminal law.

This Essay considers a solution that recognizes the normative components of expungement law and the moral underpinnings of the criminal law in the American democratic tradition. Building from a growing literature that reemphasizes the need to reinject the community into criminal adjudication at various phases of the criminal process,[24] it

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19. See Brian M. Murray, Are Collateral Consequences Deserved?, 95 Notre Dame L. Rev. 1031, 1068 (2020) (discussing desert and higher-level offenses); Travis, supra note 10, at 17–18 (discussing the history and context of these collateral consequences and punishment).

20. See Richard A. Bierschbach, Fragmentation and Democracy in the Constitutional Law of Punishment, 111 Nw. U. L. Rev. 1437, 1443 (2017) (describing how the "adjustment process involves a host of actors, each with its own strengths and perspectives on the demands of justice").

21. See infra sections II.A–.B.

22. There has been a movement in favor of reforming the criminal records apparatus on the front end, thereby reducing the need for expungement remedies on the back end.

23. See, e.g., Jeffrey Billman, Prosecutor Pressure Stalls Automatic Expunctions in North Carolina, Bolts Mag. (July 11, 2022), https://boltsmag.org/prosecutor-pressure-stalls-automatic-expunctions-in-north-carolina/ [https://perma.cc/GH3P-EX83] ("[T]he North Carolina Conference of District Attorneys, an influential organization that represents the state's prosecutors and pressed for the pause, argues that the court system needs time to address the law's 'unintended consequences.'").

24. See Laura I. Appleman, The Plea Jury, 85 Ind. L.J. 731, 766 (2010) [hereinafter Appleman, The Plea Jury] (proposing the incorporation of the local community into the guilty-plea procedure); Rachel A. Harmon, The Problem of Policing, 110 Mich. L. Rev. 761, 802–16 (2012) (discussing more effective police-regulation methods); Carissa Byrne Hessick & Michael Morse, Picking Prosecutors, 105 Iowa L. Rev. 1537, 1578–87 (2020) (discussing the potential for prosecutor elections as a source of criminal justice reform); Daniel S. McConkie, Jr., Plea Bargaining for the People, 104 Marq. L. Rev. 1031, 1043–45 (2021)

applies concepts relating to democratization and participatory process to the world of expungement.

Given that expungement is a judgment relating to the propriety of ongoing stigma and punishment as applied to a particular person, it is a natural forum for community involvement. In a democratic legal system, the community must have the ability to express its will about the purposes and functions of the criminal law through adjudication. The American constitutional tradition prefers community involvement in criminal matters—notions of restorative criminal justice suggest as much—and this sort of adjudication would allow communities to determine second-chance norms when they are desirable.

Put simply, as expungement reform climbs the ladder of offense seriousness, a dose of community adjudication becomes more justifiable.[25] The extraordinary nature of expungement means that the community's interest in adjudication increases with the seriousness of the criminal record at issue, whereas for lower-level criminal records, the petitioner's interest in reintegration can outweigh the preference for community involvement in adjudication. The latter justifies recent trends in expungement reform, but the former calls for coupling any additional substantive expansion with procedural incorporation of the community into expungement adjudication for serious offenses. Coupling community participation with expungement determinations would allow for threading the needle between two equally important interests: (1) reaffirmation of the utility of the criminal law and its limits more broadly, including in a democratic state, and (2) broader awareness of the effects of a conviction record in today's digital world.

In other words, this Essay makes the case for making expungement more participatory as the stakes increase. The more serious the conviction,

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(emphasizing the importance of public participation in democratic processes such as jury service and advisory boards); Jed S. Rakoff, Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It, 111 Nw. U. L. Rev. 1429, 1432 (2017) (discussing the supremacy of prosecutorial power); Jocelyn Simonson, Bail Nullification, 115 Mich. L. Rev. 585, 606–11 (2017) [hereinafter Simonson, Bail Nullification] (exploring the possibility of community bail nullification); Tom R. Tyler, From Harm Reduction to Community Engagement: Redefining the Goals of American Policing in the Twenty-First Century, 111 Nw. U. L. Rev. 1537, 1560 (2017) [hereinafter Tyler, From Harm Reduction] (describing the value of policing that promotes public trust); David Alan Sklansky, Unpacking the Relationship Between Prosecutors and Democracy in the United States 1 (Stan. Pub. L. Working Paper No. 2829251, 2016), https://ssrn.com/abstract=2829251 [https://perma.cc/EB99-PEPN] (discussing the relationship between democracy and prosecutors). See generally Tracey Meares, Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation, 111 Nw. U. L. Rev. 1525 (2017) (discussing the importance of citizen engagement in criminal law).

25. Exempting the community from adjudication becomes increasingly problematic on political, ethical, and legal grounds as the severity of the criminal record increases. See infra Part III.

the more directly involved the community should be in making the decision to expunge. Participatory expungement can involve the communal adjudication of expungement petitions involving higher-level offenses. This would obviate the need for the inefficient and flawed pardon process, align with the move to "democratize" criminal justice remedies, and empower communities to make decisions relating to records erasure and the reintegration[26] of those who have been convicted. It would inject a dose of community-centered adjudication into the criminal process, albeit on the back end. While scholars such as Judge Stephanos Bibas,[27] and Professors Akhil Reed Amar,[28] Laura Appleman,[29] Josh Bowers,[30] Tracey Meares,[31] Paul Robinson,[32] Jocelyn Simonson,[33] and

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26. See R.A. Duff, A Criminal Law to Call Our Own?, 111 Nw. U. L. Rev. 1491, 1503 (2017) [hereinafter Duff, Call Our Own?]; see also William J. Stuntz, The Collapse of American Criminal Justice 30–31 (2011) (discussing the history of progressive community involvement in the criminal justice system); Bierschbach, supra note 20, at 1437–38 (noting the balancing of bureaucratic and participatory forces to achieve democratic involvement); Alexander L. Burton, Francis T. Cullen, Justin T. Pickett, Velmer S. Burton, Jr. & Angela J. Thielo, Beyond the Eternal Criminal Record: Public Support for Expungement, 20 Criminology & Pub. Pol'y 123, 128–29 (2021) (discussing large public support of expungement in certain situations); Francis T. Cullen, Bonnie S. Fisher & Brandon K. Applegate, Public Opinion About Punishment and Corrections, 27 Crime & Just. 1, 41 (2000) (discussing the wide range of punitive and progressive policies favored by the public); Murray, Restorative Retributivism, supra note 15, at 891 (explaining how human decisionmaking can leave room for mercy and restoration); Ekow N. Yankah, The Right to Reintegration, 23 New Crim. L. Rev. 74, 75–81 (2020) (characterizing reintegration as a political right).

27. See Stephanos Bibas, Political Versus Administrative Justice, *in* Criminal Law Conversations 677, 677 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009) [hereinafter Bibas, Political Versus Administrative] (arguing for placing criminal justice policy in the hands of laypeople given moral expertise); see also infra sections III.A–.C.

28. See infra sections III.A–.B.

29. See Laura I. Appleman, The Lost Meaning of the Jury Trial Right, 84 Ind. L.J. 397, 399 (2009) [hereinafter Appleman, Lost Meaning] (exploring the historical meaning of the jury trial right to argue against continued reliance on bench trials).

30. See Josh Bowers, Blame by Proxy: Political Retributivism & Its Problems, A Response to Dan Markel, 1 Va. J. Crim. L. 135, 156–64 (2012) (discussing the problems with political retributivism); Josh Bowers, Upside-Down Juries, 111 Nw. U. L. Rev. 1655, 1666–67 (2017) (arguing that laypeople are "uniquely well suited to evaluate normative principles" that are at the center of the criminal process).

31. See Meares, supra note 24, at 1533 ("[P]rocedural justice not only implicates the relationship that individuals have with legal authorities but it also implicates how we, as members of groups, relate to one another in groups.").

32. See Paul H. Robinson, The Proper Role of Community in Determining Criminal Liability and Punishment, *in* Popular Punishment: On the Normative Significance of Public Opinion 54, 73–74 (Jesper Ryberg & Julian V. Roberts eds., 2014) (arguing that community views of justice should become the basis of criminal liability and punishment).

33. See Jocelyn Simonson, The Place of "The People" in Criminal Procedure, 119 Colum. L. Rev. 249, 255–56 (2019) [hereinafter Simonson, The People] (arguing in favor of abolishing the people/defendant dichotomy and embracing popular participation in criminal procedures).

others[34] have explored the historical–legal roots of community involvement in other contexts to argue for increased participation in different phases of the criminal process, this critique applies to the field of expungement.

In conducting this novel critique and proposal, this Essay proceeds as follows. Part I explains the social and legal realities that led to extending expungement to convictions. It emphasizes the negative and lasting effects of a public conviction record, how such records implicate additional public punishment and permit privately inflicted punishment, and the shortcomings of the pardon system as the traditional vehicle for the erasure of convictions. Part II then canvasses the developing law of expunging convictions, highlighting its extensions and major limits. It suggests that while reform has been widespread across the states, it generally has not proceeded beyond a certain level of conviction. Further, ample procedural hurdles exist.

Part III articulates the rationales for increased democratic participation in expungement adjudication. This argument is made from several angles: the historical and constitutional preference for democratic involvement in criminal adjudication, democratic theory, punishment theory, empirical grounds, and the practical utility of expanding the remedy. Part IV then operationalizes these arguments to propose a roadmap for states that wish to thread the needle by broadening the remedy, enhancing participation, and serving the purposes of the criminal law at the same time. It also responds to potential and likely criticisms of the proposal, some of which are frequently leveled against any efforts to democratize criminal justice.[35] At the very least, it aims to elucidate the key questions for stakeholders moving forward.

I. WHY THE MOVE TO EXPUNGE CONVICTIONS?

Expungement promises to help someone put the past in the rearview mirror given the reality that almost all employers, landlords, governmental benefit programs, and other private actors utilize criminal background checks to screen and sort candidates.[36] Expungement for convictions implicates the proportionality of punishment exacted by the state, the

34. See, e.g., Kyron Huigens, Virtue and Inculpation, 108 Harv. L. Rev. 1423, 1427 (1995) (referencing practical judgment and determinations of moral blameworthiness); McConkie, supra note 24, at 1034–35 (arguing for expanding popular participation in the plea bargaining system to achieve the social purposes of criminal law).

35. See, e.g., John Rappaport, Some Doubts About "Democratizing" Criminal Justice, 87 U. Chi. L. Rev. 711, 759–73 (2020) (describing the main arguments against democratizing various parts of the criminal justice system).

36. See Eldar Haber, Digital Expungement, 77 Md. L. Rev. 337, 342–46 (2018) (describing the promise of expungement in relation to the collateral consequences of criminal punishment).

punitive capabilities of private actors, the inadequacies of existing legal structures to account for the pernicious effects of a public criminal record, and the overall desire for productive reentry.[37] These are some reasons why legislatures have expanded expungement to conviction records, which have consequences for reentry that implicate all facets of life.[38]

The numbers are staggering. Nearly 100 million Americans have criminal records,[39] and roughly eight percent of the adult population has a felony conviction.[40] The effect of these records on reentry has been well documented by scholars, litigators, policy advocates, activists, and reformers.[41] In short, conviction records lead to collateral consequences—both state and privately inflicted—after conviction. These consequences include ineligibility for public benefits and student loans,[42] occupational license denials,[43]

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37. See Brian M. Murray, Completing Expungement, 56 U. Rich. L. Rev. 1165, 1166–67 (2022) [hereinafter Murray, Completing Expungement].

38. See Peter Leasure & Tia Stevens Andersen, The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study, 35 Yale L. & Pol'y Rev. Inter Alia 11, 12 (2016), https://yalelawandpolicy.org/sites/default/files/IA/leasure.certificates_of_relief.produced.pdf [https://perma.cc/RV76-3P7W] [hereinafter Leasure & Andersen, Certificates of Relief] ("One of the most punitive collateral consequences of conviction is the impact of a criminal record on the likelihood of securing employment. Research . . . consistently demonstrates that employment is correlated with lower rates of reoffending and therefore with successful reentry." (footnote omitted)); Peter Leasure & Tia Stevens Andersen, Recognizing Redemption: Old Criminal Records and Employment Outcomes, 41 N.Y.U. Rev. L. & Soc. Change Harbinger 271, 274 (2017), https://socialchangenyu.com/wp-content/uploads/2017/03/Leasure_Recognizing-Redemption_corrected-4.25.18.pdf [https://perma.cc/6MEX-2VGT] ("[T]hose possessing various types of criminal records fared worse in employment outcomes than those without a record." (footnote omitted)).

39. The Sent'g Project, Americans With Criminal Records 1 (2014), https://www.sentencingproject.org/app/uploads/2022/08/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf [https://perma.cc/88S9-32LR].

40. Jacobs, supra note 5, at 13–69 (noting the volume of criminal records in investigative and court databases); Sarah K.S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010, 54 Demography 1795, 1814 (2017).

41. See, e.g., Eisha Jain, Arrests as Regulation, 67 Stan. L. Rev. 809, 826 (2015) (describing how arrests, as a specific type of criminal record, effectuate regulatory objectives); Alexandra Natapoff, Misdemeanors, 85 S. Cal. L. Rev. 1313, 1320–27 (2012) (noting how misdemeanors are the most pervasive criminal records and influence reentry more than acknowledged).

42. See Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry 9 (2003); Legal Action Ctr., After Prison: A Report on State Legal Barriers Facing People With Criminal Records 8 (2004), https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/259864/doc/slspublic/LAC_PrintReport.pdf [https://perma.cc/7TXB-TBYZ].

43. See, e.g., 63 Pa. Stat. and Cons. Stat. Ann. § 3112 (2024) (covering barber licenses); Dental Law, No. 89, § 3(b)(3), 2014 Pa. Laws 828, 831 (covering dental hygienists); Social Workers, Marriage and Family Therapists and Professional Counselors Act, No. 136, § 7(a)(5), 1998 Pa. Laws 1017, 1022 (covering social workers); Real Estate Licensing and

employment restrictions,[44] and other economic and social consequences. These consequences follow conviction for all types of offenses, whether low-level or felonies.[45] The existence of this many conviction records, coupled with restrictive laws that render reentry difficult, creates a social problem of serious consideration. Some have argued for reducing the scope of the criminal law.[46] Others have called for prosecutorial discretion in charging and plea bargaining.[47] The Ban the Box Movement, popular in the early 2010s, was an early policy intervention.[48]

Although not formally classified as punishment by law, reformers argue that conviction records implicate the degree and extent of punishment exacted and permitted by the state through state and private activity.[49] It might be said that the foreseeable effects of conviction records are punitive, even if the records themselves are not punishment.[50] This is because the collateral consequences that rest on conviction records are both automatic and discretionary.[51] Some jurisdictions categorically bar consideration of those with conviction records from consideration for

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Registration Act, No. 9, § 604(a)(14), 1980 Pa. Laws 15, 35 (covering real estate brokers); 52 Pa. Code. § 30.72(f) (1997) (covering taxi drivers).

44. See Madeline Neighly, Nat'l Emp. L. Project, Workers With a Criminal Record: Employee Rights, Employer Responsibilities & Fair Hiring 4 (2011), https://www.nelp.org/app/uploads/2015/04/Madeline-Neighly.pdf [https://perma.cc/HSW6-XRBB].

45. Council of State Gov'ts Just. Ctr., After the Sentence, More Consequences: A National Snapshot of Barriers to Work 4 (2021), https://csgjusticecenter.org/publications/after-the-sentence-more-consequences/national-snapshot/ [https://perma.cc/J3NW-S3YF] (showing the percentage breakdown between types of offenses that trigger collateral consequences).

46. See, e.g., Douglas Husak, Overcriminalization: The Limits of the Criminal Law 178 (2008) ("[E]normous injustice results because we have too much punishment and criminal law." (emphasis omitted)).

47. See, e.g., Stephanos Bibas, The Need for Prosecutorial Discretion, 19 Temp. Pol. & C.R. L. Rev. 369, 373 (2010) ("[R]efining [prosecutorial] discretion can make justice more reasoned and reasonable than any set of rules alone could.").

48. Ban the Box, Nat'l Conf. State Legislatures, https://www.ncsl.org/civil-and-criminal-justice/ban-the-box [https://perma.cc/7NRL-GB5H] (last updated June 29, 2021) (describing early Ban the Box initiatives that aimed to remove the stigma associated with answers to criminal history questions).

49. See Lageson, supra note 5, at 91–112 (describing private dissemination of criminal records that causes stigma and social harm); Corda, supra note 10, at 8–14 (noting the punitive effects of criminal records in continental Europe and in early American history).

50. See Christopher Bennett, Invisible Punishment Is Wrong—But Why? The Normative Basis of Criticism of Collateral Consequences of Criminal Conviction, 56 How. J. Crime & Just. 480, 481, 484 (2017) (noting how collateral consequences from criminal records are "foreseeable effects").

51. U.S. Comm'n on C.R., Collateral Consequences: The Crossroads of Punishment, Redemption and the Effects on Communities 10 (2019), https://www.usccr.gov/files/pubs/2019/06-13-Collateral-Consequences.pdf [https://perma.cc/ME42-YLMD].

certain privileges but not as formal "punishment" for the conviction.[52] Additionally, states permit private actors to utilize conviction records in a discretionary fashion.[53] One study suggests that more than half of the collateral consequences implicated by convictions are "subject to the discretion of decision-makers."[54] Expungement aims to mitigate these accessories to formal punishment by removing the conviction record from the equation.

Unsurprisingly, expungement reformers view the construction of conviction records and their use as problematic on several grounds. For state-sanctioned activity, including in situations involving automatic consequences that flow from a conviction, reformers argue that the conviction record is effectively extra punishment that requires a separate justification.[55] Professor Alessandro Corda has demonstrated how utilitarian punishment theories inspired the creation of public criminal records in Western Europe.[56] Policymakers sought to capitalize on public shame associated with wrongdoing to pursue deterrence and incapacitation-style punitive ends.[57] Conviction records, by inflicting shame and the expressive value of the criminal law itself, pursue punitive ends normally associated with punishment.[58] Corda and others have thus argued for their consideration as additional punishment and for the imposition of proportionality constraints on the creation of criminal records.[59]

Professor Christopher Bennett, while not going as far as Corda, has argued for considering collateral consequences as foreseeable harms associated with enforcing the criminal law.[60] This holds for collateral consequences formally sanctioned by the state—such as the ineligibility for some sort of public benefit—and the permitted activity of private actors

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52. Id. at 10–12 (detailing classification of collateral consequences as "civil" rather than punitive).

53. Rebecca Vallas & Sharon Dietrich, Ctr. for Am. Progress, One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People With Criminal Records 19 (2014), https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf [https://perma.cc/L44R-99BE] (describing usage of background checks by landlords).

54. Council of State Gov'ts Just. Ctr., supra note 45, at 3.

55. See Bennett, supra note 50, at 484–85 (exploring the rationales for the harms associated with collateral consequences that are not "formal" punishment).

56. See Corda, supra note 10, at 8–14.

57. See id. at 11.

58. Id. at 46.

59. See id. at 43–44; see also Hugh LaFollette, Collateral Consequences of Punishment: Civil Penalties Accompanying Formal Punishment, 22 J. Applied Phil. 241, 246–47 (2005) (describing conventional objections to considering collateral consequences as part of the proportionality inquiry in retributive justice).

60. Bennett, supra note 50, at 484.

that results in additional harm.[61] State consequences flowing from conviction records are essentially punitive accessories to the formal punishment.[62] In the latter category, the state permits punitive activity that is not formally labeled punishment because the state is the primary actor inflicting the suffering.[63] But this private activity can be disproportionate.[64] Until recently, there was no distinction between criminal records in terms of length of availability—retail theft and homicide conviction were treated the same.[65] As mentioned elsewhere, this enables "private punitive use [to become] the real punishment after the window-dressing that is the formal system."[66]

The extrapunitive nature of conviction records makes their continued existence—especially in perpetuity, which was the default until a decade or so ago—problematic for reformers.[67] They argue that when the state uses the conviction record to bar access to a public good, the state is adding punishment.[68] And when the state permits a landlord or employer to utilize a conviction record, they are outsourcing punitive activity to private actors while hiding behind formal legal classifications and refraining from enforcing any notion of proportionality.[69] This is problematic because the state is licensing private actors to punish, contravening the state's role as the sole punisher.[70] It also is corrosive to social bonds, inhibits a culture of second chances, and undermines reentry.

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61. Id. at 483–84 (describing direct, state-sanctioned harms versus foreseeable harms, whether direct or indirect).

62. See id. (describing such consequences as supplementary harms).

63. See id. at 484; Murray, Completing Expungement, supra note 37, at 1221.

64. Murray, Completing Expungement, supra note 37, at 1226 ("[P]rivate use begins to look like unjustified double punishment that violates the core foundation of the punishment regime in a democratic society: namely that the state decides whether to punish or not in the name of the community.")

65. Murray, Retributive Expungement, supra note 10, at 680–81 (citing Corda, supra note 10, at 6) (noting how criminal histories existed long after expiration of the formal sentence).

66. Murray, Completing Expungement, supra note 37, at 1226.

67. See id. at 1219 (explaining the difficulty combatting entrenched views regarding criminal records and expungement)

68. Jamiles Lartey, How Criminal Records Hold Back Millions of People, Closing Argument, Marshall Project (Apr. 1, 2023), https://www.themarshallproject.org/2023/04/01/criminal-record-job-housing-barriers-discrimination [https://perma.cc/L22N-MRBP] (interviewing champions of TimeDone, a nonprofit, who argue that California's new record-sealing law allows for the cessation of punishment).

69. Murray, Completing Expungement, supra note 37, at 1226 (noting how private use amounts to additional and unregulated informal punishment).

70. Id. at 1222 ("For, if such harms are not punitive per se, but still the logical heirs to formalized punishment, private actors, by virtue of participation in a democratic society and in relationship to that system itself, have a responsibility not to . . . act punitively like official actors." (emphasis omitted)).

But even if the conviction records or the consequences that flow from them are not considered punitive, reformers argue that other justice-oriented considerations require extension of expungement. Economic and social concerns drive these arguments, and they transcend political lines. For example, the Vera Institute of Justice,[71] Brennan Center,[72] Marshall Project,[73] and Heritage Foundation[74] have argued for criminal records and collateral consequences reform. One think tank noted how over seventy percent of collateral consequences connect to job opportunities.[75] The Heritage Foundation highlighted how these consequences severely undercut long-term economic productivity and the ability of ex-offenders to develop and utilize marketable skills.[76] Housing concerns for people with convictions also inform policy decisions because lack of housing implicates public resources.[77] Thus, many policy arguments for expanding expungement eligibility are built from concerns relating to economic and social security, not to mention renewed participation in the broader democratic community.[78]

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71. See generally Ram Subramanian, Rebecka Moreno & Sophia Gebreselassie, Vera Inst. Just., Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction, 2009–2014, at 11 (2014), https://vera-institute.files.svdcdn.com/production/downloads/publications/states-rethink-collateral-consequences-report-v4.pdf [https://perma.cc/GKB6-T8S4] (surveying legislative activity reforming collateral consequences).

72. See Matthew Friedman, Just Facts: As Many Americans Have Criminal Records as College Diplomas, Brennan Ctr. for Just. (Nov. 17, 2015), https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas [https://perma.cc/2NS6-MBQ3] (describing pervasiveness of criminal records and why remedies like Ban the Box are necessary).

73. See Lartey, supra note 68 (noting effect of public criminal records on success of job seekers).

74. See John Malcolm & John-Michael Seibler, Collateral Consequences: Protecting Public Safety or Encouraging Recidivism?, Heritage Found. (Mar. 7, 2017), https://www.heritage.org/sites/default/files/2017-03/LM-200.pdf [https://perma.cc/9G5K-5XSZ] (describing economic and fiscal arguments against expansive collateral consequences laws).

75. See Council of State Gov'ts Just. Ctr., supra note 45, at 1.

76. See Malcolm & Seibler, supra note 74 ("[D]epriving broad swathes of ex-offenders of the ability to . . . obtain educational assistance to enhance their skills is hardly conducive to helping them become productive citizens.").

77. See John J. Lennon, How Do People Released From Prison Find Housing?, N.Y. Times (Mar. 20, 2023), https://www.nytimes.com/2023/03/20/realestate/prison-parole-housing-shelters.html (on file with the *Columbia Law Review*) (last updated Mar. 31, 2023) (discussing the frequency with which people released from prison in New York live in shelters, barriers to public housing and federal assistance, and state legislative efforts to expand housing access).

78. See Vallas & Dietrich, supra note 53, at 1, 13 ("[E]ven a minor criminal history now carries lifelong barriers that can block successful re-entry and participation in society. . . . Cleaning up a criminal record—often called expungement or sealing—generally addresses most of the barriers . . . though elimination of employment barriers is the most frequently cited reason for record clearing.").

II. THE LAW OF EXPUNGING CONVICTIONS

The scope of expungement has expanded during the last fifteen years. This Part catalogues the growth and limits of the law of expunging convictions. In doing so, it highlights the trend lines in the expansion of expungement and dials up the major question that this Essay responds to: whether, given these lines, expungement should be extended to more serious offenses, and if so, by what means.

A. *History of Legislative Activity*

In the late 2000s, reformers aimed to expand expungement relief to the lowest convictions, beginning with summary and traffic-style offenses.[79] These efforts followed the intermediate step in which some states permitted those with convictions that were ineligible for expungement to receive judicial or board certificates of rehabilitation.[80] Such certificates enabled individuals with convictions to obtain a court-ordered certification of rehabilitation that could be shown to employers, licensing boards, and other decisionmakers who might consider a criminal record when making a decision about interacting with the individual.[81] Commentators lauded this move as a sensible solution to help reintegrate those with convictions.[82] Early studies suggested that they also assisted individuals in obtaining employment.[83]

The certificates-of-relief movement did not catch on, however. Only a few states explicitly permitted them through legislation and a similar "uptake gap" emerged, with few individuals obtaining them.[84] By the early 2010s, states began to experiment with expunging low-level convictions,

79. See Prescott & Starr, Expungement of Criminal Convictions, supra note 9, at 2482 ("Michigan's expungement law . . . pre-2011 . . . required five 'clean' years, excluding time behind bars. The statute covered (and still covers) almost all types of crimes, including most violent felonies. The principal exceptions are traffic offenses . . . ." (footnote omitted)).

80. See Margaret Love & April Frazier, Certificates of Rehabilitation and Other Forms of Relief From the Collateral Consequences of Conviction: A Survey of State Laws, *in* Second Chances in the Criminal Justice System: Alternatives to Incarceration and Reentry Strategies 50, 50 (2006), https://www.wnyschoolofrealestate.org/certificate%20of%20relief%20facts2.pdf (on file with the *Columbia Law Review*) (explaining how six states offer administrative "certificates of rehabilitation" that may restore some or all of the legal rights and privileges lost as a result of conviction).

81. See generally id. (describing the consideration of administrative certificates of rehabilitation by licensing boards and employers in several states).

82. See, e.g., id. ("[R]elief mechanisms . . . are fairly effective in restoring criminal offenders to the legal rights and status they enjoyed prior to their conviction.").

83. See Leasure & Andersen, Certificates of Relief, supra note 38, at 19–20 & fig.1 (analyzing data from Ohio to find that a certificate increased the likelihood of a job offer or interview invitation nearly threefold for someone with a one-year-old felony drug conviction).

84. See Alec C. Ewald, Rights Restoration and the Entanglement of US Criminal and Civil Law: A Study of New York's "Certificates of Relief", 41 Law & Soc. Inquiry 5, 15 (2016) (referencing variation in awarding of certificates).

such as minor misdemeanors.[85] Felony convictions were not part of these discussions, except in a few limited instances.[86]

There were two primary arguments in support of these legislative efforts: Those seeking relief had demonstrated they were no longer recidivism risks and they also needed help in obtaining opportunities for full reintegration. Put simply, when nearly every employer conducts criminal background checks,[87] clearing convictions opened doors for the rehabilitated. For example, State Senator Stewart Greenleaf, who was instrumental in the extension of expungement in Pennsylvania, stated: "A low-level misdemeanor in one's past is often a barrier when seeking employment, long after they have completed their sentence . . . . A number of states are expanding their expungement laws to reduce the period during which a minor criminal record can punish people."[88] He introduced legislation with the desire to combat recidivism, save money, and rehabilitate "nonviolent offenders."[89] Similarly, Louisiana, when passing reforms in the mid-2010s, prefaced its law as a measure "to break the cycle of criminal recidivism, increase public safety, and assist the growing population of criminal offenders reentering the community to establish a self-sustaining life through opportunities in employment."[90] The argument was that expunging convictions promoted reintegration without sacrificing public safety.

Between 2014 and 2022, there has been a deluge of legislative activity extending expungement to convictions. The Collateral Consequences Resource Center (CCRC) has documented these developments in a series of reports.[91] At this time, only five jurisdictions refrain from permitting the expungement of any convictions: Alaska, Florida, Hawaii, Wisconsin, and federal law.[92] Three jurisdictions permit only misdemeanor relief.[93] Five

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85. Brian M. Murray, A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels, 10 Harv. L. & Pol'y Rev. 361, 369–73 (2016) (describing state legislative reforms in the early 2010s).

86. See id. at 371 & n.71 (citing La. Code Crim. Proc. Ann. art. 978 (2015)).

87. See Michelle Natividad Rodriguez & Maurice Emsellem, Nat'l Emp. L. Project, 65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment 1 (2011), https://www.nelp.org/wp-content/uploads/2015/03/65_Million_Need_Not_Apply.pdf [https://perma.cc/5RHP-BF3W] ("In one survey, more than 90 percent of companies reported using criminal background checks for their hiring decisions.").

88. WirePOLITICS: Criminal Record Expungement Bill Passes State Senate, Lower Bucks Times (Mar. 4, 2015), https://lowerbuckstimes.com/2015/03/04/wirepolitics-criminal-record-expungement-bill-passes-state-senate-4/ [https://perma.cc/JRF5-3UZD] (internal quotation marks omitted) (quoting state Sen. Stewart J. Greenleaf).

89. Id.

90. La. Code Crim. Proc. Ann. art. 971(6) (2024).

91. Collateral Consequences Res. Ctr., 50-State Comparison, supra note 1.

92. Id.

93. Id.

allow for misdemeanor expungement and felonies that have been pardoned.[94] Twenty-one permit widespread misdemeanor relief and cover limited felonies.[95] Seventeen permit even more relief for felonies in addition to misdemeanor expungement.[96]

In short, the general story has been legislative expansion of relief for convictions, covering most misdemeanors and some felonies. But as Part I indicates, the details matter when understanding the scope of these changes. While legislatures have been open to expungement of misdemeanors, they have been much more reserved when it comes to expungement of felony convictions.

B. *Which Convictions?*

While almost all jurisdictions permit expungement of misdemeanor convictions, roughly two-thirds of jurisdictions extend relief to felonies. This section focuses on identifying the apparent line of demarcation.

The CCRC places jurisdictions into three buckets when it comes to felony-based relief.[97] First, there are jurisdictions that allow expungement for pardoned convictions.[98] Then there are jurisdictions that allow expungement for a limited subset of felonies.[99] Third, a little more than a quarter of jurisdictions contemplate some type of broader felony relief, although the scope varies state by state.[100]

The group of states that permit expungement for pardoned felonies is the smallest but also the most permissive. This is because a pardoned conviction has certain legal effects that make arguing against an expungement of the conviction more difficult. For example, Alabama permits expungement for *pardoned* felonies, but not other felonies.[101] Violent, sex-offense, and "moral turpitude" felonies are not eligible except under extremely limited circumstances.[102] South Dakota permits expungement for pardoned convictions.[103] Delaware allows the same,

94. Id.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
100. Id.
101. Ala. Code § 15-27-2(c) (2024); see also Ashley Remkus, 'A Fresh Start': Alabama Expungement Law Will Wipe Away Some Nonviolent Convictions, AL.com (May 1, 2021), https://www.al.com/news/2021/05/a-fresh-start-alabama-expungement-law-will-wipe-away-some-nonviolent-convictions.html [https://perma.cc/F78L-K8TR] ("Under the . . . law, people convicted of some nonviolent felony crimes will also be eligible to have their convictions wiped away, but only if they first receive a pardon and wait six months.").
102. See Ala. Code § 15-27-2(c)(6) (clarifying eligibility standards for convictions relating to "moral turpitude").
103. S.D. Codified Laws § 24-14-11 (2024).

except for cases of manslaughter, murder, sexual abuse of a child, and rape.[104] Georgia permits expungement of some felony convictions after a pardon, generally excluding violent and sexual offenses.[105] Victims of human trafficking with convictions can achieve expungement in Georgia without a pardon after a long, arduous process.[106] Some nonviolent misdemeanor convictions and first-offender drug possession convictions are also eligible provided the waiting period occurs.[107]

Misdemeanor-based expungement runs the gamut from narrow possibilities to extremely permissive laws. Many states permit expungement

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104. Del. Code tit. 11, § 4375 (2024); see also Cris Barrish, 'You're Not Your Worst Mistake.' Expungement Clinic in Delaware Helps People Clear Criminal Records, WHYY (Apr. 28, 2022), https://whyy.org/articles/expungement-clinic-delaware-criminal-records/ [https://perma.cc/Y9R6-RQYY]; John Reynolds, Delaware Governor Signs Automatic Record-Clearing Law, Collateral Consequences Res. Ctr. (Nov. 10, 2021), https://ccresourcecenter.org/2021/11/10/delaware-enacts-automatic-record-clearing-law/ [https://perma.cc/UA3Y-KD9Q]; John Reynolds & Morgan R. Kelly, Mandatory Expungement Eligibility Guide, ACLU Del. (May 2, 2022), https://www.aclu-de.org/en/news/mandatory-expungement-eligibility-guide [https://perma.cc/4HF6-HHBZ]; Xerxes Wilson, Got a Record? Changes Are Coming. What Criminal Record Expungement Is, How to Get Help, Del. News J. (Jan. 5, 2024), https://www.delawareonline.com/story/news/2024/01/05/criminal-record-expungement-delaware-how-to-get-help/71966591007/ [https://perma.cc/JC23-VSM9].

105. Ga. Code Ann. § 35-3-37(j)(7) (2024); see also Can I Clean Up My Georgia Criminal History?, Ga. Just. Project, https://gjp.org/record-restriction-expungement/faq/ [https://perma.cc/SGD7-9XMB] [hereinafter Ga. Just. Project, Georgia Criminal History] (last visited Aug. 15, 2024); Madeline Thigpen, How To Get Your Felony Expunged in Georgia, Cap. B Atlanta (Dec. 21, 2022), https://atlanta.capitalbnews.org/felony-expungement-explainer/ [https://perma.cc/K875-ZHZ2].

106. Ga. Code Ann. §§ 17-10-21, 35-3-37(j); see also Criminal Record Clearing Remedies for Human Trafficking Survivors in Georgia, Ga. Just. Project, https://gjp.org/wp-content/uploads/2022/08/2022.8.4-Record-Clearing-for-Survivors-of-Human-Trafficking-2.pdf [https://perma.cc/V47T-26JZ] (last visited Aug. 15, 2024); Copelenn McMahon, The Need for an Affirmative Defense for Victims of Sex Trafficking in Georgia, Ga. L. Rev. Blog (Mar. 20, 2023), https://georgialawreview.org/post/1908-the-need-for-an-affirmative-defense-for-victims-of-sex-trafficking-in-georgia [https://perma.cc/X2G6-YF5Y]; New Georgia Law Helps Trafficking Survivors Clear Their Records, Polaris (July 13, 2020), https://polarisproject.org/blog/2020/07/new-georgia-law-helps-trafficking-survivors-clear-their-records/ [https://perma.cc/3XMF-35V7].

Texas, Idaho, and Missouri have similar exceptions for convictions relating to human trafficking. See Tex. Gov't Code Ann. § 411.0728 (West 2024); Press Release, Off. of the Tex. Governor, Governor Abbott Establishes Customized Clemency Application for Survivors of Human Trafficking and Domestic Abuse (Feb. 20, 2020), https://gov.texas.gov/news/post/governor-abbott-establishes-customized-clemency-application-for-survivors-of-human-trafficking-and-domestic-abuse [https://perma.cc/45UM-YLAR]; see also Idaho Code § 67-3014(15)(b) (2024); Miss. Code Ann. § 97-3-54.6(5) (2024).

107. See Ga. Code. Ann. §§ 35-3-37(h)(2)(B), (j)(4)(A)–(B) (excluding certain misdemeanor theft and sex offenses); see also 5 Fast Facts About Georgia's New Criminal Record Clearing Law, Ga. Just. Project (July 28, 2022), https://gjp.org/reminder-georgias-new-record-clearing-law/ [https://perma.cc/J8BC-PAMZ].

of marijuana-related convictions.[108] For example, South Dakota's law allows for expungement of minor misdemeanors and petty offenses.[109] Texas law allows for sealing of most misdemeanor convictions, with some notable exclusions, such as involvement in organized crime.[110] Mississippi authorizes misdemeanor expungement for first-time offenses.[111]

Lots of states have mixed laws, allowing for expungement of some misdemeanors but not others. For instance, Pennsylvania has a tiered approach to expunging misdemeanors. It permits expungement of first-, second-, and third-degree misdemeanors both by petition and through its clean-slate initiatives.[112] But misdemeanors are eligible only if they do not

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108. See, e.g., 12 R.I. Gen. Laws § 12-1.3-5 (2024) (providing automatic expungement for civil violations and misdemeanor and felony convictions for possession of marijuana); Marijuana Expungements, Just. Cts. Maricopa Cnty., https://justicecourts.maricopa.gov/case-types/marijuana-expungements [https://perma.cc/U8PL-QNUX] (last visited Oct. 2, 2024) ("Arizona voters passed Proposition 207 in November, 2020. Among its provisions is the ability to petition a court at no cost to expunge certain marijuana-related records." (emphasis omitted)); Tom Mooney, RI Courts Expunge More Than 23K Pot Cases Under New Legalization Law, Providence J. (June 9, 2023), https://www.providencejournal.com/story/news/courts/2023/06/09/expungements-required-under-new-law-that-legalized-recreational-pot/70303191007/ [https://perma.cc/VZ83-A85H]; see also Douglas A. Berman, Leveraging Marijuana Reform to Enhance Expungement Practices, 30 Fed. Sent'g Rep. 305, 305 (2018); Ted Oberg, Promises of Marijuana Conviction Reform Remain Unfulfilled, News4, (Apr. 20, 2023), https://www.nbcwashington.com/investigations/promises-of-marijuana-conviction-reform-remain-unfulfilled/3333412/ [https://perma.cc/LMG2-PTBV]; Virginia Marijuana Expungement Laws, Va. NORML, https://www.vanorml.org/expungement [https://perma.cc/3LSD-PLAP] (last visited Sept. 9, 2024).

109. S.D. Codified Laws § 23A-3-34 (2024).

110. See Tex. Gov't Code Ann. §§ 411.073, 411.0735(a) (West 2024) (exempting convictions under Chapter 71, relating to organized crime); see also Clare Fonstein, Here's Where Harris County Residents Can Get Help Sealing Their Criminal Records This Weekend, Hous. Chron., https://www.houstonchronicle.com/news/houston-texas/crime/article/Harris-County-sealing-criminal-records-fresh-start-17519453.php (on file with the *Columbia Law Review*) (last updated Oct. 19, 2022) ("Once one's misdemeanors are sealed they can only be viewed by criminal justice agencies and no longer have to be disclosed publicly."); Alexandra Hart, Even After Serving Out Their Sentences, Formerly Incarcerated People Often Struggle to Find Jobs, Tex. Standard (May 18, 2023), https://www.texasstandard.org/stories/formerly-incarcerated-people-often-struggle-find-jobs/ [https://perma.cc/4LFW-K6D3] (explaining that felony convictions often bar formerly incarcerated people in Texas from securing employment).

111. Miss. Code Ann. § 99-19-71(1) (2024); see also Kayode Crown, Advocates Push for Automated Criminal-Record Expungement in Mississippi, Miss. Free Press (Dec. 15, 2022), https://www.mississippifreepress.org/29722/advocates-push-for-automated-criminal-record-expungement-in-mississippi [https://perma.cc/X984-DXFE] (discussing the Mississippi Volunteer Lawyers Project's expungement clinic to help eligible Mississippians expunge misdemeanors).

112. 18 Pa. Stat. and Cons. Stat. Ann. § 9122.1(a) (2024); see also Amanda Hernández, High Fees, Long Waits Cast Shadow Over New Criminal Expungement Laws, Pa. Cap.-Star (Dec. 4, 2023), https://penncapital-star.com/criminal-justice/high-fees-long-waits-cast-shadow-over-new-criminal-expungement-laws/ [https://perma.cc/8WWC-6B8F] ("Pennsylvania

carry a penalty of more than two years.[113] An ungraded offense with a penalty no longer than five years is also eligible.[114] Eligibility is contingent on seventeen-year, conviction-free waiting periods.[115] The clean-slate provisions, which provide for automatic record-clearing, have more stringent criminal history contingencies. For example, a prior felony conviction at any time bars clean-slate relief.[116] Pardoned convictions are eligible for clean-slate relief.[117]

Louisiana provides for expungement of most misdemeanors, except for sex offenses and some domestic or intimate partner offenses.[118] Maryland also permits widespread misdemeanor expungement, including for assault, drug possession, prostitution, theft, fraud, and regulatory offenses.[119] Missouri recently relaxed its expungement restrictions, now permitting expungements for nearly all misdemeanors.[120]

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passed its Clean Slate law, the first statewide automatic record-clearing bill in 2018, and has sealed 40 million cases since.").

113. See 18 Pa. Stat. and Cons. Stat. Ann. § 9122.1(b)(1); see also Nick Vadala, How to Get Your Criminal Record Sealed or Expunged in Pennsylvania, Phila. Inquirer (Dec. 22, 2020), https://www.inquirer.com/philly-tips/criminal-record-expunged-sealed-pardon-petition-pennsylvania-20201222.html [https://perma.cc/RJJ7-NG2J] (explaining that Pennsylvania's Clean Slate law automatically seals convictions for "many second- and third-degree misdemeanors after 10 years without any further convictions").

114. 18 Pa. Stat. and Cons. Stat. Ann. § 9122.1(a); see also Clean Slate 3.0 Enacted Into Law—Allows Sealing of Some Old Felony Criminal Records, Pa. Legal Aid Network (Dec. 15, 2023), https://palegalaid.net/news/clean-slate-30-enacted-law-allows-sealing-some-felony-criminal-records [https://perma.cc/2PUN-X8TK] (discussing how under Pennsylvania's 2023 Clean Slate 3.0, drug felonies will be eligible to be sealed by automation after ten years without a subsequent misdemeanor or felony conviction unless a sentence of thirty months to sixty months' imprisonment or more was imposed).

115. See supra note 114.

116. 18 Pa. Stat. and Cons. Stat. Ann. § 9122.3(a).

117. Id. § 9122.2(a)(4).

118. La. Code Crim. Proc. Ann. art. 977 (2024); see also Louisiana Expungement—Frequently Asked Questions, La. Expungement Assistance & Advoc. Ctr., http://www.leaac.com/faq-resources/frequently-asked-questions/ (on file with the *Columbia Law Review*) (last updated Dec. 2022).

119. Md. Code Ann., Crim. Proc. § 10-110(A) (West 2024); see also Restoration Rts. Project, Maryland: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/maryland-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/H82Q-DQ5V] (last updated Oct. 10, 2024) (referencing over 100 misdemeanors as eligible for expungement); Ovetta Wiggins, Maryland Eases Path to Clear Criminal Records, Over Prosecutors' Concerns, Wash. Post (May 16, 2023), https://www.washingtonpost.com/dc-md-va/2023/05/16/maryland-expungements-wait-times/ (on file with the *Columbia Law Review*) ("Under the new law, anyone convicted of qualifying misdemeanors could apply to expunge their record five years after their sentence is completed; those convicted of specific nonviolent felonies could apply after seven years.").

120. Mo. Ann. Stat. § 610.140 (West 2024); see also Patrick Deaton, Expunging a Criminal Conviction in Missouri: Lessons Learned, 76 J. Mo. Bar 164, 164–65 (2020).

Roughly two-thirds of states permit expungement of some felonies.[121] Certain trends emerge when examining the states that permit expungement of felonies. Violent offenses are rarely eligible for expungement without a pardon.[122] Sex-based offenses are also rarely eligible.[123] Finally, legislatures have excluded certain drug-related offenses, including trafficking and distribution.[124] In short, legislatures seem to foreclose conviction-based expungement for offenses that involve the most serious harms entailing grievously harmed victims or widespread societal costs, such as drug trafficking.

Several states have moderate felony expungement regimes. For example, Connecticut allows for expungement of Class D and E felonies, excluding domestic violence crimes and those requiring sex-offender registration.[125] Delaware, when expanding its expungement law to felony convictions, included drug possession, trafficking, and certain theft crimes.[126] Kentucky permits expungement of "Class D" felony convictions, except for DUI, domestic assault, public fraud offenses, sex offenses, offenses against children, or offenses that result in serious bodily injury or death.[127] Louisiana allows felony expungement unless the offense is a "crime of violence,"[128] a sex offense,[129] involves crimes against minors, or involves certain forms of drug trafficking.[130] Maryland allows

121. Kristine Hamann, Patricia Riley & Charlotte Bismuth, The Evolving Landscape of Sealing and Expungement Statutes, 38 Crim. Just., Winter 2024, at 36, 39.

122. Id.

123. Id.

124. Collateral Consequences Res. Ctr., 50-State Comparison, supra note 1 (surveying expungement policies for drug-related offenses in each state).

125. Conn. Gen. Stat. Ann. § 54-142a(e)(1)(A) (West 2024); see also Jaden Edison & Kelan Lyons, Here's What to Know About CT's 'Clean Slate' Law, Which Erases Some Criminal Records, Conn. Mirror (Mar. 27, 2023), https://ctmirror.org/2023/03/27/ct-clean-slate-bill-law-criminal-records/ [https://perma.cc/ZL5T-XX53]; Amanda Pitts, CT's Clean Slate Law to Erase Low-Level Convictions From Records of More Than 80k People, NBC Conn. (Dec. 18, 2023), https://www.nbcconnecticut.com/news/local/cts-clean-slate-law-to-erase-low-level-convictions-from-records-of-more-than-80k-people/3174769/ [https://perma.cc/B58Z-D2NX].

126. Del. Code tit. 11, § 4373(a)(2) (2024).

127. See Ky. Rev. Stat. Ann. § 431.073(1)(D) (West 2024); Ky. Dep't of Pub. Advoc., Expungement in Kentucky: A Guide for Legal Practitioners, https://dpa.ky.gov/wp-content/uploads/2022/02/Lawyers-Guide-to-Expungement-2020-update.pdf [https://perma.cc/KK34-CP6R] (last visited Aug. 16, 2024); Expungement Certification Process, Ky. Ct. Just., https://www.kycourts.gov/AOC/Information-and-Technology/Pages/Expungement.aspx [https://perma.cc/XM4K-LAHP] (last visited Aug. 16, 2024).

128. La. Code Crim. Proc. Ann. art. 978 (2024).

129. Id.

130. Id.; see also Restoration Rts. Project, Louisiana: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/louisiana-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/6FT9-N9ED] (last updated July 21, 2024). For further discussion of Louisiana's expungement provisions, see generally Margaret Love, Louisiana's New Expungement Law: How Does It

expungement for theft-based felonies, such as burglary and drug trafficking.[131] Mississippi allows for one nonviolent felony conviction to be expunged, excluding drug trafficking and sexual offenses, amongst others.[132]

Missouri, while permitting expungement for most felony convictions and *all* misdemeanors, excludes violent offenses, sex offenses, and certain alcohol-related driving offenses.[133] New Jersey allows for expungement of a single indictable offense, which includes most felonies except for serious violent offenses, drug-related crimes, and public corruption charges.[134] New York has a similar law; one felony is eligible, but it cannot be an enumerated "violent felony," a "[C]lass A" felony, or a certain type of sex offense.[135] North Carolina limits relief to one felony that is not "Class A through G," DWI, or related to certain drug offenses.[136] Ohio allows for expungement of third-, fourth-, and fifth-degree felonies, excluding crimes of violence, robbery, most sex offenses, and offenses against minors.[137]

Stack Up?, Collateral Consequences Res. Ctr. (Jan. 16, 2015), https://ccresourcecenter.org/2015/01/16/louisianas-new-expungement-law-stack/ [https://perma.cc/Q4MF-6PUZ] (comparing Louisiana's expungement law with those of other states that created expungement schemes around the same time).

131. See Md. Code Ann., Crim. Proc. § 10-110 (West 2024); Which Records Can Be Expunged?, People's L. Libr. Md., https://www.peoples-law.org/which-records-can-be-expunged [https://perma.cc/7MU2-E7KK] (last updated Aug. 1, 2024) (describing the types of criminal records that are eligible for expungement in Maryland).

132. See Miss. Code Ann. § 99-19-71(2) (2024); Economic Justice—Expungement Services, Miss. Ctr. for Just., https://mscenterforjustice.org/work/expungement/ [https://perma.cc/REP6-9LQB] (last visited Aug. 16, 2024).

133. See Mo. Ann. Stat. § 610.140(2) (2024); Missouri Expungement Law: What Does It Mean to Seal a Record, and How Do You Do It?, Mo. Bar (Apr. 6, 2021), https://news.mobar.org/missouri-expungement-law-what-does-it-mean-to-seal-a-record-and-how-do-you-do-it/ [https://perma.cc/8AMR-EDP7]; Univ. Mo. Kan. City L. Sch. Expungement Clinic, Missouri Expungement Eligibility Requirements, Clear My Rec. Mo., https://clearmyrecordmo.org/missouri-expungement-eligibility-requirements/ [https://perma.cc/CJ7S-V5ZB] (last visited Aug. 16, 2024).

134. See N.J. Stat. Ann. § 2C:52-2 (West 2024); New Changes to Expungement Statute, Legal Servs. N.J., https://www.lsnj.org/Expungement31416.aspx [https://perma.cc/SZ3J-KFWU] (last visited Aug. 16, 2024).

135. See N.Y. Crim. Proc. Law § 160.59(1)(a) (McKinney 2024); Press Release, Off. of N.Y. Governor Kathy Hochul, Governor Hochul Expands Economic Opportunity for New Yorkers, Protects Public Safety by Signing the Clean Slate Act (Nov. 16, 2023), https://www.governor.ny.gov/news/governor-hochul-expands-economic-opportunity-new-yorkers-protects-public-safety-signing-clean [https://perma.cc/QFG4-VWB6].

136. See N.C. Gen. Stat. § 15A-145.5(a) (2024); Criminal Record Expunction: FAQs, Self-Help Materials and More, Legal Aid N.C., https://legalaidnc.org/resource/criminal-record-expunction/ [https://perma.cc/D9W9-WZJK] (last visited Aug. 16, 2024).

137. See Ohio Rev. Code Ann. §§ 2953.31–.32, .36 (2024); Legal Aid Soc'y of Cleveland, Sealing an Ohio Criminal Record (2018), https://lasclev.org/wpcontent/uploads/SealedRecord_hirez.pdf [https://perma.cc/A3DH-FC5T]; Laura A. Bischoff, New Ohio Law Makes Hiding Criminal Records Easier, Quicker, Cheaper, Columbus Dispatch (May 21, 2023), https://www.dispatch.com/story/news/state/2023/05/21/ohios-new-law-

Oregon's and Tennessee's laws are similar.[138] Oklahoma limits expungement to nonviolent and nonsexual offenses.[139] Utah forecloses expungement of "capital, first degree and violent felonies, registrable sex offenses . . . vehicular homicide, or felony driving under the influence/reckless driving."[140] West Virginia has a comparable law to Utah.[141] Vermont has steadily added to its list of felonies that are eligible for expungement, including different types of theft.[142] Wyoming's limited felony expungement law excludes, like most states, crimes involving firearms, violence, sexual offenses, harm to children, significant theft, and drug trafficking or offenses involving drug-related harms.[143]

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makes-it-easier-to-seal-expunge-old-criminal-records/70180578007/ [https://perma.cc/73JK-KT33] (last updated May 22, 2023).

138. See Or. Rev. Stat. § 137.225(1)(b), (3) (2024); Tenn. Code Ann. § 40-32-101(g) (2024) (listing eligible and excluded offenses); Restoration Rts. Project, Oregon: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/oregon-restoration-of-rights-pardon-expungement-sealing-2/ [https://perma.cc/D9UM-LUH9] (last updated July 18, 2024) ("Traffic offenses, most sex offenses, most violent offenses, and most offenses against vulnerable populations are ineligible."); Yamhill Cnty. Cir. Ct., Set Aside an Arrest Record or Conviction FAQs 1 (2020), https://www.courts.oregon.gov/courts/yamhill/programs-services/Documents/SetAsideFAQYAM.pdf [https://perma.cc/FUM3-VHJS].

139. See Okla. Stat. tit. 22, § 18(A)(13) (2024); Expungements in Oklahoma, Legal Aid Servs. Okla., Inc., https://oklaw.org/resource/expungement-q-a [https://perma.cc/GTU7-HFJX] (last updated Oct. 30, 2023).

140. See Restoration Rts. Project, Utah: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/utah-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/PNL8-65ZS] (last updated July 23, 2024) (citing Utah Code § 77-40a-303(1)(a) (2024)); Expunging Adult Criminal Records, Utah State Cts., https://www.utcourts.gov/en/self-help/case-categories/criminal-justice/expunge.html [https://perma.cc/UB9B-SSWE] (last visited Aug. 16, 2024); How Do I Expunge My Record if I Don't Qualify for Clean Slate, Clean Slate Utah, https://www.cleanslateutah.org/process [https://perma.cc/7JCY-N925] (last visited Aug. 16, 2024).

141. W. Va. Code Ann. § 61-11-26(c) (2024) (excluding offenses involving violence, sexual behavior, deadly weapons, neglect of adults, cruelty to animals, harassment, and certain driving offenses); see also Expungement of Criminal Records, Legal Aid W. Va., https://legalaidwv.org/legal-information/expungement-of-criminal-records/ [https://perma.cc/C2PK-C75B] (last updated June 24, 2024).

142. Vt. Stat. Ann. tit. 13, § 7601(3)–(4) (2024); see also Seal or Expunge Your Vermont Criminal Record, Vt. Legal Aid & Legal Servs. of Vt., https://vtlawhelp.org/expungement [https://perma.cc/PR6F-4H9Z] (last updated June 26, 2024); Cam Smith, Wiping Criminal Records in Vt. Through Expungement, WCAX (Apr. 30, 2023), https://www.wcax.com/2023/04/30/wiping-criminal-records-vt-through-expungement/ [https://perma.cc/WNE4-TSF4].

143. Wyo. Stat. Ann. § 7-13-1502 (2024); see also Common Questions: Expungements, Equal Just. Wyo., https://equaljustice.wy.gov/legal-help/find-info-by-topic/expungements/expungements-common-questions/ [https://perma.cc/FHS2-6AVT] (last visited Aug. 16, 2024); Criminal History FAQs, Wyo. Div. Crim. Investigation, https://wyomingdci.wyo.gov/criminal-justice-information-services-cjis/criminal-records-unit/criminal-history-faqs [https://perma.cc/25M4-5ZFL] (last updated Aug. 20, 2021) ("Under limited circumstances, a person may petition to expunge an adult criminal arrest record.").

These state laws indicate ambivalence about felony expungement. While states have been willing to extend expungement to more serious crimes, they tend to stop short when the crimes involve significant individual or societal harms. According to the CCRC report, this group represents at least two-thirds of the states that permit any type of felony expungement.[144]

In contrast to the moderate approaches just discussed, approximately one-fifth of states permit broad expungement of felonies, although even these states stop short when it comes to the most serious offenses.[145] Arizona has one of the broadest expungement statutes in the country, permitting erasure of all but one class of felonies, which includes certain violent and sexual offenses.[146] Arkansas, through about a decade of reforms, has aimed to make "sealing of certain records . . . that involve nonviolent and nonsexual offenses an automatic operation."[147] Essentially, nonviolent and major drug felonies can be expunged after completion of one's sentence.[148] Certain violent and sexual felonies, in addition to crimes carrying ten year or longer sentences, are not eligible.[149] Colorado, Indiana, Illinois, and other states have similar approaches, refraining from allowing erasing or sealing from public view violent and sex offenses, amongst others.[150] For example, in itemizing which violent crimes are

144. Collateral Consequences Res. Ctr., 50-State Comparison, supra note 1 (showing that of forty-three jurisdictions (including D.C.) that allow some form of felony expungement, twenty-three provided only "[l]imited felony & misdemeanor relief," and five provided only "misdemeanors & pardoned felonies" expungement).

145. Id. (showing that seventeen states, as well as Washington, D.C., permit broad expungement of felonies).

146. See Ariz. Rev. Stat. Ann. § 13-911(O)(1)–(4) (2024) (referencing crimes against children, violent and aggravated felonies, crimes involving the usage of weapons, and infliction of physical injuries on another person); see also Sam Ellefson, This Arizona Law Allows People to Seal Criminal Records in Court. Here's How, Azcentral (Nov. 28, 2023), https://www.azcentral.com/story/news/local/arizona/2023/11/28/seal-arizona-criminal-records/70975245007/ [https://perma.cc/QQV3-DVJ8]; What Are Arizona's New Expungement Laws?, Ariz. Defs., https://www.az-defenders.com/what-are-arizonas-new-expungement-laws/ [https://perma.cc/S69R-6ZDH] (last visited Aug. 16, 2024).

147. Restoration Rts. Project, Arkansas: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/arkansas-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/K86Y-K3RN] (last updated July 22, 2024) (internal quotation marks omitted).

148. See Ark. Code Ann. § 16-90-1406(a) (2024); Expungement, Ark. Legal Servs. P'ship (Mar. 2012), https://doc.arkansas.gov/wp-content/uploads/2020/09/FSExpungement_0.pdf [https://perma.cc/7UB8-CLEQ]; Record Sealing Clinic Planned for July 8 at St. Paul's Episcopal Church, Fayetteville Flyer (June 29, 2023), https://fayettevilleflyer.com/2023/06/29/record-sealing-clinic-planned-for-july-8-at-st-pauls-episcopal-church/ (on file with the *Columbia Law Review*).

149. See Ark. Code Ann. § 16-90-1408 .

150. See Colo. Rev. Stat. § 24-72-706(2)(a) (2024); 20 Ill. Comp. Stat. Ann. § 2630/5.2(a)(3) (West 2024); Ind. Code Ann. § 35-38-9-3(b) (West 2024); Kan. Stat. Ann. § 21-6614(a)–(d) (West 2024); Minn. Stat. § 609A.02, subdiv. 3 (2024); N.M. Stat. Ann. § 29-3A-5(G) (2024) (referencing

precluded, New Hampshire references "homicide, felony assault, kidnapping, felony arson, robbery, incest, and felony child sexual abuse offenses."[151]

There are a few states that go much further. California, in its latest reform, allows expungement in all cases except those requiring sex-offender registration.[152] Massachusetts contemplates a similar openness to expungement of most cases, except for offenses involving breaching the public trust, corruption, and certain firearms offenses.[153] Interestingly, some sexual offenses are eligible *after* a long waiting period and supervision has ended.[154] Nevada permits sealing in all cases except those involving crimes against a child, sex offenses, and certain DUI offenses.[155]

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crimes against a child, or those involving bodily harm or death, sex, embezzlement, or DUI); see also Ind. Cts., Expungements: Detailed Information on Criminal Case Expungement 3–4 (2024), https://www.in.gov/courts/iocs/files/pubs-trial-court-courtmgmt-expungement-detailed.pdf [https://perma.cc/Y5AL-GHZF]; Alec Berg, Hundreds of Coloradans Apply to Have Criminal Records Sealed, Rocky Mountain PBS (Oct. 17, 2022), https://www.rmpbs.org/blogs/news/hundreds-of-coloradans-apply-to-have-criminal-records-sealed/ [https://perma.cc/7HTT-BJTD]; Kevin Bersett, ISU Expungement Clinic Is Giving People With Criminal Records a Second Chance, Ill. St. Univ. (Oct. 14, 2021), https://news.illinoisstate.edu/2021/10/isu-expungement-clinic-is-giving-people-with-criminal-records-a-second-chance/ [https://perma.cc/4Z7L-YZYJ]; FAQ: About Expungement and Record Sealing, Expunge Colo., https://expungecolorado.org/faq [https://perma.cc/9Z8D-KETS] (last visited Aug. 16, 2024); Second Chance Law: Seal a Portion of Your Criminal Record, Indy.gov, https://www.indy.gov/activity/second-chance-law [https://perma.cc/8R9W-34XC] (last visited Aug. 16, 2024).

151. See Restoration Rts. Project, New Hampshire: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/new-hampshire-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/AA2J-33SH] (last updated Dec. 29, 2020); see also Annulment of Criminal Records, N.H. Ct. Serv. Ctr., https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-04/annulmentchecklist.pdf [https://perma.cc/ZT7V-CVEA] (last visited Nov. 14, 2024); What Is Annulment? FAQs, 603 Legal Aid, https://www.603legalaid.org/what-is-annulment-faqs [https://perma.cc/33HX-XLNT] (last visited Aug. 16, 2024).

152. Cal. Penal Code § 1203.41(a)(6) (2024); Cal. Cts., Record Cleaning: Felony Convictions and Prop 47, Jud. Branch Cal., https://www.courts.ca.gov/42537.htm [https://perma.cc/SYN7-9QU5] (last visited Aug. 16, 2024); Sydney Johnson, Millions of Criminal Records Cleared After Landmark California Law Takes Effect, KQED (July 7, 2023), https://www.kqed.org/news/11955206/millions-of-criminal-records-erased-after-landmark-california-law-takes-effect [https://perma.cc/XY3M-FC73].

153. Mass. Gen. Laws Ann. ch. 276, § 100A (West 2024); Find Out if You Can Expunge Your Criminal Record, Mass.gov, https://www.mass.gov/info-details/find-out-if-you-can-expunge-your-criminal-record#who-can-expunge-their-record [https://perma.cc/A3DU-RW3A] (last visited Aug. 17, 2024).

154. See Mass. Gen. Laws Ann. ch. 276, § 100A; Isaiah Thompson, CORI Reform Advocates Call for Changes in State Law, Bay State Banner (Apr. 26, 2023), https://www.baystatebanner.com/2023/04/26/cori-reform-advocates-call-for-changes-in-state-law/ [https://perma.cc/9E3R-4TXG].

155. See Nev. Rev. Stat. § 179.245(6) (West 2023); Criminal Record Sealing, Nev. Legal Servs., https://nevadalegalservices.org/criminal-record-sealing/ [https://perma.cc/UR22-HHWS] (last visited Aug. 17, 2024); Information on the Sealing of Nevada Criminal History Records, NV.gov https://rccd.nv.gov/FeesForms/Criminal/Sealing_NV_Criminal_History_

Washington recently expanded its law to include expungement eligibility for some violent felonies, but not those involving firearms or "sexual motivation."[156]

These examples show that while states have expanded expungement to many types of convictions, vastly different lines have been drawn in different places. The common thread has generally been that legislatures are reluctant to extend expungement to convictions involving violence, sex, firearms, public corruption, and DWIs. Unsurprisingly, these crimes tend to involve clear victims, whether individual or collective, grotesque moral wrongdoing, or the risk of serious and widespread danger.

C. *Processes and Standards*

There are certain processes and standards of review for expunging convictions. Legislatures have coupled substantive expansion of expungement with elaborate procedures. They have distinguished certain offenses for petition-based versus automatic relief and subjected eligibility to graduated waiting periods that seem to be calibrated to the seriousness of the offense or generalized beliefs about risks of reoffending. Further, for petition-based expungement, legislatures continue to require judges to assess the merits of petitions by referencing certain standards of review that involve determinations relating to risk and rehabilitation.[157]

States that have expanded expungement to higher-level convictions tend to require petition-based processes for the more serious offenses, reserving automated expungement for lower-level crimes and non-conviction records. For example, Alabama extended expungement to convictions in 2021 through a petition process.[158] Georgia, while permitting automated expungement for certain non-conviction records,[159] requires an individual with a conviction to apply after the applicable waiting period.[160] This holds for first-time drug possession offenders too.[161]

Records/ [https://perma.cc/7Z2K-SYHB] (last visited Aug. 17, 2024); Restoration Rts. Project, Nevada: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/nevada-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/Z67R-8L92] (last updated Aug. 25, 2024).

156. Wash. Rev. Code § 9.94A.640(1)–(4) (West 2024); Wash. Cts., Sealing and Destroying Court Records, Vacating Convictions, and Deleting Criminal History Records in Washington State 5 (2021), https://www.courts.wa.gov/content/publicUpload/Publications/SealingandDestroyingCourtRecords.pdf [https://perma.cc/CP2E-FCHJ].

157. See Murray, Retributive Expungement, supra note 10, at 698–702.

158. Ala. Code. § 15-27-1(b) (2024); Stephen W. Shaw, From the Alabama Lawyer: Expungement of Criminal Records, Ala. State Bar (Mar. 25, 2021), https://www.alabar.org/news/from-the-alabama-lawyer-expungement-of-criminal-records/ [https://perma.cc/PW2N-BAXT].

159. Georgia's law refers to this process as record restriction. See Ga. Just. Project, Georgia Criminal History, supra note 105; Thigpen, supra note 105.

160. Ga. Code Ann. § 35-3-37(j)(4)(A) (2024).

161. Id. § 35-3-37(h)(2)(B).

In contrast, South Dakota permits automated expungement for "petty offense[s], municipal ordinance violation[s], [and] Class 2 misdemeanor[s]."[162] Pennsylvania initially required petition-based expungement for first degree misdemeanors, but has since permitted some automated expungement.[163]

States with permissive conviction-based expungement laws almost always require petitions for higher-level convictions. Automated expungement is not the norm for higher-level convictions. Arizona, which has one of the most permissive expungement laws in the country, requires petitions.[164] Arkansas mirrors Arizona, and by statute requires a hearing in all cases except for petitions involving misdemeanors when the prosecutor does not object.[165] Delaware and Minnesota are similar.[166] California has a gradated system under its Clean Slate Act, with the most serious convictions not eligible for automated relief.[167] Colorado recently extended automated sealing to nonviolent convictions, which includes some felonies.[168] Kansas requires petitions for all types of convictions.[169] Michigan's regime is emblematic of the hybrid approach, requiring

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162. S.D. Codified Laws § 23A-3-34 (2024).

163. See Restoration Rts. Project, Pennsylvania: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/pennsylvania-restoration-of-rights-pardon-expungement-sealing-2/ [https://perma.cc/9Y2B-LMAS] (last updated Aug. 9, 2024); Get a Clean Slate, My Clean Slate PA, https://mycleanslatepa.com/ [https://perma.cc/WQM8-J753] (last visited Aug. 17, 2024).

164. Ariz. Rev. Stat. Ann. § 13-911 (2024); Sealing Criminal Case Records: Completing the Petition to Seal Criminal Case Records, Ariz. Jud. Branch, https://www.azcourts.gov/selfservicecenter/Criminal-Law/Sealing-records/Completing-the-Petition [https://perma.cc/E6FE-BMLB] (last visited Aug. 17, 2024).

165. Ark. Code Ann. § 16-90-1413 (2024); see also Expungement, Ark. Legal Servs. P'ship, supra note 148.

166. Del. Code tit. 11 § 4374(e)–(f) (2024) (requiring a hearing if the court deems it necessary); Minn. Stat. § 609A.03, subdiv. 5(a)–(b) (2024) (requiring a hearing within sixty days of petition); see also Off. of the Minn. Att'y Gen., Expungement of Criminal Records, https://www.ag.state.mn.us/Brochures/pubExpungement.pdf [https://perma.cc/H3ZY-Q3LF] (last visited Aug. 16, 2024).

167. Cal. Penal Code § 1203.4 (2024); Clearing Your Record, Super. Ct. Cal., Cnty. San Diego, https://www.sdcourt.ca.gov/sdcourt/criminal2/criminalexpungement [https://perma.cc/6G8D-XH5J] (last visited Aug. 16, 2024); see also Restoration Rts. Project, California: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/california-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/AGS5-YRCY] (last updated Mar. 6, 2023).

168. Colo. Rev. Stat. § 13-3-117 (2024).

169. Kan. Stat. Ann. § 21-6614(a)–(b) (West 2024); Kan. Bureau of Investigation, Expungement of Criminal History Records (2011), https://www.kansas.gov/kbi/info/docs/pdf/Fact%20Sheet%20-%20Expungement.pdf [https://perma.cc/6XC4-GRUR]; Expungement, Johnson Cnty. Dist. Att'y, https://da.jocogov.org/expungement [https://perma.cc/4NS6-KGFZ] (last visited Aug. 16, 2024); Facts About Expungement in Kansas, Kan. Legal Servs., https://www.kansaslegalservices.org/node/facts-about-expungement-kansas [https://perma.cc/6BXK-JTVJ] (last visited Aug. 16, 2024).

petitions for higher-level convictions while reserving automated processes for a smaller subset of convictions.[170] New Mexico requires petitions for all convictions except marijuana offenses.[171]

Legislatures also utilize waiting periods to signal which offenses are more serious than others. Waiting periods exist for expunging all types of convictions across jurisdictions, with a few exceptions that permit sealing or expungement at the time of the completion of the sentence. They tend to be calibrated to the grade of the offense. Higher-graded crimes tend to warrant longer waiting periods. That said, waiting periods for lower-level crimes can be quite long. New Jersey, which has a moderate conviction-based expungement regime, requires five years before any expungement application.[172] New York requires ten.[173] Iowa, which permits only misdemeanor expungement, requires eight years.[174] Louisiana's system illustrates the tiered approach. Misdemeanor convictions can be expunged after five years, while felony convictions are eligible after ten years.[175] North Carolina has the same waiting periods based on grading and restricts expungement for a subset of misdemeanor convictions to after seven years.[176] Ohio has the same scheme as North Carolina but with significantly shorter

170. See Mich. Comp. Laws § 780.621 (2024); see also Expungement Assistance, Mich. Dep't Att'y Gen., https://www.michigan.gov/ag/initiatives/expungement-assistance [https://perma.cc/S34E-CD5F] (last visited Aug. 16, 2024); Restoration Rts. Project, Michigan: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/michigan-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/59AT-SVP6] (last updated Apr. 12, 2024) (referencing the distinction between automated expungement for certain convictions and petition-based expungement for more serious convictions).

171. N.M. Stat. Ann. § 29-3A-5–8 (2024); Expungement of Other Criminal Records, N.M. Cts., https://nmcourts.gov/court-administration/office-of-general-counsel/expungement/ [https://perma.cc/BGF8-MHUF] (last visited Aug. 16, 2024).

172. N.J. Stat. Ann. § 2C:52-2(a) (West 2024); Expunging Your Court Record, N.J. Cts., https://www.njcourts.gov/self-help/expunge-record [https://perma.cc/J38B-TWUQ] (last visited Nov. 14, 2024).

173. N.Y. Crim. Proc. Law § 160.59(5) (McKinney 2024); Sealed Records: After 10 Years (CPL 160.59), N.Y. State Unified Ct. Sys., https://www.nycourts.gov/courthelp/Criminal/sealedAfter10years.shtml [https://perma.cc/EJ9X-TV99] (last updated Jan. 26, 2023).

174. Iowa Code § 901C.3 (2024); Iowa Cts., Application to Expunge Misdemeanor Court Records Under Iowa Code Section 901C.3, at 2 (2024), https://www.iowacourts.gov/collections/867/files/1965/embedDocument [https://perma.cc/3UYJ-AC7W] (last visited Sept. 10, 2024); Can I Expunge My Adult Criminal Conviction in Iowa?, Iowa Legal Aid, https://www.iowalegalaid.org/resource/can-i-expunge-my-adult-criminal-conviction-in-1 [https://perma.cc/43K5-S2LP] (last updated Mar. 23, 2023).

175. La. Code Crim. Proc. Ann. art. 977, 978 (2023); La. Expungement Assistance & Advoc. Ctr., supra note 118.

176. N.C. Gen. Stat. § 15A-145.5(c) (2024); Expunctions, N.C. Jud. Branch, https://www.nccourts.gov/help-topics/court-records/expunctions [https://perma.cc/PSQ5-6YT8] (last visited Aug. 16, 2024).

waiting periods for felonies and misdemeanors, respectively.[177] Indiana has perhaps the most detailed scheme, clearly distinguishing between convictions based on seriousness and perceived harm.[178] These are some of the examples of states trying to discriminate between types of convictions through procedural requirements.[179]

Courts tasked with assessing the merits of conviction-based petitions must apply certain standards when determining whether to expunge. For example, in Kentucky, when assessing whether a Class D felony should be expunged, the court must find that the person has been rehabilitated and poses no significant threat of recidivism.[180] This standard resembles standards in other state statutes that tend to require courts to determine whether the petitioner is rehabilitated and has a need for the expungement.[181] Minnesota requires a court to find "upon clear and convincing evidence that [the expungement] would yield a benefit to the petitioner commensurate with the disadvantages to the public and public safety."[182] Arizona requires expungement if the court finds it is "in the best interests of the petitioner and the public's safety."[183] Delaware permits

177. Ohio Rev. Code Ann. § 2953.32(B)(1)(a) (2023); Bischoff, supra note 137; R. Tadd Pinkston, Expungement & Record Sealing, https://www.opd.ohio.gov/static/Law+Library/Training/OPD+Training+Materials/2019+Law+Update+And+Eyewitness+ID/Pinkston_CLE_Presentation_PPT.pdf [https://perma.cc/9SUC-XY6P] (last visited Aug. 16, 2024).

178. See Ind. Cts., supra note 150; Restoration Rts. Project, Indiana: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/indiana-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/9LYL-9E8A] (last updated Feb. 17, 2024) (identifying "five years after . . . conviction for misdemeanors or Class D felonies [r]educed to misdemeanors; eight years after conviction for Class D felonies; eight years after conviction or three years from completion of sentence for all other felonies; and, 10 years after conviction or five years after completion for . . . violent felonies").

179. See, e.g., Tenn. Code Ann. § 40-32-101(g)(2)(B) (2024); An Introduction to Expungements: Clerk of Courts Orientation 2022, Tenn. Bureau Investigation, https://www.ctas.tennessee.edu/sites/default/files/2022-08/An%20Introduction%20to%20Expungements%20-%201%20Slide.pdf [https://perma.cc/8KKY-PTSG] (last visited Aug. 17, 2024).

180. See Ky. Rev. Stat. Ann. § 431.073(4)(a) (West 2024) (requiring that expungement be "consistent with the welfare and safety of the public" and "supported by [the applicant's] behavior . . . as evidenced that [the applicant] has been active in rehabilitative activities . . . and is living a law-abiding life since release"); Commonwealth v. Hampton, 618 S.W.3d 511, 513 (Ky. Ct. App. 2021) (same).

181. See, e.g., Md. Code Ann. Crim. Proc. § 10-110(f)(2)(iii) (West 2024); N.H. Rev. Stat. Ann. § 651:5(I) (West 2024); In Re Expungement Petition of Vincent S., 278 A.3d 770, 780 (Md. Ct. Spec. App. July 5, 2022); In Re Expungement Petition of Trey H., No. 0550, 2022 WL 301294, at *4 (Md. Ct. Spec. App. Feb. 1, 2022).

182. Minn. Stat. § 609A.03, subdiv. 5(a) (2024); see also State v. T.A.W., No. A21-1125, 2022 WL 1073230, at *2 (Minn. Ct. App. April 11, 2022).

183. Ariz. Rev. Stat. Ann. § 13-911(D) (2024).

courts to grant a petition if continued existence of the public criminal record would cause "manifest injustice."[184]

Some states gradate the standard based on the type of conviction. For example, Arkansas has a stringent standard for expunging felonies, requiring "clear and convincing evidence that doing so would further the interests of justice" and allows for considerations relating to criminal history, pending charges, and victim input.[185] In contrast, the statute flips the burden to the prosecution for misdemeanor convictions, enacting a presumption for expungement unless the prosecution presents "clear and convincing evidence that a misdemeanor or violation conviction should not be sealed."[186] Indiana permits expungement of almost all felony convictions, but requires the record to remain public and "clearly and visibly marked or identified as being expunged."[187]

These variations indicate that states are attempting to balance interests when permitting the expungement of convictions. States are signaling judgments about the legitimacy of expunging convictions by distinguishing between petition and automated processes, gradating waiting periods, and altering standards of review and burdens of proof. On balance, the more serious the offense, the more hurdles or higher the standard becomes.

As such, the developing law of expunging convictions, while in overdrive the past decade, has limits. Those limits tend to emerge substantively and procedurally as the seriousness of the offense increases. Few legislatures have shown an appetite for opening expungement to violent offenses, regardless of how long ago they occurred. This judgment, in some ways, reflects broader public attitudes regarding sentencing and other postconviction remedies, in which clear lines tend to be drawn between violent and nonviolent offenses.[188] Coupled with the ongoing inadequacies of the pardon process, it also dials up an uncomfortable question: Has expungement reform reached its limit? Or is there a way to simultaneously expand expungement while recognizing the practical and social reality of the judgments made by legislatures about the palatability of extending the remedy further? Part III presents that case, suggesting that moves to expand expungement further should incorporate direct participation by the community to ensure that the remedy remains connected to the moral and social premises of the criminal law in a democratic legal system.

184. Del. Code tit. 11, § 4374 (2024); Osgood v. State, 310 A.3d 415, 420 (Del. 2023).

185. Ark. Code Ann. § 16-90-1415(b)–(c) (2024).

186. Id. § 16-90-1415(a); Talley v. State, 610 S.W.3d 164, 167–69 (Ark. Ct. App. 2020).

187. Ind. Code Ann. § 35-38-9-7 (West 2024).

188. See infra section III.D.

III. THE CASE FOR PARTICIPATORY EXPUNGEMENT

As Part II demonstrated, there is a relatively clear line between the types of convictions that states have made eligible for expungement and those that they have not. There is an inverse relationship between perceived seriousness and eligibility; legislatures are more willing to substantively extend expungement as a remedy and procedurally make it easier, through something like an automated process, when the legislature perceives the crime as less serious. In the situations where expungement of higher-level crimes has been permitted, states tend to couple eligibility with longer waiting periods and petition-based adjudication. This Part juxtaposes these legislative realities and limits with historical and constitutional tradition as it relates to popular participation in criminal adjudication, democratic political and legal theory, punishment theory, and public attitudes relating to expungement.[189] In doing so, it suggests that extension of the substantive expungement remedy to more serious crimes should be coupled with procedural reforms that heighten public participation in the adjudication. This would help revive public adjudication of the core components of the criminal law, including proportionality in punishment, while providing the community the opportunity to determine the boundaries of justifiable second chances.

A. *The Historical and Constitutional Case*

Local communities were expected to help determine the boundaries of American criminal law through popular participation. The federalist structure of the Constitution,[190] core amendments to the Constitution,[191] and legal practices at the time of the Founding[192] and for the first century or so after the Constitution's ratification, suggest as much. Further, the Anglo-American common law tradition left great room for community involvement in criminal adjudication.[193] The Founders knew that these structural components, traditions, and practices might be inefficient; nonetheless, they remained on the chosen course.[194]

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189. This Part builds from Part III of Brian M. Murray, Insider Expungement, 2023 Utah L. Rev. 337, 380–89 [hereinafter Murray, Insider Expungement].

190. Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 83 (1998) [hereinafter Amar, The Bill of Rights] ("The dominant strategy to keep agents of the central government under control was to use the populist and local institution of the jury.").

191. See, e.g., U.S. Const. art. III, § 2; see also id. amend. V–VII.

192. Amar, The Bill of Rights, supra note 190, at 83 (noting how "the only right secured in all state constitutions penned between 1776 and 1787 was the right of jury trial in criminal cases").

193. Id. (referencing how grievances against King George III included deprivations of jury trial rights).

194. See United States v. Haymond, 139 S. Ct. 2369, 2384 (2019); see also Joshua Kleinfeld, Manifesto of Democratic Criminal Justice, 111 Nw. U. L. Rev. 1367, 1381 (2017)

Constitutional structure indicates this preference for the community's role in criminal adjudication. Amar has written extensively about how Article III's provisions relating to juries and the Fifth, Sixth, and Seventh Amendments indicate a strong preference for jury-based decisionmaking to prevent overreach by government officials.[195] Appleman has demonstrated how the enshrinement of the jury trial in the Sixth Amendment also indicates this preference.[196] While at earlier points in constitutional history the Supreme Court tended to emphasize the individual right to a jury trial under the Sixth Amendment, more recent case law has steered back on course, noting the constitutional preference for jury involvement in major areas of criminal adjudication.[197] This follows significant scholarly work arguing that the jury trial language in the Sixth Amendment amounts to a communal right, as well.[198] Amar has noted how the petit jury could "interpose itself on behalf of the people's rights."[199]

Professor Bill Stuntz demonstrated how the constitutional preference for juries aligned with American practice before plea bargaining became the norm. Juries dispensed individualized justice more frequently.[200] In effect, they served several functions. First, they could, through determinations of guilt or innocence, convey community sensibilities about the quality of the prosecution's case or even the decision to bring the case at all.[201] Second, they could communicate moral judgment about

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[hereinafter Kleinfeld, Manifesto of Democratic Criminal Justice] (referencing resistance to "total bureaucratization of legal arrangements" and a preference for a "criminal system built of ill-fitting parts" that preserves "pockets of nonbureaucratic reason and authority").

195. See Akhil Reed Amar, America's Constitution: A Biography 205–46 (2005) (discussing the presumptive role of juries in the original constitutional framework); Amar, The Bill of Rights, supra note 190, at 84 (quoting James Madison as saying "the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate" (internal quotation marks omitted)); Akhil Reed Amar, Reinventing Juries: Ten Suggested Reforms, 28 U.C. Davis L. Rev. 1169, 1169–72 (1995) (describing "the Founders' Constitution and the Bill of Rights").

196. See Appleman, Lost Meaning, supra note 29, at 399 (arguing that the Sixth Amendment enshrines a "collective right to a jury trial").

197. See Blakely v. Washington, 542 U.S. 296, 301–02 (2004) (holding that a jury must determine all facts beyond a reasonable doubt that are essential to a sentence); Apprendi v. New Jersey, 530 U.S. 466, 477–85 (2000) (holding that facts that increase the penalty beyond the statutory maximum must be submitted to a jury).

198. Appleman, Lost Meaning, supra note 29, at 399; Stephanos Bibas, Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?, 94 Geo. L.J. 183, 196–97 (2005) [hereinafter Bibas, Originalism and Formalism]; Steven A. Engel, The Public's Vicinage Right: A Constitutional Argument, 75 N.Y.U. L. Rev. 1658, 1663 (2000); see also Amar, The Bill of Rights, supra note 190, at 91–96.

199. Amar, The Bill of Rights, supra note 190, at 87.

200. See Stuntz, supra note 26, at 6, 30.

201. Id. at 30 (noting the practice of "jury nullification" to send messages to overzealous prosecutors).

the alleged wrongdoing.[202] Third, they could signal to prosecutors and state officials whether they had reached too far.[203] Finally, in limited circumstances, juries were asked to interpret the meaning of the law itself and that was considered entirely reasonable.[204] As Professor Joshua Kleinfeld has put it, juries were asked to make "prudential, equitable, and individualized moral judgment[s]."[205]

Appleman demonstrated that participation in jury trials was "the people's right."[206] Stuntz showed how community participation resulted in more moderate punishment regimes than bureaucratically administered systems.[207] Juries, through adjudication and sentencing, effectively signaled their stance on punishment.[208] In language that bears greatly on the present topic, Appleman writes: "[T]he primary role of the jury . . . was to determine the defendant's level of moral culpability," to issue a "sanction," "to restore the victim to his or her original state, and to repair the community by publicly denouncing the crime" and the perpetrator.[209] Early American juries were tasked with moderating community expressions relating to the boundaries of the criminal law.[210]

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202. Id. (describing how urban juries made moral evaluations when deciding cases).

203. Bibas, Originalism and Formalism, supra note 198, at 187.

204. Marcus Alexander Gadson, State Constitutional Provisions Allowing Juries to Interpret the Law Are Not as Crazy as They Sound, 93 St. John's L. Rev. 1, 4–9 (2019).

205. Kleinfeld, Manifesto of Democratic Criminal Justice, supra note 194, at 1383 (noting the importance of "value rationality" rather than fixating on "instrumental rationality").

206. Appleman, Lost Meaning, supra note 29, at 405. Of course, whether ideal juries are achievable is a legitimate question, and one that has particular salience given historical problems relating to jury selection, including constitutional problems relating to bias. See, e.g., Equal Just. Initiative, Race and the Jury: Illegal Discrimination in Jury Selection (2021), https://eji.org/report/race-and-the-jury/ [https://perma.cc/EU6T-XPG6]; Thomas Frampton, The First Black Jurors and the Integration of the American Jury, 99 N.Y.U. L. Rev. 515, 517–19 (2024) (describing early efforts to integrate juries); Thomas Frampton, For Cause: Rethinking Racial Exclusion and the American Jury, 118 Mich. L. Rev. 785, 792–803 (2020) (discussing how challenges for cause adversely affect jury composition).

207. See Stuntz, supra note 26, at 31–34 & tbl.3 (showing imprisonment rates were significantly lower between 1880–1972 than in 2000).

208. See Appleman, Lost Meaning, supra note 29, at 406–07 ("It was the eighteenth century, however, when some of the 'most fundamental attributes of modern Anglo-American criminal procedure' arose, including the relationship between the judge and the jury." (footnote omitted) (quoting John H. Langbein, Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources, 50 U. Chi. L. Rev. 1, 2 (1983))).

209. Id. at 407; see also Laura I. Appleman, Local Democracy, Community Adjudication, and Criminal Justice, 111 Nw. U. L. Rev. 1413, 1417 (2017) [hereinafter Appleman, Local Democracy] ("[P]unishment was not something left to the judge but rather a responsibility and right of a defendant's immediate society.").

210. See Appleman, Local Democracy, supra note 209, at 1414 (noting how community-based participation strengthens the legal system); Appleman, Lost Meaning, supra note 29, at 409 (describing early American juries in New England); Stephanos Bibas, Prosecutorial Regulation Versus Prosecutorial Accountability, 157 U. Pa. L. Rev. 959, 990 (2009)

In short, popular involvement in determining the boundaries of the criminal law and punishment animates the American criminal law tradition. But the recordkeeping apparatus and expungement possibilities are entirely mediated by administrative institutions with no opportunity for popular participation.[211] Generally, expungement is classified as a civil remedy, and the creation of criminal records occurs through the work of various administrative officials, such as the police, through arrests, and administrative bureaucracies and judicial officials follow with more records as the process continues.[212] But the civil–criminal formal distinction ignores that the effect of expungement is to mark the acceptable limits of extrapunitive activity, whether carried out by the state or by private actors.[213] Further, by cutting out popular involvement, expungement law forecloses the usage of procedure to contribute to a culture of second chances. Thus, the absence of popular involvement is problematic on both substantive and procedural grounds. Expungement law forsakes the American legal tradition's commitment to popular adjudication of criminal matters.

Substantively, this means that the broader public has no direct means by which to express its will regarding the scope of the criminal recordkeeping apparatuses underlying the need for expungement.[214] Further, it means that the public cannot communicate, through adjudication, whether it believes the punitive effects of recordkeeping are worth responding to or not. And the public might convey two commitments at the same time, which the data on public attitudes on expungement generally support: A general openness to expungement and more demands from petitioners who claim to be rehabilitated.[215] As Bibas

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[hereinafter Bibas, Prosecutorial Regulation] ("Nevertheless, some form of consultation could inject community views into the most important prosecutorial policy decisions."). Of course, the preference for community involvement does not mean that public involvement, through juries, was always representative of the particular community at hand. There is ample history suggesting that many communities were excluded from the ability to administer justice and the rules directing composition of juries do not guarantee adequate representation. For a general critique of democratization in criminal justice, see generally Rappaport, supra note 35, at 739–809 (critiquing the democratization of criminal justice).

211. Murray, Insider Expungement, supra note 189, at 344–60.

212. See Jacobs, supra note 5, at 13–69 (noting the various ways that records are created administratively, whether through police or judicial action).

213. Murray, Insider Expungement, supra note 189, at 383 ("[E]xpungement seems akin to a matter of criminal adjudication . . . . [T]he public has no say in stopping extra, unjustified harm from being inflicted on those with criminal records or, on the other hand, demanding more from petitioners who claim rehabilitation.").

214. While the public can lobby legislatures, it does not have any direct means of communicating its stance on expungement. See supra notes 211–212.

215. See Leah C. Butler, Francis T. Cullen & Alexander L. Burton, Redemption at a Correctional Turning Point: Public Support for Rehabilitation Ceremonies, Fed. Prob., June 2020, at 38, 42–43 & tbls.1 & 2 (demonstrating conflicting, but simultaneously held, positions by the public).

has put it, participation gives the public the opportunity to carry out the complex "morality play" that constitutional commitments to popular involvement enshrined and that early American practice engaged with despite its complexity.[216]

The absence of the community from expungement determinations also forecloses community buy-in to reentry and second chances. Criminal law and punishment are about the enforcement and restoration of sociomoral norms. Popular participation forces community members to grapple with the messiness of that reality, both generally and in individual cases. Just as juries require contemplation regarding guilt and innocence, justifiable defenses, and the costs of punishment, popular participation in expungement would force the everyday community member to grapple with the effect of the maintenance of a criminal record and the utility of expungement. Community involvement thus implicates both the enforcement and restorative components of the limits of the criminal law. The absence of popular participation also undermines democratic self-determination, which is the topic of the next subsection.[217]

B. *The Democratic Self-Determination Case*

The absence of popular involvement in expungement cuts against the ability of the community to demarcate acceptable and unacceptable state action in the enforcement of the criminal law, which in turn means the community loses its ability to determine what is or is not worthy of extended punitive activity beyond the formal sentence. As Professors Paul Robinson and John Darley have noted, the utility of the criminal law is contingent on the ability of the community to adequately communicate how and where it draws the complicated lines.[218] Popular involvement in criminal adjudication allows for threading the needle when it comes to criminal law enforcement: The community mediates the simultaneously harsh, but prosocial elements of the criminal law and punishment. Existing expungement law—and its trends away from community involvement—denies the community this ability.

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216. Stephanos Bibas, The Machinery of Criminal Justice 2–5 (2012) [hereinafter Bibas, Machinery of Criminal Justice] (describing the history of popular involvement in criminal justice).

217. See Kleinfeld, Manifesto of Democratic Criminal Justice, supra note 194, at 1393 ("The lesson is to value both community self-determination and substantive justice, rather than to value only substantive justice and not community self-determination or to pretend that substantive justice is community self-determination." (emphasis omitted)).

218. See Paul H. Robinson & John M. Darley, The Utility of Desert, 91 Nw. U. L. Rev. 453, 456–58 (1997) [hereinafter Robinson & Darley, Utility of Desert] (explaining that criminal law fluctuates in utility depending on its boundaries).

Others have written about how complete reliance on legislative representation is inadequate to the democratic task.[219] This principle is also baked into the American constitutional tradition, which supports direct popular participation through its reservation of certain determinations to members of the community.[220] Early American thinkers coupled support for popular participation in adjudication with a deferential localism that emanated from the idea of a political community's self-determination.[221] English legal authorities like Matthew Hale and William Blackstone advocated for localized criminal justice, and the Enlightenment criminal law reformer Cesare Beccaria supported public involvement in adjudication.[222] Alexis de Tocqueville lauded popular, majoritarian, and noble aspects of the jury system, noting how it "places the real direction of society in the hands of the governed."[223]

In addition to historical connections, the practical effect of omitting popular participation is generally negative. Tom Tyler's writings on procedural justice indicate that allowing voices to be heard contributes to the perception of the validity of the law.[224] Robinson and Darley have shown that the absence of community-informed sensibilities on the limits of the criminal law undercuts the overall utility of the criminal law and punishment more broadly.[225] This comports with the arguments of punishment theorist R.A. Duff, who has argued that popular participation enables communities to act as agents rather than mere subjects.[226]

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219. See Kleinfeld, Manifesto of Democratic Criminal Justice, supra note 194, at 1383 (noting how deliberative and participatory democracy both insist on more than representation).

220. See infra notes 222–237 and accompanying text.

221. Amar, The Bill of Rights, supra note 190, at 88–92 (noting how Madison, Hamilton, and other early constitutional interpreters understood the jury as a popular and local institution that supported the federal structure of the Constitution); see also Michael J.Z. Mannheimer, The Fourth Amendment: Original Understandings and Modern Policing 24–45 (2023) (discussing the local model of 4th Amendment adjudication).

222. Appleman, Lost Meaning, supra note 29, at 415 (noting how the Founders relied on Edward Coke, who understood the jury trial right as belonging to the community, and Matthew Hale, who emphasized the jury as a hyperlocal institution); id. at 417 (citing Cesare Bonesana Beccaria, An Essay on Crimes and Punishments 29 (Edward D. Ingraham trans., 1819) (1764)).

223. Amar, The Bill of Rights, supra note 190, at 88 (quoting 2 Alexis de Tocqueville, Democracy in America 293–94 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1945) (1840)).

224. See Tom R. Tyler, Procedural Justice, Legitimacy, and the Effective Rule of Law, 30 Crime & Just. 283, 300–01 (2003) [hereinafter Tyler, Procedural Justice] (explaining that when people have the chance to participate in a procedural process and suggest how a problem should be resolved, they are more likely to view that process as fair).

225. See Robinson & Darley, Utility of Desert, supra note 218, at 456 (explaining that a criminal law system that tracks the community's morals has a higher chance of gaining compliance).

226. See Duff, Call Our Own?, supra note 26, at 1503.

There is good reason to believe that these sorts of concerns animated the original support for robust jury involvement. Amar has written about jurors as "pupils" who were expected to transmit community values and, in the process of judging, learn more about the law.[227] This participation created a feedback loop that ensured a more informed body politic capable of adjudicating questions of fact *and* law.[228] It also would, in the words of one delegate to the Constitutional Convention, "confirm the people's confidence in government."[229] Amar quotes de Tocqueville on the democratic utility of popular participation via juries:

> The jury . . . serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of rights. . . . It teaches men to practice *equity*; every man learns to judge his neighbor as he would himself be judged.
>
> . . . *It may be regarded as a gratuitous public school*, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws . . . .
>
> . . . I look upon [the jury] as one of the most efficacious means for the education of the people which society can employ.[230]

For the average community member, there was little chance of being employed as a representative, senator, or other public official. Juries were a venue for self-government.[231] More pointedly, they provided an opportunity for direct representation in the judiciary, a branch of government almost always dominated by professionals.[232] Amar notes how Thomas Jefferson, amongst others, made this point, recognizing that it was more important to include popular participation in the judiciary than in the legislature.[233] The English tradition contains examples of judges doing

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227. Amar, The Bill of Rights, supra note 190, at 93.

228. Id. at 100–04 (noting how juries were judges of fact and law).

229. Id. at 96 (quoting The Debates in the Convention of the State of New York on the Adoption of the Federal Constitution, reprinted in 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 1, 288 (Jonathan Elliot ed., Washington 1854)).

230. Id. at 93 (alterations in original) (quoting 2 Alexis de Tocqueville, Democracy in America 295–96 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1945) (1840)).

231. Id. at 94.

232. Id. (quoting Richard Henry Lee, Letters From the Federal Farmer, reprinted in The Complete Antifederalist 249–50 (Herbert J. Storing ed., 1981)) (noting that "common people should have a part and share of influence, in the judicial as well as in the legislative department").

233. Id. at 95 (quoting Letter from Thomas Jefferson to L'Abbe Arnoux (July 19, 1789), *in* 15 The Papers of Thomas Jefferson 282, 283 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958)).

really bad things when no jury is present.[234] The jury *is* the democratic measure built into the judiciary.[235] In the American tradition, it bundles "populism, federalism, and civic virtue."[236]

As mentioned in *Insider Expungement*, expungement law reform is trending toward complete omission of the community's ability to self-determine the boundaries of expungement law.[237] Legislatures are essentially the only vehicle for representation. They are subject to the traditional constraints, incentives, and power structures that filter popular expression. Those realities are only sufficiently democratic if one holds that the lawful exercise of legislative power is adequate to harness popular attitudes and participation. But as Duff and Kleinfeld have suggested, filtered, remote participation is not the same as participatory criminal justice.[238] Further, the sort of fragmented democratic participation nodded to by others is grossly absent from expungement adjudication.[239]

C. *The Punishment Theory Case*

Expunging a conviction involves a judgment about the propriety of past and future punishment.[240] First, expungement operates as a judgment about the expiration of stigma once thought permissible given the existence of the public criminal record. Second, expungement communicates cessation of state-sanctioned public labeling and the complete closure of formal contact with the system related to that case.[241] Third, expungement, under most existing state statutes, signals approval of an acceptable level of individual reform on the part of the petitioner; at the very least, it represents a judgment about risk, or its irrelevance moving forward.[242] Finally, a granted expungement indicates an openness to full reintegration. As mentioned elsewhere, all these judgments implicate the

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234. Id. at 109 (highlighting the Star Chamber, the Bloody Assizes, and the case of Algernon Sidney).

235. Id. (quoting Essays by a Farmer (IV), reprinted in 5 The Complete Anti-Federalist 36, 36–38 (Herbert J. Storing ed., 1981)).

236. Id. at 97.

237. See Murray, Insider Expungement, supra note 189, at 348–56 (referencing the shortage of democratic involvement in expungement processes, whether traditional or present day).

238. See Duff, Call Our Own?, supra note 26, at 1501–04; Kleinfeld, Manifesto of Democratic Criminal Justice, supra note 194, at 1401.

239. Murray, Insider Expungement, supra note 189, at 386 (citing Bierschbach, supra note 20, at 1444 (noting the Constitution embodies the notion that "[j]ust punishment . . . is what comes out of that process; it is defined by the process that produces it")) ("But there is no such threat in the expungement context, meaning the process is not the product of even democratically designed fragmentation.").

240. Murray, Completing Expungement, supra note 37, at 1223.

241. Id. at 1223–24.

242. Murray, Retributive Expungement, supra note 10, at 711 (describing risk-based, utilitarian premises underlying expungement law).

concept of punishment and its purposes.[243] This section argues that these realities, coupled with the primary functions of criminal law and punishment—to redress and respond to sociomoral wrongdoing—warrant community involvement in expungement. Put simply, the community is who should decide.

1. *Restorative Criminal Law and Punishment.* — Recognizing that there is disagreement about the underlying purposes of American criminal law—both in theory and in practice—this section argues from prior work that acknowledges that criminal law and punishment are fundamentally related to the sociomoral underpinnings of the democratic community. This conception of criminal law supports popular participation in expungement adjudication because expungement implicates community sentiments and long-term membership in the community. Put another way, if punishment's aim is the appropriate reaction to wrongdoing *and* preparation for reintegration,[244] then community involvement in expungement—which implicates the limits of punitive effects and reentry—makes perfect sense. Expungement adjudication is the place where both aims of a restorative conception of punishment meet. The core premise of a restorative notion of criminal law and punishment is that the law must conduce to the common good and individual human flourishing. Criminal law is concerned with personal responsibility, both in an individual and social sense, given the obligations of being in a community. Punishment, by reacting to crime, should have restoration as its primary aim rather than exacting revenge, incapacitation, deterrence, or rehabilitation. Punishment aims to repair the disruption to the social order created by crime, and part of that repair makes the reintegration of an offender—to the extent possible—a priority. Punishment thus should be individually tailored and socially oriented in its restorative aims. Further, it is communicative because it aims to restore order, reaffirm which acts are wrong, promote future compliance, redress harm to victims and the broader community, and acknowledge the responsibility and value of all persons involved.[245] Thus, punishment should be "offender and order centric."[246] As Professor Peter Koritansky has stated, "[P]unishment . . . expresses and reaffirms the political community's indignation at the crime committed and solders that commitment in the

243. Murray, Completing Expungement, supra note 37, at 1223–25.

244. 2 Winston S. Churchill, Domestic Affairs (Home Office Vote), July 20, 1910, *in* His Complete Speeches: 1897–1963, at 1598 (Robert Rhodes James ed., 1974) ("The mood . . . of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. . . . [This attitude includes] unfaltering faith that there is a treasure, if you can only find it, in the heart of every man . . . .").

245. Murray, Restorative Retributivism, supra note 15, at 882–88.

246. Id. at 886.

minds of potential criminals whose moral future still lay undetermined."[247] But restorative punishment, by virtue of its individual and social orientation, does not fixate on concepts like the Kantian *lex talionis* that results in harsh vengeance mistaken for retribution.[248] Instead, individuals only deserve what corresponds to their transgression of the common good and social order more broadly, mindful of individual culpability. Put another way, what is deserved is connected to both the common good and individual circumstances.[249]

In terms of human law, this theory contains a dose of humility when it comes to meting out punishment. It is synergistic with conventional notions of under-determinacy in the law that requires the appropriate use of discretion.[250] Professor James Whitman has articulated how this notion of humility found its way into procedural standards reflected in modern law.[251] In modern terms, that is close to what Professor Chad Flanders has highlighted as crucial to criminal law enforcement: ensuring that institutional identities connect to community values.[252]

Appleman has argued that something akin to this view is instantiated in the Sixth Amendment and underlies the Court's moves in cases like *Apprendi* and *Blakeley*.[253] The basic gist is that the community is the body

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247. Peter Karl Koritansky, Thomas Aquinas and the Philosophy of Punishment 162 (2012) [hereinafter Koritansky, Philosophy of Punishment].

248. Peter Koritansky, Two Theories of Punishment: Immanuel Kant and Thomas Aquinas, 22 Hist. Phil. Q. 319, 329–30 (2005) (distinguishing Kantian and Thomistic understandings of what is deserved).

249. Murray, Restorative Retributivism, supra note 15, at 882–87.

250. See Koritansky, Philosophy of Punishment, supra note 247, at 140 (noting how "prudent legislators (or judges) may presumably impose differing punishments according to the various contingencies with which they are faced").

251. James Q. Whitman, The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial 87–90 (2008) (discussing medieval theology that suggested humility in adjudication and its reemergence in the late 1700s). To be fair, Whitman argues that choosing a safer path was designed to protect the souls of judges, not defendants. See id. at 92 (describing how judicial procedures arose in part to allow judges to carry out harsh sentences without fear of spiritual repercussions in the afterlife). For example, Ambrose suggested that judges should tend towards mercy in their decisionmaking in order to remain eligible for reception of communion. See id. at 38 (describing the influence of moral theology on the concept of reasonable doubt); Albert W. Alschuler, Justice, Mercy, and Equality in Discretionary Criminal Justice Decision Making, 35 J.L. & Religion 18, 22 (2020) (referencing how mercy can serve as an enhancement of "earthly justice" deemed necessary).

252. See Chad Flanders, Retribution and Reform, 70 Md. L. Rev. 87, 109, 130–31 (2010) (describing need to constrain retributive impulses within institutions in order to ensure proportionality).

253. See Laura I. Appleman, Defending the Jury: Crime, Community, and the Constitution 53 (2015) [hereinafter Appleman, Defending the Jury] (arguing that Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004), indicate how "the Court's championing of the criminal jury trial right is undergirded by a philosophy of punishment based on a type of expressive, restorative retribution").

tasked with resolving "conflicting perceptions of desert" because the community is the group that the law provides with decisionmaking authority about blameworthiness and proportionality.[254]

In a democratic legal system, popular participation provides a direct opportunity for the community to communicate the sociomoral core of criminal law and punishment.[255] Given the connection between expungement and the limits of punishment, involving the community in expungement adjudication enables the community to demarcate boundaries with respect to stigma and the incapacitating effects of public criminal records. Doing so on a case-by-case basis—especially for those offenses most closely connected with the underlying moral core of criminal law—is a unique opportunity for the community to carry out the chief function of the criminal law and punishment: restoration. Community determinations about expungement represent an opportunity to express sentiments relating to the criminal law, punishment, the common good, and individual cases with their own unique circumstances.[256] As Appleman puts it, "[W]hen the jury determines the facts leading to punishment, the wrongdoer has more difficulty avoiding the burden of criminal responsibility, because his fellow citizens, his community, and his peers have pronounced his blameworthiness . . . ."[257]

Thus, participatory expungement jives with the person- and order-centric nature of restorative notions of criminal law and punishment. Involvement of the community incorporates a relational dynamic missing from current processes.

2. *Expungement as Redemption.* — While existing expungement law was conceived with a rehabilitation-centric mindset, there is a better way to think about its meaning. As mentioned above, the state makes several judgments when it permits and grants expungement, including the notion that the petitioner is both capable and *deserving* of a second chance. This is usually due to a combination of factors, such as the petitioner's own hard work, apparent risk of reoffending, need for relief, and proportionality

254. See id. at 57 ("[R]etributive justice principles can be found in the Court's rediscovery and reaffirmation of the right of the jury—that is, the polity—to set out all criminal punishment, no matter what form it may take.").

255. See Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. Rev. 1659, 1659–69, 1685–86 (1992) (discussing how punishment can allow society to "vindicate the value of the victim" by expressing community disagreement with the perpetrator's actions).

256. See Murray, Restorative Retributivism, supra note 15, at 891 ("[R]estorative retributivism accounts for the reconstructive nature of punishment, nods to humility in application, and leaves room for the modern ideal of a self-governing, democratic, community." (footnote omitted)).

257. Appleman, Defending the Jury, supra note 253, at 58 (contrasting the use of juries as fact-finders with judge-based findings of fact and sentencing).

concerns.[258] Expungement's ability to alleviate the punitive effects stemming from a public criminal record make the relief—when it is achieved—redemptive. The power of redemption should not be underestimated.[259] Further, it fits neatly with early American conceptions of democratically administered criminal justice.[260]

Redemption is a complicated concept that is adjacent to many theories of punishment, although it most closely aligns with restorative theories of punishment, whether they are desert-based or from within the restorative justice movement. But it is a puzzle in current legal practice because reformers rarely associate the state with the capacity to bestow redemption.[261] This is probably because of the theological connotations of redemption, which necessarily point to a discussion of forgiveness and mercy, two concepts generally thought to be the province of religious entities rather than the state.[262] Early American practice in the colonies more easily blended these themes.[263] But as Bibas and Professor Richard Bierschbach have written, these themes have much to suggest for the existing criminal system because they encourage a more holistic outlook than abstract and impersonal approaches to criminal justice.[264]

Bibas, building from the work of Professor Jeffrie Murphy, notes how "[f]orgiving involves overcoming one's resentment of an offender for having inflicted an injury."[265] Typically, this involves a personal

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258. See Murray, Retributive Expungement, supra note 10, at 698–701 (discussing present-day processes and burdens of proof).

259. See Hannah Arendt, The Human Condition 237 (1998) ("Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover . . . .").

260. See Bibas, Machinery of Criminal Justice, supra note 216, at 1–27 (detailing localized criminal justice and communication of forgiveness and mercy).

261. Stephanos Bibas, Forgiveness in Criminal Procedure, 4 Ohio St. J. Crim. L. 329, 330–33 (2007) [hereinafter Bibas, Forgiveness in Criminal Procedure] (describing the nature of forgiveness and how it doesn't fit perfectly with state-administered criminal justice).

262. See Jeffrie G. Murphy, Forgiveness, Mercy, and the Retributive Emotions, Crim. J. Ethics, Summer/Fall 1988, at 3, 6–8 (discussing theological connotations of forgiveness and mercy and operationalizing them in certain contexts); see also Stephanos Bibas & Richard A. Bierschbach, Integrating Apology and Remorse Into Criminal Procedure, 114 Yale L.J. 85, 95–103 (2004) (discussing competing understandings of the appropriate role of apology and remorse in criminal procedure).

263. See Appleman, Defending the Jury, supra note 253, at 62 (noting the "strong strain of restorative, redemptive justice" within New England colonial criminal law philosophy); see also id. ("Unlike today, the criminal offender was not viewed as a permanent outcast from the community, but instead as a community member who had sinned—an act that could happen to anyone.").

264. See Bibas & Bierschbach, supra note 262, at 109–18 (discussing the broader value of remorse and apology as related to relational notions of criminal justice).

265. Bibas, Forgiveness in Criminal Procedure, supra note 261, at 331 (citing Jeffrie Murphy, Forgiveness and Resentment, *in* Forgiveness and Mercy 24–26 (1988), among others).

relationship between two people, which is not how the relationship between the state, community, and offender is typically understood. But the default existence of permanent criminal records challenges that. A public criminal record acts to entrench a state of nonforgiveness on the part of the state and broader community.[266] It signals to the offender and the community that the transgression happened and will not be forgotten by the state. In other words, it forecloses complete repair of the severed relationship between offender and community. That cuts against the "reparation of harm and community empowerment [that] are . . . distinct goals of restorative justice."[267]

A default, permanent, public criminal record apparatus erected by the state deprives the community of engaging in the act of forgiveness later or, at the very least, acknowledging the offender's redemption. Expungement, by any means, reintroduces the community's ability to forgive after prior acknowledgment of the validity of the criminal law more broadly.[268] But if the state chooses to allow expungement only by nondemocratic means, it again forecloses the community from contributing to the repairing of the relationship. As Bibas states, "For forgiveness to be meaningful, the victim must also manifest it by cancelling or remitting the moral debt and repairing his breached relationship with the offender."[269]

In the expungement adjudication context, popular involvement in decisionmaking about expungement enables the community to signal its acceptance of the petitioner's path to reintegration.[270] This lends reality to the two-way relationship implicated by crime in the first place, benefitting both the community and the former offender.[271] If punishment is justified when an offender impairs that relationship, then ending its punitive effects should involve a corresponding act by the aggrieved community that has had an opportunity to confront the

266. See Yankah, supra note 26, at 112 (describing how reintegration allows ex-offenders to regain participatory roles within their communities); see also id. at 78 nn.8–9 (referencing authors engaging concepts of retributivism and forgiveness in the modern liberal state).

267. Appleman, Defending the Jury, supra note 253, at 64 (citing Hadar Dancig-Rosenberg & Tali Gal, Restorative Criminal Justice, 34 Cardozo L. Rev. 2313, 2316 (2013)).

268. See id. at 65 ("Redemptive justice fits in well with expressive retribution in that one can agree or insist that just punishment or restitution be exacted and yet still forgive the offender working for his redemption at the end of the punishment.").

269. Bibas, Forgiveness in Criminal Procedure, supra note 261, at 332 (citing Jean Hampton, Forgiveness, Resentment and Hatred, *in* Forgiveness and Mercy 35, 35–38 (1998)).

270. See Appleman, Defending the Jury, supra note 253, at 67 (noting the need to "add[] a redemptive view of the relationship between transgressor and society that has a strong focus on reconciliation and reintegration").

271. See Bibas, Forgiveness in Criminal Procedure, supra note 261, at 334 ("Offenders value the good will of their fellow human beings.").

offender, hear the relevant stories, and seek understanding.[272] This is a deeper understanding of the potential of expungement than existing law, which emanated from the risk-based paradigm pervading the administration of the system.[273] But it more accurately represents the effect of the remedy and provides a framework for thinking through adjudication. It also makes sense of the difference between expungement and a pardon, which loosely maps the difference between forgiveness and mercy.[274]

But even if this conception of expungement goes too far, it is still possible to conceive of expungement as a grant of mercy, albeit via a different procedure than a pardon. Mercy involves the dispensing of an unwarranted gift that does not undercut justice.[275] As one applicant for a pardon in Minnesota stated, "I want to be forgiven. I just want to be forgiven."[276] In the expungement context, who should give the gift of mercy? Should it be the individual party harmed, the broader community, or the state? Which is more in touch with, and better positioned to balance, the interests and needs of "offenders, victims, and community members"?[277] Which party is in more of a relationship with the offender?[278]

Note that conceiving expungement as redemptive by virtue of being the product of forgiveness or mercy solidifies the preeminence of the community more broadly, and in individual cases, victims. This enables expungement adjudication to properly reflect the *personal* relationships inherent to matters of criminal justice, which should be both social and individualized.[279] It requires the community to determine the price and value of expungement in a way that is more onerous than existing

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272. See id. at 336 (discussing how many crime victims want to share their stories with the offender and receive an apology for the harm caused).

273. See Murray, Retributive Expungement, supra note 10, at 681–87 (discussing risk-based premises underlying expungement remedy).

274. See Bibas, Forgiveness in Criminal Procedure, supra note 261, at 332–33 (characterizing forgiveness as involving internal emotional transformation and mercy as the result of an unwarranted gift).

275. This is a complicated concept with lots of history. As Bibas notes, "There is no tension between justice and . . . mercy; mercy becomes a way to individualize justice." Id. at 333 n.14.

276. Dan Barry, 'I Want to Be Forgiven. I Just Want to Be Forgiven.', N.Y. Times (Oct. 15, 2023), https://www.nytimes.com/2023/10/15/us/minnesota-board-of-pardons.html (on file with the *Columbia Law Review*) (last updated Oct. 17, 2023) (chronicling the stories of several pardon applicants in Minnesota).

277. Bibas, Forgiveness in Criminal Procedure, supra note 261, at 333.

278. See Appleman, Defending the Jury, supra note 253, at 68 (referencing how community adjudication adds the relational dynamic to criminal justice that traditional notions of deontological retributivism lack).

279. See supra section III.C.1 (noting the restorative theory of punishment).

expungement law, but also likely to be more fruitful.[280] It also diverges from existing pardon practices that locate decisional authority in politically appointed boards or officials.[281]

3. *State Responsibility and Reintegration.* — Should the state facilitate reentry considering the criminal records apparatus? Bibas once wrote that "[c]ontinued [governmental] publicity is simply punishment without end,"[282] which is problematic on proportionality grounds. Similarly, Professor Ekow Yankah has asked, "What does a liberal democracy owe to even those citizens it rightfully punishes?"[283] This section argues that the state must facilitate—at least through procedural means—determinations about the persistence of public criminal records and that the best way to do that is through a body that most closely represents popular will. This corresponds to two realities: First, that what distinguishes crime from tort is its "public," intangible, and order-transgressing harm;[284] and second, that permanent, nonofficial punitive consequences that public records facilitate imply an "irrevocabl[e] breach[]" that simply is not present with most crimes and goes beyond the boundaries of proportionality.[285]

Yankah has written about a right to reintegration, arguing that the "civic equality" justifying state-inflicted punishment simultaneously demands state responsibility to aid reintegration after punishment has ended.[286] Similarly, criminologist John Braithwaite has called for incremental reintegrative systems that simultaneously exact desert and prepare offenders to return to society.[287] The argument builds from core premises relating to the justifications for punishment, merging traditional notions of retributivism with the egalitarian premises supporting liberal, democratic government.[288] But the focus is the "civic life" of all involved, including the state, offender, and broader public, all of whom were "made for citizenship."[289] In short, Yankah argues that a "republican" justification

280. See Rachel E. Barkow, Administering Crime, 52 UCLA L. Rev. 715, 750–51 (2005) (distinguishing voter judgments about punishment at the beginning and end of criminal processes); Murray, Completing Expungement, supra note 37, at 1230–33 (emphasizing the importance of community members' participating in reintegration).

281. See infra section III.E.2.

282. Bibas, Forgiveness in Criminal Procedure, supra note 261, at 343.

283. See Yankah, supra note 26, at 76.

284. See R.A. Duff, Answering for Crime: Responsibility and Liability in the Criminal Law 141 (2007) (defining a public wrong in criminal law).

285. See Yankah, supra note 26, at 106.

286. See id. at 75.

287. See John Braithwaite, Crime, Shame and Reintegration 54 (1989).

288. See Yankah, supra note 26, at 78–80 (discussing how reintegration requires the state attempting to restore the offender to their status as a citizen in good standing).

289. Id. at 80–81.

for punishment—stemming from the inherently social affairs underlying the law—"produces a commitment to reintegration."[290]

Reciprocal responsibilities characterize punishment. While the community cedes punitive authority to the state, it remains mindful of the possibility of the offender returning to social life.[291] In turn, upon the completion of punishment, the state has the responsibility to assist the community in its determinations as to reintegration.[292] As mentioned elsewhere, this cuts against libertarian sensibilities in American culture, which do not conceive private duties to those punished upon the completion of their punishment.[293] But the effects of this logic are not only questionable philosophically—as Yankah suggests—but likely to result in permanent incapacitation that undercuts the very sociomoral underpinnings and democratic legitimacy of the law itself.[294]

But how can the state exercise this reciprocal, liberal democratic responsibility in the expungement context? Yankah suggests waiting periods and then permanent erasure as the default rule to aid reintegration.[295] But that short-circuits the popular involvement that the "civic equality" underlying his theory portends. Because conviction-based expungement lies directly at the convergence of punitive effects permitted by the state and reintegration, democratic processes for adjudicating make sense.[296] That convergence is complicated and difficult to disentangle; as such, it is precisely the type of endeavor in which community values and priorities need to be front and center, with community members engaging in the messy demands of republicanism. Foregoing popular involvement

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290. See Id. at 80 (noting an "active duty on the part of the state to return the punished to their role as a functioning citizen" (citing Antje du Bois-Pedain, Punishment as an Inclusionary Practice: Sentencing in a Liberal Constitutional State, *in* Criminal Law and the Authority of the State 199, 212 (Antje du Bois-Pedain, Magnus Ulväng, & Petter Asp eds., 2017))); see also id. at 82 ("This republican view of criminal law, however, makes clear that criminal law represents a reciprocal duty that flows between a citizen and their civic community.").

291. See id. at 83.

292. See id. at 85 ("[S]tate punishment is best justified by the need to preserve living together as civic equals. But this same justification requires recognizing the offender's right to be reintegrated into our civic society, lest she understands herself as in permanent conflict with the polity."); see also Paul H. Robinson & Muhammad Sarahne, After the Crime: Rewarding Offenders' Positive Post-Offense Conduct 24 New Crim. L. Rev. 367, 385 (2021) (referencing "giv[ing] reformed offenders the credit they deserve").

293. See Yankah, supra note 26, at 76–79 (discussing competing theories of punishment that ignore the holistic treatment of someone punished after *formal* punishment).

294. See id. at 84 ("To fail to do so is to institute a system requiring either the constant permanent removal and quarantine of those running seriously afoul of the law, or allowing them to languish as a permanent underclass among us.").

295. Id. at 107 ("A state committed to the full reintegration of citizens should have the permanent erasure of one's criminal history as its default rule.").

296. See Robinson & Sarahne, supra note 292, at 389–90 (noting how such determinations involve value judgments of the community, meaning a "jury of some sort" would be the ideal venue).

denies the democratic legitimacy that is forged when the community determines the acceptable boundaries of the effects of criminal law in this context. While this argument is at its weakest for the least serious criminal records—such as arrest records that are sometimes created by the act of a single police officer and based on a low quantum of evidence—it gains strength as the stakes of the endeavor increase.

In contrast, the current situation permits the state alone to make these complicated and nuanced choices, thereby precluding community involvement in reintegration determinations. Automatic expungement by legislative fiat and discretionary expungement excludes the community from judicial determinations. The state is therefore discharging a portion of its reciprocal duty to adjudicate reintegration but not fully honoring its inherently democratic character. As mentioned above, this is problematic on historical grounds. Put in modern terms, it undercuts the qualitative and procedural justice value of popular adjudication. As mentioned below in section III.D, it ignores empirical support for the proposition that not only should the public do this, but that it can.

D. *The Empirical Case From Public Attitudes*

A partial justification for the trend toward broader expungement is the premise that the public cannot be trusted to make decisions about criminal record history information because that same public is responsible for the era of harsh criminal justice policy in the latter half of the twentieth century.[297] A cottage industry of background check companies and online searches demonstrates there is a thirst for criminal history information[298] and private actors utilize it, regardless of whether it is legally regulated.[299] Skeptics of democratizing criminal procedures, such as Professor John Rappaport, suggest there is a "leniency myth" and that the data is less conclusive than advertised.[300] Yet there is reason to believe that the public can handle this degree of participation in expungement adjudication of the complicated and difficult cases. Expungement law, by foreclosing public adjudicating, has seemingly acted upon a false dichotomy: incorporate the public and risk few expungements versus cut out the public and maximize expungement. But is it really the case that public involvement in expungement adjudication forecloses a generally permissive expungement regime? This section, pointing to data on attitudes toward expungement, suggests that the public can handle the

297. But see Joanna Mattinson & Catriona Mirrlees-Black, Attitudes to Crime and Criminal Justice: Findings From the 1998 British Crime Survey 34–44 (2000) (noting leniency in sentences recommended by victims of crime).

298. See Lageson, supra note 5, at 91–112 (describing situations in which internet users seem to enjoy trafficking in criminal record information).

299. See Roberts, supra note 5, at 331 (describing effect of background checks on employment prospects for applicants and why expungement is necessary).

300. See Rappaport, supra note 35, at 759–74 (questioning generic and particularized leniency by lay actors).

nuanced decisionmaking expungement requires in the same way that the data indicate that the public can handle complex sentencing determinations.

Recent empirical research relating to criminal recordkeeping and expungement suggests that public attitudes toward expungement parallel public attitudes toward criminal sentencing. Generally, the public recognizes that recordkeeping, while necessary, should have a clear shelf life. Second, the public can sort the most expungement-worthy records from the least expungement-worthy, loosely paralleling the moral line indicated by the state statutes referenced in Part II. Third, in many cases, the public comes out close to where existing expungement statutes come out. Put simply, the public can handle expungement adjudication.

The work of Robinson on sentencing and Professor Francis Cullen on recordkeeping and expungement is instructive here. First, the punitive excess that characterizes the latter stages of the twentieth century was not the norm for most of the history of the American criminal justice system.[301] More pointedly, public attitudes diverge from the harsh sentencing practices of the past fifty years.[302] While the public tends to draw a line between violent and nonviolent offenses in terms of openness to reentry, there is complexity.[303] For example, Professors Kellie Hannan, Francis Cullen, and others have shown that something they dub a "Shawshank redemption effect" exists in the field of sentencing and reentry: Regardless of when the offender committed the crime and offense seriousness, the public generally supports second-look sentencing for those who commit crimes relatively early in life.[304] Robinson and his collaborators have shown that the public understands the significance of criminal law-based condemnation and the nuance within blameworthiness determinations.[305] Their findings show results that indicate a balancing approach to meting out punishment, calibrating notions of desert to offense and harm seriousness with layered understandings of the utility of

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301. See Stuntz, supra note 26, at 33–34 (showing a significant spike in incarceration rates by the year 2000 when compared to 1880–1970).

302. See Burton et al., supra note 26, at 123–32 (noting public support for moderate, "intermediate" sanctions and rehabilitative efforts rather than pure incarceration).

303. Cullen et al., supra note 26, at 8 (observing that "[e]ven when expressing punitive opinions, people tend to be flexible enough to consider a range of sentencing options").

304. See Kellie R. Hannan, Francis T. Cullen, Amanda Graham, Cheryl Lero Jonson, Justin T. Pickett, Murat Haner & Melissa M. Sloan, Public Support for Second Look Sentencing: Is There a Shawshank Redemption Effect?, 22 Criminology & Pub. Pol'y 263, 280 (2023) (studying "global and specific support" for second-look sentencing after it was implemented in Washington, D.C., and finding that the majority of the public supported the policy).

305. See Paul H. Robinson & John M. Darley, Justice, Liability, and Blame: Community Views and the Criminal Law 210 (1995) ("One explanation is that the subjects want to express their disapproval of the person's conduct but feel that the person is not sufficiently blameworthy to be punished for the conduct.").

punishment. In short, the public is cognizant of desert and risk.[306] Robinson and his colleagues have used their findings to support the notion that public involvement in adjudication contributes to legitimacy and stability for the criminal law and its limits.[307] By contrast, most expungement regimes operate exclusively from risk-based premises to inform the merits of adjudication and leave those determinations entirely to insiders.

In another study, Professors Cullen, Alexander Burton, and Leah Butler tested public attitudes toward rehabilitation and redemption rituals as a matter of corrections policy.[308] The project was designed to determine whether there was public support for Professor Shadd Maruna's theory that such rituals have a positive effect on lowering recidivism rates by allowing the ex-offender to forge a new identity and have the public, through a public ceremony, validate it.[309] That theory helped spawn the thousands of "problem-solving" courts in the United States, which typically respond to particular subsets of persons contacting the system, such as through substance abuse or due to mental illness.[310] Those programs, administered by courts or correctional systems, culminate in formal ceremonies marking completion.[311]

Butler, Cullen, and Burton argue that the data "reveal substantial belief in offender redeemability and support for rehabilitation ceremonies and certificates."[312] Roughly fifty percent of respondents strongly agreed that "*[a]fter time served*, an offender should have a clean slate and be able

306. See id. ("[I]f one sees the criminal law as having dual roles (of both announcing rules of proper conduct and adjudicating violations of those rules) and, further, sees desert as the primary guide for assessing punishment, then this sort of judgment of 'improper conduct, no punishment' makes more sense.").

307. See Kleinfeld, Manifesto of Democratic Criminal Justice, supra note 194, at 1409 (referencing how "[t]he costs and benefits of crime and punishment must fall together into the hands of those with control over the criminal system"); Robinson, supra note 32, at 55–56 (discussing how criminal justice systems that enjoy public support tend to foster greater public trust); Paul H. Robinson & John M. Darley, Intuitions of Justice: Implications for Criminal Law and Justice Policy, 81 S. Cal. L. Rev. 1, 38–48 (2007) (describing how upholding the criminal justice system's credibility depends in large part on adhering to public opinion); Robinson & Darley, Utility of Desert, supra note 218, at 456–58 ("[T]he criminal law's moral credibility . . . is enhanced . . . if it assigns liability and punishment in ways that the community perceives as consistent with the community's principles of appropriate liability and punishment.").

308. Butler et al., supra note 215, at 39 ("[T]he current project explores the extent to which the American public would support the implementation of rehabilitation ceremonies, including certificates.").

309. See Shadd Maruna, Making Good: How Ex-Convicts Reform and Rebuild Their Lives 12 (2001).

310. See Butler et al., supra note 215, at 40.

311. See id. (describing how drug courts throughout the United States carry out the kinds of ceremonies Maruna proposed as part of their graduation ceremonies).

312. Id. at 39.

to move on with their life."[313] Nearly eighty percent agreed that ex-offenders can change and rejoin the community.[314] At the same time, the authors were quick to note that the respondents did not seem to adopt a "[p]ollyannaish view of offenders."[315] Instead, they "seem[] to have a generally realistic picture of the challenges of inmate reform."[316] Most importantly, for the purposes of this section, nearly eighty percent supported ceremonial validation of reentry with community involvement.[317] Furthermore, the respondents with demographic attributes most traditionally associated with more punitive approaches to criminal justice issues did not differ significantly from these findings.[318] As the authors put it, "[t]hese results indicate that there is a widespread consensus among the American public supportive of providing a *formal* means of offender redemption."[319]

Cullen and his collaborators have made similar findings in the field of expungement. Cullen, Burton, and others have shown through their research that public attitudes generally support expungement for almost all nonviolent crimes, especially when the petitioner has demonstrated rehabilitation—either affirmatively or through the passage of time without recidivating.[320] The results also indicate that public safety concerns dominate the thought processes of the participants, who simultaneously support the concept of public criminal records (so long as they are accurate) and expungement.[321] Put differently, the public can understand the stakes—the government and petitioners' interests—and balance them accordingly.[322]

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313. Id. at 42 (emphasis added).

314. Id.

315. Id. at 43.

316. Id.

317. Id. (referencing "widespread support . . . for both rehabilitation ceremonies (81.9 percent agree) and certificates of rehabilitation (79.4 percent agree)" in which "the public is willing to grant them the possibility of being declared rehabilitated and of recapturing all rights and privileges attached to full-fledged citizenship").

318. See id. at 43–44 (noting that nearly seventy-five percent of "conservative" respondents supported these measures).

319. Id. at 44–45 (emphasis added) ("[N]ational-level opinion data show[] that the public supports the reforms of rehabilitation ceremonies and certificates that restore offenders officially to full citizenship. In short, for those who are meritorious, Americans are willing to offer them *true redemption*. The generosity is widespread and cuts across political lines . . . .").

320. See Burton et al., supra note 26, at 126 (measuring the increase in public support for expanded expungement practices in terms of the number of states who have extended expungement eligibility in recent years).

321. See id. at 144.

322. See id. at 135–36 (noting that seventy-five percent of respondents agreed with restricted criminal records access for nonviolent crimes and ninety-two percent of respondents desired accurate recordkeeping by government agencies).

A deeper dive into this data indicates general support for the expungement of convictions, especially after certain periods of time. But the public also differs on that length of time, usually according to the seriousness of the offense. Respondents identified several factors that might suggest worthiness for expungement, indicating the ability to engage in case-by-case judgment. Like Robinson, Cullen and his collaborators did not find variations in approach or key findings according to demographic differences, including "based on political values or sociodemographic factors."[323] The community seems completely capable of making the macro, risk-based determinations currently made by legislatures or discretionary actors case-by-case.[324]

These data suggest that at the very least attitudes toward expungement come close to existing legislative approaches to expungement, meaning little would be lost by deferring decisionmaking to the community. Of course, there may be transaction costs that lower the expungement rate in situations in which legislatures have decided it should be automatic. But there is nothing to suggest that community members cannot engage in the sort of balancing that justifies community involvement in other settings.[325] Cullen and Burton put it this way: "Americans believe in second chances, especially for those whose past offenses and sustained good behavior signal that they no longer pose a threat to public safety."[326]

E. *The Practical and Political Case*

In addition to the reasons above, there are two practical reasons for incorporating the public into expungement determinations. First, doing so fits with broader calls for restoring popular participation in criminal adjudication. Second, and more practically, it responds to the enduring challenges of the pardon process, which provides little relief for those who have paid their debt.

1. *Participatory Criminal Law.* — Another component underlying the palatability of increasing participation in the expungement process relates to the current criminal justice moment more broadly. Conferences and

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323. Id. at 138.

324. See id. at 139 (outlining the predicted levels of support for policies expunging criminal records).

325. See Bibas, Political Versus Administrative, supra note 27, at 677 (arguing for placing criminal justice policy in the hands of laypeople given their moral expertise); Bowers, supra note 30, at 1666 (citing Josh Bowers, Blame by Proxy: Political Retributivism & Its Problems, A Response to Dan Markel, 1 Va. J. Crim. L. 135, 136 (2012) (noting how intuition and practical reason are essential to judgment); Huigens, supra note 34, at 1438–40 (1995) (referencing practical judgment and determinations of moral blameworthiness).

326. Burton et al., supra note 26, at 144.

symposia have been devoted to the topic.[327] This has led to calls to democratize criminal justice at various stages of the process. Over the past two decades, and given concerns that policymakers and officials are not fully responsive to the desires of the community, scholars have advanced arguments for more public involvement in investigations, charging decisions, the exercise of prosecutorial discretion at various stages, bail determinations, plea bargaining, defense activity, and sentencing.[328] Further, Tyler's work indicates that the overall legitimacy of the criminal legal system corresponds greatly to the degree of stakeholder buy-in and trust.[329]

On the political side, in addition to bipartisan efforts to expand expungement reform, there has been coordination between various constituencies to engage in criminal justice reform. The First Step Act represents one example at the federal level.[330] At the state level, coalitions have joined forces to decriminalize certain types of activities.[331] The Sentencing Commission also has revised the Sentencing Guidelines and sought to clarify issues bubbling in the circuits. Think tanks and policy organizations have critiqued the expansion of the criminal law,[332]

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327. See, e.g., Symposium, Democratizing Criminal Law, Nw. U. L. Rev. (2016); Symposium, Relief in the Making: The Policy, Implementation, and Impact of Rights Restoration Laws, Drug Enf't & Pol'y Ctr. Ohio St. Moritz Coll. of L. (2024).

328. See, e.g., Meares, supra note 24, at 1532–34 (arguing for improved procedural justice in policing to enhance democratic participation); see also Appleman, The Plea Jury, supra note 24, at 741–50 (arguing for plea juries); Harmon, supra note 24, at 768–80 (critiquing reliance on courts and calling for utilization of other institutional actors to hold police accountable); Hessick & Morse, supra note 24, at 1570–79 (questioning viability of electoral strategies for prosecutorial reform); McConkie, supra note 24, at 1065–86 (proposing various jury-like bodies to supervise plea bargaining); Rakoff, supra note 24, at 1435 (suggesting prosecutors should occasionally serve as defense counsel to communicate the scope of prosecutorial power); Simonson, Bail Nullification, supra note 24, at 599–611 (suggesting "community bail funds" to hold judicial actors accountable); Tyler, From Harm Reduction, supra note 24, at 1555–60 (arguing for policing initiatives that promote public trust).

329. See Tyler, Procedural Justice, supra note 224, at 286 (explaining how people are more likely to adhere to the rules when they accept the legal authorities).

330. Ames Grawert & Tim Lau, How the FIRST STEP Act Became Law—And What Happens Next, Brennan Ctr. for Just. (Jan. 4, 2019), https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next [https://perma.cc/8RNL-5K2W] (explaining how compromises and effort from various groups was vital to bringing the FIRST STEP Act into being).

331. Most of this activity has involved decriminalizing activities relating to controlled substances. See State Drug Law Reform, Nat'l Ass'n Crim. Def. Laws., https://www.nacdl.org/Landing/DrugLaw#State%20Reform [https://perma.cc/R6W8-GDDD] (last visited Aug. 17, 2024) ("As of October 2023, thirty-one states and Washington D.C. have decriminalized simple possession of marijuana.").

332. See Timothy Lynch, Overcriminalization, *in* Cato Handbook for Policy Makers 193, 193–99 (8th ed. 2017) ("Policymakers at all levels of government have criminalized so many activities that it should come as no surprise that our courthouses are clogged with cases and our prisons are overflowing with inmates."); Heritage Explains Overcriminalization,

prosecutorial power,[333] indigent defense resources,[334] and disproportionate sentencing regimes.[335]

With respect to criminal records policy, scholars, policymakers, legal aid organizations, and others have combined to increase awareness of the deleterious effects of a public criminal record. Organizations like the Vera Institute of Justice,[336] Cato Institute,[337] and Heritage Foundation[338] have

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Heritage Found., https://www.heritage.org/crime-and-justice/heritage-explains/overcriminalization [https://perma.cc/6N7S-RY8T] (last visited Aug. 17, 2024) ("'Overcriminalization'—the overuse and abuse of criminal law to address every societal problem and punish every mistake—is an unfortunate trend."); Overcriminalization, Nat'l Ass'n of Crim. Def. Laws., https://www.nacdl.org/Landing/Overcriminalization [https://perma.cc/FBJ9-2J9L] (last visited Aug. 17, 2024) ("[O]ur nation's addiction to criminalization backlogs our judiciary, overflows our prisons, and forces innocent individuals to plead guilty not because they actually are, but because exercising their constitutional right to a trial is prohibitively expensive and too much of a risk.").

333. See Prosecutorial Reform, ACLU Pa., https://www.aclupa.org/en/issues/criminal-justice-reform/prosecutorial-reform [https://perma.cc/395Y-2TDQ] (last visited Aug. 17, 2024) ("Prosecutors have used their power to pack jails and prisons. And it has taken decades, billions of dollars, and thousands of laws to turn the United States into the largest incarcerator in the world."); Prosecutorial Reform, Brennan Ctr. for Just., https://www.brennancenter.org/issues/end-mass-incarceration/changing-incentives/prosecutorial-reform [https://perma.cc/4VFS-YNBZ] (last visited Aug. 17, 2024) ("In many cases, spurred by punitive policies that create incentives to put people behind bars, [prosecutors] have fed the epidemic of mass incarceration plaguing the United States.").

334. See, e.g., Norman Lefstein, A Broken Indigent Defense System: Observations and Recommendations of a New National Report (Apr. 1, 2009), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/spring2009/a_broken_indigent_system_observations_and_recommendations_of_a_new_national_report/ (on file with the *Columbia Law Review*) (detailing how the failings of indigent defense systems are denying justice to the poor and adding to the just of the judicial system).

335. See Federal Sentencing Reform, ABA, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/criminal_justice_system_improvements/federalsentencingreform/ (on file with the *Columbia Law Review*) (last visited Aug. 17, 2024) (describing the "[o]ver-reliance on prison" that characterizes the federal prison sentencing regime); Sent'g Project, https://www.sentencingproject.org/ [https://perma.cc/EGG7-MQAM] (last visited Aug. 17, 2024) (describing participation in the Second Look Network which "provid[es] direct legal representation to incarcerated individuals seeking relief from lengthy or unfair sentences").

336. See Jacqueline Altamirano Marin, Erica Crew & Margaret diZerega, Looking Beyond Conviction History: Recommendations for Public Housing Authority Admissions Policies, Vera Inst. Just. 1–2 (Apr. 2021), https://www.vera.org/publications/looking-beyond-conviction-history (on file with the *Columbia Law Review*) ("Federal policymakers have encouraged [public housing authorities] to rethink limits on public housing for people with criminal conviction histories and to actively address barriers to housing that can reinforce discrimination.").

337. J.J. Prescott & Sonja B. Starr, The Power of a Clean Slate, Regulation, Summer 2020, at 28, 28, https://www.cato.org/regulation/summer-2020/power-clean-slate [https://perma.cc/64VM-PVU5] (researching the effects of expunging criminal records in an effort to facilitate the policy push for expanded expungement laws).

338. Malcolm & Seibler, supra note 74, at 1 (describing the "tenuous relationship" between many collateral consequences and the conviction that prompted them).

joined in calls for thinking more critically about collateral consequences resulting from contact with the criminal system. This follows developing Supreme Court case law relating to collateral consequences, plea bargaining, and the right to counsel.[339] In short, the time is ripe for additional discussion about community involvement in expungement adjudication.

2. *Shortcomings of Boards of Pardons.* — Existing pardon practices are varied and haphazard and do not make a dent in the pervasiveness of public criminal records. There are fifty-one pardon processes in the United States.[340] Some states have organized, regular processes whereas the majority have "uneven" and "irregular" practices.[341] In the jurisdictions where processes are regular, the CCRC considers a thirty percent success rate to be significant. Only seventeen states qualify for this category.[342] Overall, the states with regular processes tend to grant more applications. The CCRC reports that seventeen states, including Alabama, Connecticut, Georgia, and South Carolina report high pardon rates compared to other jurisdictions.[343] These states have recurring and streamlined processes.[344]

Pardon administration varies in terms of structure as well. They involve little direct public involvement. A handful of states opt for an independent board with terms of service for those appointed to the board. For example, in Alabama, an independent board is appointed by the Governor.[345] Connecticut has a similar arrangement.[346] Board composition

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339. See Lafler v. Cooper, 566 U.S. 156, 169–70 (2012) ("[H]ere the question is . . . the fairness and regularity of the processes that preceded [the trial], which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance."); Missouri v. Frye, 566 U.S. 134, 144 (2012) ("In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations."); Padilla v. Kentucky, 559 U.S. 356, 360 (2010) ("We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.").

340. Restoration Rts. Project, 50-State Comparison: Pardon Policy & Practice, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/ [https://perma.cc/9WXM-YWWH] (last updated July 2024).

341. Id. (noting twenty-eight jurisdictions with "uneven/irregular" or "rare" pardon practices).

342. Id.

343. Id. (noting "significant % of applications granted" in seventeen jurisdictions).

344. See id. (explaining that these states with high grant rates have efficient processes like "[p]ublic hearings at regular intervals").

345. Restoration Rts. Project, Alabama: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restorationprofiles/alabama-restoration-rights-expungement-sealing/ [https://perma.cc/FTL5-GTQY] (last updated Oct. 10, 2024).

346. Restoration Rts. Project, Connecticut: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-

usually consists of other public officials rather than members of the community. For example, Minnesota, which recently underwent pardon reform, has a three-person board consisting of the Attorney General, Governor, and Chief Justice.[347] Applicants are permitted to present their case to the Board who then votes in real time.

Further, most states involve the Governor in some capacity—in either a shared-power arrangement or through some form of consultation.[348] Sometimes the level of gubernatorial involvement hinges on the underlying crime.[349] This form of administration seems based on the idea that political representation is the equivalent of direct participation and that the representatives of the state, rather than the community itself, grant mercy.

IV. PARTICIPATORY EXPUNGEMENT IN PRACTICE

The above arguments support infusing popular participation into some expungement processes. But questions remain. What form would popular participation take? If there is popular involvement in adjudication, what would adjudicatory processes look like? Should involvement in adjudication be coupled with some sort of rulemaking authority? Which convictions, should a petitioner seek expungement, warrant this sort of process? Aside from public processes, how should the private sector, if at all, work to support such processes, whether the results are favorable or not to petitioners? Finally, what might be the major criticisms of such a proposal? This Part explores these questions.

A. *Participatory Expungement Possibilities*

What would participatory expungement adjudication look like in practice? Currently, expungement statutes allocate decisionmaking authority in three ways: (1) to judges; (2) through deference to legislative mandates (for automatic expungement); and (3) to prosecutors (in limited situations involving prosecutor vetoes). While all three actors represent the community, none of them are a complete reflection of it. Participatory expungement would add a fourth decisionmaker: the local community.

This section identifies two possible routes for participatory expungement: popular adjudication and popular rulemaking. Each has advantages and disadvantages. For example, while participatory expungement adjudication allocates decisionmaking authority about

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profiles/connecticut-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/A3JN-V3AZ] (last updated Oct. 14, 2024).

347. Barry, supra note 276.

348. See supra note 340 (noting that in thirty-one states, the governor "shares power" or "may consult" with the pardon board).

349. See supra note 340 (referencing processes in Alabama, South Carolina, Rhode Island, and California).

individual petitions with community members in a very direct way, it risks different results from similarly situated petitioners, raising equality concerns. The seriousness of that concern likely rests on one's faith in public decisionmakers to distinguish between cases properly and consistently. Participatory expungement rulemaking, in contrast, contemplates authorizing community members to make rules for the extraordinary cases currently untouched by legislatures. This could alleviate concerns that like cases will not be treated alike; however, it does not cultivate a similar, direct connection between petitioners seeking reintegration and the community. It is less relational in practice and begs questions relating to power dynamics, composition, and transparency.

To be clear, legislatures will need to decide which route, or combination, best works in their jurisdiction. This section merely lays out the basic contours and considerations relating to both, while raising possible advantages and disadvantages.

1. *Participatory Expungement Adjudication.* — Appleman's work on the viability of plea juries is helpful to conceptualize what this might look like. Appleman advocated for plea juries given that plea bargaining can result in what Langbein referred to as "condemnation without adjudication."[350] Similarly, expungement can result in either continued condemnation without adjudication or insufficiently democratic reintegration. Foregoing public involvement in any expungement adjudication improperly removes the community from a role that the Supreme Court has intimated is crucial to the determination of punishment.[351]

Participatory expungement could take the form of panels drawn from those already called for jury service. These panels would not need to be the size of regular juries, although a large enough number—perhaps seven to nine—would be preferable. Majority votes could determine the outcome.[352] However, unlike regular juries, they would need to serve for an extended period, although periodically. An extended length of service

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350. Appleman, Defending the Jury, supra note 253, at 129 (internal quotation marks omitted) (quoting John Langbein, Land Without Plea Bargaining: How the Germans Do It, 78 Mich. L. Rev. 204, 204 (1978)).

351. Id. at 130–31 (noting communal right that cannot be waived by defendant).

352. As expungement petitions do not adjudicate guilt or innocence, the lack of unanimity likely does not present constitutional concerns. See Ramos v. Louisiana, 140 S. Ct. 1390, 1395 (2020) (noting that the Sixth Amendment requires unanimity in order to convict). There might be good reasons, however, to require unanimity. Unanimity would be a clear statement by the community that reintegration is warranted, whereas majority support might unintentionally convey that the community lacks total confidence in the restoration. On the other hand, requiring unanimity might forestall reintegration due to the inclinations of a small minority, thereby letting a small minority determine normative questions for the entire community. These concerns plague plenty of other democratic arrangements and are not unique to this context. I am grateful to Marah Stith McLeod for raising this point.

would be useful for allowing the panel to adjudicate a range of petitions and communicate the sense of the community during a particular time.

In terms of procedure, petitioners would present their petition to the expungement panel. As these types of petitions would involve criminal records normally beyond the reach of existing expungement statutes, it is important that the presentation be made to the panel as the decider rather than as a bystander. This has important symbolic value: It reduces the space between the party seeking reintegration and the community determining its parameters.[353] Further, it fosters something akin to a relationship, which underlies reintegration. The panel could ask questions about the petitioner's cause and argument for expungement, and dialogue can ensue. This sort of procedure gives petitioners a real opportunity to be heard by their peers rather than the insiders traditionally occupying courts.

Importantly, legislatures that create this sort of adjudicatory process for higher-level offenses would need to contemplate the role of courts in relationship to the expungement panels. For example, when describing the "watchful eye of the court" for plea juries, Appleman notes how courts could reverse decisions that were substantively unreasonable.[354] Legislatures could determine the standard that must be met before a court can intervene to counteract the decision of a panel. Although data suggests decisionmaking by diverse bodies in a group can be superior to other forms of decisionmaking,[355] this sort of backstop seems warranted given concerns relating to bias or inadequate democratic representation on a particular panel.

Legislatures also would need to determine whether they would license such panels to craft their own internal standards for adjudication or not. For instance, a jurisdiction might decide that for a set of crimes beyond the reach of traditional expungement law, the community panel can determine, by its own standards, which petitions are eligible for expungement. Alternatively, a legislature might decide to impart a standard of review to the panel but leave a court with some measure of review authority.

The primary advantage to this approach is that it assigns decisionmaking authority to the community for the most serious expungement matters. Such panels could have final say on the merits of

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353. Appleman makes a similar point when describing the values served by plea juries: "Meaningful lay participation, in the form of a plea jury, would shrink the current distance between the criminal law's 'legitimizing promise and [the] systemic reality' of guilty pleas." Appleman, Defending the Jury, supra note 253, at 137 (alteration in original) (footnote omitted) (quoting Markus Dirk Dubber, American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure, 49 Stan. L. Rev. 547, 551 (1997)).

354. Id. at 135.

355. See, e.g., Cass R. Sunstein, Deliberative Trouble? Why Groups Go to Extremes, 110 Yale L.J. 71, 109 (2000) (explaining how diverse groups bond through pursuit of a common objective rather than other affinities).

expungement petitions for a class of criminal records. Considering the significance of an expungement, that is an empowering possibility. It involves a heavy dose of direct participation in adjudication.

The primary disadvantage is probably the potential for disparate results that do not accord with the desire for equal treatment under the law, which, to be fair, automated expungement does fairly well. What if a panel's decisions in similarly situated cases diverge without apparent justification? Will that undercut the procedural justice gains obtained by installing the process in the first place? Or is that a potential cost worth the risk? Conversely, many expungement processes still require petition-based expungement, permitting judges to render decisions on petitions that might not withstand similar scrutiny. So perhaps the risk of some head scratching results is not all that different than the status quo.

2. *Participatory Expungement Rulemaking*. — While some legislatures may choose to provide community members with the ability to adjudicate petitions directly, an alternative to enhancing popular participation in expungement decisions could involve tasking a large group of community members with rulemaking authority for the most extraordinary cases. Whereas the previous section articulated aspects of participatory expungement *adjudication*, this section describes a different form of popular involvement: participatory expungement *rulemaking*.

Of course, adjudication by an expungement panel seated for an extended period would have some rulemaking effect, at least by publicly signaling which types of petitions it finds acceptable. But a formal rulemaking authority—delegated to a group by the legislature—would have a different effect. Such a body would be tasked with determining how courts, or another decisionmaker, should adjudicate the more complicated expungement matters currently avoided by expungement statutes. In other words, the legislature assigns a commission-style entity with the responsibility to determine which principles, considerations, and standards should govern expungement petitions for the types of cases not currently contemplated by statute.

This panel would have quasi-legislative authority for criminal records the legislature determines it will not authorize expungement for via statute. In other words, legislatures might permit such panels to determine whether the remedy is available to a class of criminal records, but not mandate it. Basically, the legislature delegates expungement rulemaking authority for a subset of criminal records given their connection to the sociomoral underpinnings of the community.

One advantage of this approach is it might be more likely to result in similar treatment for similarly situated cases. The body could determine which types of records are eligible for expungement or not, full stop. This might result in some hardship for some potential petitioners, but that is no different than the results of legislative action with any piece of legislation relating to expungement. There are some winners and some

losers. A secondary advantage, however, is that decisionmaking authority about eligibility is less removed from the broader community than the legislature.

Of course, a disadvantage is that this might result in cookie cutter approaches that do not account for the unique circumstances presented by petitioners. In this sense, equal treatment and individualized treatment might be in conflict. Another potential disadvantage involves determining the personnel tasked with this rulemaking. This sort of body is likely to exist for a longer term, thereby meaning a more static decisionmaking apparatus. The stakes of membership in the rulemaking entity thereby go up considerably, whereas there could be a higher rate of turnover in the panels tasked with participatory expungement adjudication.

B. *Which Convictions?*

Part II identifies the relatively bright line located by legislatures with respect to which convictions have been made eligible for expungement. Essentially, legislatures—while increasing eligibility overall and broadening the number of criminal records that are eligible for automated expungement—have not opened the door to serious, nonviolent felonies, violent felonies, and crimes relating to breach of the public trust. This is fully defensible and understandable for several reasons.[356]

Legislatures have shown little appetite for extending expungement to this class of crimes. One motivation is likely sociomoral: These crimes are the easiest to point to as causing the most public and private harm. Additionally, these happen to be the crimes—or related to those crimes—whose adjudication traditionally was reserved to public juries as part of enforcement of the criminal law.[357] Third, there is potentially serious political risk with going down this road.[358]

The degree of public involvement in expungement adjudication should correlate with the degree of sociopublic harm associated with the criminal record itself. For criminal records that are generated mostly via administrative measures, like an arrest record, then primarily administrative solutions make sense. Professor James Jacobs, in *The Eternal Criminal Record*, suggests how singular police interactions that result in an arrest can create an *eternal* record.[359] Doing so would permit administrative

356. See supra sections II.A–.B.

357. See United States v. Gaudin, 515 U.S. 506, 510 (1995) (discussing the prominence of public adjudication through the jury trial).

358. See Paul Demko, Jeremy B. White & Jason Beeferman, Big Blue Cities Are Embracing Conservative Anti-Crime Measures. Here's Why., Politico (Mar. 7, 2024), https://www.politico.com/news/2024/03/07/liberal-cities-crime-policies-00145532 [https://perma.cc/3VWC-4L62] (describing the political fallout for legislators showing mercy in criminal policy).

359. See Jacobs, supra note 5, at 13–16.

abuse in some cases without democratic accountability, running afoul of the sensibilities underlying the Fourth Amendment, due process, and fairness overall.

For criminal records that are generated with a mix of administrative and popular activities, including public representatives like prosecutors and judges, then hybrid processes make sense. Prosecutorial, defense, and victim involvement are warranted because they were part of the initial adjudication, even if it occurred through the existing plea bargaining reality. Finally, for criminal records that relate to the most serious crimes, typically involving the sociomoral fabric of the community, then the degree of community involvement in determinations should increase. The latter holds even though most of those cases, in the modern system, are resolved by plea deal. Because even in those cases, the prosecutor has assumed the adjudicatory role traditionally reserved and originally intended for the community.

Moving forward, legislatures should take these principles into mind when thinking about *how* the remedy might be expanded. As mentioned above, expungement reformers are at a crossroads. If they plan to push for extension of the remedy to even more serious crimes, they should take seriously the arguments for public involvement. How expungement comes about matters.

Further, and in addition to the adding process, there is the more urgent question of *when* someone with a serious conviction might be eligible. Here, legislatures can draw from what they are already doing, particularly with waiting periods. But when crafting waiting periods, legislatures should do more than simply defer to the risk-based paradigm that pervades the construction of waiting periods currently. Instead, legislatures need to consider the competing rationales for punishment—including the limiting features of retribution—when determining waiting periods.[360] Injecting a retributive lens into expungement waiting periods might produce more nuanced results that are also more procedurally just because they accord with public attitudes toward reentry and redemption more broadly.[361]

C. *Private Sector Implementation and Support*

Participatory expungement can entail more than the official acts of government. Because expungement involves a determination by the state about the path to reintegration, there is a realm of private responsibility post-expungement. This is not contingent on whether the maintenance of

360. See Murray, Retributive Expungement, supra note 10, at 709.

361. Id.

public criminal records amounts to punishment or not.[362] Instead, this sphere of responsibility corresponds to a mix of the stigma-based harm of eternal criminal records and responsibilities of individuals in a democratic, criminal legal system.

Here is one way to think about this: As each participant in the community has ceded punitive authority to the state, each participant thereby must be cognizant of the punitive limits of the state, as well as the state's decisions to *permit* reintegration. As written in *Completing Expungement*, "when private actors continue the stigma after the formal limits of the criminal law have been utilized, they are dangerously close to usurping public authority to impose punishment."[363] But even if such private behavior is *not* punishment, membership in a shared, democratic enterprise warrants consideration by private actors of their responsibilities when handling information after an official act of expungement. Moreover, participatory expungement can occur on the front end. In fact, it already is, to some degree, with pop-up clinics, information sessions, and grassroots efforts by communities that seek to alleviate the burdens felt by their members.[364]

These ideas accord with a relational understanding of the underpinnings of the criminal law and punishment. Scholars such as Mary Sigler,[365] R.A. Duff,[366] and others[367] have written extensively about the web of relationships underlying political communities that also implicate the limits of the criminal law. Professor Christopher Bennett has referred to these associations as a "special kind of relationship."[368] Participatory

362. See Murray, Completing Expungement, supra note 37, at 1223 ("[W]hether we classify private holding and usage of already expunged information as formally punitive or not *only* informs the *nature of* the responsibility for handling the information, not whether any responsibility exists at all.").

363. Id.

364. See, e.g., Press Release, Del. Cnty. Pa., Delaware County Office of the Public Defender Hosting Free Expungement Clinic (May 24, 2024), https://www.delcopa.gov/publicrelations/releases/2024/expungementclinic.html [https://perma.cc/7RJ4-VB6A]; PA Law Help, https://www.palawhelp.org/resource/clean-slate-and-expungement-clinics [https://perma.cc/A4HQ-DVKM] (last visited Aug. 17, 2024); Reentry Clinic, Univ. Akron Sch. L., https://www.uakron.edu/law/curriculum/clinical-programs/reentry.dot [https://perma.cc/ZK9Q-XJX8] (last visited Aug. 17, 2024); Set Aside and Expungement Clinic, Cmty. Legal Servs., https://clsaz.org/event/set-aside-and-expungement-clinic-20/ [https://perma.cc/MJ5P-CJPW] (last visited Aug. 17, 2024).

365. See Mary Sigler, Humility, Not Doubt: A Reply to Adam Kolber, 2018 U. Ill. L. Rev. 158, 159–62 (discussing role of humility in punishment).

366. See R.A. Duff, Relational Reasons and the Criminal Law 3 (Univ. of Minn. Legal Stud. Rsch. Paper No. 12-30, 2012).

367. Bennett, supra note 50, at 482; Stephen P. Garvey, Restorative Justice, Punishment, and Atonement, 2003 Utah L. Rev. 303, 304–11 (comparing restorative and retributive theories of punishment); Yankah, supra note 26, at 75–82 (noting social bonds underlying criminal law and punishment).

368. Bennett, supra note 50, at 482.

expungement is thus open to private efforts to alleviate the barriers to expungement that contribute to the uptake gap and efforts that accentuate the effects of expungements once they are achieved.

Participatory expungement also contemplates room for private support for expungement petitioners in a way that resembles participatory methods in other phases. The reality is that in any expungement action, to follow Simonson's point, "the people" can be on both sides.[369] Participation from the public can occur in decisionmaking, supportive, and adversarial contexts. Put simply, participatory expungement posits opening the door to actors currently left out. Alternatively, it involves harnessing the resources and creative thinking of actors who might support or oppose expungement in concrete cases.[370]

D. *Potential Issues*

Participatory methods do not come without costs or criticism. Injecting popular participation likely creates resource questions in an already overstressed system. Further, there is the lingering question of whether the community involved in such activity can adequately express the values held by a community given heterogeneity and sub-communities that might be left out on any given occasion.[371] Finally, incorporating the community might result in risky tradeoffs that short circuits the capacity for individual relief that already is achievable under existing expungement law. In short, even if ideal involvement cannot be achieved, is it *worth* it?

The form participatory expungement takes likely determines the degree of resource challenges faced by jurisdictions. Participatory expungement rulemaking requires creating new quasi-judicial legal apparatuses that must be staffed and guided by internal norms and rules. In contrast, participatory adjudication models could take advantage of existing structures relating to constructing juries. Although lots of community members decline or avoid jury service,[372] there are still a lot of potential jurors floating around courthouses. Why not take advantage of them?

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369. Simonson, The People, supra note 33, at 286–94.

370. The literature on participatory defense is expansive and extensive. See generally Russell M. Gold & Kay L. Levine, The Public Voice of the Defender, 75 Ala. L. Rev. 157 (2023) (arguing for public defense lawyers to utilize social media technology to counteract popular narratives about crime); Janet Moore, Marla Sandys & Raj Jayadev, Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform, 78 Alb. L. Rev. 1281 (2015) (identifying core principles of participatory defense and connecting them to constitutional concepts relating to the right to counsel, due process, and equality); Simonson, The People, supra note 33, at 286–94 (recognizing the role that community members play on both sides of a criminal prosecution).

371. Rappaport, supra note 35, at 739–56.

372. Id. at 754 (noting lower than appreciated yield for mandatory jury service).

The more difficult objection to participatory expungement involves an issue that plagues any democratization argument: how can this proposal account for diverse communities that have lots of different value systems? Further, can the form the participatory model takes adequately account for those values? Finally, will negative externalities result?

Rappaport, in *Some Doubts About "Democratizing" Criminal Justice*, makes a forceful case against the prevailing democratization thesis by questioning whether community expressions of sociomoral values are practically achievable and, if so, desirable given the data on lay attitudes toward punishment.[373] Rappaport sees a few problems with deference to the community. First, communities are not homogeneous and consist of lots of different groups with lots of different values.[374] Although there may be agreement on big picture principles, like Robinson's work suggests, differences likely exist for nuanced applications of those principles. After all, "laboratory vignettes differ meaningfully from actual jury service."[375] Social mobility, whether horizontal or vertical, contributes to heterogeneity and is unlikely to go away.[376] Additionally, whether the public is informed or not about the decisions it makes suggests the results might not be fully deliberative.[377] And moral panics might lead to huge swings in preferences at different times, affecting the justice of individual case determinations.[378] Put simply, the consensus that democratizers laud and revere is unlikely to be found.[379]

A related, but distinct problem, is that deference to community decisionmaking may elevate "dominant voices while muffling others."[380] For example, idealized deliberative decisionmaking might just provide an outlet for the loudest voices to capture the democratic institution, thereby stifling participation by the broader community. This reality contrasts with the ideal notion of deliberative decisionmaking where participants are guided by the common good.[381] As Rappaport puts it, "the 'community values' that appear to emerge from community meetings and the like disproportionately reflect relatively powerful factions of the community."[382]

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373. Id. at 739–56.

374. See id. at 739–45 (arguing that even small, localized communities are not and have never been ideologically homogenous groups able to dole out justice in a fair manner).

375. Id. at 771.

376. Id. at 745–46.

377. Id. at 761 (suggesting the notion of an "informed public" is a myth).

378. Id. at 766.

379. Id. at 744 (questioning whether the data shows consensus on granular issues).

380. Id. at 749.

381. Id. at 748 (referencing philosopher Jürgen Habermas's "ideal speech situation" problem).

382. Id. at 749 & n. 231 (referencing literature discussing louder voices capturing popular institutions).

A third problem involves negative externalities. For example, communities might begin to compete with one another, moving policy to the poles rather than moderating it, like Stuntz, Appleman, and Bibas suggest. Rappaport refers to this as "jurisdictional competition." Some communities, recognizing that the one next door is tougher on crime, might move in that direction, creating an unintentional arms race.[383] In the process, this competition leaves individuals behind.

A few thoughts come to mind with respect to how the styles of participatory expungement contemplated by this paper might respond. First, the form it takes likely determines whether it can persuasively account for these concerns. But more foundationally, it is important to focus on the key argument in this paper: *Expansion* of expungement as a remedy *beyond its current level* should involve popular participation. In other words, some of the concerns articulated above have more force against proposals that seek to replace existing institutional decisionmaking with popular participation to replace bureaucratic harshness with purported lay leniency. But that is not the argument here. The baseline is different; legislatures have drawn a line of demarcation, limiting the remedy of expungement. For example, replacing sentencing judges with sentencing juries or bail judges with bail panels might mean the unintentionally harsh public undercuts the substantive justice aims of reformers. But the proposal contemplates a way to expand the remedy by popular means, not simply replace the means used for an existing process. This is a class of convictions where *no relief is currently available*. The risks are not the same.

Rappaport's concern about institutional capture by the loudest voices seems more present if participatory expungement takes the form of rulemaking. Legislatures might be tempted by the traditional forces that affect politics generally. Power dynamics, interest groups, money, and other factors might affect the composition of the decisionmaking body. Pardon and parole board composition has been criticized on these grounds.[384] To be clear, traditional institutional, singular decisionmakers already face these pressures as well. Prosecutors and judges might feel the heat when adopting positions toward expungement, and legislatures certainly do when deciding how to restrict the remedy. Existing expungement statutes are the products of compromise; some make sense and others do not. So existing expungement structures are not *more* democratic by the critique's own criteria.

On the other hand, participatory expungement adjudication through jury-style panels that utilize existing processes might be less likely to suffer from these problems. Of course, the loudest voices on the panel might dominate the conversation once it begins. To be sure, any given panel

383. Id. at 758.

384. Beth Schwartzapfel, Parole Boards: Problems and Promise, 28 Fed. Sent'g Rep. 79, 80–84 (2015) (detailing shortcomings of parole boards, including political sensitivity).

might not be perfectly representative of the broader composition of the community. But getting divergent views into the room at the start is probably easier. And the entry process, like random selection of jury pools, would ameliorate some concerns about gatekeeping. Moreover, are prosecutors' offices and judicial institutions perfectly representative such that the unilateral authority to propose or veto expungement is warranted? There is an extensive literature on prosecutorial insulation from community views, and office cultures, both for good and for bad.[385]

Further, participatory expungement does not contemplate complete deference to expressions of uninformed will by decisionmakers. Instead, it leaves room for careful crafting of standards of review and judicial backstops given broader concerns about democratic values. In short, and to use Rappaport's language, it can remain open to evidence-based reform and democratic values at the same time.[386] For example, participatory expungement adjudication or rulemaking leaves room for informing the lay participants about the risks of recidivism for someone with a petitioner's profile, but it does not mandate that they dictate a particular result.[387] Legislatures do not have to simply punt to community decisionmaking and walk away. Instead, they can partner with them, recognizing room for expertise and lay perspectives and how each brings something to the table.[388]

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385. See Jeffrey Bellin, The Power of Prosecutors, 94 N.Y.U. L. Rev. 171, 178 (2019) (examining inconsistencies in how prosecutorial authority is discussed and perceived); Bibas, Prosecutorial Regulation, supra note 210, at 963 ("Simply commanding ethical, consistent behavior is far less effective than creating an environment that hires for, inculcates, expects, and rewards ethics and consistency."). See generally Bruce Green, Access to Criminal Justice: Where Are the Prosecutors?, 3 Tex. A&M. L. Rev. 515 (2016) (arguing for enhanced prosecutorial duties in securing just results for defendants in criminal trials); Bruce Green, Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers, 62 Hastings L.J. 1093 (2011) (discussing potential solutions to the lack of clear prosecutorial professional standards); Bruce Green & Alafair S. Burke, The Community Prosecutor: Questions of Professional Discretion, 47 Wake Forest L. Rev. 285, 295 (2012) ("Community prosecution strategies may be inconsistent with ordinary principles regarding how prosecutors should employ their discretion, and the departures may not be sufficiently justified by the social utility of these strategies."); Bruce Green & Ellen Yaroshefsky, Prosecutorial Accountability 2.0, 92 Notre Dame L. Rev. 51 (2016) (discussing the emergence of criticism directed at the prosecutorial system and expanding the definition of misconduct beyond standard legal obligations).

386. Rappaport, supra note 35, at 810 (referencing the 1967 President's Commission on Law Enforcement and Administration of Justice to argue for an evidence-based approach to criminal law questions that also is mindful of broader democratic values).

387. See, e.g., Rachel Barkow, Prisoners of Politics: Breaking the Cycle of Mass Incarceration 167 (2019) (noting how empirically valuable information can lead to informed decisions); see also Daniel Epps & William Ortman, The Informed Jury, 75 Vand. L. Rev. 823, 856–59 (2022) (arguing for informing juries about sentencing ranges prior to adjudication).

388. Rappaport, supra note 35, at 812 (suggesting conversations between experts and individuals can sharpen regulation).

Whether participatory expungement can adequately capture the values in a heterogeneous community is a significant question. Throw in the fact that the community is likely to have changed since the petitioner committed the offense and the issue is even more complicated. The community might have cared a lot about the marijuana possession conviction in 1989 but not so much in 2024. But that issue exists whether the community is tasked with the decision *or* experts *or* judges. Pretending otherwise is odd. Disenchantment with the experts' ability to capture community values is just as real. While critics of democratization are skeptical of the ability to achieve consensus in such settings, they gloss over whether experts can achieve consensus either or whether they adequately represent the values of communities. Communities go back and forth on their preferences, electing tougher and lenient public officials in the same decade. Allowing the practice of expungement adjudication may have an unanticipated effect that forges consensus over time. Perhaps the thirst for consensus presupposes participation, rather than making participation contingent on the existence of consensus. Building a culture of second chances takes time, hard work, and patience—not shortcuts.

Put another way, some prosecutors initiate expungement; others oppose it. Some judges default to expungement; others search for reasons to preserve the records. But for the subset of criminal records that are the subject of this discussion, neither actor has to make a choice because existing law does not ask them to. Letting the community have it first does not entail all the risks that the skeptics of democratization are concerned about in other phases.

CONCLUSION

In some ways, this Essay aims to thread a needle about the future of expungement by connecting the nature of the remedy to how the criminal law does and should reflect the sensibilities of the community. It describes the limits of expungement reform to date and entertains whether the remedy should expand further and, if so, how. The gist is this: If reformers wish to expand the remedy, they should do so mindful of first principles relating to democratic self-determination in the legal tradition and with respect to the criminal law and punishment. That means when offense seriousness increases, popular participation should increase as well. Will this popular participation result in idealized, substantive justice outcomes for the most fervent expungement and criminal justice reformers? Probably not, although that does not exist now either. Could it open one more door to the construction of a culture of second chances? Not entirely, but somewhat. Let the people decide how much and determine the complicated questions in between.

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