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ABSTRACTS

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THE NEW ABORTION *Dov Fox & Mary Ziegler* 1555

In vitro fertilization (IVF) presents a neglected puzzle. IVF is used to create nearly one in forty babies born in the United States each year. But it remains deeply underregulated and has rarely been subject to the usual wrangling on matters of reproduction. IVF's regulatory vacuum gets chalked up to America's polarization over abortion. Yet for half a century, our laws and politics have treated these practices nothing alike. Abortion's explosive partisan battles and sharp restrictions contrast sharply with the low-key, hands-off approach to IVF. Only since 2024 has IVF become a culture-war flashpoint: condemned by major religious groups and social movements; targeted by federal proposals to restrict or promote it by congressional statute or executive order; and upended by state court decisions to treat frozen embryos like born children. IVF's sudden emergence as a site of roiling controversy and intense contestation makes it what this Article calls "the new abortion."

This Article resolves the mystery of IVF's half-century retreat from public discourse and its precipitous appearance on the national scene. It presents the first legal history of IVF's relationship to abortion, drawing on original archives from three privately held collections, two historical societies, four universities, and the Library of Congress. This study chronicles complex dynamics between abortion and IVF and analyzes their significance for American life: family, faith, race, sex, medicine, and science. This Article shows how unforeseen forces after the fall of Roe v. Wade *dislodged the conditions that entrenched IVF's fragile regulatory impasse for decades. This history also uncovers fresh patches of common ground to sustainably govern IVF in ways that enhance clinical transparency, prevent avoidable mishaps, and preserve meaningful access.*

THE ACCOUNTABILITY DEFICIT: WHEN IMMIGRATION DETENTION OBSTRUCTS ONE'S DAY IN CRIMINAL COURT *Tiffany J. Lieu* 1631

The right to have your day in court is foundational to the U.S. criminal legal system. Yet, many noncitizens in immigration detention facing criminal charges are denied this right when ICE routinely fails to produce immigration detainees to criminal court to resolve charges. In immigration proceedings, immigration judges regularly use those unresolved charges to detain and deport. This Article is the first to

examine this obstruction of court access and its implications—a particularly imperative study as recent executive and congressional proclamations foretell a gross expansion of the number of individuals in immigration detention with pending criminal charges.

Immigration obstruction of court access occurs because of an accountability deficit: Neither the immigration jailor nor criminal prosecutor suffers consequences for obstructing court access, and thus the accountability deficit falls on the noncitizen defendant. This Article posits the following three implications. First, noncitizen defendants suffer constitutional criminal procedure violations when obstructed from accessing criminal proceedings. Second, noncitizen defendants are harmed in immigration proceedings because the unresolved criminal charge is used to detain and deport them, perpetuating a cycle of obstruction. Finally, noncitizen defendants' rights are in even greater jeopardy because the jailor and prosecutor are the same entity in the immigration apparatus and are further commingled with the judge. This Article proposes to close the deficit by assigning accountability to criminal and immigration enforcement actors through a two-pronged remedy: dismissal of charges on the criminal side and prohibiting use of the pending charge to detain or deport on the immigration side.

NOTES

THE DECLINE OF SUMMARY REVERSALS AT THE U.S. SUPREME COURT *Kalvis E. Golde* 1695

Summary reversals have a long history at the U.S. Supreme Court. These short, unsigned opinions reverse lower court decisions on the merits without briefing and oral argument on the theory that the decisions below were plainly wrong. Summary reversals used to be a regular occurrence, most often reserved by the Roberts Court for decisions granting post-conviction relief to people who are incarcerated and denying qualified immunity to police and prison officers. In the past four years, however, the number of summary reversals has declined significantly. This Note discusses possible explanations for this trend: time constraints from the shadow docket, the appointment of Justice Amy Coney Barrett, the conservative alignment of the judiciary, and critiques of the Court's institutional role. It also explores the impact of a world with fewer summary reversals, particularly for people on death row.

AN UPDATED PRO CODES ACT: ENHANCING PUBLIC ACCESS TO PRIVATELY COPYRIGHTED LAWS *Ryan Jarratt* 1735

Often, private organizations composed of subject matter experts draft technical standards that describe safety recommendations or "best practices" for certain industries. Legislators and regulators on the federal, state, and local levels will, on occasion, provide legal weight to these privately created standards by incorporating them by reference into the law. Following these standards thus becomes mandatory, but the American people frequently do not have free and unrestricted access to them: The standards' private copyright holders often charge users high fees to even read them. To address this issue, Congress is currently

considering the Pro Codes Act, legislation intended to balance the importance of having these private organizations develop industry standards while also ensuring that citizens have sufficient access to the laws that govern them. The present draft of the legislation, however, falls short of truly providing Americans with access to these critical technical standards. This Note proposes various provisions that would strengthen the Pro Codes Act and more appropriately balance the interests of both standards development organizations and the American public.

ESSAY

CRIMINAL COURT'S DISABILITY *Zohra Ahmed* 1773

Do criminal courts meaningfully accommodate psychiatric disability? A review of competency proceedings across the United States suggests not. In competency to stand trial (CST) proceedings, criminal courts offer a narrow vision of psychiatric disability that excludes many defendants. Ultimately, the institutional context of criminal court undermines even the meager accommodations that the competency framework provides.

CST proceedings are the constitutional accommodations available to disabled defendants if they can establish that they are unable to consult with their lawyers or if they do not have a rational or factual understanding of the proceedings against them.

Criminal court judges and examiners systematically deny recognition to one group of diagnoses: personality disorders (PDs). Even when defense attorneys argue that defendants' PD symptoms impede their ability to collaborate, courts and some forensic experts insist that the defendants are competent. Examiners and courts reframe these difficulties as deliberate acts of subversion and conclude that defendants with PDs choose to be uncooperative. In doing so, they give PDs an exceptional and paradoxical status: They are considered psychiatric conditions, yet their expressions are deemed volitional. This Essay argues that the outcomes of CST proceedings reveal court actors' preoccupation with determining responsibility rather than advancing defendants' trial rights. In the process, courts selectively apply the competency standard, discounting its interpersonal dimensions and prioritizing the accused person's cognitive capacities.

CST proceedings illustrate that it may not be possible for criminal courts to embrace and adapt to the reality of neurodivergence while also pursuing criminalization.

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ARTICLES

THE NEW ABORTION

Dov Fox and Mary Ziegler***

In vitro fertilization (IVF) presents a neglected puzzle. IVF is used to create nearly one in forty babies born in the United States each year. But it remains deeply underregulated and has rarely been subject to the usual wrangling on matters of reproduction. IVF's regulatory vacuum gets chalked up to America's polarization over abortion. Yet for half a century, our laws and politics have treated these practices nothing alike. Abortion's explosive partisan battles and sharp restrictions contrast sharply with the low-key, hands-off approach to IVF. Only since 2024 has IVF become a culture-war flashpoint: condemned by major religious groups and social movements; targeted by federal proposals to restrict or promote it by congressional statute or executive order; and upended by state court decisions to treat frozen embryos like born children. IVF's sudden emergence as a site of roiling controversy and intense contestation makes it what this Article calls "the new abortion."

This Article resolves the mystery of IVF's half-century retreat from public discourse and its precipitous appearance on the national scene. It presents the first legal history of IVF's relationship to abortion, drawing on original archives from three privately held collections, two historical societies, four universities, and the Library of Congress. This study chronicles complex dynamics between abortion and IVF and analyzes their significance for American life: family, faith, race, sex, medicine, and science. This Article shows how unforeseen forces after the fall of Roe v. Wade *dislodged the conditions that entrenched IVF's fragile*

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** Martin Luther King Jr. Professor of Law, UC Davis School of Law. For superlative research and revisions, we owe a debt to the dazzling reference librarians at the USD Legal Research Center—Sasha Nuñez, Julianne Odin, Liz Parker, and Robert O'Leary especially—and to the marvelous student editors of the *Columbia Law Review*. For valuable insights and engagement that have improved these ideas considerably, we thank our generous colleagues at our institutions and elsewhere, in particular: Naomi Cahn, June Carbone, Glenn Cohen, Judith Daar, Hank Greely, Clare Huntington, Natalie Jacewicz, Courtney Joslin, Myrisha Lewis, Margaret Marsh, Serena Mayeri, Michelle Mello, Martha Minow, Kimberly Mutcherson, Alicia Ouellette, Barbara Katz Rothman, Sonia Suter, Deborah Tuerkheimer, and Jonathan Will.

regulatory impasse for decades. This history also uncovers fresh patches of common ground to sustainably govern IVF in ways that enhance clinical trans-parency, prevent avoidable mishaps, and preserve meaningful access.

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"It would be a sad commentary on the American ethos if federal funds could be used for the taking of human life, that is, therapeutic abortion, but not the creation of human life, that is, therapeutic conception."

— Sid Leiman, Statement to the Ethics Advisory Board (1978).[1]

"IVF destroys more embryonic life every year than Planned Parenthood. If you want to defend children's right to life, you must recognize that when it comes to the destroying of embryos, the victimization of children, big fertility does that in numbers that far outpace abortion."

— Katy Faust, North Carolina Family Policy Council (2024).[2]

1. Ethics Advisory Bd., Dep't of Health, Educ., & Welfare, Report and Conclusions: HEW Support of Research Involving Human In Vitro Fertilization and Embryo Transfer 52 (1979), https://repository.library.georgetown.edu/bitstream/handle/10822/559350/HEW_IVF_report.pdf [https://perma.cc/KE7K-XHDU] (quoting Sid Leiman).

2. Video posted by North Carolina Family Policy Council (@ncfamilypolicy), Instagram (June 13, 2024) https://www.instagram.com/reel/C8KdXgAu7yD/ (on file with the *Columbia Law Review*) (statement of Katy Faust).

INTRODUCTION

In vitro fertilization (IVF) frees families from devastating disease and makes biological parenthood possible for those who can't get pregnant on their own—that is, for those who can afford it.[3] Despite its high price tag, this medicine of miracles is responsible for more than one in fifty babies born in the United States, over 85,000 every year.[4]

IVF goes mostly unregulated,[5] but it's not the Wild West that headlines routinely portray it as.[6] The legal landscape of assisted repro-

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3. IVF is too expensive for many Americans who might consider it: A single IVF cycle can cost between $15,000 and $30,000, with more than one cycle often needed to achieve a pregnancy. Marissa Conrad, How Much Does IVF Cost?, Forbes (Aug. 14, 2023), https://www.forbes.com/health/womens-health/how-much-does-ivf-cost/ [https://perma.cc/8BL8-LKGC]. Only about half of women who undergo IVF become pregnant after three cycles. How Many IVF Cycles Are Generally Needed to Achieve Pregnancy?, Milann: Blog, https://www.milann.co.in/blogs/how-many-ivf-cycles-are-generally-needed-to-achieve-pregnancy [https://perma.cc/42GK-SSPP] (last visited Aug. 8, 2025). Roughly seven in ten Americans lack any insurance coverage to defray the costs of the procedure, burdens that fall unevenly by race: While the infertility rate for Black women is almost twice as high as that of white women, 75% of IVF patients are white, and more than 80% have household incomes of more than $100,000. See Lisa Armstrong, Black Women Are More Likely to Experience Infertility Than White Women. They're Less Likely to Get Help, Too, The Guardian (Dec. 10, 2023), https://www.theguardian.com/us-news/2023/dec/10/black-women-infertility-causes-treatment-inequity-healthcare [https://perma.cc/4PZZ-JP9D] (explaining that while Black women are twice as likely to experience infertility as white women, they make up only 4.6% of assisted reproductive technology (ART) cycles); see also Ethics Comm., Am. Soc'y for Reprod. Med., Disparities in Access to Effective Treatment for Infertility in the United States: An Ethics Committee Opinion, 116 Fertility & Sterility 54, 55–56 (2021) (noting that "[t]he majority of patients who undergo IVF in the United States pay out of pocket . . . [and] persons of middle to lower socio-economic status and persons of African-American or Hispanic ethnicity are underrepresented in the population of treated infertility patients"); Katie Watson, Rethinking the Ethical and Legal Relationship Between IVF and Abortion, 334 JAMA 19, 19 (2025) (drawing a contrast between abortion, where 72% of patients are below the poverty line and 59% are Black or Latinx, to IVF, where the majority of users are white and high income). And neither major political party has addressed the obstacles to IVF access. See infra Parts I–II.

4. See Fact Sheet: In Vitro Fertilization (IVF) Use Across the United States, HHS (Mar. 13, 2024), https://www.hhs.gov/about/news/2024/03/13/fact-sheet-in-vitro-fertilization-ivf-use-across-united-states.html [https://perma.cc/5SYR-NS2D] [hereinafter Fact Sheet: IVF Use Across the United States].

5. See Dov Fox, *Birth Rights and Wrongs*: Reply to Critics, 100 B.U. L. Rev. Online 159, 161–62 (2020), https://www.bu.edu/bulawreview/files/2020/07/FOX.pdf [https://perma.cc/J53V-8THW] [hereinafter Fox, Reply to Critics] ("[O]ne in every fifty kids born in the United States today is conceived in a fertility clinic or petri dish. And yet oversight has long remained shockingly low." (footnote omitted)); Emi Nietfeld, America's IVF Failure, The Atlantic (May 2, 2024), https://www.theatlantic.com/ideas/archive/2024/05/america-ivf-regulation-failures/678259/ (on file with the *Columbia Law Review*) (explaining how "the industry goes unregulated, leaving prospective parents with few safeguards and even fewer options when things go wrong").

6. See, e.g., Alexander N. Hecht, The Wild Wild West: Inadequate Regulation of Assisted Reproductive Technology, 1 Hou. J. Health L. & Pol'y 227, 228–29, 252–56 (2001) (noting that, while critics characterize assisted reproduction as a regulatory "Wild West,"

duction is shaped by a host of federal, state, and professional measures.[7] But no authority meaningfully polices IVF providers when, for example, a patient's eggs are fertilized with the wrong sperm, or one couple's embryos are implanted into someone else.[8] Other developed countries take oversight far more seriously, dedicating national agencies to making assisted reproduction safe and effective.[9] Much lighter regulation in the United States makes it a global outlier.[10]

Scholars have long assumed that America's IVF exceptionalism is explained by political polarization around abortion.[11] For more than half a century, however, the governance of IVF in the United States has

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some federal statutes and professional guidelines already impose oversight, undermining claims of a total regulatory vacuum). But see Debora L. Spar, Opinion, Fertility Industry Is a Wild West, N.Y. Times (Sep. 13, 2011), https://www.nytimes.com/roomfordebate/2011/09/13/making-laws-about-making-babies/fertility-industry-is-a-wild-west [https://perma.cc/L42P-SGB8] ("[W]e live in a free market for assisted reproduction, a Wild West of procreative possibilities.").

7. Federal law requires the testing of sperm and eggs donors for communicable diseases and reporting pregnancy success rates, while states license reproductive endocrinologists to ensure that they've completed a three-year fellowship after a four-year OB/GYN residency. See Dov Fox, Birth Rights and Wrongs: How Medicine and Technology are Remaking Reproduction and the Law 26 (2019) [hereinafter Fox, Birth Rights and Wrongs]. Private organizations like the College of American Pathologists visit fertility clinics every few years to accredit them. Still, these regulations are relatively light: Compliance requirements are optional and unenforced, and so is compliance with the practice guidelines that professional societies publish. See id. at 25–26. And courts are often reluctant to recognize reproductive losses or mix-ups as real or serious harms. See id. at 7–8; infra notes 308–311 and accompanying text.

8. See, e.g., Naomi R. Cahn, Test Tube Families: Why the Fertility Market Needs Legal Regulation 13–28 (2009); Lars Noah, Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation, 55 Fla. L. Rev. 603, 648–59 (2003).

9. Examples include the United Kingdom's Human Fertilisation and Embryology Authority and the Canadian Assisted Human Reproduction Agency. See Assisted Human Reproduction Act, S.C. 2004, c. 6, § 21(1) (Can.) (establishing the Canadian Assisted Human Reproduction Agency); Human Fertilisation and Embryology Act 1990, c. 37, § 5(1) (U.K.) (establishing the Human Fertilisation and Embryology Authority).

10. See Erin L. Nelson, Comparative Perspectives on the Regulation of Assisted Reproductive Technologies in the United Kingdom and Canada, 43 Alta. L. Rev. 1023, 1047 (2006) (describing a "complex web of regulatory approaches" and the absence of a "central 'oversight' agency" in the United States, in direct contrast to the United Kingdom's "comprehensive system of regulation").

11. Conventional wisdom says that IVF was consumed by "the charged political climate that resulted from the US Supreme Court's decision to legalize abortion in 1973." Margaret Marsh & Wanda Ronner, The Pursuit of Parenthood: Reproductive Technology From Test-Tube Babies to Uterus Transplants 7 (2019) [hereinafter Marsh & Ronner, Pursuit of Parenthood]. IVF's eclipse by the shadow of abortion politics has crowded out other possible explanations for its underregulation, such as (1) destroying unborn life incidentally, not intentionally, (2) at earlier stages of prenatal development, before there are fingers or heartbeats, (3) by upper-middle-class people who are frequently married and want to have a child. See, e.g., Dena S. Davis, The Puzzle of IVF, 6 Hou. J. Health L. & Pol'y 275, 277–78, 290 (2006) (explaining that the process of IVF "is almost guaranteed to produce embryo wastage" and that the "typical couple . . . in need of IVF is older, married, white, educated, and financially well-off" compared to individuals seeking abortion).

contrasted sharply with the nation's sprawling abortion regulations. Since the first successful IVF birth in the late 1970s, IVF access has evaded sustained attention from either the pro-life or pro-choice movements, or the Republican or Democratic Parties.[12] Until very recently, that is: After 2023, IVF emerged for the first time as a rallying cry for reproductive rights and justice advocates, a lightning rod for leading anti-abortion groups, and the object of condemnation by the largest conservative Protestant denomination.[13]

This dramatic shift might seem even more puzzling because IVF and abortion look very different to many Americans across the ideological spectrum. Some who are deeply committed to abortion rights as medically necessary, even lifesaving, deem IVF merely elective. Meanwhile, abortion opponents who view abortion as life-ending often see at least some forms of IVF as creating new life. If IVF and abortion are indeed different, how has IVF made its way to the front line of America's culture wars? And how should this significant change inform the way we think and talk about post-*Roe* conflicts over assisted reproduction, both in legislatures and courts, and outside of them?[14]

This Article answers these neglected questions.[15] It undertakes the first legal history of the relationship between abortion and IVF. This

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12. See infra Part II.

13. See Jamie Ducharme, IVF Changed America. But Its Future Is Under Threat, Time (Aug. 7, 2024), https://time.com/7005892/ivf-under-attack-fetal-personhood/ [https://perma.cc/7P92-LPEV].

14. See Right to IVF Act, S. 4445, 118th Cong. (2024) (protecting access to IVF by prohibiting governmental restrictions and preempting conflicting state laws to safeguard fertility care and related services); LePage v. Ctr. for Reprod. Med., P.C., 408 So. 3d 678, 682–85 (Ala. 2024) (acknowledging the profound societal and ethical questions raised by IVF and how the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* informs the legal status of embryos); Ruth Graham, Southern Baptists Vote to Oppose Use of I.V.F., N.Y. Times (June 12, 2024), https://www.nytimes.com/2024/06/12/us/ivf-vote-southern-baptists.html (on file with the *Columbia Law Review*) (reporting on the Southern Baptist Convention's vote to oppose the use of in vitro fertilization and its rejection of practices that dispose of unused embryos).

15. Existing scholarship has explored attitudes about infertility, the development of treatments to address it, and the polarization that has obstructed consensus about how to regulate new treatments. A magisterial study by historian Margaret Marsh and gynecologist Wanda Ronner offers an indispensable overview of the science of assisted reproduction and the policy landscape that surrounds its complex web of rules in the United States. See Marsh & Ronner, Pursuit of Parenthood, supra note 11. They posit that the conflict around *Roe* obstructed a much-needed federal standard. Id. at 186 (explaining how "polarization around the interrelated issues of abortion, gender roles, embryo research, and the expansion of the uses of reproductive technology made it more difficult for Congress to develop any sort of consensus"). In the aftermath of *Roe*'s demise, Marsh and Ronner's pathbreaking work raises important new questions: If polarization around abortion impeded consensus around IVF, why did the players in the abortion wars say so little about IVF, and why has that changed recently? These questions invite a fresh look at the origins of IVF's regulatory vacuum and the new era of conflict that has emerged after the Court's decision to overrule *Roe v. Wade*.

Article shows how their evolving relationship is the key to understanding (1) how for decades IVF remained deeply underregulated and rarely politicized, (2) why IVF has suddenly emerged as the locus of social-movement struggle in the aftermath of *Roe*'s reversal, and (3) what specific avenues are now possible to meaningfully regulate IVF—which is more popular than abortion—for the first time in American history.

This Article draws on extensive, original archival research from several sources: three privately held collections, four universities, two historical societies, and the Library of Congress. It traces how the abortion wars informed the laissez-faire fragility of IVF's first half century as well as the modern collapse of that implicit settlement on how to govern assisted reproduction.[16] These insights from IVF's neglected past also reveal hidden sources of potential common ground that point us toward a politically feasible future. Moving beyond partisan binaries and entrenched impasses over assisted reproduction requires acknowledging IVF's moral and social complexities within the political and economic realities of American healthcare and family life. This Article proposes attending to several key regulatory pillars: legality, access, licensing of facilities and procedures, and transparency about competent and effective practice.

For a time, the regulatory vacuum accommodated competing interests on either side of the nation's reproductive divide. Pro-life groups opposed IVF in principle, to the extent that it involved destroying embryos, but struggled to explain how a technique designed to make babies was not pro-life—and worried that making their opposition public would undermine the fight to reverse *Roe*.[17] Pro-choice groups grappled with the extent to which regulations to make IVF safe and effective would

16. Other scholars have studied legal rules governing IVF in making sense of attitudes about infertility. See generally In-Vitro Fertilization: The Pioneers' History (Gabor Kovacs, Peter Brinsden & Alan DeCherney eds., 2018) (recounting the global development of IVF through personal anecdotes from its pioneers and addressing the scientific, ethical, and legal dimensions of assisted reproduction); Robin E. Jensen, Infertility: Tracing the History of a Transformative Term (2016) (exploring rhetorical shifts in infertility discourse and examining how these narratives shape societal and individual understandings of infertility); The Palgrave Handbook of Infertility in History (Gayle Davis & Tracey Loughran eds., 2017) (examining the history of infertility through interdisciplinary perspectives, highlighting how social, political, and cultural discourses have shaped experiences and treatments). Marsh and Ronner have also written a book on the medical breakthroughs that made IVF possible. Margaret Marsh & Wanda Ronner, The Fertility Doctor: John Rock and the Reproductive Revolution (2008). Historians have also traced the cultural and political place of IVF in broader histories of reproduction. See generally Reproduction: Antiquity to the Present Day (Nick Hopwood, Rebecca Flemming & Lauren Kassell eds., 2018); Mary Ziegler, Personhood: The New Civil War Over Reproduction (2025) [hereinafter Ziegler, Personhood]. We interrogate a distinct question: How do the intersecting histories of abortion and IVF reveal common ground, block legislative compromise, create new areas of conflict, and identify new areas for potential legislative progress?

17. See infra notes 127–132 and accompanying text.

threaten access to not just IVF but also abortion—and struggled with whether IVF advanced reproductive equality or undermined it.[18]

This Article shows how this fragile compromise collapsed in the aftermath of the Supreme Court's decision reversing *Roe*.[19] *Dobbs v. Jackson Women's Health Organization* did not directly bear on IVF cases or embryo legislation, neither of which generally rely on the federal Constitution. But the political impact of *Dobbs* on debates about IVF was huge. Determined to find a new mobilizing project, pro-life groups embraced the longstanding goal of fetal personhood: the idea that the meaning of *person* in the Fourteenth Amendment and other legal provisions applies the moment an egg is fertilized.[20] Activists have specifically taken aim at IVF, mounting a durable campaign to persuade state lawmakers and conservative Protestants to oppose the procedure.[21] As more Americans have come to rely on IVF to form a family, backlash to these attacks on it reveals a degree of bipartisan agreement that would have been unthinkable in earlier years.[22] The time is ripe for a new grand bargain.

This Article draws on these lessons of the past to inform a regulatory regime with meaningful potential to bridge the ideological gulf. Members of Congress have already proposed federal legislation to safeguard IVF access, including the Right to IVF Act,[23] but these bills have stalled because of partisan gridlock.[24] This look to the past reveals surprising common ground—among both activists and the public—to promote the safety and dignity of families and resulting children who would be most affected by regulations on IVF. This Article proposes three promising areas that center on federal intervention: legality, licensing, and transparency.[25]

Legality legislation would preempt state efforts to forbid IVF or achieve its prohibition in practice. Comprehensive licensing would cover fertility clinics, gamete banks, and other entities, along with the procedures they use, oversight for compliance and quality control, and

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18. See infra sections I.B–.C.

19. See infra sections II.A–.B.

20. See Ziegler, Personhood, supra note 16, at vii–viii (summarizing the conservative theory of fetal personhood as "two core arguments: first, that a fetus is a separate, unique human individual from the moment of fertilization, and second, that because of that biological and moral uniqueness, the Constitution gives (or at least should give) that individual rights").

21. See infra notes 336, 339–334 and accompanying text.

22. See infra section II.B.

23. Right to IVF Act, S. 4445, 118th Cong. (2024).

24. Stephen Groves, Senate Republicans Block Bill on Women's Right to IVF as Democrats Make Push on Reproductive Care, AP News, https://apnews.com/article/senate-ivf-alabama-reproductive-care-460d099153d3faf548e9326ff17dbae6 (on file with the *Columbia Law Review*) (last updated June 13, 2024) ("The overtly political back-and-forth, with no attempt at finding a legislative compromise, showed how quickly Congress has shifted into a campaign mindset . . . .").

25. See infra Part III.

approval of clinical research for emerging technologies.[26] Meanwhile, transparency measures would collect and publish comprehensive data about reliability and safety and promote truth in advertising and informed consent.[27] Licensing and transparency regulations at the national level would work in tandem with guidelines on contested issues such as what kinds of traits to test and select for, payment to gamete donors and surrogates, and determinations of parentage. The proposal set forth in this Article would leave the ultimate authority to make these decisions with the individual states, drawing direction from professional associations and allowing flexibility for individual clinicians.[28]

The history of IVF teaches that the search for a perfect, all-encompassing federal law has resulted in a regulatory impasse that no longer satisfies anyone. As some rush to fill the regulatory void by eliminating IVF altogether, this Article favors preserving access to IVF while holding its reliable provision to account and enhancing the transparency of a practice that plays a central role in American family life.

Many will bristle at the idea of regulating IVF in ways that make it resemble abortion even more, fearing the violence, partisan rancor, and punitive laws that characterize the American experience around *Roe*. But the history this Article uncovers underscores that it is often better to leave the regulation of both abortion *and* IVF to medical providers and professional organizations, which have more clinical expertise and may be less vulnerable to influence from interest group commitments and political polarization.

What's more, the contemporary social-movement efforts that doomed the Right to IVF Act have fueled concerted campaigns to restrict or ban IVF—either across the board[29] or for certain families, such as same-sex couples.[30] These political efforts suggest that opening the door to regulation of any kind runs the risk of restricting IVF to the point that it is no longer available or even criminalizing it. Comparing the history of abortion and IVF throws these concerns in sharp relief: Abortion regulations have primarily served as stepping stones toward outright prohibition and the recognition of constitutional fetal rights.[31] Perhaps,

26. See infra section III.A.

27. See infra section III.B.

28. See infra section III.C.

29. See infra sections II.A–.B.

30. Project 2025, the conservative initiative to reshape the federal government under President Donald Trump, states, "In the context of . . . reproductive technologies, HHS policies should never place the desires of adults over the right of children to be raised by the biological fathers and mothers who conceive them." See Roger Severino, Department of Health and Human Services, *in* Mandate for Leadership: The Conservative Promise 449, 451 (Paul Dans & Steven Groves eds., 2023), https://web.archive.org/web/20231114060804/https://thf_media.s3.amazonaws.com/project2025/2025_MandateForLeadership_FULL.pdf [https://perma.cc/MQ3S-RZLX].

31. Pro-life groups themselves describe these efforts as a form of incrementalism that led first to the reversal of *Roe v. Wade* and, perhaps one day, to the securing of constitutional

then, the best available outcome is to preserve the status quo, in which providers are left largely to regulate themselves.

This Article recognizes that regulating IVF poses considerable risk in the current political climate. But the recent transformations it traces reveal that IVF's regulation is likely now inescapable, particularly in state legislatures. The interconnected legal histories of IVF and abortion reveal another lesson, too: After committed social movements launched campaigns to limit and ban abortion, the strategy of avoiding federal involvement and state regulation operated to undermine reproductive liberty rather than reinforce it.[32]

Since *Dobbs*, proponents of abortion rights have accordingly proposed codifying some protections into federal law, such as the Women's Health Protection Act.[33] Meanwhile, efforts to enshrine reproductive rights in state constitutions have taken on more profound significance, even in places where abortion is already protected by state statute.[34] We see parallels to IVF here too. If the push for state IVF restrictions is under way, and if leaving regulation to medical providers is no longer likely to be a long-term solution, then our task is to design a realistic federal regulation that will avoid foreseeable harms—and set us down a path that will bring greater justice to families that turn to IVF.

This history teaches that IVF could come to more closely resemble abortion in another sense too: If the present bipartisan consensus about the value of protecting IVF falls away, anti-abortion efforts to polarize the issue could pay dividends in state legislatures or even Congress. Some pro-life groups are working hard toward this outcome.[35] Meanwhile, Project 2025—an influential conservative political initiative to reshape the federal government under the Trump Administration—has pressed for limits on IVF that would disproportionately affect LGBTQ couples.[36] Such

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fetal rights. See Mary Ziegler, After *Roe*: The Lost History of the Abortion Debate 91–104 (2015) [hereinafter Ziegler, After *Roe*] (describing pro-life incrementalist strategies); Ziegler, Personhood, supra note 14, at xiv–xvvi (detailing how fetal personhood has remained the endgame for the anti-abortion movement since the 1960s).

32. See infra sections I.B–.C, I.E.

33. The Women's Health Protection Act first gained influence as a step to counter state abortion restrictions before *Dobbs*. Representative Judy Chu, one of the bill's key backers, explained that it would provide a federal baseline and ensure that supporters of abortion rights could stop "playing whack-a-mole with each of these states and their laws." Barbara Sprunt, The House Passes a Bill to Counter Texas-Style Abortion Bans, NPR, https://www.npr.org/2021/09/24/1038931908/house-democrats-abortion-rights-bill [https://perma.cc/JRC6-ZG9S] (last updated Sep. 24, 2021) (internal quotation marks omitted) (quoting Rep. Judy Chu).

34. For an overview of state ballot proposals, see 2023 and 2024 Abortion-Related Ballot Measures, Ballotpedia, https://ballotpedia.org/2023_and_2024_abortion-related_ballot_measures [https://perma.cc/T7PD-NXHK] (last visited Aug. 8, 2025).

35. See infra section II.A.

36. See Severino, supra note 30, at 451 (calling for HHS to focus on biological parents over "LGBTQ+ equity" (internal quotation marks omitted)).

campaigns suggest a cost to waiting when it comes to federal regulation of IVF, as much as there are potential costs to intervening. It is reasonable to ask whether there are better proposals than the one advanced here. This Article offers it less as an optimal or ideal solution than as a helpful baseline to avoid the worst extremes that could make IVF all too similar to abortion—and as a starting point for discussing the kind of regulation that would make IVF safer and more accessible.

Part I tells the origin story of a regulatory vacuum that emerged in the United States unlike anywhere else in the developed world. Part II analyzes the recent collapse of that fragile compromise. Part III charts a sound future for IVF and for related assisted reproductive practices like surrogacy, donor insemination, and prenatal testing. This path forward is critically informed by a distinctive political history and by IVF's relationship to abortion since *Roe* and after *Dobbs*.

I. THE BIRTH OF IVF

Less than five years after the Supreme Court's decision in *Roe v. Wade*, American newspapers reported on the birth of the first "test-tube baby," Louise Joy Brown, in Oldham, England.[37] The announcement provoked headlines about when IVF would become available in the United States, and whether access would produce "monster" babies[38] and efforts to create a "master race."[39] Almost immediately, Brown's birth also created *legal* debate.[40] In July 1978, for example, a couple sued a physician at Columbia Presbyterian Medical Center for destroying embryos they had planned to use in IVF.[41] In turn, the doctor claimed that IVF had not been proven safe.[42] Most crucially, the Department of Health, Education, and Welfare convened an Ethics Advisory Board (EAB) to study questions about regulating and funding research for IVF.[43]

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37. For a sample of coverage, see Lesley Brown, For Mother, Her Test-Tube Baby Girl Is 'Miracle at End of the Rainbow', Chi. Trib., Aug. 22, 1978, at 1; Tony Kornheiser, Marketing the 'Miracle' of Louise, Wash. Post, Sep. 26, 1979, at B1; 'Test-Tube' Infant Leaves the Hospital, N.Y. Times, Aug. 7, 1978, at A18.

38. J.W. Turney, Public Responses to Experimental Biology: A Study of Public Debate About the Biological Sciences in the Nineteenth and Twentieth Centuries 28 (1981) (Ph.D. thesis, University of Manchester) (on file with the *Columbia Law Review*).

39. Ronald Kotulak, Test Tube Baby Tempest: U.S. Medics Raring to Go, Chi. Trib., July 30, 1978, at 12 (internal quotation marks omitted); see also David Minthorn, Hitler's Breeding Experiments Recalled, L.A. Times, Sep. 17, 1978, at G4 (detailing fears about IVF and eugenic experimentation).

40. See infra notes 53–51 and accompanying text.

41. Childless Couple Is Suing Doctor, N.Y. Times, July 16, 1978, at 26.

42. See Del Zio v. Presbyterian Hosp., No. 74 Civ. 3588 (CES), 1978 U.S. Dist. LEXIS 14450, at *8 (S.D.N.Y. Nov. 9, 1978) ("[T]he defendants contend that the in vitro experiment presented a substantial possibility of danger to the patient.").

43. See infra section I.A.

Section I.A focuses on the debates of the 1970s. It shows that the EAB debates both unearthed uncomfortable truths about the degree to which sex, gender, and even sexuality informed Americans' views of IVF and abortion and opened the possibility of meaningful common ground. Section I.B explores the attempted regulatory revival of the 1980s, when Congress considered possible statutory frameworks for regulating IVF. Section I.C shows how state courts came to fill some of the regulatory gaps created by federal lawmakers and how pro-life and pro-choice leaders both resisted and accommodated these changes. Section I.D explores how struggles over stem cell research destabilized the status quo on IVF, with some abortion foes seeking new restrictions. It then shows how this regulatory push stalled as abortion opponents worried that hostility to IVF would distract from or undermine a fight to overturn *Roe v. Wade*.

A. *The Push to Deregulate*

By the time Louise Brown was born, the debate about IVF within bioethics was already almost a decade old.[44] In 1971, the Kennedy Foundation hosted a forum on the subject, which featured clashes between Robert Edwards, a pioneering physiologist instrumental to the development of successful IVF techniques, and critics of IVF, including the scientist Leon Kass and Paul Ramsey, a Christian ethicist at Princeton.[45]

After Brown's birth in 1978, however, public debate on the subject exploded.[46] The *Chicago Tribune* predicted—accurately, it seemed—that the nation's legal scholars and everyday citizens had entered a "[t]est-tube baby tempest."[47] The Harris Company conducted a 1978 poll finding that a majority of women not only approved of IVF in the abstract but would consider using it themselves.[48]

As early as 1975, Joseph Califano, Jr., the secretary of President Jimmy Carter's Department of Health, Education, and Welfare (HEW), had promised to convene the EAB to study the possibility of federal regulation of IVF or federal funding for IVF research.[49] But Louise Brown's birth

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44. For examples of these debates, see Thomas Banchoff, Embryo Politics: Ethics and Policy in Atlantic Democracies 26–40 (2011) (exploring the early religious, scientific, and political discourse on IVF).

45. Marsh & Ronner, Pursuit of Parenthood, supra note 11, at 46–47. For Kass's view, see Leon R. Kass, Babies by Means of In Vitro Fertilization: Unethical Experiments on the Unborn?, 285 NEJM 1174, 1174–79 (1971) (arguing that IVF experimentation could subject children conceived via IVF to unknown risks without their consent).

46. See infra notes 46–53 and accompanying text.

47. Kotulak, supra note 39, at 12. The term "test-tube baby" was often used by reporters and opponents of IVF in the 1970s notwithstanding the fact that embryos were often created in petri dishes, not test tubes. Tish Davidson, Medical Firsts: Innovations and Milestones that Changed the World 176 (2023). The test-tube term was coined to imply that IVF was exotic, unnatural, or experimental. Id.

48. 'Test-Tube' Babies Get Women OK, Atlanta Const., Sep. 14, 1978, at 2A.

49. Marsh & Ronner, Pursuit of Parenthood, supra note 11, at 63–66.

made further delay seem untenable. A week after her birth, a House committee held hearings and put HEW witnesses on the defensive about why the EAB had yet to convene.[50]

Califano finally agreed to convene the EAB in September 1978.[51] While holding a number of private meetings, the EAB also conducted an extraordinarily open dialogue in cities across the nation.[52] At the very same time, the anti-abortion movement was organizing with the goal of defeating federal funding for IVF research.[53]

EAB debates primarily concerned the *funding* of IVF research rather than the legality of IVF or the funding of IVF services. Any of the three could raise its own set of issues. Someone could be in favor of keeping IVF legal, for example, but believe that funding it should be a low priority for the federal government—or that paying for IVF research was less important than other spending goals. While funding and legality raised their own distinct set of issues, the EAB debates nevertheless revealed a rich and complex set of perspectives about IVF that cut across racial, religious, and political divides.

That dialogue about IVF revealed a surprising amount of nuance in the views held by Americans across the ideological spectrum—and potential areas of common ground. Those in favor of IVF access or research funding (or both) worried that it would be misused for eugenic purposes[54] or would be functionally unavailable or harmful to those from marginalized communities.[55] Abortion opponents at times considered the possibility that IVF might be justifiable if it was not experimental, if IVF was permitted but not funded, or if additional embryos couldn't be destroyed.[56]

Some deployed rights talk to stake out absolutist positions. Patients suffering from infertility overwhelmingly argued that the right to choose

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50. Id.

51. Id.

52. See id. at 53.

53. See infra section I.B.

54. See Minthorn, supra note 39, at G4 (detailing fears about IVF and eugenic experimentation).

55. For concern about the misuse of IVF, see Transcript of Department of Health, Education, and Welfare Ethics Advisory Board Meeting IV, Boston, Massachusetts at 63 (Oct. 13, 1978) (on file with the *Columbia Law Review*) [hereinafter Boston Hearing] (statement of Tabitha Powledge, Hastings Inst. of Soc'y, Ethics & the Life Scis.) (arguing that it "make[s] very little sense, either logistically or morally, to allocate public resources to the creation of new children while at the same time giving short shrift to the sometimes desperate plight of the ones already here"); id. at 275 (statement of Samuel Gorovitz, Professor, Univ. of Md.) ("Given the plight of the 40 million or so Americans who have no access to decent medical care, given the large numbers of children who have no families, it is not obvious that research into IVF . . . should be a high priority . . . .").

56. See Ethics Advisory Bd., supra note 1, at 85–89 (outlining the common objections to IVF).

recognized in cases like *Roe v. Wade*[57] and *Griswold v. Connecticut*[58] required that IVF be legal and perhaps even funded.[59] Witnesses contended that "[i]nfertility withholds the choice to bear children"[60] or that "infertile couples of the United States [should] be given the same choice that birth control and abortion have given others: The choice of whether or not to have children."[61] Other supporters of IVF access and funding maintained that IVF was inherently *pro-life* because it would lead to the birth of more babies.[62] As one witness asserted, "[IVF] is more a pro-life concept rather than an anti-life concept."[63]

Most pro-life witnesses stressed that IVF was inconsistent with the idea that the word "person" in the law and the Constitution applied from the moment an egg was fertilized—and that fetuses or unborn children thus had rights under the Fourteenth Amendment.[64] This argument, which first emerged in the 1960s, had become central to pro-life mobilizing in the 1970s.[65] After *Roe*, abortion foes rallied around a so-called human life amendment (HLA), an amendment that would change the meaning of the "person" in the Fourteenth Amendment to apply to a zygote the moment an egg was fertilized.[66]

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57. 410 U.S. 113, 153–54, 164–66 (1973), overruled by, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

58. 381 U.S. 479, 485–86 (1965).

59. See Transcript of Department of Health, Education, and Welfare Ethics Advisory Board Meeting V, Seattle, Washington at 55 (Nov. 9, 1978) (on file with the *Columbia Law Review*) [hereinafter Seattle Hearing] (statement of Cynthia Bortz, Program Assistant, Univ. Hosp.) ("Since there are no private funds available for research on in vitro fertilization, only a few very wealthy couples could afford this unless federal funding is available.").

60. Transcript of Department of Health, Education, and Welfare Ethics Advisory Board Meeting, Detroit, Michigan at 138 (Dec. 5, 1978) (on file with the *Columbia Law Review*) [hereinafter Detroit Hearing] (statement of Frances Murphy).

61. Transcript of Department of Health, Education, and Welfare Ethics Advisory Board Meeting, Kansas City, Missouri at 13–14 (Dec. 4, 1978) (on file with the *Columbia Law Review*) [hereinafter Kansas City Hearing] (statement of Linda J. Borman).

62. See infra note 63 and accompanying text.

63. Transcript of Department of Health, Education, and Welfare Ethics Advisory Board Meeting, San Francisco, California at 38 (Nov. 14, 1978) (on file with the *Columbia Law Review*) [hereinafter San Francisco Hearing] (statement of Donna Daentl, Doctor, Univ. of Cal., S.F.).

64. See infra note 300 and accompanying text.

65. See Ziegler, Personhood, supra note 16, at 4–22 ("By the mid-1960s, . . . antiabortion advocates would seek to strip away arguments about gender to focus on the fetus and draw attention away from pregnant women altogether—and to reframe the unborn child not just as a biological person but also as a holder of rights.").

66. Memorandum from Joseph P. Witherspoon, Consultant to Pub. Pol'yc Comm., to Nat'l Right to Life Comm. Exec. Comm. 5 (Aug. 14, 1973) (on file with the *Columbia Law Review*) ("What is needed is a Human Life Amendment that prohibits abortions by private persons much as the Thirteenth Amendment prohibits slavery . . . ."); see also Memorandum from Bobbie Greene Kilberg, Assoc. White House Couns., to Phil Buchen, White House Couns. (Feb. 6, 1976) (on file with the *Columbia Law Review*) (describing the three types of HLA proposals circulating in Congress).

These advocates articulated these views when religious teachings on IVF were in flux. Catholic theologians would debate the permissibility of IVF for the better part of a decade after Louise Brown's birth (and one of them, Richard McCormick of Georgetown, would play a definitive role in shaping the EAB's proposal to fund and permit IVF).[67] The Catholic Church would not issue its first official teaching on the subject, *Donum Vitae*, until 1987.[68] The same was true of a great number of faith communities, whose leaders did not weigh in on IVF until the 1980s or later.[69]

Rather than looking to religious teachings, anti-abortion witnesses at the EAB hearings often drew a direct connection between IVF and personhood,[70] equating the destruction of embryos with murder.[71] As one witness explained, "Killing a baby is wrong whether it is done in the womb

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67. For examples of these debates, see Banchoff, supra note 44, at 39–40 (2011) (discussing the "relative openness of the Catholic debate [on IVF] at the time"). Richard McCormick coauthored a piece sympathetic to IVF in 1979 with his Georgetown colleague, André Hellegers, who had become a prominent member of the pro-life movement. See Andre E. Hellegers & Richard A. McCormick, Unanswered Questions on Test Tube Life, 139 America 74, 74–78 (1978) (discussing the ethical concerns implicated by IVF). On Hellegers's involvement in the pro-life movement, see Ziegler, After *Roe*, supra note 31, at 207.

68. See Congregation for the Doctrine of the Faith, Donum Vitae: Instruction on Respect for Life in Its Origin and on the Dignity of Procreation Issued February 22, 1987, Eternal World Television Network, https://www.ewtn.com/catholicism/library/donum-vitae-2085 [https://perma.cc/ZAE2-KPZJ] [hereinafter Donum Vitae] (last visited Aug. 9, 2025) (criticizing IVF and reasoning that "the gift of human life must be actualized in marriage through the specific and exclusive acts of husband and wife").

69. See infra notes 341–344 and accompanying text.

70. See, e.g., Transcript of Department of Health, Education, and Welfare Ethics Advisory Board Meeting, Philadelphia, Pennsylvania at 122–23 (Dec. 6, 1978) (on file with the *Columbia Law Review*) [hereinafter Philadelphia Hearing] (statement of Deborah DeBardeleben, President, Choose L.I.F.E. Am.) (opposing IVF because of the risk it posed to the fetal person); id. at 140–42 (statement of Dr. George Isajiw) (arguing that IVF "promot[ed] notions of disposable children"); id. at 151 (statement of John Stanton, Vice Chairman, Pro-Life Coal. of Pa.) (calling for pro-life regulatory action to preclude legislation to on ban IVF); see also Detroit Hearing, supra note 60, at 44–45 (statement of Diane Fagelman, President, Lifespan, Inc.) ("It is bad enough we must have our tax money used to pay for welfare abortions. We do not want to have to pay for more lives lost through in vitro fertilization."); Kansas City Hearing, supra note 61, at 22–23 (statement of Ann O'Donnel, Vice President, Nat'l Right to Life Comm.) (opposing IVF on fetal personhood grounds); id. at 33 (statement of Albert Moraczewski, President, Pope John XXIII Med.–Moral Rsch. in Educ. Ctr.) (arguing that an embryo used in IVF "is radically a person and therefore has the basic rights—for example, life").

71. See, e.g., Detroit Hearing, supra note 60, at 43–44 (statement of Diane Fagelman, President, Lifespan, Inc.) (arguing that IVF involves "the destruction of another human being"); Kansas City Hearing, supra note 61, at 74–75 (statement of Mary Pat Miller, Chairperson, E. Kan. Right to Life) (arguing that IVF involved the destruction of "many lives with potential . . . flushed down the drain"). Other abortion opponents made this argument before the board and otherwise. See, e.g., Letter from Paul J. Murphy to Humberto Cardinel Medeiros (Nov. 1, 1978) (on file with the *Columbia Law Review*) (stating the Catholic Church's "clear and uncompromising" position in opposition to IVF).

or in the test tube."[72] But these positions raised as many questions as they answered. Did pro-life leaders oppose only the destruction of embryos? Or was the indefinite storage of embryos—or the very creation of embryos in a lab—incompatible with the pro-life movement's values?

B. *Traditional Family Values*

At the same time, IVF testimony exposed views about sex and gender within the pro-life movement that conflicted with its public focus on civil rights for the unborn—and thus threatened to jeopardize the movement's public campaign to secure the HLA or reverse *Roe*.[73] By the late 1970s, a fractious anti-abortion movement resolutely insisted that it advanced only a single issue: protection of the life of the unborn.[74]

But when it came to IVF, pro-life witnesses often focused on sex roles.[75] One pro-life witness at the EAB's hearing in Kansas City advanced a common source of opposition that IVF could be used by both gay couples and lesbians for whom artificial insemination had been at least technologically possible for far longer.[76] "The lesbians," this witness asserted, "have decided to seize the test tube baby method . . . to dramatically change the political power of gays in the future."[77] Prominent pro-life witnesses argued that IVF was offensive because it promoted promiscuity and undermined traditional gender roles by giving scientists the ability to generate life in a test tube rather than in the womb—and by potentially separating women's role in gestating a pregnancy from any

72. Kansas City Hearing, supra note 61, at 46 (statement of Brenda Waugh).

73. See id. at 65 (statement of Jane Clark) (expressing concern that gay and lesbian communities would use IVF to increase their political power).

74. On the movement's efforts to present itself as a single-issue cause, see Mary Ziegler, Abortion and the Law in America: *Roe v. Wade* to the Present 126–27 (2020) [hereinafter, Ziegler, Abortion and the Law].

75. Kansas City Hearing, supra note 61, at 65 (statement of Jane Clark) (arguing that reproductive technologies threatened the "basic character values of the majority" by allowing gay and lesbian couples to conceive).

76. See id.

77. Id. at 65. Concern that gay and lesbian couples would use IVF to build families appeared beyond the EAB hearings. See, e.g., Janet Bataille, Research in Human Embryos Raises Fear and Hope, N.Y. Times, Mar. 3, 1980, at A14 (reporting fears about "the hiring of surrogate mothers to provide children to homosexuals"); Margaret O'Brien Steinfels, Of Tubes and Motherhood: Hatching Better Babies, L.A. Times, Jan. 3, 1982, at D3 (arguing that IVF raises concerns about whether it was "a good thing for a child to grow up without a father"). In practice, other reproductive services, including artificial insemination and surrogacy, seemed more valuable to LGBTQ couples seeking to have families, but discomfort about the use of these technologies by LGTBQ families ran high. One study, as the U.S. Congress's Office of Technological Assessment later explained, found that many physicians were reluctant to offer even artificial insemination to same-sex couples a decade after the EAB debates. Off. of Tech. Assessment, U.S. Cong., OTA-BA-358, Infertility: Medical and Social Choices 173 (1988).

genetic relationship to, or even the conception of, an embryo.[78] "If women permit the laboratory to take from them . . . the very unique and special and powerful, profound manner in which they share in the procreative process," explained Ann O'Donnel of the National Right to Life Committee, "then they are fools."[79]

Still others blamed couples struggling with infertility for their plight. "Who really needs test tube babies?" asked one pro-life witness in Boston.[80] "After all, we are killing countless thousands of babies in our abortion mills."[81] Another pro-life correspondent later made an even bolder claim: "Research shows that inability for a woman to have a baby has as one of its main causes blockage of the fallopian tubes—and this in turn has as its main causes damage from abortion, use of the 'Pill', venereal disease, and direct sterilization."[82] She wrote, "So the contraceptive society has created its own health damaging and reproduction-destroying conditions."[83]

In many cases, however, areas of potential common ground appeared in witness testimony. Father Richard McCormick, a Jesuit theologian at Georgetown and EAB member, opposed the funding of IVF research but suggested that some IVF procedures could be ethical.[84] When embryo transplant was the "ultimate purpose" of IVF, McCormick saw less concern with IVF because miscarriage was common, and IVF mimicked the "natural process" of miscarriage.[85] As McCormick would later explain, he saw the board's job as striking a balance between those who see a "fertilized ovum as a person with all the claims and rights of persons" and those who see such an ovum "as disposable material."[86]

Witnesses across the ideological spectrum argued that, in regulating IVF, the government should prioritize better care for low-income families.[87] Reverend Stanley Stefancic, a Unitarian minister and civil rights

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78. Kansas City Hearing, supra note 61, at 24–25 (statement of Ann O'Donnel, Vice President, Nat'l Right to Life Comm.).

79. Id.

80. Boston Hearing, supra note 55, at 77 (statement of Joyce Tuomy, Member, Framingham, Mass. Town Meeting).

81. Id.

82. Letter from Kathleen Sommers to Sen. William Proxmire (Apr. 5, 1979) (on file with the *Columbia Law Review*).

83. Id.

84. Seattle Hearing, supra note 59, at 307.

85. Id.

86. Richard A. McCormick, The EAB and In Vitro Fertilization, Hastings Ctr. Rep., Dec. 1979, at 4. Today, the overall risk of miscarriage in known pregnancies is approximately 15%, with 75% of all pregnancy losses occurring in the first trimester. Peter Morales-Brown, What Are the Average Miscarriage Rates by Week?, Med. News Today, https://www.medicalnewstoday.com/articles/322634#miscarriage-rates-by-week (on file with the *Columbia Law Review*) (last updated Apr. 22, 2025).

87. Transcript of Department of Health, Education, and Welfare Ethics Advisory Board Meeting, Dallas, Texas at 8 (Dec. 11, 1978) (on file with the *Columbia Law Review*) [hereinafter Dallas Hearing] (statement of Desiree Inget, Professor, Univ. of Tex. at Aus.)

activist who had worked closely with the ACLU, argued that it would be a mistake in the IVF context to "favor individual freedom where it can be afforded over equality and distributive justice" and called for more investment in uplifting communities of color and preventing and treating disabilities present at birth.[88] Dr. Leonie Watson, a pro-life activist representing National Doctors for Life, stressed that IVF funding appeared less "necessary" when "not all Americans receive adequate health care."[89]

Those with differing views of abortion also expressed concern about the *abuse* of IVF, especially given that the technology had a eugenic potential and might further stigmatize people with disabilities.[90] James Tayoun, a pro-life city councilor, expressed concern that IVF would be abused to "engineer only the reproduction of certain classes" and prevent the births of biracial or disabled children.[91] Martha Robb of Science for the People, a progressive science organization, worried that IVF might be used to screen out the births of certain persons with disabilities or discriminate against them.[92] Pro-IVF witnesses agreed on the importance of addressing disability discrimination while insisting that infertility was itself a disability.[93]

Once both sides had been heard, the hearings concluded with board deliberations, and the EAB issued a report unanimously calling for an end to the moratorium on IVF funding for research.[94] The board suggested that such research was ethical so long as it was designed to address infertility—and used only by straight, married couples, not gay and lesbian

("Would we not be better advised to spend the money to facilitate the adoption of existing children . . . ?"). For empirical reason to doubt that greater supply of IVF reduces demand for adoption, see I. Glenn Cohen & Daniel L. Chen, Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should It Matter?, 95 Minn. L. Rev. 485, 577 (2010).

88. Seattle Hearing, supra note 59, at 22–25 (statement of Stanley Stefancic, Reverend, E. Shore Unitarian Church).

89. San Francisco Hearing, supra note 63, at 107 (statement of Leonie Watson, Exec. Dir., Nat'l Doctors for Life). Pro-IVF witnesses shared these concerns, arguing that without funding, "only a few very wealthy couples could afford" infertility treatment. Seattle Hearing, supra note 59, at 55 (statement of Cynthia Bortz, Program Assistant, Univ. Hosp.).

90. Philadelphia Hearing, supra note 70, at 127–28 (statement of Malana Petite, President, Women's Ad Hoc Health Comm.); see also Dallas Hearing, supra note 87, at 9–10 (statement of Desiree Inget, Professor, Univ. of Tex. at Aus.) (expressing concern that IVF would lead the "removal or alteration of other socially or politically 'undesirable' human attributes").

91. Philadelphia Hearing, supra note 70, at 10 (statement of James Tayoun, Member, Phila. City Council).

92. Boston Hearing, supra note 55, at 67–70 (statement of Martha Robb, Member, Sci. for the People).

93. San Francisco Hearing, supra note 63, at 88 (statement of Philip Martin) ("There are many people who have disabilities of various kinds. This is simply one disability, and now that there is a way toward solving the problem, we ought to go ahead and do it.").

94. Ethics Advisory Bd., supra note 1, at 106.

couples or individuals who were single or partnered but not married.[95] The board also concluded, at McCormick's suggestion, that IVF research should also be permitted in the first fourteen days after an embryo's creation.[96] Permitting IVF funding would be, the report suggested, a prelude to federal legislation permitting, but regulating, IVF.[97] "[T]he law in this area is confused, at best," the EAB report explained, mentioning questions about parental rights, legality, liability, and compensation to mothers and offspring in cases of medical malpractice.[98]

With the release of the report, Americans United for Life (AUL), a leading anti-abortion group, sprang into action, recruiting activists across the country to write their members of Congress to oppose the funding of IVF research.[99] Opposition to IVF funding among AUL recruits was obvious, but they seemed more conflicted about how, if at all, the law should regulate the procedure itself.[100]

Consider the correspondence to Senator William Proxmire of Wisconsin, a veteran lawmaker, as part of AUL's coordinated campaign, much of which used identical language to that in AUL's literature.[101] Some pro-life correspondents and witnesses at the EAB hearings seemed primarily opposed to *funding* IVF research or services, comparing it to abortion funding and arguing that both violated conservative Christians' conscience rights. These arguments drew on one of the anti-abortion movement's signature victories since the decision of *Roe*: the passage of the Hyde Amendment in 1976, an appropriation rider that prohibited Medicaid reimbursement for abortion.[102] Proponents of the Hyde

95. Id. at 37.

96. Id. at 107.

97. Id. at 60–63.

98. Id. at 76–77.

99. See, e.g., Group Organizing National Effort Against In Vitro Research, Cath. Nw. Progress, July 13, 1979, at 3 (explaining that AUL had engineered a letter-writing campaign and solicited testimony against IVF); see also Group Claims Victory on Federal Funding of In Vitro Fertilization, St. Louis Rev., Mar. 14, 1980, at 2 (claiming that AUL had secured more than twelve thousand letters and forty thousand signatures in its campaign against IVF funding).

100. See infra notes 112–119 and accompanying text.

101. For examples, see Letter from Joan Altmann to Sen. William Proxmire (Mar. 10, 1979) (on file with the *Columbia Law Review*) (arguing that IVF would "expose newly conceived human lives to destruction, abandonment or unnatural risks"); Letter from Edith Hofrichter to Sen. William Proxmire (Mar. 15, 1979) (on file with the *Columbia Law Review*) (same); Letter from Mary Beth Leahy to Sen. William Proxmire (Mar. 9, 1979) (on file with the *Columbia Law Review*) (using identical language).

102. In the immediate aftermath of its passage, the Hyde Amendment prevented approximately 100,000 patients who would otherwise have obtained an abortion from doing so. James Trussell, Jane Menken, Barbara L. Lindheim & Barbara Vaughan, The Impact of Restricting Medicaid Financing for Abortion, 12 Fam. Plan. Persps. 120, 122–30 (1980). The Hyde Amendment also became the blueprint for a new incremental strategy. See Ziegler, Abortion and the Law, supra note 74, at 29 (explaining that the "Hyde Amendment . . . helped to change the course of political and constitutional dialogue about abortion").

Amendment argued that requiring taxpayers to subsidize abortion not only violated fetal rights but also made taxpayers themselves complicit in a procedure that went against their most deeply held beliefs.[103] AUL letter writers echoed this point as to IVF.[104] One of Proxmire's correspondents, for example, primarily stressed his opposition to using "our tax dollars being used for financing the murder of helpless little people" through IVF.[105]

Other correspondents seemed primarily concerned with the size of the government or the prospect of a national deficit, not with fetal rights.[106] "We are never going to control inflation until all this funding stops," one wrote to Proxmire.[107] These letters exposed how much was unsettled for anti-abortion leaders. Would the pro-life movement fight for federal and state prohibitions of IVF, or was it enough for the federal government not to fund research? Other correspondents seemed conflicted about whether the problem with IVF was that it was unproven or experimental.[108] Still others seemed genuinely concerned that without IVF, some Americans would be unable to achieve their dream of biological parenthood.[109] "The scarcity of children available for adoption," one pro-life correspondent wrote, "may pose a problem."[110]

The nuances that surfaced during debates about IVF seemingly convinced the government to prefer inaction: Secretary Califano delayed the release of the EAB report and then added several months for public comment.[111] Following a reorganization of Califano's department, Patricia Harris, Califano's replacement, simply ignored both the EAB report and pro-life calls for prohibition.[112] Under Harris, HEW stressed that "[s]tate responsibilities for regulating the provision of infertility services fall under their general responsibility for safeguarding the health and welfare of

103. On these arguments, see Ziegler, Abortion and the Law, supra note 74, at 52–56 (explaining that supporters of the Hyde Amendment recast the abortion debate by invoking taxpayers' moral objections and portraying public funding as an inappropriate use of government resources).

104. Memorandum from Julius Richmond, Assistant Sec'y for Health & Surgeon Gen., Dep't of Health, Educ. & Welfare, to Patricia Harris, Sec'y, Dep't of Health, Educ. & Welfare 3 (Feb. 13, 1980) (on file with the *Columbia Law Review*).

105. Letter from Anthony J. Young to Sen. William Proxmire (Mar. 12, 1979) (on file with the *Columbia Law Review*).

106. Marsh & Ronner, Pursuit of Parenthood, supra note 11, at 76–77.

107. Letter from Mrs. William Kaun to Sen. William Proxmire (Mar. 19, 1979) (on file with the *Columbia Law Review*).

108. See, e.g., Letter from Mr. and Mrs. Hugo Kleckner to Sen. William Proxmire (Feb. 28, 1979) (on file with the *Columbia Law Review*) (describing IVF as "experimentation with no respect for our humanness and our spirituality"); Letter from Karen Shelvik to Sen. William Proxmire (Mar. 14, 1979) (on file with the *Columbia Law Review*) (arguing that Americans would not permit similar experimentation on a newborn baby).

109. Letter from Mary Beth Leahy to Sen. William Proxmire, supra note 101.

110. Id.

111. Marsh & Ronner, Pursuit of Parenthood, supra note 11, at 65.

112. Id.

their citizens."[113] Questioned by the press about whether corporate interests could transform IVF practice without legislation, Harris was prepared to admit that HEW would "do little to prevent such activities."[114]

Promising that HEW was considering the creation of model legislation to regulate IVF, Harris actually began considering whether to do anything.[115] In a confidential memo, HEW staff acknowledged that acting on the EAB's recommendations could help hundreds of thousands of couples and could serve as the prelude to regulations that could "protect women from disappointment and their potential offspring from harm."[116] On the other hand, the staffer wrote, "[p]ublic protest" would be inevitable, as would an "[u]nfavorable congressional reaction," especially given the controversy surrounding abortion and its apparent tie to the disposition of embryos.[117] Harris's concern about controversy evidently took precedence: She neither took action based on the EAB's recommendations nor reconstituted another advisory board.[118]

The upshot: IVF was neither prohibited nor formally permitted, neither regulated nor funded.[119] It wasn't just that anti-abortion groups lobbied against funding for IVF research.[120] Advocates on both sides of the nation's abortion divide saw the virtue in an emerging regulatory vacuum that allowed them to avoid confronting the complicated questions that IVF raised—from access for those at society's margins to misuse against people with disabilities.[121] Like Harris, politicians and bureaucrats feared political backlash and felt no pressure from either pro-life or pro-choice activists to act, in part because neither movement had fully settled what the law should do about IVF in the first place.[122]

At first, this vacuum may well have reflected the fact that IVF was relatively new—and that any number of pro-choice and pro-life Americans were uncertain about what to make of it, legally or otherwise. Over time, however, the IVF regulatory gap sometimes came to suit those on either side of the nation's wars over reproduction.[123]

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113. Memorandum from Laurie Feinberg, Pol'y Coordinator, Dep't of Health, Educ. & Welfare, to Patricia Harris, Sec'y, Dep't of Health, Educ. & Welfare (Apr. 14, 1980) (on file with the *Columbia Law Review*).

114. Id.

115. Id.

116. Memorandum from Julius Richmond, Assistant Sec'y for Health & Surgeon Gen., Dep't of Health, Educ. & Welfare, to Patricia Harris, Sec'y, Dep't of Health, Educ. & Welfare 3 (Feb. 13, 1980) (on file with the *Columbia Law Review*).

117. Id.

118. Marsh & Ronner, Pursuit of Parenthood, supra note 11, at 65.

119. Id.

120. See supra text accompanying notes 99–107.

121. See supra notes 106–112 and accompanying text.

122. See infra notes 124–137 and accompanying text.

123. See infra section I.C.

C. *An Impasse Entrenched*

When Elizabeth Carr, the first baby born in the United States as the result of IVF, was delivered in 1981, the political background surrounding IVF's legal vacuum had changed significantly.[124] Two years earlier, when the EAB released its final report, neither political party had staked out a clear position on questions of reproductive rights.[125] But President Ronald Reagan, who had been inaugurated the year of Carr's birth, ran as a clearly pro-life candidate, believing that such an approach could win over social conservatives who had conventionally sided with the Democratic Party.[126]

Some anti-abortion groups hoped that the GOP could be convinced to endorse bans on both IVF *and* abortion.[127] As early as 1979, Americans United for Life defended a model anti-abortion law in Illinois that addressed "in vitro fertilization for the first time," a law that AUL leaders called "the most comprehensive and potentially the most effective abortion legislation in the United States."[128] Some of the new Republican lawmakers who came into Congress in the 1980 Republican wave seemed open to the idea of federal IVF restrictions.[129] For example, Senator Orrin Hatch, a conservative Republican from Utah, responded to Carr's birth and the spread of private IVF clinics by floating the idea of a federal ban on the opening of new IVF clinics until Congress could hold hearings on the matter.[130]

But Hatch, like other anti-abortion politicians, believed that efforts to ban IVF had to come second to the fight to criminalize abortion and introduced a constitutional amendment that would permit, but not require, states to criminalize abortion.[131] Meanwhile, the National Right to Life Committee issued a three-year plan focused on passage of the HLA.[132]

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124. For information on Carr's birth, see Walter Sullivan, 'Test-Tube' Baby Born in U.S., Joining Successes Around World, N.Y. Times, Dec. 29, 1981, at C1 (discussing the increased success of IVF at the time Carr was born).

125. See Ziegler, After *Roe*, supra note 31, at 220–40 (stating that "competing social movements had to navigate the realignment of both major political parties").

126. On Reagan's use of social issues like abortion to appeal to blue-collar voters, see Rick Perlstein, Reaganland: America's Right Turn 1976–1980, at 33, 67 (2020).

127. 'Most Comprehensive' Abortion Law in U.S., St. Louis Rev., Nov. 9, 1979, at 2 (describing the AUL's attempt to limit IVF via anti-abortion legislation).

128. Id. (internal quotation marks omitted) (quoting Thomas Marzen, Att'y, Ams. United for Life).

129. See Stephenie Overman, Virginia Pro-Lifers Protest U.S. Test-Tube Baby Project, St. Louis Rev., Jan. 11, 1980, at 1 (reporting on Senator Orrin Hatch's opposition to the development of a Virginia IVF clinic).

130. Id. (discussing Senator Hatch's concerns about the "ethical, moral, and legal questions surrounding [a clinic]" (internal quotation marks omitted) (quoting Sen. Orrin Hatch)).

131. On the Hatch Amendment, see Ziegler, After *Roe*, supra note 31, at 116–24 (discussing the Republican party's promotion of a "fetal-protective amendment").

132. Nat'l Right to Life Comm., NRLC Three-Year Plan: Legislation (1980) (on file with the *Columbia Law Review*).

But, because of the apparent popularity of IVF, abortion-rights groups made IVF an argument *against* the HLA and other anti-abortion proposals. For example, Jane Wells-Schooley of the National Organization for Women testified before Congress in 1981 that HLA should be rejected partly because it would "severely restrict[] in vitro fertilization."[133]

Calls for bans on IVF, it seemed, could become a political and legal liability for the anti-abortion movement. As important, some of the movement's new allies in the GOP did not relish the idea of new IVF regulations[134]—and rank-and-file pro-lifers disagreed about whether IVF should be regulated and how much.[135]

It was against this backdrop that Senator Al Gore of Tennessee held hearings on potential regulations for IVF in 1984.[136] By then, the HLA campaign had stalled, with Hatch's last effort narrowly failing in a Senate vote the year before.[137] IVF was still rare, but less so than before, and few laws, state or federal, regulated its practice.[138]

But while Republicans generally called for less government, Democrats, who seemed more interested in regulating (and legitimizing) IVF, had their own qualms about how new technologies, like surrogacy, would be used.[139] Opening the door to federal regulations might invite limits—or set a precedent for the federal government to regulate abortion. And taking on a complex and potentially divisive issue like IVF might not have held much appeal in an election year—especially with Democrats worried (correctly) that they would take a drubbing in the 1984 presidential race and Republicans seeking to gain control of the House and Senate.[140]

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133. Constitutional Amendments Relating to Abortion: Hearings on S.J. Res. 17, S.J. Res. 18, S.J. Res. 19, and S.J. Res 110 Before the Subcomm. on the Const. of the S. Comm. on the Judiciary, 97th Cong. 1125 (1981) (statement of Jane Wells-Schooley, Vice President, Nat'l Org. for Women).

134. See Marsh & Ronner, Pursuit of Parenthood, supra note 11, at 116–19 (explaining that Republicans were skeptical of federal regulation because they "looked to the states, not the federal government, to address legal issues pertaining to family life").

135. See supra section I.A.

136. See Marsh & Ronner, Pursuit of Parenthood, supra note 11, at 119–21.

137. The final roll call vote for the amendment was 49-50. Senate's Roll-Call on Abortion Plan, N.Y. Times, Jun. 29, 1983, at A16.

138. See Marsh & Ronner, Pursuit of Parenthood, supra note 11, at 119–20.

139. Id. at 143. The connection between abortion and IVF drawn by some anti-abortion groups may also have had a chilling effect. See supra note 101 and accompanying text (detailing AUL's opposition to IVF). AUL continues to oppose IVF today. See Chris Massoglia, AUL's 2024 State Policy Report, Ams. United for Life (Dec. 30, 2024), https://aul.org/2024/12/30/auls-2024-state-policy-report/ [https://perma.cc/4TUX-CT8P] (noting that the AUL is "fighting on various fronts beyond abortion, such as in-vitro fertilization (IVF)").

140. On the 1984 congressional races, see Gary C. Jacobson & Jamie L. Carson, The Politics of Congressional Elections 126, 134, 215 (10th ed. 2020). On the 1984 presidential election, see Jack W. Germond & Jules Witcover, Wake Us When It's Over: Presidential Politics of 1984 (1985).

Some states considered breaking the logjam after Mario and Elsa Rios, a couple who had created two embryos for implantation and stored them in Melbourne, Australia, died in a plane crash in Chile in 1983.[141] After studying the matter, a group of Australian scholars recommended in 1984 that the embryos be destroyed, suggesting that any other disposition would require the consent of the embryos' creators.[142]

Horrified by the Rios story, State Senator Tom Casey, a Republican from New Orleans, proposed an ultimately successful state bill designating embryos created through IVF "legal persons," a complex designation that disallowed the destruction of such embryos during the IVF process (and raised questions about whether they could be stored in the state).[143] Cutting in the opposite direction, a more liberal group of states legislated to ensure insurance coverage for infertility treatment.[144]

The same year the New Orleans bill passed, there was a fresh congressional attempt at regulation led by Representative Bruce Morrison, a Democrat from Connecticut.[145] Larger groups on either side of the abortion issue, which had gained greater influence in national elections, mostly stayed away from the issue altogether—and with good reason. In the 1986 decision of *Thornburgh v. American College of Obstetricians and Gynecologists*, only five justices voted to strike down a set of Pennsylvania abortion restrictions.[146] Abortion rights organizations became convinced that the courts would no longer reliably protect reproductive rights and began developing strategies to build political support to take extrajudicial action with a potential "pro-choice [legislative] majority."[147]

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141. David Margolick, Legal Rights of Embryos, N.Y. Times, June 27, 1984, at A12.

142. Panel in Australia Urges that Orphaned Frozen Embryos Be Destroyed, N.Y. Times, Sep. 4, 1984, at C6.

143. State Senate OKs Test-Tube Embryos Bill, The Times (Shreveport, La.), May 15, 1986, at 15A. For more on the meaning of a judicial person under Louisiana's law, see June Carbone & Naomi Cahn, Embryo Fundamentalism, 18 Wm. & Mary Bill Rts. J. 1015, 1038–41 (2010). Louisiana's law remains in place, but families using IVF have worked around it by storing additional embryos out of state. See Chelsea Brasted, How Louisiana IVF Clinics Have Worked Around an Embryo Destruction Ban for 40 Years, Axios (Mar. 6, 2024), https://www.axios.com/local/new-orleans/2024/03/06/louisiana-ivf-treatment-clinics-embryo-law-alabama (on file with the *Columbia Law Review*).

144. See Marsh & Ronner, Pursuit of Parenthood, supra note 11, at 128–31 ("At the turn of the century, only five states—Connecticut, Illinois, Maryland, Massachusetts, and Rhode Island—mandated more or less comprehensive coverage for infertility treatment, including at least a limited number of cycles of IVF."). Today, sixteen states mandate Medicaid coverage for infertility treatment or services. Mandated Coverage of Infertility Treatment, Kaiser Fam. Found., https://www.kff.org/womens-health-policy/state-indicator/infertility-coverage/ [https://perma.cc/7JFB-YGGW] (last visited Aug. 7, 2025).

145. Marsh & Ronner, Pursuit of Parenthood, supra note 11, at 111–13.

146. 476 U.S. 747, 751 (1986), overruled by, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), and, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

147. Nat'l Abortion Rts. Action League, Agenda (Mar. 8, 1989) (on file with the *Columbia Law Review*); see also Memorandum from Jackie Blumenthal, Podesta Assocs., to

The National Abortion Rights Action League (NARAL) and its coalition partners settled on a message focused on "every woman's right to make her own decision . . . free from the dictates of government."[148] This message had two primary dimensions: (1) a resolutely single-issue focus on choice and (2) a critique of government regulation of reproduction. The former strategy was intended to maximize support for a right to choose from likely voters, who may disagree about "civil rights, feminism, labor issues, etc."[149] The latter strategy, NARAL leaders hoped, would appeal to independents and swing voters suspicious of "big government."[150] Addressing IVF regulation also would have created a source of potential division for an abortion-rights movement looking to craft the largest possible coalition.

IVF proved even more divisive for those in the pro-choice coalition because of concerns about who used it. In the 1980s, the cost of the procedure and the limits imposed by most IVF programs ensured that it was unavailable to all but the most privileged Americans.[151] Infertility rates among Black women ran 1.5 times higher than those of white women in the early 1980s.[152] And yet, as prominent critical scholar Dorothy Roberts noted, most of those who used IVF services were "white, highly educated, and affluent."[153]

Further questions about whether reproductive technologies did significant harm were raised by *In re Baby M*, a case that was breathlessly followed by American reporters in 1987.[154] Mary Beth Whitehead had entered into a contract to serve as a surrogate for William and Elizabeth Stern, whose multiple sclerosis made it dangerous for her to carry a pregnancy to term.[155] Following the birth of a baby girl, Whitehead

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Nikki Heidepriem (Mar. 13, 1989) (on file with the *Columbia Law Review*) (describing a campaign to mobilize a pro-choice constituency).

148. Ziegler, Abortion and the Law, supra note 74, at 102 (internal quotation marks omitted) (quoting Hickman-Maslin Research).

149. Memorandum from Hickman-Maslin Research to NARAL (Mar. 22, 1989) (on file with the *Columbia Law Review*).

150. Ziegler, Abortion and the Law, supra note 74, at 101; see also William Saletan, Bearing Right: How Conservatives Won the Abortion War 108–10 (2004) (explaining how NARAL's "Who Decides?" campaign was developed to appeal to conservatives, who were suspicious of government interference in individual liberties).

151. See F.P. Haseltine et al., Psychological Interviews in Screening Couples Undergoing In Vitro Fertilization, 442 Annals N.Y. Acad. Scis. 504, 507 (1985) (showing that 95% of women seeking IVF at one fertility clinic were white and 55% were professionals).

152. Laurie Nsiah-Jefferson & Elaine J. Hall, Reproductive Technology: Perspectives and Implications for Low-Income Women and Women of Color, *in* Healing Technology: Feminist Perspectives 93, 108 (Kathryn Strother Ratcliff, Myra Marx Ferree, Gail O. Mellow, Barbara Drygulksi Wright, Glenda D. Price, Kim Yanoshik & Margie S. Freston eds., 1989).

153. Dorothy E. Roberts, Race and the New Reproduction, 47 Hastings L.J. 935, 939 (1996).

154. See Courtney G. Joslin, (Not) Just Surrogacy, 109 Calif. L. Rev. 401, 411 (2021) (explaining that the *Baby M* case "garnered considerable public and media attention").

155. In re Baby M, 537 A.2d 1227, 1235–36 (N.J. 1988).

changed her mind and fought for custody.[156] The seven-week trial that followed prompted a wave of new regulation of surrogacy.[157] When the case reached the New Jersey Supreme Court, the judges invalidated the surrogacy contract between the Sterns and Whitehead, but it left the trial court to determine issues of child custody and visitation. The trial court eventually awarded custody to the Sterns while ordering that Whitehead be allowed visitation.[158]

IVF and surrogacy were in some ways very different: Traditional surrogacy of the type at issue in Whitehead's case did not involve IVF at all, and IVF rarely involved using a gestational carrier who was not an intended parent.[159] What's more, the issues that tied surrogacy and IVF sometimes parted ways. Traditional surrogacy, used by the parties in *Baby M*, raised concerns not clearly present in IVF—for example, about the commodification of pregnancy, the potential bond between a gestating and genetic parent and a child they had committed to relinquishing, and the potential exploitation of surrogates participating in reproductive labor that they were not fully comfortable with.[160]

Nevertheless, *Baby M* painted a picture of assisted reproductive technologies that could raise shared concerns about IVF and surrogacy. Was IVF, like surrogacy, exploiting the reproductive labor of people with fewer resources, while remaining functionally unavailable to low-income families? Would IVF too have unintended psychological consequences of the kind that surfaced in the *Baby M* litigation?

In this environment, support for IVF—or any specific regulations of it—seemed likely to create more division for a pro-choice coalition that desperately wanted to avoid conflict. At the same time, Democrats like Morrison were interested in *regulating* IVF—a step that would have been awkward for a movement stressing the importance of keeping reproduction "free from the dictates of government."[161]

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156. Id. at 1236–37.

157. See Susan Markens, Surrogate Motherhood and the Politics of Reproduction 38–42 (2007) ("[M]ost of the bills introduced in California during the 1987 and 1988 legislative sessions sought to discourage and/or prohibit the practice of surrogacy, an almost complete turnaround from the legislative response prior to the *Baby M* case.").

158. *In re Baby M*, 537 A.2d at 1262–64. On the final disposition of visitation and custody, see In re Baby M, 542 A.2d 52, 55 (N.J. Super. Ct. Ch. Div. 1988).

159. Gestational carriers were first introduced in the 1980s. Even between 1999 and 2013, gestational carriers comprised only 2.5% of all assisted-reproduction cycles. Ethics Comm., Am. Soc'y for Reprod. Med., Consideration of the Gestational Carrier: An Ethics Committee Opinion, 110 Fertility & Sterility 1017, 1017–18 (2018); see also John L. Yovich, T. D. Hoffman & Ian S. Fraser, IVF Surrogacy and Absent Uterus Syndromes, 332 Lancet 331, 331–32 (1988) (discussing an early use of IVF surrogacy).

160. See Rosalie Ber, Ethical Issues in Gestational Surrogacy, 21 Theoretical Med. & Bioethics 153, 161 (2000) (noting that surrogates are primarily motivated by money, drawing comparisons to prostitution).

161. Ziegler, Abortion and the Law, supra note 74, at 102 (internal quotation marks omitted) (quoting Hickman-Maslin Research).

Consensus on IVF also seemed further out of reach as some religious faiths hardened their teachings against it. In March 1987, the Catholic Congregation of the Doctrine of the Faith issued *Donum Vitae*, which condemned IVF on the same grounds it did contraception: While birth control allowed married people (and many others) to have sex without procreating, IVF and other assisted reproductive technologies impermissibly allowed people to procreate without having sex.[162] Anti-abortion leaders also cemented their opposition to funding IVF research.[163]

The failure to reach consensus on IVF regulation in some ways suited the anti-abortion movement as well, which had played down personhood in its bid to see *Roe* overturned.[164] The reason for steering clear of questions about personhood—including those connected to IVF—became clear during oral argument in *Webster v. Reproductive Health Services*, a case involving a multirestriction Missouri abortion law.[165] The law included a preamble stating that life began at conception—one that many expected to significantly undermine the right to choose abortion.[166]

Frank Susman, the attorney representing the clinic challenging the Missouri law, argued that the preamble of the law would effectively "prevent in vitro fertilization," which would "[c]learly . . . be murder under this section."[167] The state solicitor general responded that the statute would have no such effect—and that the preamble simply stated abstract support for the idea of fetal personhood.[168] Susman's strategy—to suggest that reversing *Roe* would lead to the recognition of personhood, and that personhood would transform the law on IVF—promised to endanger what abortion foes viewed as an otherwise-promising *Roe* reversal strategy.

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162. See Donum Vitae, supra note 68 (criticizing IVF and reasoning that "the gift of human life must be actualized in marriage through the specific and exclusive acts of husband and wife").

163. See Medical and Social Choices for Infertile Couples and the Federal Role in Prevention and Treatment: Hearing Before the Subcomm. on Hum. Res. & Intergovernmental Rels. of the H. Comm. on Gov't Operations, 100th Cong. 178 (1988) (statement of Rep. Hyde) (on file with the *Columbia Law Review*) ("As currently practiced IVF poses several threats to the sanctity of human life."); Press Release, U.S. Conf. of Cath. Bishops, Bishops' Spokesman Asks Reconsideration of In Vitro Decision (July 15, 1988) (on file with the *Columbia Law Review*) (opposing IVF because of the "abortifacient character of this procedure").

164. On the shift in focus away from an HLA, see Mary Ziegler, Dollars for Life: The Anti-Abortion Movement and the Fall of the Republican Establishment 69–75 (2022) (describing a dampening in the HLA narrative due to, among other factors, internal conflicts among pro-life factions and a trend in public opinion increasingly regarding anti-abortion narratives as misogynistic and antidemocratic).

165. 492 U.S. 490, 501 (1989).

166. Id.

167. Transcript of Oral Argument at 49–50, *Webster*, 492 U.S. 490 (No. 88-605).

168. Id. at 51–52 (arguing that the preamble was nothing more than a statement of policy).

Finally, in 1992, Congress did pass IVF legislation,[169] pushed through by Representative Ron Wyden, who expressed concern about the risks that the IVF market posed for unsuspecting consumers.[170] The law responded to the wildly exaggerated claims about the chances of taking home a baby that many fertility practices splashed across their promotional materials and misrepresented in conversations with patients.[171] The Wyden bill, as it was initially known, mandated that IVF clinics report their success rates.[172] In some ways, the bill was a major accomplishment: As the CDC graph below demonstrates, fertility clinics' reporting rates had been disastrously low prior to the Wyden bill.[173] The Wyden bill normalized reporting and encouraged industry self-regulation, which became a prominent feature of fertility practice in the statute's wake.[174]

169. Fertility Clinic Success Rate and Certification Act of 1992, Pub. L. No. 102-493, 106 Stat. 3146 (codified at 42 U.S.C. § 263a-1 (2018)).

170. See Consumer Protection Issues Involving In Vitro Fertilization Clinics: Hearing Before the Subcomm. on Regul., Bus. Opportunities & Energy of the H. Comm. on Small Bus., 101st Cong. 4 (1989) (statement of Rep. Wyden) (discussing an IVF survey released to aid couples in their assessment of clinics); Consumer Protection Issues Involving In Vitro Fertilization Clinics: Hearing Before the Subcomm. on Regul. & Bus. Opportunities of the H. Comm. on Small Bus., 100th Cong. 11–12 (1988) (statement of Bill Eckhardt & Vicki Eckhardt) (discussing the lack of objective information about IVF available to couples considering the procedure).

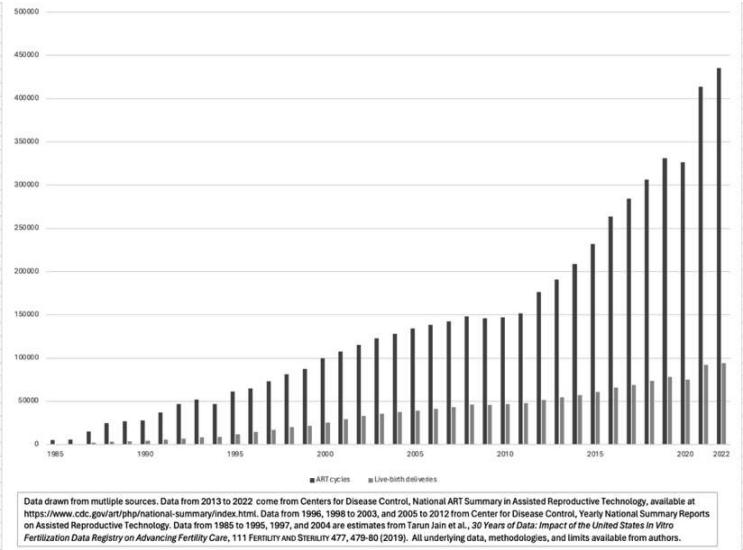
171. See Andrea Preisler, Assisted Reproductive Technology: The Dangers of an Unregulated Market and the Need for Reform, 15 DePaul J. Health Care L. 213, 218 (2013) ("[The FCSRCA] was intended to combat the problem of clinics exaggerating pregnancy success rates and to ensure that consumers are properly informed and knowledgeable about pregnancy success rates.").

172. 42 U.S.C. § 263a-1(a)(1) (requiring the reporting of "pregnancy success rates achieved by such program through each assisted reproductive technology").

173. See, e.g., Tarun Jain, David A. Grainger, G. David Ball, William E. Gibbons, Robert W. Rebar, Jared C. Robins & Richard E. Leach, 30 Years of Data: Impact of the United States In Vitro Fertilization Data Registry on Advancing Fertility Care, 111 Fertility & Sterility 477, 479 fig.1 (2019) (charting the number of IVF clinics reporting data in the United States between 1985 and 2015).

174. Professional self-regulation extends to other means of assisted reproduction beyond IVF, most commonly intrauterine insemination and intracytoplasmic sperm injection. See Don Chalmers, Professional Self-Regulation and Guidelines in Assisted Reproduction, 9 J.L. & Med. 414, 421 (2002).

FIGURE 1. ART CYCLES INITIATED AND NUMBER OF LIVE-BIRTH DELIVERIES, 1985–2022



At the same time, the bill's narrowness helped to explain its passage: It said nothing about who could donate genetic material or act as a surrogate, nothing about how many embryos could be implanted, and nothing about whether IVF had to be funded or even remain legal.[175] The bill contained carve-outs for industry and was passed with input from prominent players in the fertility market.[176]

The Society for Assisted Reproductive Technology, a nongovernmental group responsible for inspecting and certifying laboratories, denied membership to anyone who refused to comply with the statute,[177] but the bill had no clear enforcement mechanism, and physicians could still practice reproductive medicine without complying with it.[178]

175. 42 U.S.C. § 263a-1.

176. For discussion of the role of industry, see 138 Cong. Rec. 8210–11 (Apr. 3, 1992) (statement of Rep. Wyden) (explaining the influence "professional societies," including the American Fertility Society).

177. Join SART, Soc'y for Assisted Reprod. Tech., https://www.sart.org/professionals-and-providers/join-sart/ [https://perma.cc/VDN9-WALF] (last visited Aug. 9, 2025) (reporting current membership requirements, including "submission of cycle-specific clinic outcome data").

178. See Marsh & Ronner, Pursuit of Parenthood, supra note 11, at 186 ("Nevertheless, it remains true that there are no legal penalties for IVF clinics or programs choosing not to provide that information. There is considerable peer pressure from the Society for Assisted Reproductive Technologies for compliance, but peer pressure is not the same thing as legal repercussions.").

Critically, the bill did not regulate access to IVF or funding for it.[179] The regulatory vacuum that emerged in the 1970s remained. Or rather, the absence of meaningful statutory regulation left the governance of assisted reproduction to enforcement through property law, family law, and tort law.[180] Unsurprisingly, these existing theories of civil liability proved ill-suited to the distinctive character of these reproductive harms.[181] Claims for medical malpractice or emotional distress require showing some physical or economic harm that procreation plaintiffs couldn't always readily demonstrate.[182] Some of these actions were jarring, as when they called a child's birth or life "wrongful."[183] For example, in a 1995 IVF case that made national headlines,[184] the closest common-law analogy that judges could locate for being robbed of the chance of biological parenthood was a basement flooding that caused the "discomfort and annoyance" of being denied the use of one's home.[185]

By the 1990s, the growth of fertility clinics in the United States exploded, growing from a handful to a few hundred with the capacity to extract eggs, fertilize them with sperm, grow embryos, and implant them to initiate a pregnancy.[186] Still, IVF remained largely unregulated, accommodating the interests of groups that took very different positions on abortion. On the one hand, abortion-rights supporters invoked IVF to oppose abortion bans. On the other, scholars and activists raised serious concerns about whether IVF, as conventionally practiced, contradicted principles of equity that ought to animate the project of reproductive rights.[187] Anti-abortion groups were of two minds too: sometimes convinced that IVF practice enabled the destruction of rights-holding embryos, while aware that many Americans viewed it as a life-creating technology—and that targeting IVF could jeopardize the fight to undo *Roe*

179. Id.

180. See Michele Goodwin, A View From the Cradle: Tort Law and the Private Regulation of Assisted Reproduction, 59 Emory L.J. 1039, 1073 (2010) ("Congress's hands-off approach to reproductive technologies gives clinics a pass on data submission that could prove highly relevant to the CDC, women's health organizations, childrens' health care advocates, and prospective ART patients.").

181. See Fox, Reply to Critics, supra note 5, at 160–66 (analyzing tort principles in the context of reproductive harm); see also LePage v. Ctr. for Reprod. Med., P.C., 408 So.3d 678, 680 (Ala. 2024) (failing to find an exception to Alabama's Wrongful Death of a Minor Act for "extrauterine children").

182. Fox, Reply to Critics, supra note 3, at 163.

183. See id. at 166–68 (discussing "wrongful birth suits").

184. See Fertility Clinic Is Sued Over the Loss of Embryos, N.Y. Times, Oct. 1, 1995, at A26.

185. Frisina v. Women & Infants Hosp. of R.I., Nos. CIV. A. 95-4037, CIV. A. 95–4469, CIV. A. 95-5827, 2002 WL 1288784, at *8–9 (R.I. May 30, 2002) (citing Hawkins v. Scituate Oil, 723 A.2d 771 (R.I. 1999)).

186. See Ashley M. Eskew & Emily S. Jungheim, A History of Developments to Improve In Vitro Fertilization, 114 Mo. Med. 156, 157 (2017) (describing the increasing demand for fertility treatment).

187. See supra text accompanying notes 146, 167, 180.

v. Wade.[188] Even as conflict about abortion intensified, the ambivalence about IVF that characterized both movements left no major push to regulate it—neither to restrict nor protect it.

D. *The Judicial Stopgap*

For a time, it did seem that state courts would fill IVF's regulatory gap—at least when it came to matters of embryo destruction, if not sexual morality and gender roles. In 1992, the divorce case of Junior and Mary Sue Davis made national headlines.[189] *Davis v. Davis*, like *Baby M*, did not squarely address the legality or regulation of IVF, instead focusing on how additional embryos created as part of IVF would be dealt with in the event of their procreators' divorce.[190] Nevertheless, *Davis* surfaced some of the questions that both pro-life and pro-choice groups found difficult. Junior, a maintenance worker from a small town near Knoxville, and his wife had struggled with infertility before turning to IVF.[191] The two went through six attempts at IVF, all of them unsuccessful, and ultimately divorced with seven unimplanted embryos stored at the Knoxville clinic where they received treatment.[192] Mary Sue, who testified that she viewed the embryos as life, initially wished to use the embryos herself—and argued that destroying them would be "murder."[193] Junior, who opposed this request, framed the case as one involving the "equal rights [of] men," arguing that he had a right not to become a genetic parent against his will.[194]

In September 1992, W. Dale Young, the trial judge, ruled that the embryos qualified as children and proceeded to apply a best-interests-of-the-child analysis, ultimately concluding that "human life begins at conception."[195] Personhood proponents asked the court to name a guardian ad litem to ensure that the "seven 'children in vitro's' lives will [not] be irretrievably lost."[196] The Tennessee Court of Appeals reversed that decision in 1990, reasoning that to force either party into parenthood would be "repugnant and offensive to constitutional principles."[197]

With the case headed to the Tennessee Supreme Court in 1992, *Davis* served as a reminder that the issue of IVF had not become much easier for

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188. See supra text accompanying notes 140–142.

189. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

190. Id. at 589.

191. Id. at 589–93.

192. Frozen Embryos Decision Now Rests With Judge, Elizabethton Star (Elizabethton, Tenn.), Aug. 11, 1989, at 16 (on file with the *Columbia Law Review*).

193. Id. (internal quotation marks omitted) (quoting Mary Sue Davis).

194. Id. (internal quotation marks omitted) (quoting Junior Davis).

195. Judge Gives Estranged Wife Custody of Embryos, L.A. Times, Sep. 21, 1989, at A2 (internal quotation marks omitted) (quoting Judge W. Dale Young). For the court's decision, see Davis v. Davis (*Davis I*), No. E-14496, 1989 WL 140495 (Tenn. Cir. Ct. Sep. 21, 1989), rev'd, (*Davis II*), No. 180, 1990 WL 130807 (Tenn. Ct. App. Sep. 13, 1990).

196. Brief of Law at 8, *Davis I*, 1989 WL 140495.

197. *Davis II*, 1990 WL 130807, at *2–3.

those on either side of conflicts about reproductive rights. There was an additional wrinkle when Mary Sue remarried and no longer wanted to use the embryos herself, instead requesting that they be donated to another couple.[198]

Mary Sue's request placed a high value on embryos but did not sit well with all abortion opponents, some of whom had objected to IVF because it permitted intended parents to separate genetic parenthood and gestation, or because it separated procreation from heterosexual sex.[199] "We know what Mr. Davis wants," wrote the Catholic columnist Father William Maestri, "We know what the former Mrs. Davis wants. However, we do not seem to care about what the unborn child needs."[200]

The *Davis* decision also underscored the drawbacks of assigning complex decisions about IVF to courts. The EAB dialogue of 1978 allowed a range of experts to gather testimony from across communities and states to put together a nuanced proposal.[201] The *Davis* court, by contrast, was limited to considering the filings of the parties in the case. And yet because of the persistent federal vacuum surrounding IVF, it was state courts like the one in *Davis* left to weigh on complex questions like the status of embryos.

Compounding the issue was the anti-abortion movement's focus on men's rights. Starting in the late 1980s, the National Right to Life Committee mounted an ambitious campaign complaining about the lack of *fathers'* rights in abortion.[202] In cases like *Smith v. Doe*, attorneys James Bopp, Jr., and Richard Coleson argued that even under *Roe*, men had a fundamental interest in procreating and parenting their unborn children—and that, at least in some cases, that interest should trump women's decision to have an abortion.[203] In *Smith*, Bopp and Coleson argued that the putative father's interests in his unborn child were greater than what they characterized as the trivial interests of Smith's estranged lover, such as wishing to appear attractive or not gain weight.[204] In another case, the two argued that a father had a right to "care, custody, companionship, and control" of an unborn child, even when a woman was

198. Duncan Mansfield, Legal Fight Over Fate of 7 Frozen Embryos May Go to High Court, The Tennessean (Nash., Tenn.), Nov. 25, 1992, at 2-B.

199. See infra notes 210–215 and accompanying text.

200. William Maestri, No Easy Solution to the Frozen Embryos Case, The Clarion Herald (New Orleans, La.), Sep. 27, 1990, at 12.

201. See supra section I.A.

202. See Ziegler, Abortion and the Law, supra note 74, at 89–125 (explaining how anti-abortion attorneys, in aiming to directly challenge *Roe*, used fathers' rights cases to argue abortion harmed men emotionally and was sought by women for unjustifiable reasons).

203. Petition for Writ of Certiorari at 8, 16, Smith v. Doe, No. 88-1837 (U.S. May 10, 1989) (on file with the *Columbia Law Review*).

204. Id.

seeking an abortion.[205] Cases like *Davis* made it harder to pursue the anti-abortion movement's new men's rights agenda.

At the same time, the Tennessee Supreme Court's decision did not sit well with anti-abortion leaders either. The court had held that the embryos were neither persons nor property but something in between and that Junior Davis's desire to avoid unwanted genetic parenthood trumped Mary Sue's desire to donate the embryos.[206] After *Davis*, fertility clinics around the country had patients and their partners sign forms about what they wanted to happen to their embryos in the event of separation, divorce, or death—the main options being implantation, storage, destruction, or contribution to scientific research.[207] *Davis* suggested that a tie goes to the person seeking to avoid the attribution of parenthood.[208] David O'Steen of the National Right to Life Committee complained that "[whichever] party is seeking to destroy the unborn child prevails."[209]

If *Davis* created political headaches for the anti-abortion movement, abortion opponents had a more urgent priority: the decision of *Planned Parenthood v. Casey*, a Supreme Court case that seemed likely to be the one to reverse *Roe*.[210] The Court in *Casey*, to the shock of many, preserved what it called the essential holding of *Roe*—that there was a right to choose abortion before viability.[211] At the same time, the Court replaced *Roe*'s trimester framework with the undue-burden standard, which made it much easier for the states to regulate abortion.[212] In the short term, *Casey* meant that states would not be able to recognize fetuses as rights-holding

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205. Petition for Writ of Certiorari at 8–27, Conn v. Conn, 488 U.S. 955 (1988) (No. 88-347), 1988 WL 1093818; see also Letter from Rich Coleson to Paul Lewis (July 28, 1988) (on file with the *Columbia Law Review*) ("I believe the key is to show that *Roe* did not settle the matter . . . and show that [the elements mentioned in *Roe*] are not present or do not outweigh the father's interest in his child.").

206. See Cindy Yao, Isabella Payne, Sela Carrington, Alison Hagani & Payton Gannon, Assisted Reproductive Technologies, 25 Geo. J. Gender & L. 345, 352 (2024) (discussing the various legal approaches courts use to decide frozen embryo disposition disputes and noting that most courts give greater weight to the party seeking to avoid procreation).

207. See Davis v. Davis, 842 S.W.2d 588, 595–97 (Tenn. 1992) (presuming the validity of agreements specifying the disposition of embryos in contingencies such as death, divorce, or abandonment of the program).

208. See I. Glenn Cohen, The Right Not to Be a Genetic Parent?, 81 S. Cal. L. Rev. 1115, 1130, 1134 (2008) ("[T]he 'gamete providers . . . have primary decision-making authority regarding preembryo' implantation." (internal quotation marks omitted) (quoting *Davis*, 842 S.W.2d at 597)).

209. Ronald Smothers, Court Gives Ex-Husband Rights on Use of Embryos, N.Y. Times, June 2, 1992, at A1 (internal quotation marks omitted) (quoting David O'Steen, Exec. Dir., Nat'l Right to Life Comm.).

210. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), overruled by, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

211. See id. at 846 (concluding that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed").

212. Id. at 874.

persons, at least for the purpose of abortion. But *Casey* did not resolve questions within the reproductive-rights movement about IVF.

These divisions resurfaced during the litigation of *Johnson v. Calvert*, a case about gestational surrogacy,[213] a practice in which the intended parents are gamete donors and the party gestating the pregnancy has no genetic tie to the embryo. Gestational surrogacy, too, raised its own set of issues beyond those related to IVF: for example, whether carriers suffer psychological harm from such arrangements[214] and whether gestational surrogacy was a form of involuntary servitude or at the very least exploitative.[215] But the *Johnson* case underscored potential ties between IVF and gestational surrogacy and served as a reminder about the concerns about IVF's inaccessibility and disparate racial history.[216]

Anna Johnson, a Black nurse and single mother, had agreed to serve as a gestational carrier for Mark and Crispina Calvert.[217] But the agreement broke down during Johnson's pregnancy, and after the birth of a son, she pursued parental rights.[218] Johnson's race and class drove home concerns among some supporters of reproductive rights that IVF and other reproductive technologies reinforced existing status hierarchies.[219]

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213. 851 P.2d 776 (Cal. 1993) (en banc).

214. Later research has suggested that gestational surrogates do not experience substantial adverse reactions in most cases. See, e.g., Annie Yau, Rachel L. Friedlander, Allison Petrini, Mary Catherine Holt, Darrell E. White, Joseph Shin, Sital Kalantry & Steven Spandorfer, Medical and Mental Health Implications of Gestational Surrogacy, 225 Am. J. Obstetrics & Gynecology 264, 264–69 (2021) (finding no substantial adverse medical or psychological outcomes for gestational carriers or the children born through surrogacy when rigorous screening and support are provided). The current state of medical evidence had not yet come into view at the time of *Calvert*.

215. See Deborah R. Grayson, Mediating Intimacy: Black Surrogate Mothers and the Law, 24 Critical Inquiry 525, 539–40 (1998) (discussing how gestational surrogacy risks replicating historical patterns of involuntary servitude and exploitation of Black women by conflating their reproductive labor with physical labor and perpetuating racialized control over motherhood).

216. See Dov Fox, Thirteenth Amendment Reflections on Abortion, Surrogacy, and Race Selection, 104 Corn. L. Rev. Online 114, 125–26 (2019), https://publications.lawschool.cornell.edu/lawreview/wp-content/uploads/sites/2/2020/07/Fox-essay-final.pdf [https://perma.cc/BC4A-MWKH] (extending a Thirteenth Amendment framework to abortion, surrogacy, and race selection and noting surrogacy's ties to historical racial hierarchies).

217. Crispina Calvert, a nurse born in the Philippines, was Filipina, but was cast as "white" in the binary drama of American racial discourse. See Jay Mathews, California Surrogate Stirs Dispute: Birth Mother Seeks to Share Custody, Wash. Post, Sep. 21, 1990, at A8 (reporting on the racial dynamics of the dispute, with Mr. Calvert insisting "[h]e's a Caucasian baby"(internal quotation marks omitted) (quoting Mark Calvert)).

218. *Calvert*, 851 P.2d at 789.

219. For an overview of these concerns, see Khiara M. Bridges, *Windsor*, Surrogacy, and Race, 89 Wash. L. Rev. 1125, 1132–34 (2014) (explaining that critics see surrogacy as reinforcing race, class, and gender hierarchies by commodifying women's bodies and exploiting economically disadvantaged women).

For example, the National Organization Against Surrogacy stressed that IVF and surrogacy, under decisions like *Johnson*, would make it easier for the wealthy to "solicit black and brown women" as "breeders."[220] The legal philosopher Anita Allen denounced the *Johnson* decision as "whites owning Black women's wombs."[221] Other progressives saw the Calverts' victory—and the very phenomenon of gestational surrogacy—as an example of reproductive liberty.[222] If "[m]ales can sell their semen," the Calverts' lawyer argued, "[t]hen why can't women as a matter of law have the right to become a nine-month foster mother by carrying another couple's child?"[223]

It was certainly true that IVF was not equally available to all Americans. Feminists objected to the limits many clinics placed on access to IVF in the 1990s, such as requirements that intended parents be heterosexual and married.[224] Professor Dorothy Roberts maintained that the government could do more to equitably battle infertility by addressing its root causes, such as "occupational and environmental hazards, diseases, and complications following childbirth and abortion."[225]

These criticisms notwithstanding, in the 1990s, most fertility programs required that clients be married to access IVF.[226] This was a time when the rate of Black women who had not been married by age forty-five was nearly twice as high as that of white women.[227] The cost of IVF—which in 1994

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220. Catherine Gewertz, Genetic Parents Given Sole Custody of Child, L.A. Times (Oct. 23, 1990) https://www.latimes.com/archives/la-xpm-1990-10-23-mn-2958-story.html (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Jeremy Rifkin, Co-Chairman, Nat'l Coal. Against Surrogacy).

221. Anita L. Allen, The Black Surrogate Mother, 8 Harv. Blackletter J. 17, 17 (1991) (citing Alice Walker, What Can the White Man . . . Say to the Black Woman, The Nation, May 22, 1989, at 691); see also Dorothy E. Roberts, The Genetic Tie, 62 U. Chi. L. Rev. 209, 210 (1995) [hereinafter Roberts, The Genetic Tie] (arguing that surrogacy reflects the fact that "America is obsessed with creating and preserving white genetic ties").

222. See Gewertz, supra note 220 (summarizing a pro-surrogacy argument that the decision "upholds the principle that women are entitled to do what they choose with their reproductive powers").

223. Id. (internal quotation marks omitted) (quoting Christian R. Van Deusen, Att'y).

224. Roberts, The Genetic Tie, supra note 221, at 241; see also Barbara Katz Rothman, Recreating Motherhood: Ideology and Technology in a Patriarchal Society 233 (1989) (describing surrogacy as a process which was limited to couples with "sperm and money," thus creating barriers for lesbian couples or poor couples).

225. Roberts, Race and the New Reproduction, supra note 153, at 948.

226. While other nations explicitly restricted IVF to married, heterosexual couples, limits in the United States often arose from clinics "gatekeeping in an attempt to safeguard child safety and welfare." Crystal Liu, Note, Restricting Access to Infertility Services: What Is a Justified Limitation on Reproductive Freedom?, 10 Minn. J.L. Sci. & Tech. 291, 318 (2009); see also Andrea D. Gurmankin, Arthur L. Caplan & Andrea M. Braverman, Screening Practices and Beliefs of Assisted Reproductive Technology Programs, 83 Fertility & Sterility 61, 65 (2005) (showing that clinics were more likely to turn away patients who were single or in a same-sex partnership).

227. Diana B. Elliott, Kristy Krivickas, Matthew W. Brault & Rose M. Kreider, Historical Marriage Trends From 1890–2010: A Focus on Race Differences 14 (U.S. Census Soc., Econ.

ran to nearly $70,000 for a single cycle, according to a study published in the *New England Journal of Medicine*—also put IVF financially off limits to many families of color.[228] *Johnson* reinforced the impression that IVF and other assisted reproductive technologies tended to benefit white or Asian families but did not always confer the same advantages on anyone else.

At the same time, IVF and the legal changes it helped to inspire struck some progressives as having emancipatory potential.[229] Traditionally, the law relied on a genetic or gestational bond to determine parenthood, disqualifying LGBTQ parents, stepparents, and a variety of other caretakers.[230] Together, IVF and gestational surrogacy made this metric unworkable because, as in *Johnson*, the gestational and genetic parents were not the same individual.[231] *Johnson*, for example, held that parental rights attached primarily based on parental intent rather than genetics, gestation, or marriage alone—a result that could create a more egalitarian vision of parenthood for those who were unmarried, in same-sex unions, or not genetically related to their children.[232] Given divisions over how—or whether—IVF should be regulated, supporters of reproductive rights had difficulty overcoming obstacles to reform.

Nevertheless, the reasons for regulation had certainly not gone away. To maximize the chances of a successful pregnancy, some clinics implanted multiple embryos, which led to a sharp increase in multiple births: The rate of high-order multiple births in the United States tripled between 1971 and 1996, with accompanying rises in gestational risks, pre- and

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& Hous. Div., Working Paper No. 2012-12, 2012), www.census.gov/content/dam/Census/library/working-papers/2012/demo/SEHSD-WP2012-12.pdf [https://perma.cc/2RG4-LS9W].

228. See Peter J. Neumann, Soheyla D. Gharib & Milton C. Weinstein, The Cost of a Successful Delivery With In Vitro Fertilization, 331 NEJM 239, 241 (1994) ("Under the assumptions for the base case, it costs $66,667 per delivery for couples undergoing their first cycle of treatment and rises to $114,286 per delivery for couples attempting their sixth cycle."). The story received attention from the press. Cost of Test Tube Babies Averages $72,000, N.Y. Times (July 28, 1994), https://www.nytimes.com/1994/07/28/us/cost-of-test-tube-babies-averages-72000.html (on file with the *Columbia Law Review*). This estimate accounted for several related costs for a successful IVF delivery and ran significantly higher than what clinics charged. See Ann Wozencraft, It's a Baby, or It's Your Money Back, N.Y. Times (Aug. 25, 1996), https://www.nytimes.com/1996/08/25/business/it-s-a-baby-or-it-s-your-money-back.html (on file with the *Columbia Law Review*).

229. Roberts, Race and the New Reproduction, supra note 153, at 948.

230. See Johnson v. Calvert, 851 P.2d 776, 781–82 (Cal. 1993) (en banc) ("[W]hile gestation may demonstrate maternal status, it is not the sine qua non of motherhood. Rather, it is possible that the common law viewed genetic consanguinity as the basis for maternal rights.").

231. See Courtney Megan Cahill, The New Maternity, 133 Harv. L. Rev. 2221, 2270–71 (2020) (arguing that *Johnson* assumed to have identified an ambiguity "surrounding motherhood that had always existed" (emphasis omitted)).

232. See, e.g., Douglas NeJaime, The Nature of Parenthood, 126 Yale L.J. 2260, 2306 (2017) [hereinafter NeJaime, The Nature of Parenthood] (offering *Johnson* as an example of how "sex-equality principles animated the rejection of reproductive biology as a justification for gender-differentiated parental recognition").

postnatal complications, and medical costs.[233] In 1996, responding to a report by the National Institutes of Health on embryo research, Congress passed the Dickey–Wicker Amendment, an appropriations rider proposed by Representatives Jay Dickey and Roger Wicker that prohibited federal funding for research that destroyed an embryo, which Dickey called "lethally experimenting with a life."[234] But no further regulations were forthcoming.[235]

As the 2000s began, courts had stepped in to fill part of the regulatory gap that had defined IVF for so many families.[236] But these judicial stopgaps fell far short of meaningful reform. Courts lacked the institutional capacity to consider every facet of an increasingly complex issue,[237] and varying decisions across jurisdictions only complicated matters for patients.[238] And neither pro-choice nor pro-life leaders were willing to prioritize legislation to radically change the status quo.

E. *Stem Cells and Embryo Protection*

Following his 2000 election, President George W. Bush limited funding for research on new embryonic stem cell lines and convened the President's Council on Bioethics, chaired by longtime IVF critic Leon Kass, to advise him on related questions.[239] But Bush's move quelled debate

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233. Shari Roan, How Many Babies Is Too Many?, L.A. Times (May 14, 1996), https://www.latimes.com/archives/la-xpm-1996-05-14-mn-3989-story.html (on file with the *Columbia Law Review*).

234. John E. Yang, House Panel Approves Ban on Human Embryo Research, Wash. Post, June 26, 1996, at A4 (internal quotation marks omitted) (quoting Rep. Jay Dickey).

235. Nicholas Riley, Comment, Reconstructing Embryos: The Legal Ramifications of iPSC Technology and the Dickey–Wicker Amendment, 2022 U. Chi. Legal F. 365, 370–73 (explaining that the Dickey–Wicker amendment was the final word on IVF regulation until the Obama Administration).

236. See supra text accompanying notes 207–223.

237. See, e.g., Doe v. Irvine Sci. Sales Co., 7 F. Supp. 2d 737, 741–43 (E.D. Va. 1998) (dismissing a claim for emotional damages after the defendant's negligent contamination of fertilized embryos resulted in a failed pregnancy on the grounds that the plaintiff suffered no physical injury); Perry-Rogers v. Fasano, 715 N.Y.S.2d 19, 28–30 (App. Div. 2000) (holding that, when a fertilized embryo was implanted in the gestational mother by mistake, she lacked standing for custody as the child's parent); Creed v. United Hosp., 600 N.Y.S.2d 151, 151–52 (App. Div. 1993) (dismissing a negligence claim brought after a doctor implanted a fertilized ovum in the wrong woman on the grounds that the plaintiff suffered only emotional damages); Frisina v. Women & Infants Hosp. of R.I., Nos. CIV. A. 95-4037, CIV. A. 95-4469, CIV. A. 95-5827, 2002 WL 1288784, at *9–10 (R.I. Super. Ct. May 30, 2002) (holding that the defendant's negligent destruction of the plaintiff's embryos constituted property damage); Harnicher v. Univ. of Utah Med. Ctr., 962 P.2d 67, 72 (Utah 1998) (dismissing an infliction of emotional distress claim brought after a doctor fertilized a woman's ovum with the wrong man's sperm on the grounds that the plaintiffs suffered only the inability to believe that the children were biologically their own).

238. See, e.g., supra text accompanying notes 211–219; infra notes 260–256.

239. Gilbert Meilaender, On Bioethics in Public, New Atlantis, Fall 2009/Winter 2010, at 39, 39; Samuel Philbrick, President George W. Bush's Announcement on Stem Cells, 9 August 2001, Embryo Project Encyclopedia (Nov. 19, 2011), https://embryo.asu.edu/

about neither stem cell research nor IVF. The Bioethics Council attributed the "relatively laissez-faire approach to regulation" to enduring and "deep disagreement" about the moral status of human embryos.[240] Some anti-abortion groups attacked other pro-life activists for not making IVF enough of a priority.[241] "It is discriminatory," wrote the American Life League in its *Declaration on Truth and Life*, "to treat those created through in vitro fertilization or other such manipulations as less deserving of respect and dignity as human persons."[242]

At the time, leading anti-abortion groups were focusing on criminalizing *later* procedures, their central campaign a push to criminalize so-called partial-birth abortion, a term applied to the dilation and extraction procedure.[243] In promoting these bills, anti-abortion groups stressed that their opponents—both the abortion-rights movement and the Democratic Party—were well outside the political mainstream.[244] James Bopp, Jr., and Thomas Marzen of the National Right to Life Committee, for example, praised the partial-birth abortion campaign in a funding request as the most effective means over at least the last decade to "educate the voting public [about] the radical nature of the abortion liberty."[245] Seeking to prohibit IVF, by contrast, could allow abortion-rights supporters to paint their opponents as the true extremists. Bush, too, seemed to want to express support for personhood without calling for IVF restrictions, and he did so by announcing a program of block grants to facilitate embryo adoption, a process by which patients could donate additional embryos to other couples.[246]

The National Right to Life Committee responded by reframing its concerns about IVF as a demand that stem cell research not receive federal funding—and, in 2004, the only question related to IVF that appeared in the group's candidate questionnaire asked about funding for stem cell

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pages/president-george-w-bushs-announcement-stem-cells-9-august-2001 [https://perma.cc/5W5Z-2V9N].

240. President's Council on Bioethics, Reproduction and Responsibility: The Regulation of New Biotechnologies 8 (2004).

241. See Judy Peres, In-Vitro New Front in Embryo War: Right-to-Life Battle Lines May Be Shifting to Fertilized Frozen Embryos, Which Have Helped Millions of Women Conceive, Chi. Trib., July 6, 2005 (illustrating the dispute between different pro-life groups regarding IVF).

242. Am. Life League, Declaration on Truth and Life (n.d., c. 2001) (on file with the *Columbia Law Review*).

243. On the partial-birth abortion campaign, see Reva B. Siegel, Dignity and the Politics of Protection: Abortion Restrictions Under *Casey/Carhart*, 117 Yale L.J. 1694, 1707-33 (2008).

244. Ziegler, Abortion and the Law, supra note 74, at 183–84 (alteration in original) (internal quotation marks omitted) (quoting James Bopp, Jr. and Thomas Marzen).

245. Id. at 176 (alteration in original) (internal quotation marks omitted).

246. Laura Meckler, 'Embryo Adoption' Getting Push From $1 Million Awareness Drive, Chi. Trib., Aug. 21, 2002, at 9. The status of these donations as adoptions was contested, dividing those who saw embryos as something less than persons from those who embraced full embryonic personhood.

research.[247] By 2005, however, some anti-abortion groups were considering pushing state restrictions of IVF.[248] Kentucky lawmakers considered a proposal, like Louisiana's,[249] that permitted the implantation of only one embryo.[250] But these state efforts went nowhere.[251]

State courts continued intervening to fill the gap. In 1998, the New York Court of Appeals stressed that prior written agreements by the parties to IVF, including clinic consent forms, could be understood as enforceable contracts regarding the disposition of additional embryos.[252] In 2003, the Iowa Supreme Court developed an alternative approach, freezing the status quo unless the parties to IVF reached a mutual, contemporaneous agreement about the disposition of embryos.[253] Other courts gave priority to the party favoring implantation if the embryos represented that person's last procreative chance.[254] Jurisdictions offered different responses about how to understand the worth of embryos and to devise rules governing their disposition.[255] Other matters—like the number of embryos transferred—were left to the private market to determine.[256]

Nevertheless, after the Supreme Court upheld the Partial-Birth Abortion Ban Act in 2007 in *Gonzales v. Carhart*,[257] several forces ensured that neither the abortion-rights nor anti-abortion movement pushed for a cohesive federal approach to IVF. Leading anti-abortion groups had to contend with an effort to amend state constitutions to recognize fetal personhood, an effort that commenced in Colorado because of Kristi

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247. Nat'l Right to Life Comm., Inc., 2004 Congressional Candidate Questionnaire (on file with the *Columbia Law Review*).

248. See Peres, supra note 241 ("A spokesman for Americans United for Life said his group is researching model legislation for states that want to regulate reproductive technologies.").

249. See supra note 143 and accompanying text.

250. Id.

251. For an overview of contemporary regulation, see Legislation to Watch, Resolve, https://resolve.org/take-action/our-issues/current-legislation [https://perma.cc/HZT6-8VL3] (last visited Aug. 7, 2025).

252. Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998) ("Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them." (citations omitted)).

253. In re Marriage of Witten, 672 N.W.2d 768, 780 (Iowa 2003).

254. See, e.g., Szafranski v. Dunston, 34 N.E.3d 1132, 1162–63 (Ill. App. Ct. 2015) ("Karla's interests in using the pre-embryos to have a biologically related child—given her ovarian failure and inability to create any more pre-embryos with her own eggs, prevail over Jacob's interests in not using them."); Reber v. Reiss, 42 A.3d 1131, 1140–42 (Pa. Super. Ct. 2012) ("[B]ecause Husband and Wife never made an agreement prior to undergoing IVF, and these pre-embryos are likely Wife's only opportunity to achieve biological parenthood and her best chance to achieve parenthood at all, . . . the balancing of the interests tips in Wife's favor.").

255. See infra notes 254–256 and accompanying text.

256. See supra sections I.A–.C.

257. 550 U.S. 124 (2007).

Burton, a homeschooled, conservative, Christian activist.[258] Burton's effort attracted support from absolutists across the country, leading to the formation of a national organization, Personhood USA.[259] Larger anti-abortion groups worried that such an amendment would be struck down by the Supreme Court and quite possibly give the Court an opportunity to strengthen abortion rights.[260]

As important, groups like National Right to Life Committee worried that personhood amendments were *political* losers because they arguably would affect laws well beyond regulations of abortion.[261] In Colorado, for example, opponents of Burton's proposal argued that it would prohibit IVF, or at least the creation of additional embryos that would not immediately be implanted.[262] Burton dismissed these arguments as a scare tactic,[263] but the debate made it difficult for anti-abortion leaders to air existing concerns about IVF, much less seek to regulate or prohibit it—especially after Colorado's proposal was soundly defeated at the polls.[264]

In 2008, when voters rejected Burton's proposal, roughly half-a-million frozen embryos were in storage across the United States.[265] There were signs that IVF was still controversial: On his way out of office, President George W. Bush unveiled a so-called right-to-refuse rule that permitted doctors, hospitals, and even receptionists and volunteers in medical experiments the right to refuse involvement in medical treatments they found objectionable, including IVF.[266]

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258. Ziegler, Abortion and the Law, supra note 74, at 183–84.

259. Id.

260. See Julie Rovner, 'Personhood' Divides Anti-Abortion Groups, NPR (Nov. 9, 2011), https://www.npr.org/sections/health-shots/2011/11/09/142184556/personhood-divides-anti-abortion-groups [https://perma.cc/7CQE-84ZW] (reporting on Mississippi's failed personhood amendment and anti-abortion advocates' frustrations that the Supreme Court "has . . . indicated an interest in reformulating the right to abortion to make it even more extreme"(internal quotation marks omitted) (quoting James Bopp, Jr., Gen. Couns., Nat'l Right to Life Comm.)).

261. Id.

262. Id.

263. Id.

264. See Colorado Amendment 48, Definition of Person Initiative, Ballotpedia, https://ballotpedia.org/Colorado_Amendment_48,_Definition_of_Person_Initiative_%28 2008%29 [https://perma.cc/N95T-BG9K] (last visited Aug. 9, 2025).

265. Shari Roan, On the Cusp of Life, and of Law, L.A. Times (Oct. 6, 2008), https://www.latimes.com/archives/la-xpm-2008-oct-06-he-embryos6-story.html [https://perma.cc/97ZZ-HW3L].

266. Bush first unveiled conscience rules regarding abortion, see Stephanie Simon, Rules Let Health Workers Deny Abortions, Wall St. J. (Aug. 22, 2008), https://www.wsj.com/articles/SB121934377810560987?gaa_at=eafs&gaa_n=ASWzDAheHj94_l7EzPmw0hZHsCSAkCBsZ2AkmrXaD0wAHlN5SeTDuBw8Jbii&gaa_ts=68c8aab4&gaa_sig=h_acznME1_ODVG2dt8LPzkAqltnPSTGGze4Bvhizp7rXEzKc9RoSTCXfdaOKwHarMHD24tkVTinfTKyPvik_yg%3D%3D (on file with the *Columbia Law Review*), but then expanded the right-to-refuse rule. See David G. Savage, Conscience Rule Unveiled, Chi. Trib., Dec. 19, 2008, at 1. For the rule itself, see 45 C.F.R. § 88 (2025).

The following year, Nadya Suleman, whom the press would gleefully dub "octo-mom," gave birth to octuplets following IVF.[267] At times, protestors gathered outside Suleman's home, arguing that Suleman and her children would depend on public assistance because Suleman lacked the means to support her children.[268]

Both Georgia and Missouri pushed proposals to limit the number of embryos implanted, seemingly driven by personhood concerns.[269] Georgia Right to Life, which had broken away from the National Right to Life Committee over the question of personhood amendments, framed the new legislative proposals as an extension of the personhood campaign, calling them a way of recognizing embryos "as living human beings and not as property."[270] But state implantation limits stalled, and personhood amendments gave leading anti-abortion groups reason to steer clear of potential IVF regulations. For example, when Personhood USA and affiliated groups pushed an amendment in Mississippi, the state believed to be among the most likely to approve such a measure, opponents of the strategy insisted that it would criminalize IVF, and Joseph Latino, Roman Catholic Bishop of Jackson, Mississippi, spoke out against it because of his fear that it would "ultimately harm . . . efforts to overturn *Roe v. Wade*."[271] The fact that 58% of voters in Mississippi rejected the proposal hardly changed the calculus.[272]

Much more attention centered on abortion following the confirmation of Justice Brett Kavanaugh in 2018, when states began pushing more aggressive abortion bans with the expectation that the Supreme Court

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267. For contemporary news coverage of Suleman, see Goodwin, supra note 180, at 1041 (describing how Suleman became a celebrity "as the infamous 'octo-mom' for giving birth to octuplets through a sophisticated medical procedure involving forty-six doctors and extensive medical treatments for her infants").

268. See, e.g., Jessica Garrison, Kimi Yoshino & Catherine Ho, Public Fury Overtakes Awe After the Birth of Octuplets, L.A. Times (Feb. 7, 2009), https://www.latimes.com/archives/la-xpm-2009-feb-07-me-octuplets7-story.html (on file with the *Columbia Law Review*); Steve Gorman, Threats Send California Octuplets Mom Into Hiding, Reuters (Feb. 11, 2009), https://www.reuters.com/article/domesticNews/idUSTRE51A7R020090211/ (on file with the *Columbia Law Review*).

269. Betsy McKay, In-Vitro Fertilization Limit Is Sought, Wall St. J. (Mar. 3, 2009), https://www.wsj.com/articles/SB123603828823714509?gaa_at=eafs&gaa_n=ASWzDAgIwZzjIKRsK2cw3gvESSt2b1w6w9Nlb7zeWOdkA7deMwKQxYdqzvqs&gaa_ts=68c8ad90&gaa_sig=Q46zXJeuueIi8oNU9eaHyHB6nBpVvjn35Pi2jUpZFEaR3OTET-zWRdrMNJMYvJrXYrjhsmu8YwYCvK113U0amw%3D%3D (on file with the *Columbia Law Review*).

270. Id. (internal quotation marks omitted) (quoting Daniel Becker, President, Ga. Right to Life).

271. Richard Fausset, 1 State Personifies Personhood Push, Chi. Trib., Nov. 6, 2011, at 1 (internal quotation marks omitted) (quoting Joseph Latino, Roman Cath. Bishop of Jackson, Miss.).

272. Frank James, Mississippi Voters Reject Personhood Amendment by Wide Margin, NPR (Nov. 8, 2011), https://www.npr.org/sections/itsallpolitics/2011/11/08/142159280/mississippi-voters-reject-personhood-amendment [https://perma.cc/C2YX-6NEE].

would uphold them.[273] Some state laws gestured explicitly to personhood.[274] Ten states had statutes or constitutional amendments purporting to define persons across different areas of law to include fetuses or unborn children.[275] Other states defined the word "person" in their criminal codes as including a fetus or unborn child or punished conduct during pregnancy as abuse or neglect.[276]

IVF's regulatory vacuum had proven remarkably persistent. Since the 1990s, states had classified not-yet-implanted embryos as genetic property

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273. See Elizabeth Nash, Lizamarie Mohammed, Olivia Cappello & Sophia Naide, State Policy Trends 2019: A Wave of Abortion Bans, but Some States Are Fighting Back, Guttmacher Inst. (Dec. 10, 2019), https://www.guttmacher.org/article/2019/12/state-policy-trends-2019-wave-abortion-bans-some-states-are-fighting-back [https://perma.cc/SSQ8-XPQG] ("[S]upporters of the new wave of abortion bans have made it clear that they are seeking to give the U.S. Supreme Court multiple opportunities to undermine or overturn long-standing constitutional protections for individuals seeking an abortion.").

274. Megan Messerly, 'Scratching Their Heads': State Lawmakers Take a Closer Look at Personhood Laws in Wake of Alabama Ruling, Politico (Feb. 29, 2024), https://www.politico.com/news/2024/02/29/states-fetus-personhood-alabama-ivf-00143973 [https://perma.cc/NQB3-F8R7].

275. See Ala. Const. art. I, § 36.06 ("This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life."); Ariz. Rev. Stat. Ann. § 1-219(A) (2025) ("The laws of this state shall be interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons, citizens and residents of this state . . . ."); Ga. Code Ann. § 1-2-1(b) (2025) ("'Natural person' means any human being including an unborn child."); Kan. Stat. Ann. § 65-6732(c)(2) (West 2025) (defining "unborn child" as "all unborn children or the offspring of human beings from the moment of fertilization until birth at every stage of biological development" (internal quotation marks omitted)); Ky. Rev. Stat. Ann. § 311.720 (West 2025) ("'Human being' means any member of the species homo sapiens from fertilization until death . . . ."); Mo. Ann. Stat. § 1.205 (2025) ("The life of each human being begins at conception . . . ."); Mont. Code Ann. § 50-20-102(2)(c) (2023) (stating that the state interest in protecting human life applies "to unborn persons in order to extend to unborn persons the inalienable right to defend their lives and liberties"); 18 Pa. Stat. and Cons. Stat. Ann. § 3202(c) (2025) ("In every relevant civil or criminal proceeding in which it is possible to do so without violating the Federal Constitution, the common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws . . . ."); Tenn. Code Ann. § 39-15-214(a)(6) (2025) ("The state has a legitimate, substantial, and compelling interest in protecting the rights of all human beings, including the fundamental and absolute right of unborn human beings to life, liberty, and all rights protected by the Fourteenth and Ninth Amendments to the United States Constitution . . . ."); Utah Code § 76-7-301.1(1) (2025) ("[U]nborn children have inherent and inalienable rights that are entitled to protection by the state of Utah pursuant to the provisions of the Utah Constitution."); Utah Code § 78B-3-109(1) (2025) ("The Legislature finds and declares that it is the public policy of this state to encourage all persons to respect the right to life of all other persons, regardless of age, development, condition, or dependency, including all persons with a disability and all unborn persons.").

276. See Pregnancy Just., When Fetuses Gain Personhood: Understanding the Impact on IVF, Contraception, Medical Treatment, Criminal Law, Child Support, and Beyond 6 (2023), https://www.pregnancyjusticeus.org/wp-content/uploads/2023/05/fetal-personhood-with-appendix-UPDATED-1.pdf [https://perma.cc/2ALR-Y6YV] (describing states that define "person," "individual," or "human being" to include a fetus).

subject to agreements among the individuals they came from and went to and the facilities that helped to create and store them.[277] In the 2000s, anti-abortion groups had promoted embryo adoption laws and even considered restrictions on IVF itself.[278] But support for IVF—which abortion-rights supporters invoked in the fight against personhood amendments—gave pro-lifers pause: Perhaps attacking IVF would undermine the fight to reverse *Roe*.[279] Leaving IVF off the radar continued to make sense, even for the most ardent supporters of fetal personhood.

What any of this meant for IVF was not immediately obvious in early 2022. After all, even the most ardent abortion opponents, like Kristi Burton, had dismissed the supposed connection between IVF and personhood laws.[280] And yet within a year of the leak of the *Dobbs* decision, the longstanding political compromise that had sustained IVF's regulatory vacuum collapsed. Part II turns next to the reasons for its demise.

II. REMAKING NORMAL

When *Politico* obtained a leaked copy of the Supreme Court's opinion in *Dobbs* in the spring of 2022,[281] 2.5% of all births were attributable to IVF.[282] IVF remained financially inaccessible for low-income families,[283] and Black and Latinx families were less likely than white families to be able to afford IVF and less likely to achieve a successful pregnancy when they managed to access it.[284] And the IVF industry, of course, was more complicated than a "Wild West."[285] The CDC had published surveillance

277. See Mary Ziegler, Beyond Balancing: Rethinking the Law of Embryo Disposition, 68 Am. U. L. Rev. 515, 522 (2018) (describing various approaches to embryo disposition, including the mutual, contemporaneous agreement approach).

278. See supra notes 246–250 and accompanying text.

279. See supra notes 268–272 and accompanying text.

280. See supra note 263 and accompanying text.

281. Josh Gerstein & Alexander Ward, Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows, Politico (May 2, 2022), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 (on file with the *Columbia Law Review*) (last updated May 3, 2022).

282. See Press Release, Am. Soc'y for Reprod. Med., US IVF Usage Increases in 2023, Leads to Over 95,000 Babies Born (Apr. 23, 2025), https://www.asrm.org/news-and-events/asrm-news/press-releasesbulletins/us-ivf-usage-increases-in-2023-leads-to-over-95000-babies-born/ [https://perma.cc/A7KP-SEQN] (reporting that 91,771 of approximately 3.6 million babies were born from IVF in 2022).

283. The cost of IVF can still easily exceed $40,000 per cycle. Fact Sheet: IVF Use Across the United States, supra note 4.

284. Tarun Jain, Racial Disparities and In Vitro Fertilization (IVF) Treatment Outcomes: Time to Close the Gap, Reprod. Biology & Endocrinology, Nov. 19, 2020, at 1, 1.

285. See Spar, supra note 6.

summaries of assisted reproductive technologies, including IVF, since 1997.[286] But scarce funds and staff hamstrung data collection.[287]

The American Society for Reproductive Medicine (ASRM) published ethics and practice guidelines,[288] while its sister organization, the Society for Assisted Reproductive Technology (SART), certified and monitored laboratories and provided data to the CDC.[289] Professional membership has always been voluntary, however, with no mechanism either to validate the information that SART pulls together or to discipline providers for failing to comply with ASRM recommendations.[290]

Meanwhile, the federal government, state medical boards, and common law all policed IVF less rigorously than comparable areas of medical practice like obstetrics and gynecology, radiology, and oncology.[291] The two organizations that accredited most fertility clinics often kept the details of investigations private.[292] Private equity firms, which one study found owned a larger proportion of fertility clinics than any other medical practice, created sprawling chains and drove a focus on profitability.[293] Lawsuits that followed catastrophic failures—such as the implosion of a cryopreservation tank in San Francisco or the failure of another tank in Cleveland—typically settled before trial and were subject to nondisclosure agreements.[294] And courts were reluctant to recognize

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286. For the most recent report, see National ART Summary, CDC (Dec. 10, 2024), https://www.cdc.gov/art/php/national-summary/?CDC_AAref_Val=https://www.cdc.gov/art/reports/2021/summary.html [https://perma.cc/6W8N-CCNY]. The CDC has gathered such reports since 1997. See Saswati Sunderam, Dmitry M. Kissin, Yujia Zhang, Amy Jewett, Sheree L. Boulet, Lee Warner, Charlan D. Kroelinger & Wanda D. Barfield, Assisted Reproductive Technology Surveillance—United States, 2018, Morbidity & Morality Wkly. Rep., Feb. 18, 2022, at 1, 2.

287. See Alicia Ouellette, Arthur Caplan, Kelly Carroll, James W Fossett, Dyrleif Bjamadottir, Darren Shickle & Glenn McGee, Lessons Across the Pond: Assisted Reproductive Technology in the United Kingdom and the United States, 31 Am. J.L. & Med. 419, 424–27 (2005).

288. Practice Guidance, Am. Soc'y for Reprod. Med., https://www.asrm.org/practice-guidance/ [https://perma.cc/24QJ-HXHQ] (last visited Aug. 8, 2025).

289. What Is SART?, Soc'y for Assisted Reprod. Tech., https://www.sart.org/about-us/what-is-sart/ [https://perma.cc/GBM5-BTGA] (last visited Aug. 8, 2025).

290. See Judith Daar, Emerging Reproductive Technologies: Regulating Into the Void, *in* Case Studies in the Ethics of Assisted Reproduction 13, 21 (Louise P. King & Isabelle C. Band eds., 2023) (explaining that there is not one uniform way for providers to comply with ASRM recommendations).

291. See Steve P. Calandrillo & Chryssa V. Deliganis, In Vitro Fertilization and the Law: How Legal and Regulatory Neglect Compromised a Medical Breakthrough, 57 Ariz. L. Rev. 311, 329–30 (2015) (explaining that "the fertility industry is subject only to very limited state and federal regulation").

292. Lenny Bernstein & Yeganeh Torbati, Inside the Opaque World of IVF, Where Errors Are Rarely Made Public, Wash. Post (Apr. 28, 2024), https://www.washingtonpost.com/health/2024/04/28/ivf-errors-fertility-clinics-regulation/ (on file with the *Columbia Law Review*).

293. Id.

294. Id.

intangible reproductive injuries in the first place, leaving these harms to fall through the cracks of available protections under contract, property, or tort law.[295]

Despite dissatisfaction with the state of the law, the regulatory vacuum surrounding IVF seemed to have survived miraculously intact for decades. Then came *Dobbs v. Jackson Women's Health Organization*. The dissenters called out "[i]n vitro fertilization" as "medical care most people view as quite different from abortion," the regulation of which could be expected to confront the Court with new questions about how *Dobbs* applies.[296] But the majority opinion said nothing about IVF. And its holding that a woman has no right to abortion doesn't bear in any direct or necessary way on the creation, use, or destruction of embryos in the laboratory before there's a pregnancy in the first place. So why did *Dobbs* lead to the demise of the enduring compromise that had sustained IVF's regulatory vacuum?

Section II.A explores the social-movement developments that undermined the IVF regulatory vacuum. Section II.B examines the legal developments that supercharged a new social-movement push to restrict IVF—and new reproductive-rights mobilization in favor of *preserving* access to reproductive health. This Article shows that these developments have highlighted real threats to IVF access—and that backlash to those threats has revealed widespread, bipartisan support for IVF. Section II.C briefly discusses new religious alignments that have sustained a new polarized legal climate around IVF.

A. *The New North Star*

While fulfilling decades of hope and carefully planned strategy, *Dobbs* created a sort of crisis for the pro-life movement. Personhood had been the goal for which most dedicated right-to-lifers had mobilized, but more casual supporters had seen the movement's priority as the destruction of *Roe v. Wade*.[297] It was the overruling of *Roe* that protestors demanded each year at the preeminent anti-abortion rally, the March for Life, which took

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295. The Tennessee Supreme Court summed up this legal state of affairs in a 2015 case, explaining that the "law does not recognize disruption of family planning as either an independent cause of action or an element of damages." Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235, 271 (Tenn. 2015).

296. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2337 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

297. See, e.g., Elaine Godfrey, What Winning Did to the Anti-Abortion Movement, The Atlantic (Jan. 19, 2023), https://www.theatlantic.com/politics/archive/2023/01/march-for-life-anti-abortion-movement-after-roe/672761/ (on file with the *Columbia Law Review*) (arguing that the pro-life movement's next goal after the reversal of *Roe* was not obvious and had caused uncertainty and disruption); see also Abigail Abrams, The Battle Over the Future of the Anti-Abortion Movement if the Supreme Court Overturns *Roe v. Wade*, Time (Mar. 25, 2022), https://time.com/6160143/anti-abortion-roe-wade-supreme-court/ [https://perma.cc/48CN-SH24] (describing the divisions exposed by the expected reversal of *Roe* and the search for a new mobilizing goal).

place in front of the Supreme Court.[298] The fall of the right to choose abortion also threatened the loss of donors and activists who would feel that the pro-life movement's ambitions had already been achieved.[299]

Claims that the Fourteenth Amendment already recognized personhood from the moment of fertilization struck many leaders of a fractious movement as a natural substitute for the fight against *Roe*.[300] The movement's commitment to personhood was deeply entrenched—evidenced, among other things, by ongoing references to personhood in the Republican platform.[301] As important, in recent years, a once-troubled

298. It was only after *Dobbs* that the March for Life ended at the Capitol, reflecting the claim that the center of gravity post-*Roe* had moved to legislatures. Veronica Stracqualursi, Anti-Abortion Activists Attend First March for Life 'With Fresh Resolve' Post-*Roe*, CNN, https://www.cnn.com/2023/01/20/politics/march-for-life-2023-abortion/index.html [https://perma.cc/4ZH2-DRP5] (last updated Jan. 20, 2023).

299. Clear fundraising disparities among political action committees and in ballot initiative campaigns evidenced these struggles. Anti-abortion PACs Susan B. Anthony List, National Right to Life, and the National Pro-Life Alliance raised a mere $2.1 million between June 2022 and the first quarter of 2023, compared with more than $19 million raised by abortion rights PACs Planned Parenthood, Emily's List, and NARAL Pro-Choice America. And PAC spending on state abortion ballot initiatives in 2022 favored the pro-choice side by more than a two-to-one margin. Alison Durkee & Darreonna Davis, *Roe v. Wade* Overturned One Year On: Here's Where the Money's Going, Forbes (June 24, 2023), https://www.forbes.com/sites/alisondurkee/2023/06/23/roe-v-wade-overturned-one-year-on-heres-where-the-moneys-flowing-abortion/ [https://perma.cc/JED2-JPVD].

300. Tonya Mosley, Abortion Opponents Push for 'Fetal Personhood' Laws, Giving Rights to Embryos, NPR (Apr. 4, 2024), https://www.npr.org/2024/04/04/1242774406/abortion-opponents-push-for-fetal-personhood-laws-giving-rights-to-embryos [https://perma.cc/R9ZN-LZBU] (explaining that "[t]here is a movement among some anti-abortion activists that the 14th Amendment . . . should also apply to fetuses because the framers of that amendment did not explicitly say that this doesn't apply to born persons" (quoting Carter Sherman, Reporter, *The Guardian*)).

301. Until 2024, the platform included a reference to the Human Life Amendment. See Republican Party Platform of 1980, Am. Presidency Project (July 15, 1980), https://www.presidency.ucsb.edu/documents/republican-party-platform-1980 [https://perma.cc/DM5X-4TLQ] ("While we recognize differing views on this question among Americans in general—and in our own Party—we affirm our support of a constitutional amendment to restore protection of the right to life for unborn children."); 2016 Republican Party Platform, Am. Presidency Project (July 18, 2016), https://www.presidency.ucsb.edu/documents/2016-republican-party-platform [https://perma.cc/4V2Q-7ND6] ("We support a human life amendment to the Constitution and legislation to make clear that the Fourteenth Amendment's protections apply to children before birth."). In 2024, the GOP replaced this language with a more muddled reference to the idea that the Fourteenth Amendment already protects fetal personhood. See 2024 Republican Party Platform, Am. Presidency Project (July 8, 2024), https://www.presidency.ucsb.edu/documents/2024-republican-party-platform [https://perma.cc/S6XM-U6WT] (stating that the party "stand[s] for families and Life" and stressing that "the 14th Amendment to the Constitution of the United States guarantees that no person can be denied Life or Liberty without Due Process"); see also Sarah McCammon & Steve Inskeep, How Language Around Abortion Rights Features in the New Republican Party Platform, NPR (July 16, 2024), https://www.npr.org/2024/07/16/nx-s1-5035029/how-language-around-abortion-rights-features-in-the-new-republican-party-platform [https://perma.cc/43XN-JAXR] (detailing how pro-life groups believed that the platform referred to fetal personhood); Julianne

relationship between the conservative legal movement and anti-abortion movement had grown far closer,[302] and prominent pro-life scholars had foregrounded originalist arguments for personhood.[303]

In June 2023, a coalition of twenty-six pro-life groups issued a letter they called the New North Star, insisting that the Fourteenth Amendment already recognized fetal personhood from the moment of fertilization and called on the federal and state governments "to secure equal protection for the child in the womb."[304] The New North Star letter also created plans for a new kind of pro-life incrementalism—the sort of slow, step-by-step plan that had successfully imposed limits on access to abortion while diluting the very idea of a right to choose.[305] The letter set forth a parallel strategy: demanding the recognition of fetal personhood in areas of the law unrelated to abortion.[306]

The more that other legal rules recognized rights for zygotes, embryos, and fetuses, the more of an outlier the nonrecognition of constitutional fetal personhood would seem. A key incremental proposal involved the regulation of IVF and restrictions dictating that "embryos in cryopreservation are not legal property or quasi-property under state law and cannot simply be discarded and destroyed."[307] With the movement's commitments to fetal personhood newly in the open, a more direct and focused attack on IVF was underway.

McShane, RNC Official: Nothing in Our Platform Says We Won't Ban Abortion Nationwide, Mother Jones (July 15, 2024), https://www.motherjones.com/politics/2024/07/rnc-platform-ed-martin-abortion-ban-softening-gop/ [https://perma.cc/SL2A-WM88] (discussing Ed Martin, a member of the GOP platform committee, and his explanation of references to fetal personhood).

302. On the changing relationship between the anti-abortion movement and the conservative legal movement, see generally Ziegler, Personhood, supra note 16.

303. See, e.g., Brief of Amici Curiae Scholars of Jurisprudence John M. Finnis and Robert P. George in Support of Petitioners at 5–23, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 3374325 (discussing nineteenth-century commentators on the right to life); Michael Stokes Paulsen, The Plausibility of Personhood, 74 Ohio St. L.J. 13, 14–68 (2013) (making the originalist case for fetal personhood that the original meaning of "person" encompassed fetuses); Joshua Craddock, Note, Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortions? 40 Harv. J.L. & Pub. Pol'y 539, 539–52 (2017) (same); Josh Craddock, Our Pro-Life Constitution, Nat'l Rev. (Dec. 21, 2023), https://www.nationalreview.com/magazine/2024/02/our-pro-life-constitution/ (on file with the *Columbia Law Review*) (same).

304. The New North Star (c. Jun. 2023) https://www.liveaction.org/assets/1747757030-equal-protection-coalition-letter.pdf (on file with the *Columbia Law Review*) [hereinafter New North Star Letter].

305. See id. (recommending seven policy changes that reflect this effort). On the evolution of anti-*Roe,* anti-abortion incrementalism, see generally Ziegler, After *Roe*, supra note 31, at 90–123.

306. See New North Star Letter, supra note 304 (listing potential policy areas to establish fetal personhood in, such as child endangerment laws or tax credits).

307. Id. (emphasis omitted).

B. *Fetal Personhood and Backlash*

The new attack on IVF exposed existing limits on IVF access and underscored the possibility that further limits could be placed on it in the future. At the same time, the more real those risks seemed, the more Americans across the ideological spectrum expressed support for IVF. The combination of threats to IVF access and ensuing backlash, this Article argues, might open opportunities to overcome the legislative impasse that has plagued IVF for decades.

In February 2024, the Alabama Supreme Court's decision in *LePage v. Center for Reproductive Medicine, P.C.* ensured that IVF would be a critical political issue in and beyond the 2024 election.[308] The case involved a clinic in Mobile, Alabama, which operated within the same building as the local hospital.[309] A hospital patient managed to access the cryopreservation tank and accidentally destroyed several embryos.[310] The three families affected by the loss of the embryos filed suit.[311] Some of their legal theories were commonplace, like emotional distress damages for the clinic's negligence.[312] But the families also argued that the state's Wrongful Death of a Minor Act defined persons to include frozen embryos, qualifying their destruction as wrongful deaths,[313] deaths no different than if a child had been killed by a drunk driver.[314]

Before *Dobbs*, courts in Arizona and Ohio had squarely rejected this idea that fertility patients could sue for wrongful death when a clinic negligently lost, contaminated, or destroyed their embryos.[315] Two years after *Dobbs*, however, the Supreme Court of Alabama held that plaintiffs could recover as surviving "parents" of "extrauterine children" who "had been kept alive in a cryogenic nursery while they awaited implantation" before they were "killed" by the clinic's failure to secure the laboratory where they were being stored.[316] The Chief Justice wrote a separate opinion quoting extensively from the Bible, explaining that "human life cannot be wrongfully destroyed without incurring the wrath of a holy God."[317]

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308. See 408 So.3d 678, 680–82 (Ala. 2024) (acknowledging the major policy questions raised by the case but declining to provide clear answers or guidance).

309. Id. at 681.

310. Id.

311. Id. at 680–81.

312. Id.

313. Id. at 682–83.

314. Ala. Code § 6-5-391 (2025).

315. See Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1267 (Ariz. Ct. App. 2005) (holding that defining embryos as persons for purposes of wrongful death suits is a decision best left to the legislature); Penniman v. Univ. Hosps. Health Sys., Inc., 130 N.E.3d 333, 337 (Ohio Ct. App. 2019) (finding that personhood in the context of a wrongful death claim requires viability).

316. *LePage*, 408 So.3d at 680–82.

317. Id. at 693 (Parker, J., concurring specially).

LePage did not prohibit IVF, but its holding opened the possibility that the accidental destruction of an embryo could lead to ruinous liability, and fertility clinics across the state paused operations in the aftermath of the court's decision, grinding IVF to a halt.[318] The decision elicited powerful backlash. The Alabama legislature, dominated by socially conservative Republicans, passed a law shielding IVF providers and other defendants from liability.[319] Given widespread support for IVF documented in polls, Republicans quickly distanced themselves from the ruling and declared their support for IVF, including in the 2024 GOP platform.[320] President Donald Trump repeatedly endorsed IVF on the campaign trail, even proclaiming himself the "fertilization president" early in his second term.[321] One month after reclaiming the White House, Trump issued an executive order to develop "a list of policy recommendations on protecting IVF access and aggressively reducing out-of-pocket and health plan costs for IVF treatment."[322]

The announcement sparked swift backlash from the anti-abortion movement, however.[323] And right-to-life activists did not change their position. Students for Life, for example, drafted talking points on the party platform, arguing that "[t]he science has far outpaced a conversation with broader society about how to protect life and whether it's a good idea to trade human lives and enslave women's bodies in a contract."[324] The Heritage

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318. See Janice Hopkins Tanne, University in Alabama Halts IVF Treatments After Court Rules Embryos Are Children, Brit. Med. J., Feb. 22, 2024, at 1, 1 (discussing the cessation of IVF treatments in the largest medical center in Alabama).

319. Emily Cochrane, Alabama Passes Law to Protect I.V.F. Treatments, N.Y. Times (Mar. 6, 2024), https://www.nytimes.com/2024/03/06/us/politics/alabama-ivf-law.html (on file with the *Columbia Law Review*).

320. See 2024 Republican Party Platform, supra note 301 ("We will oppose Late Term Abortion, while supporting mothers and policies that advance Prenatal Care, access to Birth Control, and IVF (fertility treatments).").

321. Nathaniel Weixel & Alejandra O'Connell-Domenech, HHS Layoffs Undercut Trump's Pledge to Be 'Fertilization President', The Hill (Apr. 26, 2025), https://thehill.com/policy/healthcare/5266568-ivf-access-trump-reproductive/amp/ [https://perma.cc/C5TL-89GU] (internal quotation marks omitted) (quoting President Donald Trump).

322. Exec. Order No. 14,216, 90 Fed. Reg. 10451, 10451 (Feb. 18, 2025). Within weeks after that executive order, however, the Administration made significant cuts to maternal health and reproductive medicine programs at HHS that included eliminating the CDC's six-person Assisted Reproductive Technology Surveillance team responsible for reporting on pregnancy outcomes for fertility patients at IVF clinics nationwide. Weixel & O'Connell-Domenech, supra note 321.

323. Tyler Arnold, Pro-Life Advocates Decry Trump Executive Order Expanding IVF Access, Nat'l Cath. Reg. (Feb. 18, 2025), https://www.ncregister.com/cna/pro-life-advocates-decry-trump-executive-order-expanding-ivf-access [https://perma.cc/PYZ5-WGLG]; Suzanne Blake, Trump's IVF Executive Order Sparks Republican, Anti-Abortion Backlash, Newsweek (Feb. 19, 2025), https://www.newsweek.com/trumps-ivf-executive-order-sparks-republican-pro-life-backlash-2033288 [https://perma.cc/PEK8-JJLF].

324. Kristi Hamrick, What to Expect When You're Expecting to Talk About Invitro Fertilization (IVF), Students for Life of Am. (Feb. 23, 2024), https://studentsforlife.org/

Foundation circulated new talking points and policy proposals endorsing restrictions on IVF, including limits on the number of embryos created and implanted and prohibitions against prenatal genetic testing.[325] Of course, promoting limits on the number of embryos that could be implanted was not itself a radical idea: Nations from Germany to Japan had introduced regulations of this kind, and advocates with little interest in criminalizing abortion or IVF had proposed similar rules in the United States.[326] Nevertheless, the new proposals advanced by pro-life groups had a different purpose, one inextricably tied to their suspicion of IVF and opposition to abortion.[327]

LePage also helped to solidify the place of IVF as an issue of reproductive rights. Reproductive Freedom for All launched a media campaign centered on IVF calling on its advocates to support reproductive rights "from abortion to IVF."[328] Planned Parenthood of Greater New York declared that "Protecting IVF is Part of Protecting Reproductive Freedom."[329] SisterSong Reproductive Justice Collective, a preeminent group in the movement for reproductive justice, had begun hosting conferences on infertility and its treatment in communities of color—involving prizes for some attendees that included IVF and other

2024/02/23/what-to-expect-when-youre-expecting-to-talk-about-invitro-fertilization-ivf/ [https://perma.cc/2QYS-2JHC].

325. Emma Waters, Why the IVF Industry Must Be Regulated, Heritage Found. (Mar. 19, 2024), https://www.heritage.org/life/report/why-the-ivf-industry-must-be-regulated [https://perma.cc/6242-8GW4].

326. See Sheila Jasanoff & Ingrid Metzler, Borderlands of Life: IVF Embryos and the Law in the United States, United Kingdom, and Germany, 45 Sci., Tech. & Hum. Values 1001, 1015–27 (2020) (providing an overview of IVF policies in Germany, the United Kingdom, and the United States); Kirstin RW Matthews & Daniel Moralí, National Human Embryo and Embryoid Research Policies: A Survey of 22 Top Research-Intensive Countries, 15 Regenerative Med. 1905, 1911 (2020) (reviewing IVF policies in countries that invest heavily in science and technology).

327. See Jill Filipovic, The Anti-Abortion Movement Is Coming for Fertility Treatments, Ms. Mag. (Feb. 20, 2024), https://msmagazine.com/2024/02/20/fertility-ivf-alabama-supreme-court-anti-abortion/ [https://perma.cc/AGK3-LJVG] ("Many of the [anti-abortion] movement's leaders have indicated that they would like to outlaw [IVF], and . . . abortion opponents have never stopped at simply ('simply') banning abortion. They want full control over reproduction, and over women specifically."); Jessica Winter, The Fight Over I.V.F. Is Only Beginning, New Yorker (Mar. 3, 2024), https://www.newyorker.com/science/annals-of-medicine/the-fight-over-ivf-is-only-beginning [https://perma.cc/R4QP-MRCS] ("Henry, of Johns Hopkins and the University of Maryland, believes that LePage will make it easier for states with anti-abortion laws to criminalize pregnancy and miscarriage.").

328. Press Release, Reprod. Freedom for All, Reproductive Freedom for All Responds to Senate GOP Again Blocking Democrats' Efforts to Protect IVF (June 13, 2024), https://reproductivefreedomforall.org/news/reproductive-freedom-for-all-responds-to-senate-gop-again-blocking-democrats-efforts-to-protect-ivf/ [https://perma.cc/Y5N6-KM9Z].

329. Gabriela Aguilar, Protecting IVF Is Part of Protecting Reproductive Freedom, Planned Parenthood of Greater N.Y.: Blog (Mar. 5, 2024), https://www.plannedparenthood.org/planned-parenthood-greater-new-york/blog/the-dangerous-criminalization-of-reproductive-freedom-starts-with-ivf [https://perma.cc/UY97-UVZB].

treatments at respected area fertility clinics.[330] Even some prominent Republicans went on record to defend IVF amid the backlash to *LePage*.[331]

With Trump in the White House, the tensions exposed by *LePage* remain visible: Republicans continue to proclaim support for IVF yet offer little clarity about the concrete steps that they will take to protect it, while pro-life groups continue to mount a campaign to oppose IVF and restrict access to it.[332]

In May 2025, President Trump said he had several policy recommendations to make IVF more accessible under consideration—but a month later, none of them had been made public, and no reason was given to explain why.[333] With Republicans in control of both houses of Congress, 2025 has seen no progress on the bill that the GOP championed in 2024 pledging to block harmful IVF restrictions in the states.[334] And pro-life groups and lawmakers continue to wage war on IVF, despite Trump's support for it.[335] Students for Life issued a press release condemning Trump's position on IVF and asserting that it "kills more children than abortion."[336]

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330. Black Infertility Awareness Week, SisterSong, https://www.sistersong.net/black-infertility-awareness-week [https://perma.cc/HSB2-S4EL] (last visited Aug. 6, 2025); Image posted by SisterSong (@sistersong_woc), Instagram, We're Awarding Over $40,000 (July 26, 2024), https://www.instagram.com/p/C95tCnMPYk-/ [https://perma.cc/RER8-PF26].

331. See Megan Messerly & Alice Miranda Ollstein, Republicans Are Rushing to Defend IVF. The Anti-Abortion Movement Hopes to Change Their Minds, Politico (Apr. 1, 2024), https://www.politico.com/news/2024/04/01/anti-abortion-movement-ivf-war-00149766 [https://perma.cc/82CR-ADHG] (noting that lawmakers, including Republican representatives, "have, by and large, been reluctant" to support IVF restrictions).

332. See infra notes 356–350 and accompanying text.

333. In May 2025, reports focused on the deliberations within the White House about forthcoming IVF recommendations. See Caroline Kitchener, Inside the I.V.F. Deliberations at the White House as Key Report Nears, N.Y. Times (May 17, 2025), https://www.nytimes.com/2025/05/17/us/politics/ivf-policy-white-house.html (on file with the *Columbia Law Review*) (last updated May 18, 2025) (detailing debates about potential IVF proposals); see also Christine Fernando, White House Says Trump Is Reviewing IVF Policy Recommendations Promised in Executive Order, AP News, https://apnews.com/article/trump-ivf-recommendations-fertility-clinic-bombing-1e7a626e88d7d7a120b0c4a7ba6f8314 [https://perma.cc/ZR44-6SYY] (last updated May 20, 2025) (same). By June, a delay left some experts wondering whether Trump would make good on his promises. Cecelia Smith-Schoenwalder, Advocates Anxiously Ask: When Will Trump Release IVF Recommendations?, U.S. News & World Rep. (June 9, 2025), https://www.usnews.com/news/national-news/articles/2025-06-09/advocates-clinics-anxiously-ask-when-will-trump-release-ivf-recommendations (on file with the *Columbia Law Review*).

334. The Republican bill, sponsored by Senators Ted Cruz and Katie Britt, would deny Medicaid funding to any state that prohibited IVF. Caitlin Yilek, Republicans Ted Cruz and Katie Britt Introduce Bill to Protect IVF Access, CBS News (May 20, 2024), https://www.cbsnews.com/news/ted-cruz-katie-britt-ivf-access-bill/ [https://perma.cc/GMV2-JYPH].

335. See Kitchener, supra note 333 ("[M]any in the Trump administration are eager to combat infertility . . . . But that goal is complicated by dueling interests within Mr. Trump's base.").

336. Jordan Butler, Trump Holds Many Pro-Life Wins, But His IVF Executive Order Ain't One: The Truth About the Anti-Life IVF Industry, Students for Life of Am. (Feb. 20,

Despite Trump's stated position, the Heritage Foundation continues to promote model legislation limiting the number of embryo transfers performed in IVF procedures.[337] And the Ethics and Public Policy Center, a socially conservative think tank, released a plan that makes two main arguments: (1) IVF should be restricted because it leaves "embryonic children frozen for decades in fertility clinics, [requires] genetic screening tests picking winners and losers based on the embryos' sex, health, or IQ, and [ensures] the widespread destruction of embryos either intentionally or through neglect,"[338] and (2) IVF should be replaced by "natural" methods to "restore" women from "reproductive dysfunction" by tracking the female menstrual cycle and hormonal changes by using observable signs or biomarkers like menstrual bleed, cervical mucus, and urinary hormones—this "restorative approach" notes that male-factor infertility is "beyond its scope."[339] Self-proclaimed abolitionist Republicans have also proposed personhood bills that would limit or criminalize IVF.[340] The back-and-forth between the pro-choice movement, the pro-life movement, and both political parties has continued.

LePage and *Dobbs* revealed longstanding connections between the fight for fetal personhood and support for restrictions on IVF. Groups already opposed to the legal recognition of fetal personhood—because of its potential impact on abortion access or even the criminalization of behavior during pregnancy—increasingly came to see IVF as a similar issue: one involving the freedom to make critical healthcare decisions or navigate the equality- and status-related burdens tied to pregnancy.[341]

2025), https://studentsforlife.org/2025/02/20/trump-holds-many-pro-life-wins-but-his-ivf-executive-order-aint-one-the-truth-about-the-anti-life-ivf-industry/ [https://perma.cc/7EYJ-SM78] (emphasis omitted).

337. Model Legislation: IVF Embryo Transfer Limit, Heritage Found., https://www.heritage.org/model-legislation/ivf-embryo-transfer-limit [https://perma.cc/S843-P9TX] (last visited Aug. 9, 2025).

338. Natalie Dodson & Emma Waters, Treating Infertility: The New Frontier of Reproductive Medicine, Ethics & Pub. Pol'y Ctr. (Mar. 18, 2025), https://eppc.org/publication/treating-infertility-the-new-frontier-of-reproductive-medicine/ [https://perma.cc/8B6K-7HZK].

339. Natalie Dodson, Introduction to Ethics & Pub. Pol'y Ctr. & Heritage Found., Treating Infertility: The New Frontier of Reproductive Medicine 1, 1–2 (2025) https://eppc.org/wp-content/uploads/2025/08/10-FINAL-Treating-Infertility-The-New-Frontier-of-Reproductive-Medicine.pdf [https://perma.cc/JWQ6-49N9] [hereinafter Treating Infertility]; Marguerite Duane, An Overview of Restorative Reproductive Medicine, *in* Treating Infertility, supra, at 6, 7; Craig Turczynski & Phil Boyle, Putting All Our Eggs in One Basket, *in* Treating Infertility, supra, at 12, 14.

340. For an example, consider a recent bill proposed in Ohio. See Jessie Balmert, Ohio Republican Bill Would Treat Abortions as Homicide, Ban All Abortions in State, Columbus Dispatch (June 17, 2025), https://www.dispatch.com/story/news/politics/2025/06/17/new-ohio-gop-bill-would-ban-all-abortions-treat-abortion-as-homicide/84239311007/ [https://perma.cc/4ZJE-KJ6Y] (last updated June 18, 2025).

341. Earlier initiatives witnessed a similar dynamic. See Jonathan F. Will, Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice, 39 Am. J.L. & Med. 573, 580, 598 (2013) (explaining the conservative push to define "personhood" as

LePage produced a backlash that created new legislative opportunities, perhaps even in Congress itself. But the decision also hardened the commitment of anti-abortion groups to attacking IVF—a campaign that won new allies in powerful religious communities.

C. *Religious Realignments*

Within religious hierarchies opposed to abortion, the Catholic Church had stood out for its opposition to IVF.[342] Views among other religious denominations varied considerably. Hindu and Buddhist teachings on IVF were strikingly liberal.[343] Judaism also broadly takes a liberal view on IVF, while Orthodox, conservative, and reform Jews disagree about related techniques, including surrogacy.[344] Muslim religious teachings are also relatively permissive: Since the 1980s, Sunni religious leaders have issued fatwas, or religious rulings, and guidelines permitting IVF when used by married, heterosexual couples, and Shi'a teachings have reached a similar conclusion.[345] Eastern Orthodox churches condemned IVF, while most Christian denominations, including some Baptists, Methodists, Lutherans, Mormons, Episcopalians, and Seventh Day Adventists, tolerated IVF, at least when used by married couples.[346] By contrast, evangelical Protestant leaders, who had increasing influence in the pro-life movement, had remained comparably silent.[347]

Surveys show that roughly the same number of white evangelical Protestants know someone who has used assisted reproductive technology as do members of other faith communities, and a spring 2024 Pew Research Center survey indicated that 63% of white evangelicals surveyed

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beginning within "twenty-four hours after the sperm penetrates the egg," which implicates not only abortion, but IVF and certain forms of contraception).

342. On Catholic resistance to IVF, see Marsh & Ronner, Pursuit of Parenthood, supra note 11, at 151, 169.

343. H.N. Sallam & N.H. Sallam, Religious Aspects of Assisted Reproduction, 8 Facts Views & Vision ObGyn 33, 44–45 (2016).

344. See Sherman J. Silber, Infertility, IVF and Judaism, *in* Infertility and Assisted Reproduction 728, 728–31 (Botros R.M.B. Rizk, Juan A. Garcia-Velasco, Hassan N. Sallam & Antonis Makrigiannakis eds., 2008) (explaining that while IVF is generally encouraged for Jewish couples dealing with infertility, there is a debate among Jewish sects as to whether donor gametes are allowed).

345. See Marcia C. Inhorn, Making Muslim Babies: IVF and Gamete Donation in Sunni Versus Shi'a Islam, 30 Culture Med. & Psychiatry 427, 427-450 (2006) (comparing how IVF works in practice in Sunni Egyptian communities and Shi'ite Lebanese communities, given that both sects allow IVF, but only Shi'ism expressly permits the use of donor gametes).

346. See Cynthia B. Cohen, Protestant Perspectives on the Uses of the New Reproductive Technologies, 30 Fordham Urb. L.J. 135, 145 (2002) (arguing that the "underlying Protestant view" is "a general acceptance of the use of IVF," especially in light "of the problems and anguish experienced by many who desperately hope that their loving union will be blessed with children").

347. See id. at 135 (explaining how Protestant denominations do not have a central teaching authority concerning conceiving and bearing children through IVF).

saw IVF as a "good thing."[348] But critical figures, such as R. Albert Mohler, Jr. of the Southern Baptist Theological Seminary, had argued against IVF for more than a decade.[349]

The aftermath of *Dobbs* created an important opportunity for Mohler and his colleagues. The Southern Baptist Convention (SBC) had generally moved to the right on abortion, with a significant plurality calling for the passage of an "Abolishing Abortion" amendment calling not only for the recognition of fetal personhood but also insisting that fetal personhood would require the punishment of women.[350] The *LePage* decision publicized theological arguments that the recognition of fetal rights was incompatible with IVF as currently practiced.[351] So when R. Albert Mohler, Jr., and Andrew Walker, a young theology professor from Louisville, proposed a resolution condemning IVF,[352] the SBC chose to pass it, with Mohler calling IVF "an engineered system whereby multiple embryos are created only for most of them, assuredly, to be destroyed."[353]

Even as IVF tends to remain popular among rank-and-file believers, the alliance between conservative Catholics and Protestants that had sustained the anti-abortion cause could now take new aim at IVF.[354] In the

348. Gabriel Borelli, Americans Overwhelmingly Say Access to IVF Is a Good Thing, Pew Rsch. Ctr. (May 13, 2024), https://www.pewresearch.org/short-reads/2024/05/13/americans-overwhelmingly-say-access-to-ivf-is-a-good-thing/ [https://perma.cc/H253-BED9].

349. For an early example, see Christian Morality and Test Tube Babies: Part I, Albert Mohler, https://albertmohler.com/2005/09/29/christian-morality-and-test-tube-babies-part-one-2/ [https://perma.cc/9TUK-ZESA] (last visited Aug. 10, 2025) (arguing that Christian morality militates against the use of IVF).

350. On abolitionism within the SBC, see On Abolishing Abortion, S. Baptist Convention (June 21, 2021), https://www.sbc.net/resource-library/resolutions/on-abolishing-abortion/ [https://perma.cc/7AAK-RMLC]. On the debate prompted by the resolution, see Lisa Misner, SBC Resolution on Abortion Creates Strategy Debate Among Pro-Life Baptists, Ill. Baptist News (June 30, 2021), https://illinoisbaptist.org/sbc-resolution-on-abortion-creates-strategy-debate-among-pro-life-baptists [https://perma.cc/8YND-KJPY].

351. See LePage v. Ctr. for Reprod. Med., P.C., 408 So. 3d 678, 680–82 (Ala. 2024) (holding that embryos are "children" within the Wrongful Death of a Minor Act, such that IVF clinics can be held liable for the destruction of embryos).

352. Mark Wingfield, SBC's 1,000-Word Resolution Covers Nine Hot Topics, Baptist News Glob. (June 11, 1025), https://baptistnews.com/article/sbcs-1000-word-resolution-covers-nine-hot-topics/ [perma.cc/68TG-Z4RZ] ("The 1,000-word statement was drafted by the [Southern Baptist] convention's Resolutions Committee, chaired by Andrew Walker, a scholar who works for Al Mohler . . . . All nine of the social and ethical issues embodied in the omnibus resolution are frequent talking points of Mohler . . . .").

353. Bob Smietana, Southern Baptists Pass Resolution Calling for Strictures to Curb IVF, Ministry Watch (June 14, 2024), https://ministrywatch.com/southern-baptists-pass-resolution-calling-for-strictures-to-curb-ivf/ [https://perma.cc/M86X-VRY8] (internal quotation marks omitted) (quoting R. Albert Mohler, Jr., President, S. Baptist Theological Seminary). For the full text of the resolution, see S. Baptist Convention, Proposed Resolutions (2024), https://sbcannualmeeting.net/wp-content/uploads/2024/06/Final-Resolutions-2024.pdf [https://perma.cc/B7GP-TUYK] (putting forth a resolution "On the Ethical Realities of Reproductive Technologies and the Dignity of the Human Embryo").

354. See Kristen Soltis Anderson, Opinion, I.V.F. Is a Miracle. For Republicans, It Is a Land Mine., N.Y. Times (Feb. 27, 2024), https://www.nytimes.com/2024/02/27/opinion/

public imagination, this religious realignment links IVF to other culture war issues, from abortion to same-sex marriage. For example, in denouncing IVF as immoral, Mohler stressed that same-sex couples used it.[355]

Mohler's attention to the use of IVF by same-sex couples is representative: A range of social conservative groups have argued that IVF should be available only to heterosexual, married couples. Project 2025 argued for an overhaul of IVF practices to reflect the claim that "a married mother, father, and their children are the foundation of a well-ordered nation and healthy society."[356] With regard to IVF and other "current and emerging reproductive technologies," Project 2025's *Mandate for Leadership* asserts that "HHS policies should never place the desires of adults over the right of children to be raised by the biological fathers and mothers who conceive them," implying that for same-sex couples to use IVF to have and raise children runs contrary to the idea of a "well-ordered nation."[357]

The social movements warring over reproductive rights—and some of the faith communities aligned with them—have made IVF a point of conflict.[358] At the same time, the backlash to *LePage* was widespread and cut across religious, ideological, and partisan lines in ways that suggest

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ivf-alabama-republicans.html (on file with the *Columbia Law Review*) (presenting a conservative Christian's defense of IVF and expressing fear that some Christians want to ban it).

355. For Mohler's claim, see Liam Adams, Southern Baptists to Debate Measure Opposing IVF Following Alabama Court Ruling, The Tennessean (Nash., Tenn.), https://www.tennessean.com/story/news/religion/2024/06/07/southern-baptists-to-debate-measure-opposing-ivf-at-annual-meeting/73999757007/ (on file with the *Columbia Law Review*) (last updated June 7, 2024).

356. Severino, supra note 30, at 450–51.

357. Id. at 451. This position dovetails with the conclusions drawn by a variety of conservative organizations—and with the campaign against IVF led by the Heritage Foundation, which argues that "children have a right to know their biological parents." Waters, supra note 325. Other socially conservative organizations have staked out a similar position. See, e.g., IVF: Moral and Ethical Considerations, Focus on the Fam., https://www.focusonthefamily.com/family-qa/ivf-moral-and-ethical-considerations/ [https://perma.cc/54M4-ECLJ] (last visited Aug. 9, 2025) ("The meaning of marriage and child identity can be preserved when IVF is used *only* by a married man and woman with no third-party involvement (no donor sperm, donor eggs, or surrogacy)."). The influential Alliance Defending Freedom has also flagged these concerns in its own writing on IVF. See, e.g., Denise Burke, In IVF Case, Alabama Supreme Court Protects Life From Conception, All. Defending Freedom (Mar. 4, 2024), https://adflegal.org/article/ivf-case-alabama-supreme-court-protects-life-conception/ (on file with the *Columbia Law Review*) (last updated Mar. 18, 2024).

358. See supra notes 340–348 and accompanying text; see also Leigh Ann Caldwell & Theodoric Meyer, Republicans' Complicated Relationship With IVF, Wash. Post (Feb. 27, 2024), https://www.washingtonpost.com/politics/2024/02/27/republicans-complicated-relationship-with-ivf/ (on file with the *Columbia Law Review*) (detailing how, after the *LePage* ruling, Republicans, despite expressing some support for IVF, "were hard[] to pin down" on the question of what should be done with unused embryos).

support for IVF is both broader and deeper than in earlier years.[359] Polls show that support for IVF exceeds even the longstanding backing for legal abortion.[360]

America's IVF moment is thus one of great opportunity and great risk. Past hurdles to a federal compromise seem less insurmountable. At the same time, the threat of state prohibitions—or even national limits—can no longer be dismissed. If the governance void for IVF is not long for this world, what should replace it? Drawing on the legal history that has brought us to this point, Part III outlines a new regulatory regime that might prove acceptable to those with divergent views about IVF and the many legal and ethical questions tied to it.

III. THE PROMISE OF REGULATORY CONCILIATION

The fall of *Roe v. Wade* has broken up the uneasy arrangement that has governed IVF for over half a century.[361] IVF is responsible for helping thousands to form the happy families that they would not have been able to without it. Yet a new push to prohibit or heavily restrict IVF has gained momentum.[362] And legislative progress seems impossible. The federal Right to IVF Act has failed in more than one vote.[363] None of this seems likely to change in the near term.[364]

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359. See Henry T. Greely, The Death of *Roe* and the Future of Ex Vivo Embryos, J.L. & Biosciences, July–Dec. 2022, at 1, 15–16 (predicting that IVF's popularity will tend to afford it political refuge from legal restriction).

360. Borelli, supra note 348; Colleen Long & Amelia Thomson-Deveaux, More Than 6 in 10 Americans Support Protecting Access to In Vitro Fertilization, AP-NORC Poll Finds, PBS News (July 12, 2024), https://www.pbs.org/newshour/health/more-than-6-in-10-americans-support-protecting-access-to-in-vitro-fertilization-ap-norc-poll-finds (on file with the *Columbia Law Review*). Opinion on IVF may be more complex than some of these polls capture. For example, a May 2024 Gallup poll found Americans much more divided on the question of whether it was moral to destroy additional embryos. Jeffrey M. Jones, Americans Back IVF; Divide on Morality of Destroying Embryos, Gallup (June 13, 2024), https://news.gallup.com/poll/646025/americans-back-ivf-divide-morality-destroying-embryos.aspx [https://perma.cc/6TLZ-83M5].

361. See, e.g., Editorial, IVF Protections Should Be a Priority for Both Parties, Bloomberg (Mar. 6, 2024), https://www.bloomberg.com/opinion/articles/2024-03-06/alabama-ivf-law-shows-that-compromise-is-within-reach [https://perma.cc/R3N3-4SHP] (discussing how, after *Dobbs*, courts are imposing liability on IVF providers under laws meant to restrict abortion).

362. See supra sections II.B–.C.

363. Deirdre Walsh, Senate Republicans Block IVF Bill, as Democrats Elevate Issue Ahead of November Election, NPR (Sep. 17, 2024), https://www.npr.org/2024/09/17/g-s1-23414/senate-republicans-block-ivf-legislation [https://perma.cc/98MD-EC59].

364. On these votes, see Clare Foran, Morgan Rimmer & Ted Barrett, Senate GOP Blocks IVF Bill Again as Democrats Spotlight Issue Ahead of Elections, CNN, https://www.cnn.com/2024/09/17/politics/senate-ivf-bill-vote/index.html [https://perma.cc/3RYU-GA7U] (last updated Sep. 17, 2024); Groves, supra note 24.

But the history of IVF illuminates how Americans have come together around the safety and efficacy of IVF despite their disagreements about how to value or treat embryos, the scope or moral status of reproductive rights, and these rights' implications for faith, gender, race, and class.[365] We take these shared concerns as the starting point for a new federal baseline that would centralize matters of legality, licensing, and transparency.

Our proposals below do not amount to our theoretical ideal. If IVF didn't provoke such profound cultural divisions, we'd go beyond funding or safety measures and enhance reliable access up front, while securing meaningful causes of action for victims of negligent misconduct whose claims fall through the cracks of contract, property, and torts like medical malpractice or informed consent.[366] The proposals that we advance here are relatively modest by comparison because they are designed to recover political common ground.

For those who see profound value in assisted reproduction, leaving industry and medical providers to set the rules about it might seem safer than imposing federal legislation, especially in light of deepening opposition to IVF within the pro-life movement and some faith communities. Opening assisted reproduction to meaningful government oversight could lead IVF down a path like abortion's: subject to punitive laws and even less available to those at society's margins.[367] The ethical objections that some social conservatives express about the use of reproductive technologies by same-sex couples make these concerns particularly acute.[368]

These are real dangers. But leaving IVF to the states poses risks too. In the wake of *Dobbs* and *LePage*, IVF's religious and social-movement realignment has made the last half century of nonregulation increasingly unsustainable. In the post-*Roe* era, state and federal lawmakers are bound to intervene on IVF. The question is no longer *whether* to regulate but *how*. For example, will there be a federal baseline that preempts extreme state restrictions? Or will states be free to prohibit IVF altogether—or for those in certain communities?

In this political moment of relative consensus across the ideological spectrum, we believe that the kind of regulation that's apt to command support today would be more likely to help families and deescalate conflict—in particular, as compared with regulation down the road, when today's pro-life efforts to stigmatize IVF could start bearing fruit. Accordingly, we advance three strands of regulation at the federal level, designed to promote IVF's legality, licensing, and transparency.

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365. See supra sections II.B–.C.

366. See infra text accompanying note 378.

367. See, e.g., Kimberly Mutcherson, Regulating Reproductive Medicine in a World Without *Roe*, 388 NEJM 289, 291 (2023) (discussing how punitive abortion laws may be transferred to IVF regulation).

368. See supra notes 356–350 and accompanying text.

Legality measures would preempt state laws prohibiting IVF outright or introducing incremental restrictions on IVF whose purpose or effect is to leave access out of reach. *Licensing* would cover fertility-adjacent facilities and the procedures that such entities use. It would also cover monitoring for compliance, quality control, and approval of clinical research for emerging technologies.[369] *Transparency* measures would seek to collect and publish comprehensive data about reliability and safety and promote truth in advertising and informed consent.[370]

Congressional authority to regulate the private fertility industry would most plausibly fall under the Commerce Clause power to enact federal legislation that substantially affects interstate commerce.[371] While American fertility medicine used to take form in mostly stand-alone clinics and academic programs that operated within a single state, private investment firms have recently undertaken mergers and acquisitions, consolidating fertility practice within large corporate enterprises that operate in entities across state lines, which routinely involves moving patients, medical supplies, and reproductive materials across those borders.[372]

Congress could accordingly regulate assisted reproduction in a couple of ways. First, it could delegate power to an agency like the FDA, building out that agency's existing scope enough to reach that specialty

369. See J.P.W. Vermeiden, Laboratory-Related Risks in Assisted Reproductive Technologies, *in* Assisted Reproductive Technologies: Quality and Safety 127, 128–29 (Jan Gerris, François Olivennes & Petra De Sutter eds., 2004) (outlining quality control measures for assisted reproduction technology); Matts Wikland & Cecilia Sjöblom, The Application of Quality Systems in ART Programs, 166 Molecular & Cellular Endocrinology 3, 5 (2000) (discussing the implementation of a quality control program in a clinic for assistive reproductive technology).

370. See Naomi Cahn & Sonia M. Suter, The Art of Regulating ART, 96 Chi.-Kent L. Rev. 29, 40 (2021) (finding that fertility clinics face no consequences for failing to report on their success rates under federal law).

371. U.S. Const. art. I, § 8, cl. 3. For discussion, see Abbe R. Gluck & Nicole Huberfeld, What Is Federalism in Healthcare for?, 70 Stan. L. Rev. 1689, 1707 (2018) ("[T]he courts confirmed that healthcare could largely be handled . . . as a national, rather than a state or local, problem. In 1944, the U.S. Supreme Court ruled that insurance was national commerce and could be regulated by Congress as such.").

372. See Pasquale Patrizio, David F. Albertini, Norbert Gleicher & Arthur Caplan, The Changing World of IVF: The Pros and Cons of New Business Models Offering Assisted Reproductive Technologies, 39 J. Assisted Reprod. & Genetics 305, 308–10 (2022) (illustrating three business models in the IVF industry and providing case studies of clinics shifting from physician-owned practices to private-equity-backed national network). Less likely sources of authority come from the constitutional spending power, or conditions of Medicare or Medicaid participation—few beneficiaries seek to get pregnant, and accreditation doesn't cover IVF except in states that include fertility care under their definition of "family planning services." See Anna Reed, Cruel Dilemmas in Contemporary Fertility Care: Problematizing America's Failure to Assure Access to Fertility Preservation for Trans Youth, 29 Mich. J. Gender & L. 95, 107–09 (2022) (explaining that while states have the authority to require that insurance plans cover infertility treatment, there are administrative and financial barriers to doing so).

area.[373] The only federal law that meaningfully regulates assisted reproduction to date declines to grant the FDA the authority to regulate reproductive technologies other than ones like gene editing that manipulate human cells.[374] Expanding the Agency's power to regulate fertility "products," from donors to embryos, could consolidate and enforce compliance in matters like reporting, screening, testing, and reliability that are currently made voluntary and spread across the CDC, Centers for Medicare and Medicaid Services, and Clinical Laboratory Improvement Act.[375] This reimagining of the FDA's jurisdiction would likely require going beyond present roles and expertise by staffing or seeking outside assistance from relevantly qualified personnel.[376]

Professors Naomi Cahn and Sonia Suter point to another way forward: creating a new government entity dedicated to oversight of assisted reproduction, including fertility clinics, sperm and egg vendors, and human embryo laboratories.[377] Models abroad include the United Kingdom's Human Fertilisation and Embryology Authority and the

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373. See Dov Fox, Safety, Efficacy, and Authenticity: The Gap Between Ethics and Law in FDA Decisionmaking, 2005 Mich. St. L. Rev. 1135, 1160–64 (explaining FDA approval, advisory, and off-label oversight as part of the Agency's regulatory scope).

374. Fertility Clinic Success Rate and Certification Act of 1992, Pub. L. No. 102-493, 106 Stat. 3146 (codified at 42 U.S.C. §§ 263a-1 to 263a-7 (2018)). The Agency has so far weighed in only to discourage research on next-generation advances like mitochondrial transfer, human cloning, and germline embryo editing. See Myrisha S. Lewis, How Subterranean Regulation Hinders Innovation in Assisted Reproductive Technology, 39 Cardozo L. Rev. 1239, 1269 (2018) (describing the FDA's decision to regulate mitochondrial transfer and other advanced forms of ART). So, for example, the FDA rejected as beyond its scope a 2018 petition to rein in some of the biggest regulatory loopholes for American sperm banks. Sperm banks aren't required to track the births per donor, which is how those numbers (as revealed by ancestry sites) get into the hundreds. See Citizen Petition (FDA Jan. 1, 2017), https://donorsiblingregistry.com/attachment/74/show [https://perma.cc/BB4H-5XUL] (urging the FDA to regulate cryobanks by requiring standardized genetic testing, mandatory reporting of births, and limits on the number of children per donor, citing examples of sibling groups numbering in the hundreds); Letter from Peter Marks, Dir., Ctr. for Biologics Evaluation & Rsch., to Wendy Kramer, Dir., Donor Sibling Registry (2018) (on file with the *Columbia Law Review*) (denying the petition's requests as being outside of the FDA's mandate to "make and enforce . . . regulations . . . necessary to prevent the introduction, transmission, or spread of communicable diseases" (quoting 42 U.S.C. § 264(a) (2018))). Nor are American sperm banks required to run background checks on donors or test them for fatal disorders their kids might inherit. These institutions don't even have to share actionable medical updates that they learn about donors with the families who are raising kids at risk of a debilitating condition that could be mitigated. See id. (rejecting proposals to enhance FDA requirements to include background checks and post-conception medical updates).

375. See, e.g., 42 U.S.C. § 263a (requiring federal certification of laboratories and setting standards for reporting, screening, and testing).

376. See Dov Fox, The Regulation of Biotechnologies: Four Recommendations, 38 Hastings Ctr. Rep. 57, 57 (2008) (arguing that FDA committees should include ethical representatives because the Agency's present staff cannot reasonably be expected to master the necessary ethical methodology and literature).

377. Cahn & Suter, supra note 370, at 71–72.

Canadian Assisted Human Reproduction Agency.[378] Both consult professional organizations and members of the public to incorporate their voices and perspectives in devising regulatory decisions and uniform practice guidelines for the safety and well-being of patients and other affected parties.[379]

A federal board could regulate assisted reproduction in the United States, subject to legality baselines that prevent that board from imposing onerous and pretextual "quality" restrictions on clinics designed to drive them out of business, the way that some states have for abortion providers.[380] It's unreasonable to expect the nationwide approaches in the United Kingdom and Canada could simply be replicated in America, where any compromise on IVF would have to account for distinctive dimensions in matters of healthcare financing, free-market enterprise, scientific progress, reproductive freedom, and government regulation.[381] And it ought to leave to the states many of the more divisive questions that would not shut down IVF, provided that they do not seek a de facto IVF ban and do not discriminate against patients based on protected classifications like race, marital status, and sexual orientation.[382] The Uniform Laws Commission should lay out a range of options with proposed legislative language about matters from legal parentage to the disclosure of information about gamete donors.[383]

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378. See Human Fertilisation and Embryology Act 1990, c. 37 (U.K.); Assisted Human Reproduction Act, S.C. 2004, c. 6 (Can.).

379. Either approach—expand the FDA or create a new agency—would call for diverse membership of scientists, professionals, and patients. See Erik Parens & Lori P. Knowles, Reprogenetics and Public Policy: Reflections and Recommendations, *in* Reprogenetics: Law, Policy, and Ethical Issues 253, 266–67 (Lori P. Knowles & Gregory E. Kaebnick eds., 2007) (explaining that the previously distinct fields of genetic and reproductive sciences are becoming increasingly related such that any regulation would require an interdisciplinary approach).

380. See, e.g., Linda Greenhouse & Reva B. Siegel, *Casey* and the Clinic Closings: When "Protecting Health" Obstructs Choice, 125 Yale L.J. 1428, 1444–46 (2016) (drawing a distinction between abortion regulations that help women make informed decisions and regulations that do not serve health-related ends and instead obstruct access to abortion).

381. See, e.g., Ouellette et al., supra note 287, at 422–23 (noting that unlike the United Kingdom, the United States has only limited, voluntary regulation of ART and no central authority).

382. See N. Coast Women's Care Med. Grp., Inc. v. S.D. Cnty. Super. Ct., 189 P.3d 959, 962 (Cal. 2008) (holding that physicians must comply with California's Unruh Civil Rights Act, which prohibits discrimination based on sexual orientation, despite religious objections).

383. See Walter P. Armstrong, Jr., A Century of Service: A Centennial History of the National Conference of Commissioners on Uniform State Laws 12 (1991) (explaining how the Uniform Laws Commission serves to alleviate confusion and contradiction among state laws); About Us, Unif. L. Comm'n, https://www.uniformlaws.org/aboutulc/overview [https://perma.cc/37QY-2L7F] (last visited Aug. 10, 2025) (providing an overview of the Uniform Law Commission and its mission to bring stability through well-drafted legislation); National Conference of Commissioners on Uniform State Laws (NCCUSL), Corn. L. Sch. Legal Info. Inst., https://www.law.cornell.edu/wex/national_conference_of_commission

This measure of discretion for state intervention leaves space for states to overlook a range of concerns. More progressive states might pay little heed to the commercialization of reproduction, for example, or weigh short-term savings on IVF funding against the long-term expenses associated with treating health risks that result from multiple gestations.[384] States that lean conservative may in turn neglect the gendered consequences of pregnancy, class disparities in access to fertility care, and the social meaning that prenatal testing can have for people with disabilities.[385]

Public resistance might be anticipated from several groups—from abortion opponents who seek outright prohibition to avoid destruction of human life at any stage for whatever purpose; from clinics, clinicians, and the trade groups that represent them, that oppose any regulation of assisted reproductive medicine; and from social progressives and reproductive justice advocates who frame IVF as a positive right. Our solution will not satisfy all stakeholders. And yet the threat of the dissolving status quo looms greater still, enough, we hope, to overcome such resistance.

A. *Licensing, Monitoring, and Compliance*

In other areas of healthcare, states make hospitals monitor and report major avoidable errors such as mismatched blood transfusions or surgery on the wrong body part.[386] They call these errors "never events" because they're things that should never happen: extremely harmful, simple enough to stop, with no value in preserving.[387] Some states accordingly require investigations, record-keeping, and preventive measures.[388]

But no agency or authority tracks or polices this kind of substantial and needless error in assisted reproduction. Reproductive "never events" include the negligent loss, destruction, or contamination of samples, as well as mix-ups and switches, such as fertilizing eggs with the wrong sperm

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ers_on_uniform_state_laws_(nccusl) [https://perma.cc/C7WV-ECCP] (last visited Aug. 10, 2025) (same).

384. See Kimberly M. Mutcherson, Procreative Pluralism, 30 Berkeley J. Gender L. & Just. 22, 69 (2015) (explaining the potential adverse impacts of different proposed state regulations on populations with limited family-building choices).

385. See Kimberly M. Mutcherson, Transformative Reproduction, 16 J. Gender, Race & Just. 187, 197–200 (2013) (discussing policies that "elevate[] the reproductive acts of those with race, class, and sexual orientation privilege above the reproductive acts of those who lack any or all such privileges").

386. See UC Davis PSNet Editorial Team, Never Events, Patient Safety Network (Sep. 15, 2024), http://psnet.ahrq.gov/primer.aspx?primerID=3 [https://perma.cc/7K2X-HJMG] (outlining a list of particularly shocking medical errors termed "never events").

387. Id.

388. See id. (discussing how many states have adopted similar policies aimed at eliminating never events completely).

or implanting the wrong embryo into patients.[389] The facts of *LePage* are a case in point: Deficient security measures enabled unauthorized personnel to walk into a clinic laboratory, access people's stored materials, and drop a test tube that represented families' dreams of biological parenthood.[390] Other causes include "outmoded procedures, uncalibrated equipment, unsanitized laboratories, and unreliable quality controls that range from screening specimens prone to erroneous results to paper-and-pen labeling."[391]

When victims like the plaintiffs in *LePage* try to take badly behaving professionals to court, however, their claims almost always get dismissed under existing causes of action.[392] For example, suits for breach of contract fail because fertility clinics don't promise any concrete results and make patients sign liability waivers.[393] Medical malpractice suits often fall away when courts require patients to prove bodily harm, which can be lacking even in devastating cases of reproductive negligence.[394] Negligence torts and informed consent are thwarted by the absence of tangible injury that these actions require.[395] The absence of these other legal remedies was in fact a big reason that the justices in *LePage* used to justify authorizing a wrongful death action that treats frozen embryos as born children.[396]

Reproductive never events are a point of departure from which people who see things very differently are more likely to find common ground in support of a system of warnings, disclosures, and reporting.[397]

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389. See Dov Fox, Transparency Challenges in Reproductive Health Care, *in* Transparency in Health and Health Care in the United States 286, 287–93 (Holly Fernandez Lynch, I. Glenn Cohen, Carmel Shachar & Barbara J. Evans eds., 2019) [hereinafter Fox, Transparency Challenges] (overviewing ART never events like the mishandling, destruction, or contamination of genetic materials).

390. LePage v. Ctr. for Reprod. Med., P.C., 408 So.3d 678, 680–82 (Ala. 2024).

391. Fox, Transparency Challenges, supra note 389, at 287.

392. See Dov Fox, Reproductive Negligence, 117 Colum. L. Rev. 149, 153–54 (2017) ("[O]ur legal system does not recognize a conception of injury that accommodates the disruption of reproductive plans apart from any unwanted touching, broken agreement, or damaged belongings.").

393. See id. at 163 ("Contract claims are unavailing . . . because specialists take care to avoid promising any specific result of the reproductive care they provide; they usually secure liability waivers for implied breach too.").

394. See id. at 165–66 ("[T]he malpractice tort usually affords recovery only in cases like this one, in which a plaintiff suffers physical injury. Medical malpractice actions in particular tend to require proof of bodily harm that is missing in many devastating cases of reproductive negligence.").

395. See id. at 171 (explaining that standard limitations on recovery for mental harm limits the efficacy of negligence torts and informed consent suits in the reproductive context).

396. See LePage v. Ctr. for Reprod. Med., P.C., 408 So.3d 678, 682–83 (Ala. 2024) (explaining that to deny that embryos were covered by the Wrongful Death of a Minor Act would deprive parents of any civil remedy for the destruction of their embryos).

397. See Dov Fox, Making Things Right When Reproductive Medicine Goes Wrong: Reply to Robert Rabin, Carol Sanger, and Gregory Keating, 118 Colum. L. Rev. Online 94, 96 (2018), https://columbialawreview.org/wp-content/uploads/2018/04/Fox_Making-

People may be able to hold conflicting beliefs about the moral status of frozen embryos, for example, and still come together on reliability measures designed to keep them safe.[398] They can disagree about when life begins or whether it should be selected and yet see eye-to-eye on a basic clinic certification system that would address deficient standards of care and conflicts of interest to minimize errors and preserve access without chilling innovation.[399]

Key functions would involve monitoring fertility clinics and related entities, conducting longitudinal studies of existing practices, maintaining safety standards, and enforcing them.[400] We can see from the history of early debates about IVF that Americans across the ideological spectrum shared concern about the safety and efficacy of IVF. Addressing reproductive never events would have commanded broad support then, and we should not expect a different result today.[401] To keep spiraling costs from being passed down to consumers, the federal government could subsidize the cost of implementing measures like additional staff, compliance officers, and reliable safety alerts.

The federal government needn't reinvent the wheel.[402] A licensing system could draw on existing laboratory accreditation and other programs developed by professional societies and practitioners with strong institutional competence and expertise.[403] There are indeed (just) two

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Things-Right-When-Reproductive-Medicine-Goes-Wrong.pdf [https://perma.cc/8PRG-Q6LQ] ("Sterilization, surrogacy, and embryo selection—these all are mired in complex controversies about sex, pregnancy, and family life that cut across partisan divides. The[se] ideological tensions obscure the electoral risks of regulation, even in jurisdictions that are reliably red or blue." (footnote omitted)).

398. See Rachel Cohen Booth, Why IVF Looks Different in the US Than in the Rest of the World, Vox (Mar. 26, 2024), https://www.vox.com/policy/2024/3/26/24104638/abortion-ivf-duckworth-regulation-reproductive-technology (on file with the *Columbia Law Review*) (explaining how both Republicans and Democrats support certain regulations for IVF clinics, but both parties approach the issue from different angles).

399. See Dov Fox, Family Planning and Its Limits, 23 J. Contemp. Legal Issues 87, 112–13 (2021) (overviewing academic debates on how to best regulate IVF clinics).

400. See Jennifer Merchant, Assisted Reproductive Technology (ART) in the United States: Towards a National Regulatory Framework?, 20 Journal International de Bioéthique [J. Int'l de Bioéthique], no. 4, 2009, at 55, 57 (Fr.) (providing examples of IVF regulation in the United Kingdom and France and discussing how these practices could be used in the United States).

401. See Dov Fox, Redressing Future Intangible Losses, 69 DePaul L. Rev. 419, 427 n.41 (2020) (looking at how two states, Virginia and Florida, moved to a no-fault compensation scheme for birthing related harms).

402. See Michelle Bercovici, Biotechnology Beyond the Embryo: Science, Ethics, and Responsible Regulation of Egg Donation to Protect Women's Rights, 29 Women's Rts. L. Rep. 193, 206–07 (2008) (outlining existing solutions in the field of ART that could help mold a comprehensive regulatory framework).

403. See Delores V. Chichi, Note, In Vitro Fertilization, Fertility Frustrations, and the Lack of Regulation, 49 Hofstra L. Rev. 535, 546 (2021) (noting that the Fertility Clinic Success Rate and Certification Act allows for accreditation of clinics by one of three nonfederal laboratory accreditation programs).

outlier states—Louisiana and Arkansas—that already require medical facilities to meet professional guidelines, which are currently voluntary, with no penalty for noncompliance.[404] The American College of Obstetricians and Gynecologists and especially the ASRM publish regular reports on best practices.[405]

Baseline standards for safety and well-being would be enforced by national certification for any clinics and clinicians seeking to provide assisted reproduction.[406] For example, sperm banks ought to be required to test donors for nontrivial risks of heritable health disorders they could pass along to dozens of offspring.[407] The government ought to implement inspections and approvals to prevent the kinds of failures and breaches that lead to uncontroversially bad outcomes.[408] The American market would otherwise determine matters of supply, demand, price, and compensation for the services they offer, while preserving the space that doctors have now to exercise discretion in treating patients according to their individual circumstances.[409]

An illustration: Multiple-birth deliveries are associated with worse maternal and infant outcomes, including preterm birth, low birth weight, increased risk of ovarian cancer, neurological impairments, and death, compared to singletons. So ASRM advises limiting the number of embryos that get transferred at once to initiate a pregnancy as a matter of women's and children's health.[410]

Rather than hard-capping the number of embryos, we would offer government incentives to reinforce evidence-based recommendations like these—for example, up to two embryos for women under thirty-five, while

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404. Ark. Code Ann. § 23-85-137 (2025); La. Stat. Ann. § 9:128 (2025).

405. Parens & Knowles, supra note 379, at 15.

406. See I. Glenn Cohen, The Right(s) to Procreate and Assisted Reproductive Technologies in the United States, *in* The Oxford Handbook of Comparative Health Law 1009, 1019 (David Orentlicher & Tamara K. Hervey eds., 2022) (noting that in most countries, government regulation guides reproductive practice).

407. The regulation of sperm banks at the state level is limited. Colorado limits the number of families a donor may sell their sperm to and entitles donor-conceived persons to request their donor's medical history and identifying information once they turn eighteen. Colo. Rev. Stat. §§ 25-57-106, -109 (2025).

408. See Anne Drapkin Lyerly, Marking the Fine Line: Ethics and the Regulation of Innovative Technologies in Human Reproduction, 11 Minn. J.L. Sci. & Tech. 685, 704 (2010) (noting that the United Kingdom's Human Fertilisation and Embryo Authority licenses and monitors fertility clinics).

409. See Elizabeth Chloe Romanis, Assisted Gestative Technologies, 48 J. Med. Ethics 439, 440–41 (2022) (describing the great extent to which the experience of pregnancy varies by individual circumstances, such as hormonal changes and cultural norms).

410. See Am. Soc'y for Reprod. Med., Oversight of Assisted Reproductive Technology 9 (2021), https://www.asrm.org/globalassets/_asrm/advocacy-and-policy/oversiteofart.pdf [https://perma.cc/TR59-GKYT] ("The ASRM Guidelines . . . recommend that when treating women under age 35 consideration should be given to transferring only one embryo at a time and no more than two embryos should be transferred for women of this age range in order to reduce the number of higher-order multiple pregnancies.").

leaving the ultimate decision to be made by highly trained specialty physicians in light of their clinical judgment and the patient's age, health, medical history, financial resources, and personal values.[411] These guidelines would also make clear that decisions will be monitored and physicians will be subject to discipline or license revocation for failing to exercise reasonable judgment.[412] These regulatory proposals in the IVF context can be readily distinguished from the abortion context, in which many of the state laws bar doctors from exercising their medical judgment about whether an emergency exception to an abortion ban should apply.[413]

B. *Data-Gathering, Transparency, and Communication*

In the past, those across the ideological spectrum hesitated about funding IVF research because its risks were unknown, and because its misuses might not be exposed.[414] Reproductive never events have long gone largely undisclosed.[415] And there remain no systematic or reliable disclosures about IVF errors or failures, adjusted for risk—or any reporting of success rates associated with specific diagnoses and treatments—to avoid skewing data of patients with more favorable medical projections from the outset.[416] Such measures toward greater transparency could reclaim common ground today. Accurate disclosures would encourage insurers to bring the most sound and effective providers into their network for coverage. This information system would also be designed to help patients obtain better reproductive care by steering them away from error-prone providers, while discouraging misconduct and identifying areas for clinical improvement in ways that try to avoid provoking defensive deviations from sound practice.

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411. See id. at 11 (preferring clinical judgment, coupled with case-by-case analyses and evidence-based national guidelines, over simple legal restrictions on the number of embryos transferred).

412. See, e.g., Rong-Gong Lin II & Jessica Garrison, California Medical Board Revokes License of 'Octomom' Doctor, L.A. Times (June 2, 2011), http://articles.latimes.com/2011/jun/02/local/la-me-0602-octomom-doctor-20110602 [http://perma.cc/L2BQ-WE4U].

413. See Greer Donley & Caroline Kelly, Abortion Disorientation, 74 Duke L.J. 1, 68 (2024) (describing states that do not recognize any health exceptions to their ban on abortion and those precluding certain medical judgments); Dov Fox & William Ortman, Cliff Running, 103 Wash. U. L. Rev. 155, 165–77 (2025) (explaining how certain state laws reframe good faith medical decisions as "unreasonable" in the abortion context).

414. See supra text accompanying notes 38–39.

415. See, e.g., Fox, Birth Rights and Wrongs, supra note 5, at 26–28 (describing the lack of both federal and state oversight of medical negligence at reproductive stages).

416. See Jennifer F. Kawwass, Dmitry M. Kissin, Aniket D. Kulkarni, Andreea A. Creanga, Donna R. Session, William M. Callaghan & Denise J. Jamieson, Safety of Assisted Reproductive Technology in the United States, 2000–2011, 313 JAMA 88, 90 (2015) (cautioning that findings on the maternal death rate may be biased due to underreporting of ex ante patient compilations).

As fertility patients navigate their reproductive journeys, greater transparency might be expected to help them identify competent doctors in their areas.[417] Ratings and reviews must include the subjective experiences of patients, individually and aggregated, including nonintrusive background information about their reproductive health—in other words, data well beyond objective measures like how many IVF cycles to achieve a live birth. That's because reporting outcomes alone fail to account for factors such as which patients were able to access care and what chances they had to have a baby in the first place. Focusing too closely on outcomes even gives shrewd providers reason to try gaming the system by cherry-picking patients who are more likely to have a successful pregnancy. Reliable data could also enhance IVF access for minority communities to the extent that this information sharing acknowledges long-standing inequalities, including those related to infertility, maternal morbidity, and mortality, among women of color, low-income patients, and queer populations.[418]

Also, medical services like IVF aren't exempt from consumer protection claims for deceptive or misleading activity.[419] The history of deceit in IVF illuminates the importance not only of discouraging misleading practices but also of disclosing risks that disproportionately affect the most vulnerable. Before patients engage a reproductive professional in the first place, national standards ought to rein in the marketing claims that feed medical misimpressions. Consider the false hope that young women will face zero health risks or that they'll be guaranteed the ability to have biological children later in life if they freeze their eggs for themselves, sell them to others, or carry a child as a surrogate.[420] Another example: "Polygenic" embryo screening, marketed directly to consumers, is overhyped to fertility patients, encouraging them to "choose your healthiest embryo" and "protect your future child from

417. See, e.g., FertilityIQ, https://www.fertilityiq.com/fertilityiq/providers [https://perma.cc/Z6HX-3CMV] (last visited Aug. 9, 2025) (providing basic biographic information on fertility doctors in the user's area).

418. See Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty 6 (1997) (explaining how "scientific racism" has permeated reproductive policing); James F. Smith et al., Socioeconomic Disparities in the Use and Success of Fertility Treatments: Analysis of Data From a Prospective Cohort in the United States, 96 Fertility & Sterility 95, 99 (2011) (explaining how household income and education correlate with access to quality reproductive treatment).

419. See Karlin v. IVF Am., Inc. 712 N.E.2d 662, 666–68 (N.Y. 1999) ("[W]hen [physicians] choose to reach out to the consuming public at large in order to promote business . . . they subject themselves to the standards of an honest marketplace . . . .").

420. See, e.g., Naomi Cahn & Jennifer Collins, Fully Informed Consent for Prospective Egg Donors, 16 AMA J. Ethics 49, 51–53 (2014) (detailing the lack of regulation ensuring informed consent in the egg donor industry); Seema Mohapatra & Dov Fox, The Moral Economy of Fertility Markets: Hope and Hype, History, and Inclusion, 48 J.L. Med. & Ethics 765, 765 (2020) ("But misleading claims risk preying on the dreams that egg freezing can make possible, leaving too many with overblown expectations and no legal recourse.").

genetic risks," neither of which the technology is capable of doing in any reliable way.[421]

The federal government ought to hold providers to truthful promotion of assisted reproductive practices on websites, blogs, and social media platforms, as well as in other public statements.[422] The new agency should have the power to regulate false advertising by imposing consequences for distorted or exaggerated messaging, subject to the free speech limits corresponding to First Amendment rights conferred on clinics.[423] The Federal Trade Commission is authorized in theory to prohibit unfair and deceptive practices and the dissemination of misleading claims regarding medical services—but in practice, it has rarely exercised this power in meaningful ways.[424]

In the course of fertility treatment, national standards for informed consent would afford patients with readily comprehensible information about side effects and probable outcomes while also communicating the fact of their for-profit nature and any potential conflicts of interest, for example, to the extent that seeking higher pregnancy and birth rates is at odds with the principal concern for the health and well-being of fertility patients and resulting children.[425] Federal oversight of the informed consent process would seek to empower fertility patients to make decisions with knowledge of the relevant risks and benefits. The materiality doctrine of informed consent is not enough: Causation is hard to prove, the requisite tangible injury is often missing, and compensation is limited.[426]

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421. See Dov Fox, Sonia M. Suter, Meghna Mukherjee, Stacey Pereira & Gabriel Lázaro-Muñoz, Choosing Your "Healthiest" Embryo After *Dobbs*: Polygenic Screening and Distinctive Challenges for Truth in Advertising and Informed Consent, 38 Harv. J.L. & Tech. 463, 464 (2024) (internal quotation marks omitted) (first quoting Genomic Prediction, LifeView, https://lifeview.com (on file with the *Columbia Law Review*) (last visited Oct. 20, 2025); then quoting Mitigate More Risks With the World's Most Advanced Whole Genome Screening for Embryos, Orchid, https://orchidhealth.com (on file with the *Columbia Law Review*) (last visited Oct. 20, 2025)) (explaining how marketing often misleads consumers about the medical risks of polygenic embryo screening).

422. See Fox, Transparency Challenges, supra note 389, at 295 (suggesting a patient-driven solution to the "absence of transparency in reproductive medicine").

423. See Am. Fin. Servs. Ass'n v. Fed. Trade Comm'n, 767 F.2d 957, 970 n.12 (D.C. Cir. 1985) (discussing potential First Amendment issues in regulating commercial advertisement).

424. See Magnuson–Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183, 2185 (codified at 15 U.S.C. § 2301 (2018)) (regulating warrantors in the interest of preventing deceptive market practices).

425. See Sonia M. Suter, The Politics of Information: Informed Consent in Abortion and End-of-Life Decision Making, 39 Am. J.L. & Med. 7, 14 (2013) (explaining the expectations and limitations of informed consent requirements).

426. See Dov Fox, "Fertility Fraud" Legislation—A Turning Point for Informed Consent?, 387 NEJM 770, 771–72 (2022) ("[T]he requirement that patients show evidence of tangible harm to prove a breach of informed consent has largely closed the courthouse doors to people who have been subject to misconduct that can be classified as procreation deprived, imposed, or confounded.").

New standards would aim to ensure that patients have the capacity to make educated decisions about their healthcare and treatment options.[427]

Courts have understood the legal doctrine to require disclosure of material information most relevant to risks, benefits, and alternative courses of action.[428] IVF providers and commercial entities alike would be expected, for example, to convey estimated risks and gains in absolute and relative terms together with relative uncertainty in the form of tables, figures, and other easy-to-understand materials.[429]

Again, federal rules for informed consent needn't start from scratch: Professional guidelines and individual state requirements could be adjusted to be implemented nationally.[430] Indeed, patient access to accurate information is the sole issue that already prompted regulation at the national level, following congressional hearings in the late 1980s to address the overblown success rates advertised by many IVF providers.[431] That 1992 Wyden bill was hamstrung, however, by the influence of lobbying by the fertility industry, which erased carrots for disclosures and sticks for misrepresentations.[432] IVF's history teaches that the new regulatory landscape after *Dobbs* makes space for more robust information-forcing legislation that responds to the deficiencies of past legislation.[433]

C. *Access, Funding, and Parentage*

A more ambitious federal statute (and our ideal solutions) would tackle matters well beyond legality, transparency, and licensure, such as rights to sue in the event of misconduct and meaningful access, including funding subsidies and guarantees of who should have a chance to enjoy parental rights after a child is born in the absence of genetic or gestational

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427. See Dov Fox, Medical Disobedience, 136 Harv. L. Rev. 1030, 1066, 1085–86 (2023) (positing that a "professional enterprise centered on patient interests" requires that the doctor disclose risks and benefits accurately and the patient understand the effects and alternatives).

428. See Kass v. Kass, 696 N.E.2d 174, 181 (N.Y. 1998) (honoring the informed consent document signed by the parties in their later dispute over the custody of their pre-zygotes).

429. See Jody Lynée Madeira, The ART of Informed Consent: Assessing Patient Perceptions, Behaviors, and Lived Experience of IVF and Embryo Disposition Informed Consent Processes, 49 Fam. L.Q. 7, 14–18 (2015) (finding that patients were best able to understand forms that were not "too technical," "presented [the procedure] in a logical way," and quantified the potential risks by separating them into "things that are likely to go wrong versus the things that [are] remotely likely to happen" (second alteration in original) (internal quotation marks omitted) (quoting study participants)).

430. See, e.g., Cal. Const. art. XXXV, § 5 (establishing the right to conduct research on stem cells derived from in vitro fertilization treatments when donated under "appropriate informed consent procedures").

431. See supra notes 169–174 and accompanying text (providing an overview of the passage of the Wyden bill).

432. See 42 U.S.C. § 263a(i)(1)–(2) (2018) (authorizing only a suspension of a laboratory's license as punishment for a violation).

433. See supra notes 165–176 and accompanying text.

ties.[434] But the history of disputes over IVF counsels that a broader statute might not command a broad enough consensus to pass in the near term. For this reason, we propose leaving a range of other issues to the states for the time being. These include, for example, whether and how research can be conducted on human embryos, what if any limits ought to govern their selection, and who can serve as a gamete donor.[435]

The story we tell about commercial surrogacy and abortion bans after *Dobbs* highlights the significant risks of a federalist model that leaves reproductive access to a laboratory of the states.[436] And many of the unscrupulous, profit-driven practices that go unregulated in assisted reproduction resemble accusations that abortion opponents level against clinicians who end pregnancies.[437] Letting states that are hostile to IVF regulate it would enable them to adopt the same incrementalist playbook that they ran in the abortion context during the era of *Roe*.[438] The government should at least provide or require a measure of insurance coverage for more expensive parts of assisted reproduction, the way that many other developed countries do, as Donald Trump proposed during his presidential campaign in fall 2024.[439] Senate Democrats had the summer before introduced legislation to require many health plans to cover IVF, but Senate Republicans blocked the bill from moving forward.[440] Since then, the picture has been mixed. One month after taking office, Trump issued an executive order directing his Administration to study ways to expand IVF access and reduce treatment costs;

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434. See I. Glenn Cohen, The Constitution and the Rights Not to Procreate, 60 Stan. L. Rev. 1135, 1139–41 (2008) (laying out a model of reproductive rights that disaggregates parental rights into gestational, genetic, and legal parenthood).

435. See Cahn, supra note 8, at 26 (explaining how "reproductive technology reflects our deepest . . . desires to have a child and touches on highly politicized issues" about "access based on race and class and family form"); Dov Fox, Interest Creep, 82 Geo. Wash. L. Rev. 273, 352 (2014) (observing that disputed matters of reproduction are "a site of contestation about the . . . relationship between men and women, parents and children, individuals and government, humans and nature").

436. See supra notes 33–33 and accompanying text.

437. See, e.g. Heritage Found., Why The IVF Industry Must Be Regulated 1 (2024), https://www.heritage.org/sites/default/files/2024-03/FS268.pdf [https://perma.cc/82TD-6LGP] (arguing that "[t]he well-being of children, not profit margins, should be the top priority when it comes to IVF and embryonic cryopreservation").

438. See supra note 305 and accompanying text.

439. See Dasha Burns, Abigail Brooks & Alexandra Marquez, Trump Says He Wants to Make IVF Treatments Paid for by Government or Insurance Companies if Elected, NBC News (Aug. 29, 2024), https://www.nbcnews.com/politics/donald-trump/trump-says-wants-make-ivf-treatments-paid-government-insurance-compani-rcna168804 [https://perma.cc/6XBT-XVYS].

440. See Right to IVF Act, S. 4445, 118th Cong. (2024); Maya C. Miller, Senate G.O.P. Blocks I.V.F. Access Bill as Democrats Press for Political Edge, N.Y. Times (June 13, 2024), https://www.nytimes.com/2024/06/13/us/politics/ivf-access-bill-republicans.html (on file with the *Columbia Law Review*) (last updated June 17, 2024).

then, in April, as part of broader cuts to the HHS, the Administration eliminated a team at the CDC tasked with monitoring IVF outcomes.[441]

Coverage mandates risk driving up insurance premiums across the board in ways that simply pass the cost down to patients, leaving access to IVF not any meaningfully better than before. Insurance requirements could mitigate this risk in a number of ways, for example, by limiting the number of IVF cycles that are covered or by limiting the number of embryos covered for implantation to initiate a single pregnancy—and, in either case, perhaps varying those limits in principled ways that do not end up crowding out access based on age or reproductive health.[442]

Twenty-one states currently require some measure of private insurance coverage of IVF and fertility preservation, and sixteen mandate certain practices to be included under Medicaid.[443] That's still not much, over and above the handful of big Silicon Valley firms and large companies in major metropolitan cities that subsidize fertility treatment as a medical benefit of employment.[444] Any federally funded program would require Congress to pass new laws, while adding IVF to the benefits covered under the Affordable Care Act would involve convincing the relevant panel of doctors that oversees that program that it counts as a preventive health service.[445] However funding or insurance mandates might be operationalized, IVF ought to be available to everybody for whom assisted reproduction might be clinically viable, in line with the courts that have held that infertility is a disease and so should be covered for anyone.[446]

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441. Exec. Order No. 14,216, 90 Fed. Reg. 10,451 (Feb. 18, 2025). The April cuts involved the Assisted Reproductive Technologies Surveillance Team, which was charged with monitoring success rates and adverse outcomes tied to IVF. Berkeley Lovelace Jr. & Abigail Brooks, CDC's IVF Team Gutted Even as Trump Calls Himself the 'Fertilization President', NBC News (Apr. 2, 2025), https://www.nbcnews.com/health/health-news/cdcs-ivf-team-gutted-even-trump-calls-fertilization-president-rcna199261 [https://perma.cc/F8A5-ZFBV].

442. See, e.g., Ariz. Rev. Stat. Ann. § 25-318.03(A)(1) (2025) (awarding control in embryo disputes to the party seeking implantation); La. Stat. Ann. § 9:121 (2025) (defining embryos as having "certain rights granted by law, composed of one or more living human cells and human genetic material . . . so unified and organized that it may develop in utero into an unborn child").

443. See Mandated Coverage of Infertility Treatment, supra note 144.

444. See Kathryn Mayer, More Employers Offering Fertility, Adoption Benefits, Soc'y for Hum. Res. Mgmt. (Sep. 27, 2024), https://www.shrm.org/topics-tools/news/benefits-compensation/more-employers-offering-fertility–adoption-benefits [https://perma.cc/N35J-PRTN] (reporting the recent increase in employers offering fertility and adoption benefits).

445. 42 U.S.C. § 300gg-13(a) (2018) (requiring support by the United States Preventive Services Task Force or Health Resources and Services Administration to classify certain preventive health services).

446. See Egert v. Conn. Gen. Life Ins. Co., 900 F.2d 1032, 1039 (7th Cir. 1990) (holding that Connecticut General Insurance acted arbitrarily and capriciously when it denied claims for IVF); Witcraft v. Sundstrand Health & Disability Grp. Benefit Plan, 420 N.W.2d 785, 790 (Iowa 1988) (affirming that IVF treatment is an expense related to an illness and thus covered by the plaintiff's insurance plan). For discussion of patchwork state laws around

And religiously affiliated clinics could still seek exemptions under federal or state versions of the Religious Freedom Restoration Act.[447]

Other matters that may be better regulated at the state level include determinations of parentage, payment for surrogates and egg or sperm donors, prenatal screening, embryo testing, and the genetic selection of offspring traits.[448] Some states will adopt a permissive approach in the name of reproductive freedom to freely contract and form families.[449] Others may limit screening for genetic health because it can serve as a proxy for disability discrimination, stigmatizing deserving would-be parents, and risks reinforcing stereotypes about people deemed to have impairments.[450] Still other states might restrict these practices by voiding contracts, capping prices, or banning them altogether.[451] Half of states forbid malpractice suits for botched diagnoses for inherited disease before or during pregnancy.[452] Offspring selection for nonmedical traits like sex, height, and skin pigmentation provokes serious concerns about "designer children" and slippery slopes, including the erosion of the unconditional character of parental love, the very real risk of depressing social equality, and the strain on the structural resources available to diverse individuals who struggle to conceive.[453]

Surrogacy and the trading of eggs for money raises issues about exploiting vulnerable women and commodifying their reproductive labor.[454]

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insurance coverage for infertility treatment, see Meghan E. Vreeland, Note, ARTful Dodging: States' Reliance on the Medical Expense Income Tax Deduction as a Failure to Provide Inclusive Coverage for Infertility Treatment, 40 Women's Rts. L. Rep. 211, 215–16 (2019).

447. See, e.g., Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–92 (2014) (holding that the contraceptive mandate violated RFRA without offering a religious exemption).

448. Michelle Bayefsky, Who Should Regulate Preimplantation Genetic Diagnosis in the United States?, 20 AMA J. Ethics 1160, 1160 (2018).

449. See, e.g., Dov Fox, Selective Procreation in Public and Private Law, 64 UCLA L. Rev. Discourse 294, 296–97 (2016), https://www.uclalawreview.org/wp-content/uploads/2019/09/Fox-D64.pdf [https://perma.cc/4ARV-2R7R] (providing a "critical[] apprais[al] [of] the law and ethics of selective procreation").

450. See Alicia Ouellette, Selection Against Disability: Abortion, ART, and Access, 43 J.L. Med. & Ethics 211, 219 (2015) (discussing the disability critique of pre-implantation genetic selection and selective abortion).

451. See Bailey K. Sanders, Setting the Price of Fertility: Egg Donor Compensation Following *Kamakahi v. American Society for Reproductive Medicine*, 22 Hou. J. Health L. & Pol'y 183, 185 (2022) (explaining the effect of pricing caps on the egg donation market).

452. See, e.g., Fox, Reply to Critics, supra note 3, at 166–67 (discussing the history of malpractice suits for events occurring during pregnancy).

453. See Dov Fox, Silver Spoons and Golden Genes: Genetic Engineering and the Egalitarian Ethos, 33 Am. J.L. & Med. 567, 604–09 (2007) (warning that "as genetic possibilities enlarge the perception of control over heredity, people may well come to think of those born with certain abnormalities as 'genetic failures'"); Sonia Mateu Suter, The Routinization of Prenatal Testing, 28 Am. J.L. & Med. 233, 251 (2002) (explaining how wrongful birth lawsuits have caused medical professionals to push for more genetic testing).

454. See Dov Fox, Paying for Particulars in People-to-Be: Commercialisation, Commodification and Commensurability in Human Reproduction, 34 J. Med. Ethics 162,

Meanwhile, states may variously resolve embryo disputes based on party contracts or by favoring reproductive interests to pursue parenthood or avoid it.[455] And different states might determine parental status as a function of intention, genetics, gestation, marriage, or social parenthood.[456] Nonnegotiable anywhere in the United States under this model would be keeping IVF legal for everyone, subject to informed consent requirements, and licensing and monitoring for the safety of patients and resulting children. On these issues alone, contrary state laws would be preempted unless lawmakers repealed them.

National guidance and model legislation should still recommend ways in which states can broaden access, provide security, and enhance equality in areas of law and life that have long excluded certain minority groups.[457] Those who would favor a free-market approach to assisted reproduction—to promote autonomy, patient choice, efficiency, and innovation—must reckon with the barriers to access that include the high cost of IVF, the high incidence of negligent mishaps, and expensive and risky multiple births that result from embryo-maximizing multiple implantations.[458]

A Republican Congress wouldn't permit requiring equal access to IVF for sexual minorities at the national level. But still the federal government ought to recommend that states reclassify the inability to conceive as qualifying for mandatory insurance under health plans.[459] Those unable

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165 (2008) (discussing the moral degradation that occurs when surrogacy and eggs are traded for money).

455. See Loeb v. Vergara, 313 So. 3d 346, 368 (La. Ct. App. 2021) (discussing the contractual element of an embryo dispute); I. Glenn Cohen & Eli Y. Adashi, Embryo Disposition Disputes: Controversies and Case Law, Hastings Ctr. Rep., July–Aug. 2016, at 13, 13–15 (overviewing divergent approaches to embryo disputes in different jurisdictions); Gerard Letterie & Dov Fox, Legal Disputes Over Frozen Embryos After *Dobbs*: A Retrospective Study of Claims, Contracts, and Liability in Cases of Divorce or Separation, 45 Pace L. Rev. 73, 78 (2024) ("Personhood was used as a basis for claims in 10% of cases. Embryos in these cases were characterized as a person with all rights and privileges . . . .").

456. See Courtney G. Joslin & Douglas NeJaime, How Parenthood Functions, 123 Colum. L. Rev. 319, 337 (2023) (discussing states that recognize "functional parent doctrines" recognizing nonbiological and nonmarital parenthood).

457. See, e.g., Daar, supra note 290, at 33 (describing how a lack of research and regulation "can produce devastating outcomes visited upon the most vulnerable in our society"); NeJaime, The Nature of Parenthood, supra note 232, at 2277 (describing an example of a nationwide congressional initiative in which drafters hoped to impose parental obligations upon resistant biological fathers).

458. See Maartje Schermer, Reprogentic Technologies Between Private Choice and Public Good, *in* Human Flourishing in an Age of Gene Editing 212, 222 (Erik Parens & Josephine Johnston eds., 2019) (discussing the need to expand access to reproductive technology such as gene editing); Martha M. Ertman, What's Wrong With a Parenthood Market?: A New and Improved Theory of Commodification, 82 N.C. L. Rev. 1, 16 (2003) (observing that the lack of subsidies for reproductive technology functions as a barrier to parenthood).

459. Financial burden leads patients to transfer more embryos at once to increase the chances of getting pregnant in a single cycle. If patients have no insurance coverage to help with the costs, they may be able to afford only one or two treatment cycles. If, however, IVF

to make a baby should be eligible for coverage regardless of marital status, sexual orientation, or gender identity—even as some identities have come under attack by the Trump Administration.[460] Some states model reasonable coverage limits. For example, New York mandates insurance coverage for a maximum of three IVF cycles,[461] while Maryland and Rhode Island cap coverage at $100,000.[462] The federal government should strongly discourage discrimination in regard to these benefits, subject to limited protections for religious refusal on conscience grounds.[463] The Uniform Parentage Act of 2017—adopted in California, Connecticut, Massachusetts, Pennsylvania, Rhode Island, Vermont, and Washington—is a strong model for recognizing equal rights for parents who have a child through assisted means of reproduction.[464]

Recommended ranges for paying surrogates and donors of eggs and sperm could prorate compensation based on factors like associated time, inconvenience, and risk.[465] To address fears about designer babies and

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is covered by an insurance mandate like those existing in a handful of states, physicians and patients can make decisions that are most medically appropriate. See, e.g., Leanne Aban, Jenna Pickering, Kira Eidson, Reema Holz, Chunhui Li & Olivia Luongo, Assisted Reproductive Technologies, 24 Geo. J. Gender & L. 337, 364–65 (2023) (summarizing insurance companies' arguments for excluding ART procedures from coverage); Dov Fox, It's Time for the U.S. to Cover IVF (for Gays and Lesbians Too), HuffPost (Mar. 18, 2013), https://www.huffpost.com/entry/it-is-time-for-the-us-to_b_2900323 [https://perma.cc/S8UY-25EY] (last updated Nov. 14, 2013) (outlining how various arguments against IVF subsidies fall short).

460. See PFLAG, Inc. v. Trump, 769 F. Supp. 3d 405, 416 (D. Md. 2025) (deciding a case against President Trump's executive orders allegedly stripping funding from institutions providing gender-affirming care to patients).

461. IVF and Fertility Preservation Law Q&A Guidance, N.Y. Dep't of Fin. Servs., https://www.dfs.ny.gov/apps_and_licensing/health_insurers/ivf_fertility_preservation_law_qa_guidance [https://perma.cc/T838-JAHB] (last visited Aug. 9, 2025).

462. Md. Code Ann., Ins. § 15-810.1 (West 2025); 27 R.I. Gen. Laws § 27-18-30 (2025).

463. See Comm. on Ethics, Am. Coll. of Obstetricians & Gynecologists, The Limits of Conscientious Refusal in Reproductive Medicine 5 (2007), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2007/11/the-limits-of-conscientious-refusal-in-reproductive-medicine.pdf [https://perma.cc/F9BB-H53M] (recommending measures designed to accommodate religious beliefs but without imposing them upon others); Jo Yurcaba, Gay Couple Files First-of-its-Kind Class Action Against NYC for IVF Benefits, NBC News (May 9, 2024), https://www.nbcnews.com/nbc-out/out-news/gay-couple-files-first-kind-class-action-nyc-ivf-benefits-rcna151250 [https://perma.cc/2JXB-U3K7] (discussing a suit brought by a gay couple against New York City for excluding male couples from the City's IVF insurance coverage); ASRM Today: Equity, Access, and Innovation, Episode Two: Access, Am. Soc'y for Reprod. Med. (Sep. 5, 2024), https://asrmtoday.libsyn.com/asrm-today-s2-ep2-access [https://perma.cc/9W5W-R4BR] (discussing barriers to accessing fertility treatment).

464. See Unif. Parentage Act (Unif. L. Comm'n 2017); Douglas NeJaime, The Constitution of Parenthood, 72 Stan. L. Rev. 261, 338–40 (2020) (describing the development and structure of the 2017 UPA).

465. See Prac. Comm., Am. Soc'y for Reprod. Med. & Prac. Comm., Soc'y for Assisted Reprod. Tech., Gamete and Embryo Donation Guidance, 122 Fertility & Sterility 799, 803 (2024) (describing methods of evaluating complicating factors).

eugenics,[466] the government should advise minimum testing requirements that prioritize serious, single-gene disorders over mild or genetically complex ones—and should distinguish testing for potentially fatal health conditions like prostate cancer and Alzheimer's from selecting for behavioral and physical traits like intelligence or height.[467] In setting forth any recommendations about genetic screening, public actors should be sensitive to the potential for disrespect or discrimination against people with disabilities.[468]

These policies promise concrete benefits for fertility patients. Greater transparency will facilitate informed choices about reliable treatments that safely and effectively diagnose devastating disorders. Insurance coverage will enable access for the many Americans who are currently unable to afford the high price of IVF.[469] For some people, funding assistance makes the difference between becoming a parent and not, or between living in their home state and having to move to a state that offers insurance coverage in order to make a family.[470] Antidiscrimination policies can likewise be what allows sexual minorities to find willing providers in parts of the country where they are scarce. Capping the number of embryos that can be implanted at once—subject to special, patient-specific circumstances—will tend to improve health outcomes for both women and children,[471] while addressing concerns about the commodification of sex

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466. See, e.g., Ari Schulman, Opinion, The World Isn't Ready for What Comes After I.V.F., N.Y. Times (Sep. 9, 2024), https://www.nytimes.com/2024/09/09/opinion/ivf-debate.html (on file with the *Columbia Law Review*) (outlining fears that new advancements in I.V.F. will allow parents to select "the most genetically desirable of dozens and even hundreds of embryos").

467. See Prac. Comm., Am. Soc'y for Reprod. Med. & Prac. Comm., Soc'y for Reprod. Biologists & Technologists, Comprehensive Guidance for Human Embryology, Andrology, and Endocrinology Laboratories: Management and Operations: A Committee Opinion, 117 Fertility & Sterility 1183, 1194 (2022) (highlighting different possible focus points that regulation could specifically target).

468. See, e.g., Dov Fox, Prenatal Screening Policy in International Perspective: Lessons From Israel, Cyprus, Taiwan, China, and Singapore, 9 Yale J. Health Pol'y L. & Ethics 471, 478–79 (2009) (reviewing Ruth Schwartz Cowan, Heredity and Hope: The Case for Genetic Screening (2008)) ("[N]ew genetics threatens 'expressive' harm toward those whose genetic traits are targeted for elimination through reproductive measures.").

469. See, e.g., Seema Mohapatra, Assisted Reproduction Inequality and Marriage Equality, 92 Chi.-Kent L. Rev. 87, 92 (2017) (describing the expense associated with assisted reproductive technologies like IVF). An alternative to insurance coverage is financial "risk-sharing" or refund programs that offer patients a payment structure under which they pay a higher initial fee for a package of multiple cycles that is discounted over the per-cycle fee, and patients may receive a partial or complete refund if they do not become pregnant or deliver an infant. Ethics Comm., Am. Soc'y for Reprod. Med., Financial "Risk-Sharing" or Refund Programs in Assisted Reproduction: An Ethics Committee Opinion, 121 Fertility & Sterility 783, 783 (2024).

470. Jody Lyneé Madeira, Taking Baby Steps: How Patients and Fertility Clinics Collaborate in Conception 91–108 (2018).

471. See, e.g., Am. Soc'y for Reprod. Med., supra note 410, at 9 (describing the clinical outcomes from current IVF regulation).

cells, gestational services, the act of procreation itself, and the children who result.[472]

Reforms centered on health, truthfulness, competency, and access recall the earliest common ground forged in the earliest days of IVF around the EAB hearings, Wyden bill, and beyond.[473] For half a century, divisions within and between the movements for and against legal abortion have stood in the way of realizing responsive measures to make IVF more safe, effective, honest, and available.[474] Radical realignments in the wake of *Dobbs* have sparked an anti-abortion campaign to restrict IVF even as the backlash to *Dobbs* reveals considerable bipartisan agreement about the benefits of IVF itself.[475] A new threat to IVF has emerged, with a powerful social movement openly seeking to transform or eliminate its practice. This American moment represents an important legislative opportunity to capitalize on a wide-ranging consensus about IVF's value. We have sought to identify the most promising places to start that legislative work.

CONCLUSION

For decades, the debates about abortion and IVF have veered down opposite paths. Abortion stood as a byword for polarization. It figured centrally in presidential elections and judicial nominations, and in states across the country, it was subject to uniquely invasive regulation. IVF, by contrast, rarely played a central role in the nation's law and politics, and perhaps for this reason, was subject to little regulation at all.

The aftermath of *Dobbs* has blurred these differences. Future conflicts over reproductive rights are as likely to feature IVF *and* abortion—and to tie the two ever closer together. At our present crossroads, it is critical to understand what brought us to this defining moment in conflicts over reproduction and infertility and to see what lies beyond it.

The legal history of IVF, and the rise and fall of its so-called Wild West, offers plenty of reason for pessimism about what comes next. Our past has at times been a story about federal officials who sometimes prioritized conflict avoidance or even industry preferences over the welfare of those struggling with infertility. And the parallel stories of abortion and IVF underscore the risks and unintended regulation of any reproductive

472. See, e.g., Rene Almeling, Sex Cells: The Medical Market for Eggs and Sperm 60–65 (2011) (expressing concern over the amount of information available to IVF participants); Dov Fox, Retracing Liberalism and Remaking Nature: Designer Children, Research Embryos, and Featherless Chickens, 24 Bioethics 170, 175 (2010) (comparing genetic engineering to other accepted "environmental enhancements like college test preparation and private musical training"); Kimberly D. Krawiec, Markets, Morals, and Limits in the Exchange of Human Eggs, 13 Geo. J.L. & Pub. Pol'y 349, 364 (2015) (discussing how the taboo around reproduction complicates the market structure around IVF).

473. See supra text accompanying notes 63–64, 83–92, and 170–173.

474. See supra sections I.B–.E.

475. See supra Part II.

decision. But this history also illuminates the promise of common ground for those who have always wanted IVF to be not only legal but also safer, more reliable, more transparent, and more equitable.

THE ACCOUNTABILITY DEFICIT: WHEN IMMIGRATION DETENTION OBSTRUCTS ONE'S DAY IN CRIMINAL COURT

*Tiffany J. Lieu**

The right to have your day in court is foundational to the U.S. criminal legal system. Yet, many noncitizens in immigration detention facing criminal charges are denied this right when ICE routinely fails to produce immigration detainees to criminal court to resolve charges. In immigration proceedings, immigration judges regularly use those unresolved charges to detain and deport. This Article is the first to examine this obstruction of court access and its implications—a particularly imperative study as recent executive and congressional proclamations foretell a gross expansion of the number of individuals in immigration detention with pending criminal charges.

Immigration obstruction of court access occurs because of an accountability deficit: Neither the immigration jailor nor criminal prosecutor suffers consequences for obstructing court access, and thus the accountability deficit falls on the noncitizen defendant. This Article posits the following three implications. First, noncitizen defendants suffer constitutional criminal procedure violations when obstructed from accessing criminal proceedings. Second, noncitizen defendants are harmed in immigration proceedings because the unresolved criminal charge is used to detain and deport them, perpetuating a cycle of obstruction. Finally, noncitizen defendants' rights are in even greater jeopardy because the jailor and prosecutor are the same entity in the immigration apparatus and are further commingled with the judge. This Article proposes to close the deficit by assigning accountability to criminal and immigration enforcement actors through a two-pronged remedy: dismissal of charges on the criminal side and prohibiting use of the pending charge to detain or deport on the immigration side.

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INTRODUCTION

Recent executive and legislative proclamations foretell the gross expansion of the U.S. immigration detention system, particularly for individuals with pending criminal proceedings. Days after being sworn into office, President Donald Trump issued quotas to U.S. Immigration and Customs Enforcement (ICE) to increase immigration arrests from a few hundred per day to at least 1,200 to 1,500 per day.[1] Just a few months later, the Trump Administration increased the quota to 3,000 arrests per day.[2] As a result, ICE detention facilities are over capacity. Detention centers were reportedly already at 109% capacity within the first few weeks

1. Nick Miroff & Maria Sacchetti, Trump Officials Issue Quotas to ICE Officers to Ramp Up Arrests, Wash. Post, https://www.washingtonpost.com/immigration/2025/01/26/ice-arrests-raids-trump-quota/ (on file with the *Columbia Law Review*) (last updated Jan. 26, 2025).

2. Julia Ainsley, Ryan J. Reilly, Allan Smith, Ken Dilanian & Sarah Fitzpatrick, A Sweeping New ICE Operation Shows How Trump's Focus on Immigration Is Reshaping Federal Law Enforcement, NBC News (June 4, 2025), https://www.nbcnews.com/politics/justice-department/ice-operation-trump-focus-immigration-reshape-federal-law-enforcement-rcna193494 (on file with the *Columbia Law Review*).

of the Administration,[3] and the number of immigrants in detention had increased by 20% six months later.[4] The Trump Administration has long said that its top priority for such detention and deportation is noncitizens with criminal convictions or pending charges.[5] Moreover, in January 2025 Congress enacted the Laken Riley Act, which requires that certain individuals be detained by ICE with no opportunity for a bond hearing, even if they have only been arrested or charged—and not yet convicted—for a host of crimes, including minor crimes like shoplifting.[6] A few months later in July 2025, Congress passed the so-called One Big Beautiful Bill Act[7]—a massive budget reconciliation bill that will "supercharge" the Administration's anti-immigration agenda, allocating approximately $170 billion to immigration detention and enforcement.[8] The immigration detention dragnet, then, is set to sweep in many individuals who face pending criminal charges and thus need to have their day in criminal court.

That ICE detains individuals with pending criminal proceedings is not surprising. But what many may be shocked to learn is that, once noncitizen defendants are detained, many are barred from accessing criminal court proceedings.[9] Indeed, ICE routinely refuses to permit individuals in its custody to attend criminal court hearings, in person or virtually, even when ordered to do so by a state criminal court.[10] As a result, individuals are obstructed from having their day in criminal court to resolve those charges. Meanwhile, unresolved charges are used against noncitizen defendants in their immigration proceedings to deny release from

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3. Camilo Montoya-Galvez, ICE Releases Some Migrant Detainees as Its Detention Facilities Reach 109% Capacity, CBS News, https://www.cbsnews.com/news/ice-releases-some-migrant-detainees-detention-facilities-reach-109-percent-capacity/ [https://perma.cc/5PHB-QNTS] (last updated Feb. 5, 2025).

4. Meg Anderson, Private Prisons and Local Jails Are Ramping Up as ICE Detention Exceeds Capacity, NPR (June 4, 2025), https://www.npr.org/2025/06/04/nx-s1-5417980/private-prisons-and-local-jails-are-ramping-up-as-ice-detention-exceeds-capacity [https://perma.cc/4L9N-HGYL].

5. Allison McCann, Albert Sun & Eileen Sullivan, Who Are the Millions of Immigrants Trump Wants to Deport?, N.Y. Times, https://www.nytimes.com/interactive/2025/01/17/us/immigrants-trump-deportations.html (on file with the *Columbia Law Review*) (last updated Jan. 24, 2025); Miroff & Sacchetti, supra note 1 ("Tom Homan has said for weeks that ICE . . . would prioritize immigrants with criminal records and who are gang members.").

6. Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025) (codified in scattered sections of 8 U.S.C.).

7. One Big Beautiful Bill Act, Pub. L. No. 119-21, 139 Stat. 72 (2025) (codified in scattered titles of U.S.C.).

8. Juliana Kim, How Trump's Tax Cut and Policy Bill Aims to 'Supercharge' Immigration Enforcement, NPR (July 3, 2025), https://www.npr.org/2025/07/03/g-s1-75609/big-beautiful-bill-ice-funding-immigration [https://perma.cc/LV7S-6T5E].

9. See infra Part I.

10. See infra section I.B.

immigration detention—therefore prolonging detention—or to deny immigration relief, thereby leading to deportation.[11]

This Article is the first to shed light on this little-known and constitutionally problematic immigration detention practice—which this Article calls "obstruction of court access"—and the ways it shapes the crimmigration[12] paradigm. Consider the case of Ramirez, who arrived in the United States at age fourteen and worked throughout high school to support his family.[13] Ramirez's immigration troubles began when, in high school, he was charged with an offense against a minor for sexual involvement with a schoolmate.[14] Based on this pending charge, ICE detained him and placed him in immigration removal proceedings.[15] In immigration court, Ramirez sought relief from removal by applying for adjustment of status to become a legal permanent resident, which he became eligible for after his mother became a naturalized U.S. citizen.[16] Although the immigration judge concluded that Ramirez was statutorily eligible for adjustment of status, the judge denied him relief and ordered him deported *based solely* on the pending criminal charge.[17] He was ultimately deported to a country where he feared persecution.[18]

Ramirez's deportation, based solely on the pending criminal proceedings, is all the more troubling in light of what did—or rather, did *not*—occur in those criminal proceedings. For nearly four years, Ramirez never had his day in criminal court to refute the allegations levied against him because he was stuck in immigration detention.[19] ICE failed to produce him despite numerous state court writs of habeas corpus ordering that he be produced to court.[20] In the end, immigration authorities deported him based solely on a charge that immigration authorities obstructed him from resolving.[21] More than a year after he was deported, the First Circuit remanded his case to the Board of Immigration Appeals (BIA)—the administrative appellate body that reviews immigration judges' decisions and the highest administrative body for interpreting and applying immigration laws—to properly analyze the impact of the pending

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11. See infra Part III.

12. See generally Juliet Stumpf, The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power, 56 Am. U. L. Rev. 367 (2006) (coining the term "crimmigration" to describe the growing criminalization of immigration law).

13. Rosa v. Garland, 114 F.4th 1, 5 (1st Cir. 2024). This author was counsel in this petition for review before the First Circuit. A pseudonym is used for purposes of this Article.

14. Id.

15. Id.

16. Id. at 5–6.

17. Id. at 7.

18. Attestation of Tiffany J. Lieu (Aug. 26, 2025) (on file with the *Columbia Law Review*) [hereinafter Lieu, Attestation].

19. *Rosa*, 114 F.4th at 22 n.9.

20. Lieu, Attestation, supra note 18.

21. *Rosa*, 114 F.4th at 7.

charge on his application for relief.[22] But still, he remains deported, as ICE has refused to permit his return to the United States.

Ramirez's story is just one of many. Yet, thus far, immigration obstruction of court access has occurred in the shadows of public[23] and scholarly attention. Criminal law scholars have examined *defendants'* failure to appear in criminal court after being released on bail,[24] but, as Lindsay Graef and others recently noted, failure to appear because a *jailor* failed to bring the defendant from jail to court is a type of failure to appear that "has been largely unrecognized in [criminal law] scholarship and policy conversations."[25] Moreover, this body of criminal law scholarship does not consider the interaction between the criminal and immigration legal systems when the individual impacted is a noncitizen defendant stuck in immigration detention. Nor has there been much litigation challenging immigration failure to produce.[26] Indeed, it bears noting that, while anecdotes like Ramirez's abound, it is difficult to ascertain the precise scope of the problem empirically due to a lack of systematic recordkeeping by state or federal entities.[27]

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22. Id. at 25.

23. Although press sources have reported on the obstruction-of-court-access problem, there has thus far been no systematic description or examination of the practice or its implications. See, e.g., Barbara Howard, ICE Detainees Can Now Answer State Charges, GBH (Jan. 30, 2019), https://www.wgbh.org/news/local/2019-01-30/ice-detainees-can-now-answer-state-charges [https://perma.cc/MVV7-HLLU] (last updated Aug. 1, 2023) ("It has been a problem for a while now: immigrants failing to show up to their state court hearings because they're not being transported from federal [ICE] detention."); Adrian Walker, Criminal Defendants in ICE Custody Haven't Always Been Able to Have Their Day in Court. That's About to Change, Bos. Globe (Jan. 29, 2019), https://www.bostonglobe.com/metro/2019/01/29/criminal-defendants-ice-custody-haven-always-been-able-have-their-day-court-that-about-change/L7xrSntmEyAh1InLXScZ7L/story.html (on file with the *Columbia Law Review*) ("You can't clear your name if you can't go to court, and many of those held—no one knows how many—weren't being allowed to go to court.").

24. See, e.g., Lauryn P. Gouldin, Keeping Up Appearances, 58 U.C. Davis L. Rev. 1019, 1021–29, 1068–89 (2024) (examining pretrial appearances and critiquing the consequences for nonappearance).

25. Lindsay Graef, Sandra G. Mayson, Aurélie Ouss & Megan T. Stevenson, Systemic Failure to Appear in Court, 172 U. Pa. L. Rev. 1, 22 (2023).

26. This author is co-counsel on a first-of-its-kind putative class action lawsuit challenging ICE's policy of denying individuals in its custody at the Moshannon Valley Processing Center remote attendance to state criminal court proceedings in violation of their constitutional right to court access. See Doe v. Dep't of Homeland Sec., No. 3:24-cv-00259-SLH-PLD (W.D. Pa. docketed Sep. 11, 2024). That litigation is ongoing.

27. It is difficult to ascertain the precise scope of the problem because detention facilities do not keep close track of or report who in detention has pending criminal court proceedings, whether the facility received a state court writ for production of the individual, or whether the individual was ultimately produced to court. Similarly, criminal courts do not track in any systematic way, if at all, which defendants are detained in ICE custody and whether their failure to appear was due to immigration detention. Some advocates have sought this information on a local level in New Jersey through federal Freedom of Information Act requests and state public access records requests to ascertain the scope of ICE's practice of failing to produce. These requests are pending. See Complaint for

Yet immigration obstruction of court access is an important subject of study not only because of the unique jeopardy noncitizen defendants face but also because it sheds new light on the interaction between the criminal and immigration legal systems when a noncitizen defendant faces active proceedings in both. This new understanding of crimmigration is all the more imperative as executive and congressional priorities and mandates increasingly bring active criminal and immigration proceedings into conflict.

This Article fills the scholastic and information gap. It examines the systems that permit obstruction of court access in immigration detention and the harms it imposes on noncitizen defendants as a matter of criminal law rights and immigration law rights, and it proposes a two-pronged solution to remedy the harms as an adjudicatory matter. In so doing, this Article contributes to existing criminal law and immigration law scholarship.

Drawing on court rulings, government documents, and client experience, Part I describes immigration obstruction of court access. It examines the immigration priorities and enforcement practices that result in a detention system that detains many noncitizens who have pending criminal proceedings. It then examines the ways ICE affirmatively and effectively obstructs those individuals from having their day in criminal court to answer those charges.

Part II turns to the question of how immigration detention could possibly be permitted to obstruct a noncitizen defendant's constitutional rights to court access in this way. This Article argues that the answer lays in what Professor David Sklansky has called in other contexts an "accountability deficit."[28] When neither the immigration jailor nor the criminal prosecutor face consequences for refusing to produce a noncitizen defendant to criminal court proceedings, obstruction of court access is permitted to occur with effective impunity. The accountability deficit, then, is paid by the noncitizen defendant stuck in immigration detention who suffers harms under both the criminal and immigration legal systems.

The existence of the accountability deficit in immigration obstruction of court access is glaring when compared with the accountability mechanisms that lawmakers have legislated in the criminal custody context.[29] Indeed, the problem of obstruction of court access is not unique to immigration detention. For much of U.S. history, defendants serving carceral sentences in one jurisdiction while facing prosecution in another

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Declaratory and Injunctive Relief at 1–3, Legal Servs. of N.J. v. U.S. Immigr. & Customs Enf't, No. 2:23-cv-22222 (D.N.J. filed Nov. 9, 2023) [hereinafter LSNJ FOIA Complaint]. Seeking empirical information through records requests on the state and federal levels is an area for further research.

28. See David Alan Sklansky, Crime, Immigration, and Ad Hoc Instrumentalism, 15 New Crim. L. Rev. 157, 217–19 (2012).

29. See infra section II.A.

jurisdiction have similarly struggled to exercise their rights to face charges against them.[30] Recognizing this problem, the states and federal government enacted the Interstate Agreement on Detainers,[31] which requires that charges be dismissed if incarcerated individuals are not brought to court and timely tried.[32] Lawmakers, in effect, legislated accountability to protect defendants' rights in criminal custody. Such legislated accountability, however, does not apply when a noncitizen defendant is subject to civil immigration detention.[33]

Having identified the accountability deficit, Part III examines the consequences of that dearth. It posits three interrelated implications that are underexplored in criminal law scholarship and immigration law scholarship and give rise to an accountability imperative.

First, noncitizen defendants stuck in immigration detention suffer criminal law harms of constitutional proportion when they are obstructed from participating in criminal proceedings.[34] The right to have one's day in court is a foundational precept of the U.S. criminal justice system, safeguarded by a constellation of rights under the First, Fifth, Sixth, and Fourteenth Amendments.[35] The Supreme Court has long made explicit that these criminal procedure rights apply to anyone in criminal proceedings, regardless of whether they are a citizen or are detained.[36] Thus, through a criminal rights lens, the constitutional dilemma that occurs when ICE obstructs a noncitizen defendant from appearing in court is, perhaps, intuitive. In *Doe v. Department of Homeland Security*, a putative class action on which this author is co-counsel, the district court concluded that ICE's obstruction of court access policy at the Moshannon Valley Processing Center was likely unconstitutional, emphasizing that even defendants agreed "that a deprivation of access to criminal court proceedings causes a waterfall of further . . . deprivations [that] are illegal under the United States Constitution."[37] The court issued a preliminary injunction ordering defendants to "immediately function in compliance with the tenants of the United States Constitution" by granting individuals access to criminal court proceedings virtually.[38] But outside the context of

30. See infra section II.A.

31. See 18 U.S.C. app. § 2 (2018).

32. See infra section II.A.2.

33. See infra section II.B.

34. See infra section III.A.

35. See generally Wayne R. LaFave, Jerold H. Isarael, Nancy J. King & Orin S. Kerr, Modern Criminal Procedure: Cases, Comments, and Questions (16th ed. 2023) (examining a defendant's constitutional rights to counsel, speedy trial, confrontation, and compulsory process in criminal proceedings).

36. See, e.g., Wong Wing v. United States, 163 U.S. 228, 237–38 (1896) (explaining that noncitizens in criminal proceedings are entitled to full constitutional criminal procedural protections).

37. Doe v. U.S. Dep't of Homeland Sec., No. 3:24-cv-00259-SLH-PLD, 2025 WL 360534, at *5 (W.D. Pa. Jan. 31, 2025).

38. Order Granting Preliminary Injunction at 1, *Doe*, 2025 WL 360534.

this one case, which remains ongoing, individuals who are in ICE custody are continually obstructed from attending criminal proceedings in violation of their constitutional rights.

Second, this criminal law obstruction, in turn, harms noncitizen defendants in immigration proceedings in what this Article calls "cyclical obstruction." Immigration judges, as an evidentiary and adjudicatory matter, are permitted to and do often consider unresolved criminal proceedings against an individual to deny release from detention or deny immigration relief, leading to deportation.[39] These dual immigration consequences are harms in and of themselves and, moreover, interact with the criminal legal system to fuel cyclical obstruction. That is, the very detention that obstructs the criminal process perpetuates that detention, which in turn perpetuates the obstruction of criminal process, and so on. Deportation fuels the same cycle of obstruction. Obstruction of court access and the accountability deficit, then, shed light on the interaction between the criminal and immigration legal systems that occurs because immigration judges can consider the resulting unresolved charges.

This cyclical obstruction, and its evidentiary/adjudicatory origins, compels a new understanding of the criminal–immigration interaction. Much of the crimmigration scholarship has focused on the impact of one system on the other. Professor Stephen Legomsky, for example, has theorized that elements of the criminal legal system have been asymmetrically incorporated into immigration proceedings and adjudication—that is, criminal law enforcement methodologies but not criminal procedural protections have been incorporated.[40] Flowing in the opposite direction, scholars like Jennifer Chacón,[41] Ingrid Eagly,[42] and Amy Kimpel[43] have theorized the ways immigration law and adjudication have begun to erode criminal procedural norms. This Article's study of the obstruction of court access builds on this scholarship by articulating the bidirectional impact of the criminal and immigration legal systems and the ways in which the immigration system, quite literally, obstructs criminal process. This cyclical obstruction is significant: The noncitizen

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39. See infra section III.B.

40. See Stephen H. Legomsky, The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms, 64 Wash. & Lee L. Rev. 469, 474–75 (2007).

41. See Jennifer M. Chacón, Managing Migration Through Crime, 109 Colum. L. Rev. Sidebar 135, 136–37 (2009), https://columbialawreview.org/wp-content/uploads/2016/08/Chacon1.pdf [https://perma.cc/9GNZ-M6PR] (arguing that the relaxed procedural norms of civil immigration proceedings are being imported into the criminal realm).

42. See Ingrid V. Eagly, Prosecuting Immigration, 104 Nw. U. L. Rev. 1281, 1288 (2010) (arguing that the immigration agency interacts with criminal process to erode procedural protections afforded to criminal defendants).

43. See Amy F. Kimpel, Alienating Criminal Procedure, 37 Geo. Immigr. L.J. 237, 241 (2023) (arguing that the increased prosecution of immigration crime is changing criminal procedure in the federal courts, including through mass hearings and eroding Fourth Amendment rights).

defendant stuck in immigration detention faces a double and cyclical jeopardy.

The third and final implication of obstruction of court access and the accountability deficit must be understood through the institutional design of the immigration apparatus. That design is one in which the jailor and prosecutor are the same entity and are commingled with the judge. Drawing on the growing body of scholarship that has examined the administration of immigration law through the lens of institutional design,[44] this Article posits that the roles of jailor, prosecutor, and judge lack sufficient internal checks and balances. Indeed, the same entity, ICE, is both the jailor who prevents noncitizen defendants from resolving criminal charges and the prosecutor who uses those pending charges against them to detain and seek to deport. In other words, ICE as the jailor and prosecutor is capable of effectively manufacturing evidence against a noncitizen defendant in immigration proceedings in the form of unresolved criminal charges or, at the very least, preventing noncitizen defendants from presenting exculpatory evidence. That evidence, or lack thereof, in turn, is then considered by immigration judges—whom scholars have critiqued as lacking independence because they are also governed by an executive department with the same immigration policy agenda[45]—to detain and deport noncitizen defendants, which further drives the cyclical obstruction of criminal court access. The implications of this institutional design in the context of obstruction of court access make the need for accountability all the more imperative.

Part III, in sum, tells the story of the implications of the accountability deficit in obstruction of court access. It demonstrates that immigration obstruction of court access quite literally obstructs criminal process in violation of individual constitutional criminal law rights, and it identifies two facets of the immigration system—one adjudicatory and one

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44. See, e.g., Adam B. Cox & Eric A. Posner, The Second-Order Structure of Immigration Law, 59 Stan. L. Rev. 809, 814 (2007) (examining the design choices governing how immigrants are screened and selected and conflicting incentives within the immigration system); Alina Das, Immigration Detention: Information Gaps and Institutional Barriers to Reform, 80 U. Chi. L. Rev. 137, 139 (2013) (examining the institutional design choices governing the use of information in immigration detention); Eagly, supra note 42, at 1290–91 (examining the institutional design of criminal immigration prosecutions).

45. Mary Holper, The Fourth Amendment Implications of "U.S. Imitation Judges", 104 Minn. L. Rev. 1275, 1306–13 (2020) [hereinafter Holper, Imitation Judges] (arguing that immigration judges are not neutral arbiters in bond hearings in violation of the Fourth Amendment); Stephen H. Legomsky, Deportation and the War on Independence, 91 Corn. L. Rev. 369, 372–75 (2006) [hereinafter Legomsky, War on Independence] (describing immigration judges' concerns with Justice Department involvement in their adjudication of immigration cases); Stephen H. Legomsky, Restructuring Immigration Adjudication, 59 Duke L.J. 1635, 1644–76, 1685–720 (2010) (calling for a new immigration system with immigration judges independent from the Justice Department); Tara Magner, Immigration Judges Seek Independence From Department of Justice, 16 Geo. Immigr. L.J. 733, 733 (2002) (referencing the National Association of Immigration Judges' petition for immigration courts to be placed under an independent agency).

institutional design—that interact with the criminal system to create a cycle of harm in both criminal and immigration proceedings.

Part IV then turns to closing the accountability deficit. The focal point of the proposed solution is not about how to directly force ICE to produce a noncitizen defendant in criminal court, but rather to assign accountability to criminal prosecutors and ICE as the jailor and immigration prosecutor when obstruction of court access occurs. To do so, Part IV proposes a two-pronged remedy that draws upon the implications previously identified. The remedy is two-pronged because the consequences of the accountability gap are cyclical and flow to both the criminal and immigration systems. Accountability mechanisms, therefore, must attach in both. On the criminal side of the ledger, this Part proposes that if an individual is not able to appear in criminal court, the charges against them must be dismissed. As to immigration proceedings, this Part proposes that the BIA restrict immigration judges from considering pending or dismissed criminal proceedings against an individual if ICE has obstructed their ability to resolve those proceedings. Omitting such evidence mitigates the adjudicatory and institutional design concerns. While these remedies may seem improbable in the current political environment, they are what strict adherence to constitutional principles demands.

I. OBSTRUCTION OF COURT ACCESS IN IMMIGRATION DETENTION

This Part illustrates, as a descriptive matter, immigration obstruction of court access. It begins with a broad overview of the immigration apparatus and the roles within it to establish the structural underpinnings of the immigration detention landscape. The reality of immigration detention is that many individuals detained have pending criminal proceedings that they must attend. This Part then explores the little-known phenomenon of immigration obstruction of court access: Once placed in immigration detention, many immigrants cannot attend those criminal proceedings.

A. *The Need to Access Criminal Court in Detention*

Enforcement and adjudication of U.S. immigration law is the purview of the executive branch and is largely governed by two umbrella executive agencies: DHS—the enforcement arm—and DOJ—the adjudicatory arm.

Within DHS, ICE manages all aspects of the immigration enforcement process, including deciding who to prosecute for removal, initiating removal proceedings against an individual, deciding who to detain, and serving as the legal custodian for those in immigration

detention.[46] ICE is also tasked with serving as immigration prosecutor, representing the government in removal proceedings against noncitizens in immigration court.[47] Once DHS initiates removal proceedings against a noncitizen, that individual has an opportunity to defend against removal in immigration court. The immigration court system is housed within the Executive Office of Immigration Review (EOIR), which in turn is housed within DOJ and operates under the delegated authority of the U.S. Attorney General.[48] In removal proceedings in immigration court, an immigration judge determines, as pertinent to this Article, whether an individual should be released from immigration detention on bond pending removal proceedings; whether an individual is removable from the United States; and, if so, whether they are entitled to relief from removal through forms of immigration relief like asylum or adjustment of status.[49] These court proceedings are adversarial—an ICE prosecutor presents evidence against a noncitizen, who is often unrepresented.[50] Either the noncitizen or DHS may appeal the immigration judge's decision to the BIA, which is also housed within EOIR within the DOJ.[51] Either party may then appeal certain BIA decisions to the federal courts of appeal via a petition for review.[52]

Turning specifically to immigration detention, ICE is statutorily authorized to detain an individual for the duration of removal proceedings, until they are either found not removable[53] or ordered deported.[54] In some cases, ICE may be required by statute to detain an individual—so-called mandatory detention—if they have been convicted of certain crimes.[55] The Laken Riley Act in 2025 expanded mandatory

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46. These duties fall within a subcomponent of ICE: Enforcement and Removal Operations. See U.S. Immigration and Customs Enforcement, ICE, https://www.ice.gov/about-ice [https://perma.cc/9L7M-NEJ7] (last updated Mar. 7, 2025).

47. ICE attorneys work within a subcomponent of ICE: the Office of the Principal Legal Advisor. Id.

48. Exec. Off. for Immigr. Rev., About the Office, DOJ, https://www.justice.gov/eoir/about-office [https://perma.cc/D9SF-RP8R] (last updated May 29, 2025).

49. See infra section III.C.

50. See, e.g., Ingrid V. Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. Pa. L. Rev. 1, 32 (2015) (reporting that, between 2007 and 2012, only 14% of detained immigrants were represented). Although noncitizens have the right to counsel under the Immigration and Nationality Act, they do not have the right to government-funded counsel. See 8 U.S.C. § 1362 (2018).

51. 8 C.F.R. § 1003.1(a)(1) (2025).

52. 8 U.S.C. § 1252(a)(2)(D).

53. Notably, ICE may continue to detain an individual even after they obtain certain forms of relief from removal like withholding of removal or protection under the United Nations Convention Against Torture. See 8 U.S.C. § 1231(a).

54. ICE may continue to detain an individual who has been ordered removed for ninety days to effectuate removal. Id.

55. 8 U.S.C. § 1226(c); see also Philip L. Torrey, Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody", 48 U. Mich. J.L. Reform 879, 883–96, 906–12 (2015) (tracing the history of mandatory detention and arguing that

detention for certain noncitizens to include additional crimes—like shoplifting, theft, and burglary—and for criminal dispositions less than a conviction—like being arrested, charged, or merely admitting to sufficient facts for one of these additional crimes.[56] Even if an individual is not subject to mandatory detention, ICE maintains discretion to detain an individual—so-called "discretionary detention"—pending the resolution of their removal proceedings.[57] Eligible noncitizens subject to discretionary detention may seek release from detention in a bond hearing, which is an adversarial proceeding against an ICE prosecutor before an immigration judge.[58]

The prominence of immigration detention as a tool of immigration enforcement is poignantly reflected in the numbers. In the weeks leading up to President Trump's inauguration, ICE detained approximately 39,703 noncitizens.[59] Within a month of the change to the new administration, which has made immigration enforcement one of its top priorities, that number had increased to 43,759 noncitizens, and within six months had skyrocketed to 56,397 noncitizens—an expansion fueled by executive-mandated detention quotas.[60] Congressional budget allocation similarly reflects the emphasis on detention. In fiscal year 2024, Congress allocated ICE an annual budget of $19.6 billion, with $3.43 billion specifically earmarked for immigration detention centers alone.[61] By contrast, Congress allocated only $840 million for the entire immigration court system that year.[62] Moreover, in July 2025, Congress enacted and the President signed into law the One Big Beautiful Bill Act, which allocates $45 billion for immigration detention centers and an additional approximately $30 billion to hire more ICE personnel and maintain ICE detention facilities, among other spending.[63]

DHS should interpret the statutory mandatory custody requirement to encompass alternatives to detention). While the Supreme Court held that mandatory detention is not facially unconstitutional in Demore v. Kim, 538 U.S. 510, 531 (2003), lower courts have since held that prolonged mandatory detention without a bond hearing may violate procedural due process. See, e.g., Black v. Decker, 103 F.4th 133 (2d Cir. 2024); German Santos v. Warden Pike Cnty. Corr. Facility, 965 F.3d 203 (3d Cir. 2020).

56. Laken Riley Act, Pub. L. 119-1, sec. 2, 139 Stat. 3, 3 (2025) (codified at 8 U.S.C. § 1226(c)).

57. See 8 U.S.C. § 1226(a).

58. See infra sections III.B–.C.

59. ICE Detainees, TRAC Immigr., https://tracreports.org/immigration/detentionstats/pop_agen_table.html [https://perma.cc/F7QQ-EGAK] (last visited Aug. 9, 2025) (reporting 39,703 individuals detained in ICE custody on January 12, 2025).

60. Id. (reporting 43,759 and 56,397 individuals detained in ICE custody on February 23, 2025, and June 15, 2025).

61. Am. Immigr. Council, The Cost of Immigration Enforcement and Border Security 3, 5 (2024), https://www.americanimmigrationcouncil.org/sites/default/files/research/cost_of_immigration_enforcement_factsheet_2024.pdf [https://perma.cc/AF7J-AAGK].

62. Id. at 3.

63. Kim, supra note 8.

Importantly, the civil immigration system is procedurally separate from the criminal legal system. Certainly, the immigration system, like other civil systems such as family court and housing court, are "enmeshed"[64] with the criminal system. For example, whether a noncitizen is removable or subject to mandatory detention under immigration law depends on whether they have been arrested, charged, or convicted for qualifying state or federal criminal offenses.[65] Nonetheless, the two systems are entirely separate procedurally. Thus, a noncitizen may face concurrent prosecutions with separate court proceedings that they must attend: one in civil immigration court and one in state or federal criminal court.

Many individuals in detention face such concurrent prosecution. A number of them have pending criminal proceedings—many of which are minor infractions, such as traffic violations[66]—and therefore need to go to criminal court either to defend against pending charges or to challenge wrongful convictions through post-conviction relief. This reality is due to ICE's arrest practices and the enforcement priorities set by the governing Administration.

Perhaps unsurprisingly, ICE targets sites of criminal law enforcement to arrest noncitizens who have pending criminal charges. ICE arrests individuals at courthouses[67] when they appear for pretrial hearings to have their day in court on pending charges.[68] ICE also arrests individuals at

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64. Padilla v. Kentucky, 559 U.S. 356, 365 (2010).

65. 8 U.S.C. §§ 1226(a)–(c), 1227(a)(2) (2018); see also César Cuauhtémoc García Hernández, Crimmigration Law 23–93 (2d ed. 2022) (explaining the immigration consequences of criminal dispositions).

66. Immigration Detention Quick Facts, TRAC Immigr., https://tracreports.org/immigration/quickfacts/ [https://perma.cc/7ZV7-UTM9] (last visited Aug. 9, 2025).

67. See Memorandum from Caleb Vitello, Acting Dir., ICE, to ICE Emps. (Jan. 20, 2025), https://www.ice.gov/doclib/foia/policy/11072.3_CivilImmEnfActionsCourthouses_01.21.2025.pdf [https://perma.cc/AAD2-H4HA] (setting forth the Trump Administration's policy for detaining individuals at courthouses). Others have persuasively articulated that courthouse detentions vitiate access to justice. See, e.g., Douglas Keith, States Push Back Against ICE Courthouse Arrests, Brennan Ctr. Just. (Nov. 22, 2019), https://www.brennancenter.org/our-work/analysis-opinion/states-push-back-against-ice-courthouse-arrests [https://perma.cc/DL9A-SNLL] ("Advocates have documented the chilling effect ICE's presence has on courthouse access—deterring victims, survivors, and witnesses from pursuing justice and using court services—and the resulting harm it does to the justice system."); ICE out of Courts Coal., Safeguarding the Integrity of Our Courts: The Impact of ICE Courthouse Operations in New York State 24–36, 56–59, https://www.immigrantdefenseproject.org/wp-content/uploads/Safeguarding-the-Integrity-of-Our-Courts-Final-Report.pdf [https://perma.cc/W5CB-8GP9] (last visited Aug. 9, 2025) (providing statistical support for the proposition that access to justice is limited by ICE's presence in courthouses).

68. See, e.g., Baptista v. Lyons, 440 F. Supp. 3d 42, 45 (D. Mass. 2020) (explaining that when the noncitizen petitioner attempted to appear at the district court to schedule hearings on his open criminal matters, he was taken into immigration custody); Pensamiento v. McDonald, 315 F. Supp. 3d 684, 686 (D. Mass. 2018) (same); Figueroa v. McDonald, 680 F. Supp. 3d 18, 20 (D. Mass. 2018) (same); *Ramirez v. Tompkins*, ACLU Mass.,

police stations and jails.[69] ICE may make arrests by simply waiting on the premises and arresting noncitizens when they are released or through more formal cooperation with jurisdictions by issuing an immigration detainer requesting that local authorities notify ICE before releasing a noncitizen who has been arrested.[70] ICE may also identify individuals for targeted enforcement using databases and information-sharing tools, such as the IRS[71] and LexisNexis,[72] among others, or by deputizing state and local law enforcement officials through 287(g) agreements to perform specified immigration enforcement functions.[73] Troublingly, even after a

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https://www.aclum.org/en/cases/ramirez-v-tompkins [https://perma.cc/FS26-MUH3] (last visited Oct. 11, 2025) (describing how ICE agents arrested Ramirez in the courthouse parking lot shortly after he appeared for a pretrial conference for a charge relating to a minor car accident).

69. For example, of the approximately 180 people that ICE apprehended in New Jersey and detained at Moshannon between January and July 2024, between twenty-five and thirty-five people per day were apprehended at police stations and thirty-five to forty-five people per day from jails. See Supplemental Declaration of Ian G. Peacock, Ph.D., in Support of Plaintiffs' Motion for a Temporary Restraining Order and Permanent Injunction at exhs. C–E, Doe v. Dep't of Homeland Sec., No. 2:24-cv-9105-MEF-LDW (D.N.J. filed Oct. 16, 2024), Dkt. No. 31-14 (on file with the *Columbia Law Review*).

70. See 8 C.F.R. § 287.7(a) (2025); see also National Map of Local Entanglement With ICE, Immigrant Legal Res. Ctr. (Nov. 13, 2019), https://www.ilrc.org/resources/national-map-local-entanglement-ice [https://perma.cc/YMH3-2CWN] (tracking each county's level of cooperation with ICE, including cooperation with ICE detainers).

71. See Nat'l Immigr. F., IRS & ICE Immigration Data-Sharing Agreement: Explainer 1 (2025), https://forumtogether.org/wp-content/uploads/2025/05/IRS-ICE-Immigration-Data-Sharing-Agreement-Explainer.pdf [https://perma.cc/BQ5T-SATB] ("The [IRS] finalized a memorandum of understanding (MOU) with [ICE] on April 7, 2025 to share sensitive taxpayer information to aid in deportation efforts."); see also Suzanne Gamboa, IRS to Share Info With ICE About Some Undocumented Immigrant Taxpayers, NBC News (Apr. 8, 2025), https://www.nbcnews.com/news/latino/irs-share-taxpayer-info-ice-immigrants-rcna200250 [https://perma.cc/QPT6-6DXK] ("The Department of Homeland Security said in a court document that the IRS has agreed to share certain tax information filed by undocumented taxpayers with Immigration and Customs Enforcement.").

72. ICE holds a $16.8 million contract with LexisNexis, set to expire in 2028, for access to information and tools that allegedly help to track noncitizens and their activities. See Sam Biddle, LexisNexis Is Selling Your Personal Data to ICE so It Can Try to Predict Crimes, The Intercept (June 20, 2023), https://theintercept.com/2023/06/20/lexisnexis-ice-surveillance-license-plates/ (on file with the *Columbia Law Review*) (last updated June 23, 2023) (describing how LexisNexis is providing ICE with tools for immigration enforcement); Maurizio Guerrero, ICE Is Swiftly Expanding Its Sprawling Surveillance Apparatus, Prism (Jan. 30, 2025), https://prismreports.org/2025/01/30/ice-surveillance-immigrants/ [https://perma.cc/VH8S-TZKC] (confirming that the LexisNexis–ICE con-tract is set to expire in 2028); see also Sam Biddle, ICE Searched LexisNexis Database Over 1 Million Times in Just Seven Months, The Intercept (June 9, 2022), https://theintercept.com/2022/06/09/ice-lexisnexis-mass-surveillances/ (on file with the *Columbia Law Review*).

73. Section 287(g) of the Immigration and Nationality Act permits DHS to, through written agreement, deputize state and local law enforcement officers to, inter alia, investigate whether individuals in state and local custody are noncitizens and transfer them into ICE custody (the so-called "Jail Enforcement Model" (JEM)), enforce limited immigration authority during routine police duties (the so-called "Task Force Model" (TFM)), and serve and execute administrative warrants on certain noncitizens (the so-called

criminal court judge has granted bail and determined that the individual is neither a flight risk nor a danger to the community, ICE still frequently arrests individuals as they are released from pretrial detention.[74] In *United States v. Trujillo-Alvarez*, for example, the federal magistrate judge ordered that Trujillo-Alvarez be released pending trial because he was not a flight risk or, as even the government conceded, a danger to the community.[75] In so doing, the judge acknowledged that ICE could choose to detain Trujillo-Alvarez upon release but stated that ICE's conduct was "not within [his] control."[76] ICE agents detained Trujillo-Alvarez the next day.[77] Individuals are, in other words, released into detention. This problematic practice of releasing noncitizens into ICE detention[78] is so common that noncitizens often do not seek bail in the first instance, fearing that they will be immediately transferred to ICE custody.[79]

ICE also arrests individuals who have been found guilty but were not sentenced to a term of imprisonment. The Agency often arrests individuals

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"Warrant Service Officer" (WSO)). See 8 U.S.C. § 1357(g) (2018); Am. Immigr. Council, The 287(g) Program: An Overview 1–2 (2025), https://www.americanimmigrationcouncil.org/wp-content/uploads/2012/11/the_287g_program_an_overview.pdf [https://perma.cc/35ZW-TKNL] (explaining 287(g) agreements and the deputization of state or local law enforcement); Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, ICE, https://www.ice.gov/identify-and-arrest/287g [https://perma.cc/6A4S-TAB3] (last updated Oct. 10, 2025) (same). As of September 18, 2025, ICE reports that it has signed 287(g) agreements with 1,001 localities over 40 states, including 129 JEM agreements across 27 states, 371 WSO agreements across 35 states, and 501 TFM agreements across 33 states. Id.

74. See, e.g., Asolo v. Prim, No. 21-CV-50059, 2021 WL 3472635, at *1–2 (N.D. Ill. Aug. 6, 2021) (explaining that ICE detained an individual right after a state court judge released him on a $500 bond); Vargas v. Wolf, No. 2:19-cv-02135-KJD-DJA, 2020 WL 1929842, at *1 (D. Nev. Apr. 21, 2020) (explaining that ICE detained an individual even though "[t]he government did not seek [pretrial] detention . . . and the magistrate judge released her on a personal recognizance bond"). When an individual is released from jail after paying bail but is subsequently detained and deported by ICE, that money is often not returned. See Jack Herrera, For One Texas County, Arresting Migrants Made Big Money, N.Y. Times (May 1, 2025), https://www.nytimes.com/2025/05/01/us/migrants-border-bail-forfeit-kinney-county-texas.html (on file with the *Columbia Law Review*) ("Over the past four years, [Kinney County] has refused to return $1.7 million in bail from migrant trespass cases . . . .").

75. 900 F. Supp. 2d 1167, 1170, 1173 (D. Or. 2012).

76. Id. at 1172.

77. Id.

78. Courts and scholars have argued that ICE's practice of arresting individuals who are released from federal pretrial detention violates the Bail Reform Act. See, e.g., Kerry Martin, Jail by Another Name: ICE Detention of Immigrant Criminal Defendants on Pretrial Release, 25 Mich. J. Race & L. 147, 155 (2020) (analyzing "the legality of ICE's . . . detention of noncitizen criminal defendants upon their release from pretrial detention").

79. Lena Graber & Amy Schnitzer, Nat'l Laws. Guild, The Bail Reform Act and Release From Criminal and Immigration Custody for Federal Criminal Defendants 1 (2013), https://kmbllaw.com/wp-content/uploads/ImmigrationDetainerNatlImmProjectArticle.pdf [https://perma.cc/TM99-25B2] ("[N]oncitizen defendants who do make bail are often transferred to immigration custody instead of being released. . . . [S]ome noncitizens do not seek bail because they fear such a transfer.").

when they return to the courthouse to meet with their probation officer[80] and even immediately upon release after trial. In *Omari v. United States*, for example, the court granted Omari probation and released him under conditions of supervised release.[81] But immigration authorities arrested him right after he was released and detained him for over four months without a bond hearing, thereby impeding his ability to comply with the conditions of probation and release.[82] In still other cases, ICE waits for individuals who have finished serving a criminal sentence—and thus are presumably rehabilitated—and arrests them as they leave the jail or prison.[83] As one individual who served a twenty-year sentence recounted, he saved up enough while serving his sentence to purchase a pair of new white sneakers to wear on his walk out of prison and back into the "free world."[84] He walked only a few steps before ICE put him on a bus and took him to immigration detention.[85] ICE detained him for two years in conditions he claimed were worse than prison.[86] Unable to stand further detention, he requested to be deported rather than continue to fight his immigration case in detention.[87]

ICE's broader arrest operations may also sweep individuals with pending criminal court proceedings into the detention dragnet as they walk through day-to-day life. For years, ICE has arrested individuals in their homes, often implementing the so-called "knock and talk"[88] practice whereby ICE agents approach an individual's home without a judicial warrant and misrepresent themselves as police or probation officers to gain entry and make an arrest.[89] ICE also detains individuals at their

80. See, e.g., Diaz-Ceja v. McAleenan, No. 19-cv-00824-NYW, 2019 WL 2774211, at *1 (D. Colo. July 2, 2019) (explaining that ICE detained an individual while he was checking in with his probation officer after entering into a diversionary program under a deferred judgment).

81. No. 3:03-CV-1044-M, 2003 WL 21321239, at *1 (N.D. Tex. June 4, 2003).

82. Id.

83. See, e.g., Memorandum from Tiffany Lieu to the Columbia L. Rev. (Aug. 2, 2025) (on file with the *Columbia Law Review*) (describing an interview with a former client who was detained in these circumstance).

84. Id.

85. Id.

86. Id.

87. Id.

88. A federal district judge held that ICE's "knock and talk" practice, when conducted with the purpose of arrest, was unconstitutional in a class action lawsuit challenging the Agency's home arrest practice in Los Angeles and the surrounding regions. Kidd v. Mayorkas, 734 F. Supp. 3d 967, 982 (C.D. Cal. 2024).

89. See, e.g., Christopher Bao, Charlie Roth & Miriam Waldvogel, ICE Conducts Raid in Downtown Princeton, Community Intervenes, Daily Princetonian (July 10, 2024), https://www.dailyprincetonian.com/article/2024/07/princeton-news-town-ice-downtown-raid-community-undocumented-migrants [https://perma.cc/Q6DW-8RPL] ("The American Civil Liberties Union . . . has previously termed the use of police vests as 'impersonation,' arguing that it falsely insinuates that ICE agents belong to local law enforcement."); ICE Ruses, Immigr. Def. Project, https://www.immigrantdefenseproject.

workplace during worksite raids,[90] hospitals where they are receiving care,[91] religious institutions, and schools,[92] sometimes without providing a warrant or identifying themselves as ICE agents or law enforcement officers.[93] ICE agents also identify and target noncitizens who go to the courthouse for mundane matters like paying traffic tickets.[94]

As a result of ICE's detention practices, many individuals in ICE custody need access to criminal courts to answer pending state and federal charges against them. In fiscal year 2024, ICE arrested 23,624 noncitizens with pending criminal charges and 57,688 noncitizens with criminal convictions nationwide—that comprises, respectively, approximately 20.8% and 50.9% of ICE arrests that year.[95] Moreover, of the approximately 277,913 noncitizens ICE detained in fiscal year 2024, 26,528 individuals had pending criminal charges and 70,279 had criminal convictions.[96] Between May 2019 and January 2021, during the first Trump Administration, 10% to 19% of those detained by ICE on a given day had pending criminal charges, and 30% to 54% had criminal convictions.[97] Under the Biden Administration, the number of individuals in detention

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org/ice-ruses/ [https://perma.cc/WSM5-ACGJ] (last visited Aug. 30, 2025) ("One common ruse is where ICE agents pretend to be local law enforcement in order to hide that they are ICE.").

90. From 2017 to 2020, ICE arrested more than 1,800 workers through worksite raids. Worksite Raids Under the Trump Administration, Nat'l Immigr. L. Ctr. (Jan. 1, 2020), https://www.nilc.org/issues/workersrights/worksite-raids/ (on file with the *Columbia Law Review*).

91. See, e.g., Deborah M. Weissman, Angelina Godoy & Havan M. Clark, The Final Act: Deportation by ICE Air, 49 Hofstra L. Rev. 437, 457–58 (2021) (describing instances of ICE arresting an immigrant who was at the hospital donating bone marrow and a ten-year-old child with cerebral palsy after she had emergency surgery).

92. See Rebecca Santana, Migrants Can Now Be Arrested at Churches and Schools After Trump Administration Throws Out Policies, PBS (Jan. 22, 2025), https://www.pbs.org/newshour/politics/migrants-can-now-be-arrested-at-churches-and-schools-after-trump-administration-throws-out-policies [https://perma.cc/G74N-VEU2].

93. See, e.g., Chloe Atkins & Patrick Smith, Columbia Student Mahmoud Khalil Was Detained Without an Arrest Warrant, Trump Administration Says, NBC News (Apr. 25, 2025), https://www.nbcnews.com/news/us-news/columbia-student-mahmoud-khalil-was-detained-arrest-warrant-trump-admi-rcna202946 (on file with the *Columbia Law Review*); Martin Kaste, Masked Officers in Tufts Student Arrest Raise Fears Among Immigrants and Bystanders, NPR (Mar. 28, 2025), https://www.npr.org/2025/03/28/nx-s1-5342428/tufts-student-arrest-raises-questions-about-masked-ice-agents [https://perma.cc/79FD-JARD] (describing an instance of masked and unidentified law enforcement agents arresting a Turkish doctoral student).

94. See, e.g., Press Release, ACLU S. Cal., ACLU Condemns ICE for "Bait-and-Switch" Courthouse Policy (Feb. 10, 2014), https://www.aclusocal.org/en/press-releases/press-release-aclu-condemns-ice-bait-and-switch-courthouse-policy [https://perma.cc/68DY-2QPV] (describing several cases in which ICE agents identified and arrested noncitizens after noncitizens paid traffic tickets).

95. ICE Enforcement and Removal Operations Statistics, ICE, https://www.ice.gov/spotlight/statistics [https://perma.cc/65MT-HSPH] (last updated May 30, 2025).

96. Id.

97. See ICE Detainees, supra note 59.

who had criminal law encounters decreased. Between August 2021 and August 2024, 4% to 13% of those detained by ICE on any given day had pending criminal charges, and 18% to 37% had criminal convictions.[98] Within the first six months of the second Trump Administration, 14% to 27% of those detained by ICE on any given day had pending criminal charges, and 27% to 31% had criminal convictions.[99]

These numbers will only expand in light of recent legislation and the Trump Administration's proclaimed priorities. Indeed, the Laken Riley Act expands the mandatory detention regime, explicitly requiring that ICE detain certain individuals even if they have only been arrested or charged with shoplifting and other crimes.[100] Moreover, the Trump Administration has explicitly targeted noncitizens with criminal charges or criminal convictions for enforcement activity.[101] Thus, the number of noncitizens in ICE detention who need to go to court, which was already high, is set to balloon. But, as the next section explains, many of the noncitizens that ICE detains are, once in detention, no longer able to participate in criminal court proceedings against them.

B. *Stuck in Immigration Detention*

For many in immigration detention, the closing of the detention cell door also closes the courthouse doors. ICE, as the legal custodian of those it detains, determines whether to temporarily release an individual so they may appear in court in person or to produce them virtually via remote platforms. But ICE often obstructs individuals in its custody from appearing in criminal court, ignoring individual grievances[102] and directly refusing to comply with state court orders demanding that an individual in its custody be produced[103]—a lack of accountability wrought by federalism dynamics, as explored in Part II. Judge Kermit Lipez of the First

98. Id.

99. Id.

100. Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025) (codified in scattered sections of 8 U.S.C.).

101. See McCann et al., supra note 5 (noting that President Trump's top priority for deportations are those with criminal records).

102. See, e.g., 8 U.S.C. § 1226(a) (2018) (providing that the Attorney General may detain and release certain noncitizens); Garcia v. Valdez, No. EDCV 14-02533-MWF (AS), 2021 WL 3918134, at *4 (C.D. Cal. Aug. 12, 2021) (alleging that ICE rejected the plaintiff's grievance regarding ICE's refusal to transport him to his court hearing).

103. See, e.g., Affidavit of Jennifer Klein ¶ 7, Ramirez v. Tompkins, No. 1:18-cv-12452 (D. Mass. filed Nov. 27, 2018), Dkt. No. 4 [hereinafter Klein Affidavit] (on file with the *Columbia Law Review*) (describing ICE's refusal to release an individual into the custody of local law enforcement acting despite a judicial order); LSNJ FOIA Complaint, supra note 27, at exh. AA (containing an email exchange showing ICE refusing to comply with a state court "writ of production compelling ICE to virtually produce [the individual] for Court," claiming that "[ICE] do[es] not have the recourses [sic] to facilitate criminal court hearings by tele video at Moshannon").

Circuit recently called this practice "troubling."[104] This section describes the little-known obstruction of court access problem that occurs in the shadows of immigration detention. It examines the ways ICE affirmatively and effectively obstructs criminal court access.

1. *Affirmative Obstruction.* — In some cases, ICE affirmatively prevents an individual from accessing criminal court proceedings by refusing to physically transport the individual to court[105] and, moreover, refusing to permit anyone else to transport the individual.

In Massachusetts, for example, in 2017 advocates reported a series of instances in which individuals detained at the Plymouth County Correctional Facility, a detention center in Massachusetts, obtained state court writs of habeas corpus ordering that individuals be produced for in-person court hearings.[106] When officers from the sheriff's department would arrive at Plymouth to pick up the individual, however, ICE would refuse to temporarily release the individual into the sheriff's department's custody, in violation of the state court writ.[107] These were not isolated incidents.[108] At a public meeting in 2018, then-Acting Field Office Director Thomas Brophy acknowledged that ICE had developed a policy of refusing to allow individuals to attend state court proceedings after the Massachusetts high court issued a decision barring state officials from cooperating with ICE.[109] It is possible, then, that ICE's refusal was motivated by its concern that local law enforcement would not return the individual to detention after the hearing.

ICE's practice of refusing to produce an individual to criminal court and barring others from doing so affirmatively obstructs individuals from having their day in criminal court.

2. *Effective Obstruction.* — Even when ICE does not affirmatively prevent individuals from appearing in court, its policies and practices may

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104. Oral Argument at 27:45–27:55, Rosa v. Garland, 114 F.4th 1 (1st Cir. 2024) (No. 22-1523), https://www.ca1.uscourts.gov/doar/search-results?query=22-1523 (on file with the *Columbia Law Review*). This author was counsel in this case.

105. See, e.g., Pensamiento v. McDonald, 315 F. Supp. 3d 684, 686 (D. Mass. 2018) (ordering, in habeas proceedings, ICE to transport the noncitizen from immigration detention to all future hearings for his state criminal charges because "ICE was refusing to transport [the plaintiff] to his criminal proceedings in state court"); Figueroa v. McDonald, 680 F. Supp. 3d 18, 20 (D. Mass. 2018) (same); see also Asolo v. Prim, No. 21 CV 50059, 2021 WL 3472635, at *8 (N.D. Ill. Aug. 6, 2021) (alleging in a preliminary injunction that "ICE refuses to take [the plaintiff] to his hearings" (internal quotation marks omitted) (quoting Motion for Preliminary Injunction at 9)).

106. Klein Affidavit, supra note 103, ¶ 7.

107. Id.

108. See, e.g., Garcia v. Valdez, No. EDCV 14-02533-MWF (AS), 2021 WL 3918134, at *4 (C.D. Cal. Aug. 12, 2021) (claiming that ICE "refused to allow Plaintiff to be transported from [immigration detention] to Superior Court" and that Defendants "consistently refused to allow Plaintiff to be transported" to criminal proceedings (internal quotation marks omitted) (first quoting Dkt. No. 5 at 4; then quoting Dkt. No. 28 at 4, 6)).

109. Klein Affidavit, supra note 103, ¶ 8.

effectively obstruct court access. In these cases, while ICE does not itself provide transportation, it agrees to temporarily release an individual into the custody of local law enforcement to attend a criminal court hearing so long as local law enforcement provides transportation to and from the hearing. Yet, practical barriers—many of which ICE itself manufactures—prevent local officials from being able to fill the transportation gap.

Chief amongst these barriers is ICE's practice of transferring noncitizens to detention facilities far from criminal court proceedings and often across state lines.[110] ICE cites 8 U.S.C. § 1231(g)(1) to justify its authority to transfer individuals in its custody at any time and without notice,[111] which it has increasingly exercised over time.[112] In 1999, 23% (46,914) of individuals detained were transferred at least once; by 2009, 52% (405,544) of individuals detained were transferred at least once.[113] By 2015, 60% (177,402) of adults detained were transferred between immigration detention facilities at least once.[114] Such transfers move individuals to facilities far from—and often to a different state than—their families, attorneys, evidence, and, importantly, pending criminal court proceedings. Between 1999 and 2010, ICE transferred individuals to

110. See generally Jessica Rofé, Peripheral Detention, Transfer, and Access to the Courts, 122 Mich. L. Rev. 867, 894–901 (2024) (documenting ICE's practice of transferring immigrants between detention centers and the harms immigrants face). ICE has stated that it transfers individuals due to bedspace availability, facility closures, ICE contract terminations, and medical or security reasons. See Off. of Inspector Gen., DHS, Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers 2 (2009), https://tracreports.org/tracker/dynadata/2010_01/OIG_10-13_Nov09.2.pdf [https://perma.cc/33J6-M4CF] (reviewing ICE detainee transfer policies and procedures). Some, however, have posited more nefarious motivations for transferring noncitizens between immigration detention facilities, including retaliation for asserting rights and forum shopping for jurisdictions with less favorable caselaw. See, e.g., Sabrina Balgamwalla, ICE Transfers and the Detention Archipelago, 31 J.L. & Pol'y 1, 35–37 (2022) (examining ICE's policy and practice of transferring individuals and the goals of government forum shopping); Natasha Phillips, Note, Keeping Counsel: Challenging Immigration Detention Transfers as a Violation of the Right to Retained Counsel, 27 Mich. J. Race & L. 375, 380, 382 (2022) (examining, on a systemic and individual level, the considerations motivating ICE transfer decisions).

111. Scholars have argued that § 1231(g)(1) does not in fact authorize ICE to transfer individuals, but several courts have upheld ICE's practice. See, e.g., Rofé, supra note 110, at 901 & n.219 (examining ICE's justifications for transferring individuals and citing court decisions); Adrienne Pon, Note, Identifying Limits to Immigration Detention Transfers and Venue, 71 Stan. L. Rev. 747, 759–62 (2019) (arguing that § 1231(g)(1) pertains to ICE's discretion over where to construct and manage brick-and-mortar facilities, not transfers between facilities).

112. Hum. Rts. Watch, A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States 17 (2011), https://www.hrw.org/reports/us0611webwcover.pdf [https://perma.cc/T52Z-YK69].

113. Id. at 17–18 & fig. 1, tbl. 1.

114. Emily Ryo & Ian Peacock, A National Study of Immigration Detention in the United States, 92 S. Cal. L. Rev. 1, 39–40 (2018) (finding that 27% of adults released in 2015 experienced one transfer, approximately 15% experienced two transfers, and approximately 12% experienced three or more transfers).

detention facilities an average of 370 miles away.[115] In 2015, 37% of transfers occurred across state lines and 29% occurred across federal judicial circuits.[116] ICE continued to increase its practice of transferring individuals in 2025 under the second Trump Administration, with some individuals being transferred ten to twenty times, often with no notice.[117] Scholars have well documented the harms of such transfers on individuals, their families, and their access to counsel.[118] But such transfers also harm individuals in another way: When ICE transfers individuals hundreds of miles from criminal court proceedings, often across state lines, ICE erects practical barriers that make it much more difficult, if not effectively impracticable, for local authorities to transport individuals when ICE fails to do so.[119]

Consider the case of Martinez,[120] a longtime resident of the United States who was detained by ICE and had a pending charge in a Massachusetts state criminal court. ICE originally detained Martinez at the Plymouth detention center in Massachusetts but later, without explanation, transferred him hundreds of miles away to be detained at Moshannon in Pennsylvania. As a result, Martinez went from being detained approximately 73 miles from the courthouse to over 460 miles away. In an attempt to have his day in court for his scheduled criminal trial, Martinez and the state prosecutor obtained a writ from the Massachusetts state criminal court ordering ICE and the local county Sheriff's Office to facilitate the necessary arrangements to transport him. But ICE refused to transport him itself and, while it stated that it would temporarily release him into the custody of local officials, county officials

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115. Hum. Rts. Watch, supra note 112, at 1, 20.

116. Ryo & Peacock, supra note 114, at 40.

117. Maanvi Singh & Will Craft, Plane to Purgatory: How Trump's Deportation Program Shuttles Immigrants Into Lawless Limbo, The Guardian (Sep. 10, 2025), https://www.theguardian.com/us-news/ng-interactive/2025/sep/10/trump-globalx-airline-deportation-immigration [https://perma.cc/RUK9-EZRQ] (explaining that in the first one hundred days of the Trump administration, immigrants were "moved between detention facilities more than before," with some being moved as many as ten or twenty times).

118. See, e.g., César Cuauhtémoc García Hernández, Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel, 21 Berkeley La Raza L.J. 17, 38–56 (2011) (arguing that ICE's widespread use of transfers violates the procedural due process rights of lawful permanent residents); Pon, supra note 111, at 762–68 (discussing the hardships of being transferred between detention centers on detained individuals, including psychological and emotional harms, interference with the right to counsel and their ability to access evidence, and changes in substantive law).

119. In addition, some states, like New Jersey, have bail reform laws that preclude state authorities from obtaining custody over certain individuals. See, e.g., N.J. Stat. Ann. §§ 2A:162-15–2A:162-26 (West 2025); see also State v. Molchor, 235 A.3d 235, 243 (N.J. Super. Ct. App. Div. 2020) (concluding that an individual may not be "detained where release conditions may be crafted to assure the defendant's appearance, but for his possible detention and removal by federal immigration officials").

120. This Article uses a pseudonym to protect the individual's privacy. Records of this individual's case are on record with the author and the *Columbia Law Review*.

were unable or unwilling to travel 460 miles across state lines to fill the transportation gap. As a result, Martinez was unable to attend his trial, and the court issued a default warrant. As a measure of last resort to get Martinez produced to court, the state prosecutor asked the district attorney's office in Pennsylvania to charge Martinez as a fugitive from justice. Eventually—after Martinez, through counsel, filed a writ of habeas corpus ad testificandum in federal district court[121]—Martinez's counsel, ICE, and local law enforcement reached an agreement for his production. Martinez was finally able to attend court nine months after his original trial date. At that hearing, he was acquitted pursuant to a joint stipulation of dismissal.

ICE's decision, then, to transfer individuals to detention facilities far from pending criminal court proceedings while abdicating any responsibility to provide transportation itself erects practical and logistical barriers that make it effectively impossible for individuals to access criminal court.

ICE could mitigate the manufactured challenges of in-person court attendance by permitting individuals to appear in criminal court by virtual means, such as Zoom.[122] In some cases, courts require virtual attendance.[123] But ICE often refuses to produce an individual to criminal proceedings virtually.[124] At Moshannon, this refusal is a matter of policy, the constitutionality of which is currently being challenged in federal district court.[125] As the *Doe v. DHS* putative class action reveals, ICE at Moshannon—which detains approximately 1,340 noncitizens,[126] many of

121. See infra section II.B (explaining how writs of habeas ad testificandum have been issued by federal courts to order individuals in ICE custody to be brought to state criminal court proceedings for the purpose of giving testimony).

122. It is beyond the scope of this Article whether virtual proceedings are sufficient to satisfy an individual's criminal court rights.

123. Following the COVID-19 pandemic, some state courts only operate virtually. See, e.g., Class Action Complaint for Declaratory and Injunctive Relief at 42–44, Doe v. Dep't of Homeland Sec., No. 2:24-cv-09105 (D.N.J. filed Sep. 11, 2024), Dkt. No. 1 [hereinafter *Doe v. DHS* Complaint].

124. See, e.g., Commonwealth v. Erilus, 113 N.E.3d 935, *2 (Mass. App. Ct. 2018) (unpublished table decision) ("The defendant did not appear because he was in ICE custody, and ICE refused to transport him to the hearing or to allow him to participate by videoconference."); *Doe v. DHS* Complaint, supra note 123, at 9; LSNJ FOIA Complaint, supra note 27, at 16.

125. See *Doe v. DHS* Complaint, supra note 123, at 11. The *Doe v. DHS* putative class action is a bellwether case challenging ICE's policy of refusing to produce noncitizen defendants in its custody to virtual criminal proceedings at Moshannon. While advocates report that ICE refuses to produce noncitizens to criminal proceedings virtually or in person at other detention facilities beyond Moshannon, advocates have not yet challenged ICE's practice at other facilities, likely due to resource constraints or informational barriers. In light of the preliminary injunction issued in *Doe v. DHS*, putative class actions challenging similar refusal policies at other detention centers may become more widespread.

126. Detention Facilities Average Daily Population, TRAC Immigr., https://trac reports.org/immigration/detentionstats/facilities.html [https://perma.cc/W5BL-WUFV] (last visited Aug. 11, 2025).

whom have criminal court proceedings out of state—maintains a policy that it will not produce immigrants for state criminal court proceedings virtually by tele- or videoconferencing.[127] This is so even though ICE at Moshannon *does* produce individuals to immigration court proceedings and certain family court proceedings by videoconference.[128] In accordance with this policy, ICE repeatedly refuses to honor state court writs ordering it to produce individuals for court. In one illustrative example, the court administrator for the Union City Municipal Court informed ICE that the court had issued a writ for the production of an individual in ICE's custody. ICE refused to honor the writ, stating in an email to the court administrator:

> Just to confirm, Union County will be coming to MVPC to take custody of subject and return same day?
>
> The facility does not have the staff or resources for virtual hearings at all. The writ would entail local law enforcement physically assuming custody of the subject and returning him to ICE upon completion of local charges.[129]

When informed that municipal court proceedings required virtual appearance, ICE responded that in order for an individual to attend a criminal court hearing virtually, the individual must obtain a state court writ ordering local law enforcement to pick up the individual at Moshannon, transport them to another jail from which they can attend court virtually, and then transport them back to ICE custody at Moshannon.[130] To put this policy in concrete terms, consider Martinez's case. ICE's policy would require Massachusetts state authorities to travel approximately 460 miles over seven hours to pick him up from Moshannon, transport him to another jail to use its facilities to appear virtually to the hearing, transport him back to Moshannon after the virtual hearing, and then travel the 460 miles over seven hours back to Massachusetts—all to appear for a virtual hearing using readily available technology like Zoom designed to avoid precisely these unnecessary resource expenditures. Thus, ICE's acknowledgment that its virtual production policy is "rather involved"[131] is rather an understatement.

Many state authorities, understandably, cannot and do not accommodate this policy, leaving individuals unable to attend their court proceedings physically or virtually. Indeed, ICE at Moshannon only produced eight individuals to New Jersey criminal court proceedings

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127. *Doe v. DHS* Complaint, supra note 123, at 33.

128. See, e.g., id. at 40 (recognizing this policy); LSNJ FOIA Complaint, supra note 27, at exh. W (containing an email from a case manager to a detainee's attorney stating that "ICE does not permit hearings to be held via zoom unless they are family court" and that for other "outside hearing[s]" noncitizens must obtain a state court writ).

129. LSNJ FOIA Complaint, supra note 27, at exh. L.

130. Id.

131. Id.

between March 2023 and October 2024.[132] Thus, even when ICE does not affirmatively impede access to courts, its policies and practices effectively obstruct an individual's right to have their day in criminal court.

* * *

When ICE affirmatively or effectively obstructs an individual from appearing in criminal court, that individual suffers a host of harms of constitutional significance in criminal proceedings and immigration proceedings. Before examining those harms in Part III, the next Part turns to the operative question: How is such obstruction permitted to happen in immigration detention?

II. WHEN THE JAILOR AND PROSECUTOR ARE INTERJURISDICTIONAL

The obstruction of court access problem is not unique to immigration detention. For much of U.S. history, individuals and states grappled with the same conundrum in interjurisdictional criminal prosecutions—that is, when an individual in criminal custody serving a carceral sentence in one jurisdiction faced criminal prosecution in another jurisdiction. Historically, these individuals had no way of requiring their jailor to produce them in criminal court to answer charges against them. This Part examines the federalism dynamics that give rise to this lack of production in interjurisdictional contexts as a structural matter, and how the criminal custody and immigration custody contexts have—and have not—created structural accountability to protect individual rights. In so doing, this Part argues that immigration obstruction of court access can be understood as the outgrowth of what Professor Sklansky calls an "accountability deficit"—that is, "the blurred lines of responsibility between local, state, and federal authorities."[133] It begins by looking to the criminal custody context for lessons learned before turning to the immigration detention context.

A. *Criminal Custody*

An individual serving a carceral sentence in the custody of State A may need to go to court to defend against prosecution in State B. Writs of habeas corpus are the traditional way of gaining access to court from detention, but there are gaps in this mechanism because State A officials are not always required to comply with court orders from State B. Over time, the states and federal government came to recognize the problems inherent in such interjurisdictional prosecutions and accordingly established a compact—the Interstate Agreement on Detainers—to create

132. Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction at exh. 4, Doe v. Dep't of Homeland Sec., No. 3:24-cv-00259-SLH-PLD (W.D. Pa. filed Nov. 15, 2024), Dkt. No. 60-4.

133. Sklansky, supra note 28, at 217–18.

a mechanism by which individuals and prosecutors can compel custodians to make individuals available for prosecution, and jailors and prosecutors can be held accountable for failing to comply. This section first explores the federalism dynamics that create the production gap before turning to the rise and mechanics of legislated accountability.

1. *Habeas Corpus: The Federalism Problem.* — Writs of habeas corpus are a common mechanism incarcerated individuals and prosecutors use to order that an individual in custody be produced for criminal court.[134] Such writs are typically issued by the state or federal court with jurisdiction over the criminal prosecution.[135] While such writs are binding in intrajurisdictional prosecutions—that is, when an individual is detained by State A while facing prosecution by State A—problems arise when the individual is detained by one jurisdiction, federal or state, and prosecuted by another.

Beginning with federal court orders, federal courts may issue a writ of habeas ad prosequendum pursuant to 28 U.S.C. § 2241(c)(5) to order a custodian to bring an individual to court to be prosecuted.[136] As the Supreme Court held in *Carbo v. United States*, federal courts have jurisdiction to issue such writs extraterritorially.[137] In *Carbo*, for example, the U.S. District Court for the Southern District of California properly issued a writ ad prosequendum ordering the New York City prison to produce Carbo from state custody to federal criminal proceedings in California.[138] While the Supreme Court has not definitively determined whether state officials are bound to comply with federal writs ad prosequendum as a matter of law,[139] as a matter of practice, state officials

134. See Evan M. O'Roark, Note, Saying "No" After *Pleau*: Exploring the Conflict Between the Interstate Agreement on Detainers Act and the Federal Writ Ad Prosequendum, 47 Suffolk U. L. Rev. 189, 192–98 (2014) (explaining that writs of habeas corpus and the Interstate Agreement on Detainers are the mechanisms for interjurisdictional transfers for incarcerated individuals).

135. See, e.g., 28 U.S.C. § 2241 (2018) (providing that Justices of the Supreme Court or judges of federal district courts and circuit courts may issue federal writs of habeas corpus); Mass. Gen. Laws Ann. ch. 248, § 2 (West 2025) (providing that judges of the Massachusetts Supreme Judicial Court, superior courts, or district courts may issue state writs of habeas corpus).

136. 28 U.S.C. § 2241(c)(5) (authorizing federal courts to issue a writ of habeas when "[i]t is necessary to bring [an individual] into court to testify or for trial").

137. 364 U.S. 611, 612–13 (1961).

138. Id.; see also United States v. Mauro, 436 U.S. 340, 344 (1978) (describing how the U.S. District Court for the Eastern District of New York issued writs of habeas corpus ad prosequendum directing the warden of the New York state prisons where defendants were incarcerated to produce the defendants to federal district court proceedings).

139. In *Carbo*, the Supreme Court noted that because the state authorities had honored the federal writ at issue as a matter of comity, it left for another day "what would be the effect of a similar writ absent such cooperation." 364 U.S. at 621 & n.20; see also O'Roark, supra note 134, at 198–99 ("[T]he Supreme Court has never definitively answered whether a state must always comply with a federal writ ad prosequendum . . . ." (emphasis omitted)).

generally comply with federal writs out of comity.[140] State officials in *Carbo*, for example, produced Carbo pursuant to the writ.[141] The Supreme Court in *United States v. Mauro* noted that writs of habeas ad prosequendum have historically been an "efficient means of obtaining prisoners" for federal authorities.[142]

Challenges abound, however, when a state court seeks to order another jurisdiction to produce an individual in its custody.[143] In such cases, the traditional remedy of seeking a writ of habeas corpus from the state court of jurisdiction falls flat because state courts lack extraterritorial authority to bind other states or the federal government. The Supreme Court first established these precepts in *Ableman v. Booth*, in which the Court held that the Supreme Court of Wisconsin lacked authority to issue writs of habeas corpus to release Booth, a federal prisoner who was charged with aiding and abetting an alleged fugitive enslaved person to escape from federal custody under the Fugitive Slave Act.[144] The Court reasoned that states lacked judicial power to bind authorities beyond the state[145]: "[N]o State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent Government,"[146] including requiring that an individual "be brought before them."[147] The Court further pointed to federal supremacy in the federal-state overlap. While the state "is sovereign within its territorial limits," when state and federal territorial authorities overlap, "many of the rights of sovereignty which the States then possessed should be ceded to the General Government."[148] The Supreme Court reaffirmed its holding fourteen years later in *Tarble's Case*, clarifying that state courts lack jurisdiction to issue a writ of habeas corpus to release any person in federal custody, whether they are "held under the authority, or claim and color of the authority, of the United States."[149]

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140. See *Mauro*, 436 U.S. at 363 (noting the Court was "unimpressed" with the government's argument that "it would be contrary to the Supremacy Clause . . . to permit a State to refuse to obey [a federal writ of habeas corpus ad prosequendum]" and binding the United States to the Interstate Agreement on Detainers).

141. *Carbo*, 364 U.S. at 612.

142. *Mauro*, 436 U.S. at 355.

143. See Edward A. Hartnett, The Constitutional Puzzle of Habeas Corpus, 46 B.C. L. Rev. 251, 258–60 (2005) (cataloguing some of these issues).

144. 62 U.S. (21 How.) 506, 507–14 (1858). For a more thorough history of the development of this doctrine, see Richard S. Arnold, The Power of State Courts to Enjoin Federal Officers, 73 Yale L.J. 1385, 1386–88 (1964); Charles Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 354 (1930).

145. Some have questioned the Supreme Court's rationale in these cases. See, e.g., Arnold, supra note 144, at 1389 (questioning "where the Court found this absolute prohibition," as the Constitution does not confer exclusive habeas corpus jurisdiction on the federal courts).

146. *Booth*, 62 U.S. at 515–16.

147. Id. at 524.

148. Id. at 516–17.

149. 80 U.S. (13 Wall.) 397, 402, 406 (1871).

In *Ponzi v. Fessenden*, the Supreme Court confirmed that the Attorney General has the power and discretion to transfer a federal prisoner to a state court, but that any decision to do so is discretionary as a matter of comity.[150] In *Ponzi*, a Massachusetts state court issued a writ ad prosequendum ordering federal officials to transfer a federal prisoner to stand trial for state larceny charges, and federal officials opted to comply, though the Supreme Court made it clear that no express authority compelled such a transfer.[151] Thus, state courts lack authority to order other state or federal authorities to produce an individual in their custody to state criminal proceedings—they must rely on comity.[152]

2. *Legislated Accountability: Interstate Agreement on Detainers*. — As a result of these federalism dynamics, states did not have a reliable means of obtaining incarcerated individuals from other states' or federal custody for criminal prosecution.[153] Historically, states relied on formal extradition proceedings, whereby the prosecuting state had to issue an arrest warrant against the individual.[154] In some cases, states entered into special contracts with another state to govern the transfer of incarcerated individuals between the party states.[155] But these bilateral contracts were uncommon, as the effort required to establish such contracts often outweighed any benefit unless incarcerated individuals were frequently transferred between the two states.[156] States' only recourse, then, was to issue detainers notifying the custodial authority that the state requested

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150. 258 U.S. 254, 262–63 (1922).

151. Id. at 261.

152. See, e.g., id. at 262–66 (noting that the Attorney General has the authority and discretion to comply with or decline state court orders in relation to the confinement of individuals incarcerated in federal prisons); see also, e.g., *Booth*, 62 U.S. at 515–16 ("And the State . . . had no more power to authorize these proceedings [including habeas corpus] of its judges and courts, than it would have had if the prisoner had been confined in . . . any other State . . . ."); Commonwealth v. McGrath, 205 N.E.2d. 710, 712 (Mass. 1965) (explaining that although the state has no right to secure the presence of a defendant in federal custody, "[o]n principles of comity . . . the Federal government may waive its right to exclusive jurisdiction . . . and consent to a trial of the defendant in our courts"); Escamilla v. Superintendent, 777 S.E.2d 864, 869 (Va. 2015) ("Habeas corpus relief under [the Virginia State] Code . . . is available only to those subject to the actual or constructive detention of the Commonwealth [of Virginia] . . . ."); 39 C.J.S. Habeas Corpus § 295, Westlaw (2025) ("The jurisdiction vested in state courts by state laws to issue writs of habeas corpus does not extend to the discharge from custody of persons held by federal officers under authority of the United States."); Note, Limitations on State Judicial Interference With Federal Activities, 51 Colum. L. Rev. 84, 87 (1951) ("[I]t is established that state courts have no jurisdiction to release on habeas corpus persons held by federal authorities under color of federal law." (footnote omitted)).

153. See S. Rep. No. 91-1356, at 2 (1970) ("In the absence of the agreement on detainers, prisoners do not have any way of initiating legal proceedings to clear detainers filed against them by authorities outside the State or other jurisdiction in which they are imprisoned.").

154. See, e.g., United States v. Mauro, 436 U.S. 340, 355 n.23 (1978).

155. See id. (describing the special contracts between states and the effort required).

156. See id.

custody of an individual and wait—often for the duration of the individual's sentence—for the custodial state to produce the individual.[157]

Recognizing the problems inherent in this system, the various states, and later the federal government,[158] entered into a formalized solution to the interjurisdictional dilemma: the Interstate Agreement on Detainers (the "Agreement").[159] The Agreement is a compact between the United States, the District of Columbia, and forty-eight states[160] that prescribes procedures to ensure that individuals criminally incarcerated in a member jurisdiction are expeditiously produced to answer criminal prosecution in another member jurisdiction.[161] The Agreement applies to cases in which, while an individual is serving "a term of imprisonment in a penal or correctional institution of a party State,"[162] another party state lodges a detainer[163] against the individual based on "any untried indictment, information, or complaint."[164] The Agreement establishes procedures for either the incarcerated individual[165] or the prosecuting state[166] to demand speedy resolution of the charges underlying a detainer. The governor of

157. See id. at 358 n.25.

158. S. Rep. No. 91-1356.

159. 18 U.S.C. app. § 2 (2018).

160. Louisiana and Mississippi are not members to the Agreement. See Interstate Agreement on Detainers, Council of St. Gov'ts, https://compacts.csg.org/compact/interstate-agreement-on-detainers/ (on file with the *Columbia Law Review*) (last visited Aug. 3, 2024).

161. While there are a number of other interstate compacts, such as the Uniform Mandatory Disposition of Detainers Act (UMDDA), which eight states have adopted, this Article focuses on the Interstate Agreement on Detainers because it is the most widely adopted and commonly used compact. See 5 Crim. Proc. § 18.4(d), Westlaw (4th ed. 2024) (explaining that the UMDDA provides that if a custodian doesn't inform an incarcerated individual of a detainer filed against them within a year, the charge will be dismissed with prejudice and provides a mechanism for an incarcerated individual to request disposition of any outstanding charge).

162. 18 U.S.C. app § 2, art. III(a).

163. A detainer "is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." United States v. Mauro, 436 U.S. 340, 359 (1978) (internal quotation marks omitted) (first quoting H.R. Rep. No. 91-1018, at 2 (1970); then quoting S. Rep. No. 91-1356, at 2). Detainers are distinct from writs of habeas ad prosequendum—the former serves as a notice to custodians and may remain pending for some time, while the latter are ordered by a court pursuant to state or federal statute and are "immediately executed." Id. at 360.

164. 18 U.S.C. app § 2, art. III(a).

165. Under the Agreement, the incarcerated individual has the right to request final disposition of all charges underlying the detainer by sending written notice to the warden or other official of the custodial facility. See id. § 2, art. III(c).

166. Under the Agreement, the state that lodged the detainer "shall be entitled to have a prisoner . . . made available" after filing a written request for temporary custody or availability to the custodial state. Id. § 2, art. IV(a).

the custodial jurisdiction maintains certain refusal rights.[167]

Critically, the Agreement establishes a system of accountability. If an individual exercises their right under the Agreement, the prosecuting jurisdiction must bring them to trial within 180 days.[168] If the prosecution requests production under the Agreement, it must commence trial within 120 days of an individual's arrival.[169] The penalty for failing to comply with these timelines is dismissal of the charges with prejudice, with limited exceptions.[170] In this way, the states created a legislative solution to the interjurisdictional problem. The Agreement establishes a structural mechanism for individuals and states to demand that an individual be produced for court,[171] and, importantly, a system of accountability whereby the prosecuting authority—not the individual stuck in custody—bears the consequences of any interjurisdictional challenges.

A review of the federal legislative history[172] reveals that protecting the integrity of the criminal process was at least one concern that motivated Congress to join the Agreement and the accountability mechanism it creates.[173] Intriguingly, while the Senate approved the Agreement with no apparent opposition in 1970,[174] it had, just the year before, rejected the

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167. See id. § 2, art. IV(a) ("[T]here shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability . . . .").

168. Id. § 2, art. III(a), (c).

169. Id. § 2, art. IV(c).

170. Id. § 2, art. III(d), IV(e), V(c).

171. The federal government as a member state has delegated the authority to the Federal Bureau of Prisons (BOP) to decide upon requests by states under the Agreement. See 28 C.F.R. § 0.96(m) (2025). The BOP, in turn, has established internal procedures to effectuate the Agreement. See Fed. Bureau of Prisons, DOJ, Legal Resource Guide to the Federal Bureau of Prisons 18 (2019), https://www.bop.gov/resources/pdfs/legal_guide_march_2019.pdf [https://perma.cc/LBF4-NAXK].

172. The origins of the Agreement date back to 1948, when a group of state entities known as the Joint Committee on Detainers issued a report outlining concerns about the use of interstate detainers and guiding principles for prosecutors, prison officials, and parole authorities. United States v. Mauro, 436 U.S. 340, 349–50 & n.16 (1978).

173. Congress was also concerned that imprisoned individuals suffer worsened conditions when subject to a detainer and that unresolved detainers may disrupt an individual's rehabilitation in prison. See United States v. Reed, 620 F.2d 709, 711 (9th Cir. 1980) ("The purpose of the Interstate Agreement on Detainers Act is 'to minimize the adverse impact of a foreign prosecution on rehabilitative programs of the confining jurisdiction.'" (quoting United States v. Milhollan, 599 F.2d 518, 528 (3d Cir. 1979))); S. Rep. No. 91-1356, at 3 (1970) ("[W]hen detainers are filed against a prisoner he sometimes loses interest in institutional opportunities because he must serve his sentence without knowing what additional sentences may lie before him, or when, if ever, he will be in a position to employ the education and skills he may be developing."); Janet R. Necessary, Note, The Interstate Agreement on Detainers: Defining the Federal Role, 31 Vand. L. Rev. 1017, 1021 (1978).

174. 116 Cong. Rec. 38,840–42 (1970).

Agreement when it was first introduced in the Senate.[175] What change did a year make? The legislative record specifically references a pair of Supreme Court cases that came down that year that refocused the interjurisdictional paradigm on incarcerated individuals' Sixth Amendment right to a speedy trial.[176] In *Smith v. Hooey*, the petitioner was incarcerated in a federal penitentiary in Kansas and sought repeatedly over six years to be brought to pending proceedings in Texas.[177] The Texas court denied these requests, reasoning, as courts had for many years,[178] that because the petitioner was confined in a federal prison, the state had no duty to produce him to court.[179] The Court rejected this approach, holding that, under the Sixth Amendment right to a speedy trial, a state has a duty to make a diligent and good-faith effort to secure the presence of the accused from the custodial jurisdiction for trial.[180] Because the prosecuting state failed to make any good faith effort, the Court remanded for further proceedings.[181] A year later in *Dickey v. Florida*, the Supreme Court took a step further and vacated a conviction after concluding that the defendant's speedy trial rights were violated when he was not produced from prison in one jurisdiction to criminal court proceedings in another jurisdiction.[182]

Thus, the criminal procedure rights of individuals detained in one jurisdiction but subject to prosecution in another jurisdiction were very much on lawmakers' minds. As Senator Roman Lee Hruska of Nebraska stated: "At the heart of this measure is the proposition that a person should be entitled to have criminal charges pending against him determined in expeditious fashion—another manner of stating the speedy trial guarantees of the Constitution."[183] In this way, Congress was motivated by the integrity of the criminal process in two regards: on the one hand, protecting the rights of prisoner defendants—that is, "afford defendants

175. The Agreement was first introduced in the 90th Congress, where it passed in the House but failed in the Senate. *Mauro*, 436 U.S. at 353. The Act ultimately passed both chambers a year later when it was introduced again during the 91st Congress.

176. In his remarks in support of the Agreement and the Senate Report, Senator Roman Lee Hruska discussed the Supreme Court's decisions in Smith v. Hooey, 393 U.S. 374 (1969), and Dickey v. Florida, 398 U.S. 30 (1970). See S. Rep. 91-1356 (1970); 116 Cong. Rec. 38,840 (statement of Sen. Hruska).

177. 393 U.S. at 375.

178. See, e.g., 5 Crim. Proc., supra note 161, § 18.4(a) ("For many years, it was commonly held that a person who was charged with another offense while he was serving a term of imprisonment for an earlier crime had no speedy trial right during that period of imprisonment."). Some courts concluded that speedy trial rights did not attach because a detained individual was unavailable for trial due to their own culpability. See, e.g., *Dickey*, 398 U.S. at 32–33 (explaining that the Florida court denied the habeas application because the individual's "unavailability for trial in Florida" was due to incarceration).

179. *Smith*, 393 U.S. at 377.

180. Id. at 383.

181. Id. at 382–83.

182. 398 U.S. at 37.

183. 116 Cong. Rec. 38,840 (1970) (statement of Sen. Hruska).

in criminal cases the right to a speedy trial"—and, on the other hand, protecting the rights of victims and prosecuting states—that is, "diminish the possibility of convictions being vacated or reversed because of a denial of this right."[184] The Agreement and the accountability mechanism it establishes was, as Congress recognized, a "vitally needed system"[185] to protect those interests.

It bears acknowledging, as Professor Leslie W. Abramson has pointed out, that the Agreement is an imperfect system and courts have limited its scope since its enactment.[186] The point in discussing the Agreement is not to hoist it as the ideal solution to the interjurisdictional dilemma. The point, rather, is to demonstrate that lawmakers recognized the dilemma of interjurisdictional prisoner defendants and that they sought to protect both the rights of individuals and the integrity of the criminal process by establishing a system of accountability in which the government, not the individual, bears the consequences of obstruction of court access. This recognition makes the lack of commensurate accountability safeguards in the immigration detention context all the more glaring.

B. *Immigration Custody: The Accountability Deficit*

Noncitizen defendants in ICE detention who face state charges are interjurisdictional defendants. Yet—unlike in the criminal custody context—when the custodian is ICE, there is no readily available mechanism to compel the production of a noncitizen defendant to state court, nor are there consequences to the jailor or prosecutor for failing to produce.

The same federalism dynamics that once left incarcerated individuals without an avenue from custody to court across jurisdictions still apply to noncitizen defendants in immigration detention facing state prosecution. ICE, as a federal agency, is not legally obligated to comply with state court writs.[187] Thus, when a state criminal court issues a writ ordering that an individual be produced to court, ICE may—and commonly does—affirmatitvely or effectively obstruct court access by refusing to itself produce the individual to criminal court in person or virtually, or even to temporarily release the individual into the custody of local law enforcement to transport the individual.[188] As in the criminal custody context, then, the federal–state dynamics leave state courts without

184. S. Rep. No. 91-1356, at 2 (1970).

185. 116 Cong. Rec. 38,840 (statement of Sen. Hruska).

186. See Leslie W. Abramson, The Interstate Agreement of Detainers: Narrowing Its Availability and Applications, 21 New Eng. J. on Crim. & Civ. Confinement 1, 42 (1995) (explaining that the Supreme Court and lower courts have reduced the scope of the Interstate Agreement of Detainers and recommending reforms).

187. See supra section II.A; see also Special Prosecutor of N.Y. v. U.S. Att'y for S.D.N.Y., 375 F. Supp. 797, 804 (S.D.N.Y. 1974) ("[S]tate courts possess no power to remove a person from the jurisdiction of federal courts or agencies by writ of habeas corpus.").

188. See supra section I.B.1.

authority to order that a noncitizen defendant in ICE custody be produced to court.

Federal writs of habeas corpus provide a more effective means of binding ICE, as a federal agency, to produce an individual in its custody to state or federal court. In particular, federal courts have issued writs of habeas ad prosequendum—which, as discussed above, provide temporary custody for the purpose of prosecution[189]—or writs of habeas ad testificandum—which provide temporary custody for the purpose of giving testimony[190]—to order custodians to produce an individual to state or federal court.[191] Although underutilized, federal courts have issued these so-called lesser writs to order that individuals in ICE custody be brought to state criminal court proceedings.[192] In *Pensamiento v. McDonald*, for example, a federal district judge granted a writ of habeas ordering that ICE and local authorities coordinate to transport Pensamiento from ICE detention to his Massachusetts criminal hearing after ICE repeatedly refused to transport him to court.[193] In a similar case, a federal district judge granted similar relief "on the ground that Petitioner has a due process right to be present at the state court criminal proceedings against him."[194] The lesser writs, then, present a potential pathway to ensuring that immigrants have their day in criminal court. As yet, however, immigrants in ICE custody have not widely leveraged the lesser writs. This underutilization is not surprising. Petitioning the federal courts for writs of habeas is a complex and resource-intensive process, which, for many, is

189. See supra section II.A.1.

190. See Barber v. Page, 390 U.S. 719, 724 (1968) (holding that "28 U.S.C. § 2241(c)(5) gives federal courts the power to issue writs of habeas corpus ad testificandum at the request of state prosecutorial authorities" (emphasis omitted)); 65 A.L.R. Fed. 321 Art. 6 (1983) ("28 U.S.C.[] § 2241(c)(5) . . . give[s] federal courts authority to issue writs of habeas corpus ad testificandum to enable federal prisoners to appear as witnesses at state trials.").

191. See, e.g., United States v. Poole, 531 F.3d 263, 267–68 (4th Cir. 2008) (explaining that the Maryland federal district judge issued a writ of habeas corpus ad testificandum to order the Kentucky prison warden to produce the incarcerated individual to Maryland federal district court for his hearing); United States ex rel. Quinn v. Hunter, 162 F.2d 644, 646 (7th Cir. 1947) (explaining that the Illinois district court issued a writ of habeas corpus ad testificandum ordering an individual incarcerated in Leavenworth, Kansas, to be brought to Chicago for court proceedings).

192. See, e.g., Rangolan v. County of Nassau, 370 F.3d 239, 249 (2d Cir. 2004) (explaining that the New York district court issued a writ of habeas corpus ad testificandum ordering immigration officials in York, Pennsylvania, to deliver the individual in their custody to a detention center in Brooklyn, New York, so that he could attend every day of trial); J.S.R. v. Sessions, 330 F. Supp. 3d 731, 744–45 (D. Conn. 2018) (granting a writ of habeas corpus ad testificandum for immigrant detainees in Texas to appear physically in federal court in Connecticut); Figueroa v. McDonald, 680 F. Supp. 3d 18, 21 (D. Mass. 2018) (ordering ICE to transport an immigrant "to all future hearings for the state criminal charges").

193. 315 F. Supp. 3d 684, 686–89, 694 (D. Mass. 2018).

194. Order at 1, *Figueroa*, 680 F. Supp. 3d 18 (No. 1:18-cv-10097-PBS), Dkt. No. 41.

inaccessible without an attorney.[195] Yet many individuals stuck in detention are deprived of appointed defense counsel precisely because they are unable to attend criminal proceedings, as discussed in section III.A. Federal writs, then, are no panacea to the obstruction of court access dilemma.

Federalism dynamics leave individuals stuck in ICE detention similarly unable to meaningfully compel production as those in criminal custody. Yet, unlike in the criminal custody context,[196] when ICE is the custodian, no interstate agreements apply. The Agreement applies only to individuals who are serving "a term of imprisonment in a penal or correctional institution."[197] Because immigration detention is neither a term of imprisonment nor penal, the Agreement does not apply to noncitizen defendants in immigration detention.[198] The court in *Ayala-Heredia v. Executive Office U.S. Marshals*, for example, concluded that the Agreement did not apply because Ayala-Heredia was in ICE custody at the time he sought relief under the Agreement, having already completed his prison term for unlawful reentry.[199] Noncitizen defendants stuck in immigration detention, then, are precluded from the protections of the Agreement, even though they face many of the same harms that motivated lawmakers to legislate accountability through the Agreement.[200]

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195. For example, 28 U.S.C. § 2254(b)(1) (2018) provides that a federal court may not grant a writ of habeas unless the applicant has "exhausted the remedies available in the courts of the State" or the state lacks effective corrective process and protections.

196. See supra section II.A.

197. 18 U.S.C. app. § 2, art. III(a) (2018).

198. See United States v. Roy, 771 F.2d 54, 57–58 (2d Cir. 1985) (applying the Agreement when the defendant was awaiting trial on pending charges only because he was concurrently serving a sentence for a parole violation conviction); United States v. Reed, 620 F.2d 709, 711–12 (9th Cir. 1980) (holding that defendant was not "serving a term of imprisonment" while awaiting trial and awaiting revocation of parole arising out of an earlier charge (quoting 18 U.S.C. app. § 2, art. IV(a))); United States v. Collins, 863 F. Supp. 102, 106 (E.D.N.Y. 1994) ("[T]he weight of authority rejects the Agreement's application to [pretrial detainees]."); United States v. Evans, 423 F. Supp. 528, 531 (S.D.N.Y. 1976) (finding that defendants are unable to invoke the Agreement because its express language and purpose exclude pretrial detainees), aff'd, 556 F.2d 561 (2d Cir. 1977). Scholars estimate that in approximately 7% of Pennsylvania criminal cases in which the defendant missed at least one hearing, the defendant was in pretrial detention and not brought from jail to court, often due to miscommunication about court dates, staffing issues, and jail lockdowns. See Graef et al., supra note 25, at 22. Whether pretrial custody should be included within the Agreement is beyond the scope of this Article. Arguably, individuals in ICE detention face an even greater risk of not being produced to criminal proceedings than pretrial detainees do because, while the very purpose of pretrial detention is to ensure that defendants will be brought to trial, the purpose of immigration detention is unmoored from criminal proceedings and is instead designed to ensure that defendants are present for immigration proceedings. Thus, ICE, as a custodian, has no mission mandate to bring the individual to criminal court.

199. No. 11-CV-1072 (RPM)(LB), 2011 WL 3348226, at *3 n.5 (E.D.N.Y. Aug. 2, 2011).

200. See supra section II.A.2; infra Part III.

Therein lies the accountability deficit: When ICE, the jailor, claims that the responsibility of transportation lies with the prosecuting authorities, and the prosecuting authorities claim the converse,[201] the end result is that the noncitizen defendant remains stuck in detention and obstructed from their day in criminal court. As we have seen in the criminal custody context, this deficit can be mitigated through establishing accountability: The government bears the consequences for failing to produce through dismissal of the charges with prejudice. Yet immigration detention lacks legislated accountability, and thus it is the noncitizen defendant—not the jailor or prosecutor—that suffers the consequences. Absent accountability, any existing mechanisms to seek production in criminal court are mere "empty rituals."[202]

III. THE ACCOUNTABILITY IMPERATIVE AT THE CRIMINAL–IMMIGRATION INTERSECTION

While the federalism dynamics underlying obstruction of court access are not unique to the criminal–immigration custody context, the lack of structural accountability and attendant consequences very much are. Individuals stuck in immigration detention suffer consequences both as criminal defendants and as immigrants.

This Part examines the harms of obstruction of court access and posits three interrelated implications that give rise to the accountability imperative. The first is that noncitizen defendants unable to appear in criminal court proceedings suffer criminal law harms. Specifically, it argues that the inability to appear in criminal court is an obstruction of criminal proceedings that, in turn, subverts criminal constitutional due process. The second implication is that because of adjudicatory norms in immigration proceedings, criminal law obstruction harms noncitizen defendants in immigration proceedings—namely, by detaining and deporting them—which in turn perpetuates criminal obstruction in a cycle. Adjudicatory norms in the immigration legal system, then, drive cyclical obstruction with both criminal and immigration ramifications. Finally, the institutional design of the immigration apparatus prevents individuals from having a meaningful opportunity to be heard in immigration court. By institutional design concerns, this Article means the lack of meaningful checks and balances that occur, first, when the jailor—who controls whether a noncitizen defendant may appear in criminal court—is also the immigration prosecutor that uses the unresolved charge against that noncitizen defendant in immigration proceedings; and second, when the judge who considers this evidence is governed by the same executive branch. Part III takes each in turn.

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201. See Klein Affidavit, supra note 103, ¶ 16.

202. See Tiffany J. Lieu, Effectively Irrebuttable Presumptions: Empty Rituals and Due Process in Immigration Proceedings, 92 Geo. Wash. L. Rev. 580, 612–14 (2024).

A. *Criminal Procedure Jeopardy*

As the Supreme Court recognized in *Gideon v. Wainwright*, "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."[203] These safeguards include the Fifth Amendment rights to due process and access to the courts and the Sixth Amendment rights to representation by counsel, confront adverse witnesses, and compulsory process. The Supreme Court has long held that these safeguards apply to all individuals in criminal proceedings—regardless of their citizenship status.[204] Thus, while an individual standing as an immigrant may not be entitled to criminal safeguards in immigration removal proceedings,[205] they are uncontrovertibly entitled to those safeguards when they stand as a defendant in criminal proceedings. Yet, when ICE prevents a noncitizen defendant from appearing in criminal court, it jeopardizes these rights. This section explores the constitutional implications of obstruction of court access. The intent is not to provide a comprehensive analysis or exhaustive list of all rights that may be violated or to prove definitively that these criminal procedure rights are necessarily violated in all obstruction of court access cases. Rather, the purpose is to demonstrate the ways obstruction of court access quite literally obstructs criminal *proceedings*, which in turn subverts the constitutional rights to criminal *process*.

We begin by considering the right of an "accused . . . to have the Assistance of Counsel for his defense."[206] The Supreme Court has long recognized that "in our adversary system of criminal justice, any person

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203. 372 U.S. 335, 344 (1963).

204. See, e.g., Wong Wing v. United States, 163 U.S. 228, 237–38 (1896) (explaining that noncitizen defendants in criminal proceedings are entitled to constitutional criminal procedural safeguards); see also Jennifer M. Chacón, A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights, 59 Duke L.J., 1563, 1603–04 (2010) [hereinafter Chacón, Diversion of Attention] (explaining that, in criminal proceedings, citizen and noncitizen defendants alike are entitled to the same constitutional criminal procedure protections under the Fourth, Fifth, Sixth, and Eighth Amendments).

205. Abel v. United States, 362 U.S. 217, 237 (1960) (explaining that deportation proceedings "are not subject to the constitutional safeguards for criminal prosecutions"). Scholars have persuasively argued that safeguards in criminal proceedings should apply in immigration proceedings. See, e.g., Chacón, Diversion of Attention, supra note 204, at 1624–27 (proposing the application of the Fourth Amendment exclusionary rule to removal proceedings); Robert Pauw, A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply, 52 Admin. L. Rev. 305, 307–13 (2000) (summarizing arguments that the Ex Post Facto Clause and the Sixth Amendment's right to counsel should apply in deportation proceedings); Michael J. Wishnie, Immigration Law and the Proportionality Requirement, 2 U.C. Irvine L. Rev. 415, 417–18 (2012) (arguing that removal "is sufficiently punitive to trigger constitutional proportionality review" pursuant to the Fifth Amendment's Due Process Clause and the Eighth Amendment's Cruel and Unusual Punishment Clause).

206. U.S. Const. amend. VI.

haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[207] The Court has also long recognized that the right to be represented by counsel is "by far the most pervasive" right that an accused person has "for it affects his ability to assert any other rights he may have."[208] The right to appointed counsel, in other words, is a "necessit[y]"[209] both because it ensures a fair trial and because it has cascading impact on the ability to meaningfully access other safeguards.

But for many noncitizen defendants stuck in immigration detention, obstruction of court access obstructs their ability to obtain and maintain appointed public defense counsel.[210] Court procedures for appointing counsel in New Jersey and Massachusetts illustrate the mechanisms of this obstruction. In New Jersey, public defense counsel is typically appointed for indigent individuals at their first appearance before the state court.[211] When an individual cannot appear for the initial court proceeding, they cannot request appointment of or demonstrate their eligibility for a public defender.[212] Having missed this critical juncture, an individual must successfully navigate a complex process to get an appointed public defender, including completing a specific online form and advocating for timely appointment of counsel with numerous offices.[213] The court in *Doe*

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207. *Gideon*, 372 U.S. at 344.

208. United States v. Cronic, 466 U.S. 648, 654 (1984) (internal quotation marks omitted) (quoting Walter V. Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956)).

209. *Gideon*, 372 U.S. at 344.

210. The Sixth Amendment right to counsel attaches at the initial appearance. Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion) (holding that the right to counsel attaches at "the initiation of adversary judicial criminal proceedings"). Once the right attaches, a defendant is entitled "to counsel at all critical stages of the criminal process." Iowa v. Tovar, 541 U.S. 77, 80–81 (2004) (citing Maine v. Moulton, 474 U.S. 159, 170 (1985); United States v. Wade, 388 U.S. 218, 224 (1967)). A proceeding constitutes a critical stage when "potential substantial prejudice to [the] defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Wade*, 388 U.S. at 227; see also *Moulton*, 474 U.S. at 170 ("[T]o deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.").

211. See N.J. R. Crim. P. 3:4-2(d)(3)–(5) (providing that, at an indigent defendant's initial appearance before the court, the judge must inform the defendant of their right to appointed counsel, ask if they want counsel, and provide them with "an application for public defender services . . . [to] complete and submit . . . for immediate processing"); *Doe v. DHS* Complaint, supra note 123, at 67.

212. *Doe v. DHS* Complaint, supra note 123, at 67; Declaration of M.F. ¶¶ 6–7, Doe v. Dep't of Homeland Sec., No. 3:24-cv-00259 (W.D. Pa. filed Oct. 16, 2024), Dkt. No. 31-5 (on file with the *Columbia Law Review*) ("[T]he municipal court would not appoint a public defender to represent me without a court appearance."); Declaration of Isabela Doe ¶ 19, *Doe*, No. 3:24-cv-00259, Dkt. No. 31-1 (on file with the *Columbia Law Review*) ("Because I have not been able to go to Court, I have not been assigned with a public defender to help me in that case. I do not know how to fix this without going to court.").

213. *Doe v. DHS* Complaint, supra note 123, at 67.

v. DHS thus opined that the right to counsel is "one of many rights subverted when a detainee is denied an appearance in court."[214]

Even if an individual is able to obtain appointed counsel, they may not be able to retain said counsel due to procedural barriers. In Massachusetts, a court may designate a case as defaulted when an individual fails to appear in court—a designation that may remove appointed counsel from the case.[215] In both states, it is a complex process to request that public defense counsel be appointed—one that many require an attorney to navigate. As one individual aptly put it: "You should not need a lawyer in order to get a public defender appointed to help you in a criminal case."[216] By obstructing a noncitizen defendant's ability to appear in court, immigration failure of production subverts the foundational right to counsel.[217]

Bench warrants, a common collateral consequence of failing to appear, illustrate the harms of being deprived counsel. These warrants instruct law enforcement to arrest an individual for failing to appear in court,[218] often without asking why the individual is not present.[219] The consequences are steep. Even if an individual is able to secure release from immigration detention, an outstanding bench warrant means that state law enforcement may apprehend and redetain them—this time in another

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214. Doe v. U.S. Dep't of Homeland Sec., No. 3:24-cv-00259-SLH-PLD, 2025 WL 360534, at *5 n.6 (W.D. Pa. Jan. 31, 2025).

215. See Interview with Eleni Bakst, Clinical Instructor, Harvard Immigr. & Refugee Clinical Program (Jan. 2025) (on file with the *Columbia Law Review*).

216. Declaration of V.A.C. ¶ 29, *Doe*, No. 3:24-cv-00259, Dkt. No. 31-6 (on file with the *Columbia Law Review*); see also Declaration of I.H.B. ¶ 4, *Doe*, No. 3:24-cv-00259, Dkt. No. 31-9 (on file with the *Columbia Law Review*) [hereinafter I.H.B. Declaration] ("I had a public defender only because lawyers at the Legal Services of New Jersey . . . helped me get assigned one—I could not figure out how to get one appointed on my own while I was detained at Moshannon.").

217. As examined in section III.B, infra, ICE's failure to produce individuals to criminal proceedings may result in deportation. Numerous state and federal courts have held that such removal may violate an individual's Sixth Amendment right to counsel if it interferes with their ability to communicate with counsel, review evidence, and effectively prepare a defense to the charge. See, e.g., United States v. Castillo, 537 F. Supp. 3d 120, 128 (D. Mass. 2021) (finding that an individual's Sixth Amendment right to counsel was violated because his deportation interfered with the ability to consult with counsel and prepare a defense); United States v. Castro-Guzman, No. CR-19-2992-TUC-CKJ (LCK), 2020 WL 3130395, at *5 (D. Ariz. May 11, 2020) (same); United States v. Resendiz-Guevara, 145 F. Supp. 3d 1128, 1138 (M.D. Fla. 2015) (same).

218. See Bench Warrant, Black's Law Dictionary (12th ed. 2024) ("A writ issued directly by a judge to a law-enforcement officer, esp. for the arrest of a person who has been held in contempt, has been indicted, has disobeyed a subpoena, or has failed to appear for a hearing or trial.").

219. See Nirej Sekhon, Dangerous Warrants, 93 Wash. L. Rev. 967, 985–87 (2018) (explaining that bench warrants "tend to be issued in rote fashion," without judges inquiring why the defendant is not present).

entity's custody—through no fault of their own.[220] As one individual who was scheduled to be released from detention because he was granted immigration relief put it: "The bench warrant has brought me a lot of worry that I will be released from Moshannon just to be arrested again and not be able to be liberated until this case is resolved."[221] When a noncitizen defendant who is stuck in detention is represented by counsel who can explain their absence in court, the judge is less likely to issue a bench warrant.[222]

As to the proceedings themselves, because a defendant has a constitutional right to be present,[223] judges most often continue proceedings to a future date or until the individual is able to appear.[224] But as a practical matter, an immigrant defendant suffers long delays before they are able to have their day in court, if ever they have their day in court.[225] Judges often have to reset hearings many times over many months—during which the individual remains detained.[226] In some cases, individuals are deported without ever having the opportunity to appear in court.[227]

When adjudication of a criminal charge is delayed for months or years, that delay may run afoul of the constitutional[228] and statutory[229] right

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220. Bench warrants may also pose barriers to accessing employment and public benefits or services and may make defendants less likely to seek medical aid or report victimization. Gouldin, supra note 24, at 1083.

221. See I.H.B. Declaration, supra note 216, ¶ 11.

222. Sekhon, supra note 219, at 986.

223. See, e.g., United States v. Gagnon, 470 U.S. 522, 526 (1985) (per curiam) (explaining that a defendant has a constitutional right to presence, rooted in the Sixth Amendment's Confrontation Clause and the Due Process Clause, "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge" (internal quotation marks omitted) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105–06, 108 (1934))).

224. See Graef et al., supra note 25, at 5 (explaining that cases cannot proceed when essential witnesses fail to appear and, hence, judges typically continue or dismiss the case).

225. See, e.g., United States v. Lutz, No. CR-19-00692-001-TUC-RM (BGM), 2019 WL 5892827, at *1 (D. Ariz. Nov. 12, 2019) (explaining that ICE detention caused Lutz to miss two preliminary hearings after a federal judge granted him conditional pretrial release); Valadez-Lopez v. Chertoff, No. C-05-04192 RMW, 2007 WL 2070215, at *2 (N.D. Cal. July 16, 2007) (explaining that ICE prevented the individual from attending at least five scheduled hearings in state criminal court).

226. See, e.g., *Lutz*, 2019 WL 5892827, at *1.

227. See, e.g., infra section III.B.

228. U.S. Const. amend. VI. In *Barker v. Wingo*, the Supreme Court established a four-factor balancing test for speedy trial violations: the length of delay, the reason for the delay, the defendant's assertion of the right to a speedy trial, and the presence of any prejudice to the defendant resulting from the delay. 407 U.S. 514, 530 (1972). Immigration obstruction of court access and the accountability deficit pose a particular constitutional dilemma under the reason for delay and prejudice factors.

229. Congress and nearly all states have also enacted legislation to implement the constitutional right. See Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174 (2018); 5 Crim. Proc., supra note 161, § 18.3(c) (discussing state laws safeguarding the right to speedy trial);

to a speedy trial. As the Supreme Court emphasized in *Klopfer v. North Carolina*, when it incorporated the speedy trial protections of the Sixth Amendment against the states, the right to a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment."[230] Two years after *Klopfer*, the Court further elaborated in *Smith v. Hooey* that speedy trial protections "prevent undue and oppressive incarceration prior to trial," "minimize anxiety and concern accompanying public accusation," and "limit the possibilities that long delay will impair the ability of an accused to defend himself."[231] The Court recognized that "[t]hese demands are both aggravated and compounded in the case of an accused who is imprisoned by another jurisdiction"[232]—including immigrants in immigration detention. Indeed, *Smith* and these constitutional speedy trial concerns were part of the congressional impetus for legislating accountability through the Agreement.[233]

In some cases, judges proceed with a hearing without the individual or their counsel, if any, present. Consider the case of Geovanna, a survivor of domestic violence, whom police arrested and charged after an instance of abuse.[234] From the moment ICE detained her, the courthouse doors were closed. Geovanna was not appointed defense counsel and missed multiple criminal court hearings even though she repeatedly requested that ICE produce her virtually.[235] In the end, the judge dismissed the charges against her after her partner informed the court he no longer wished to pursue the charges at a hearing at which Geovanna was not present.[236] While the outcome was favorable, it occurred only after Geovanna suffered months in immigration detention and without her ever having the ability to have her day in court.[237] Instead, Geovanna was left to "rely on [her] partner, the person who hurt [her] and who had brought the charges against [her], to explain what was happening in the Court."[238] When an individual like Geovanna is unable to confront witnesses who

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Marc I. Steinberg, Right to Speedy Trial: The Constitutional Right and Its Applicability to the Speedy Trial Act of 1974, 66 J. Crim. L. & Criminology 229, 229 (1975) (explaining that Congress enacted the Speedy Trial Act of 1974 "[i]n order to more effectively implement the interests of both society and the accused").

230. 386 U.S. 213, 223 (1967).

231. 393 U.S. 374, 377–78 (1969) (internal quotation marks omitted) (quoting United States v. Ewell, 383 U.S. 116, 120 (1966)).

232. Id.; see also id. at 379–80 (opining that the harm of long delays on an individual's ability to defend themselves are "*markedly increased* when the accused is incarcerated in another jurisdiction" (emphasis added)).

233. See supra section II.A.2.

234. Geovanna is a pseudonym used to protect the declarant's privacy. See Declaration of G. ¶¶ 5–13, Doe v. Dep't of Homeland Sec., No. 3:24-cv-00259 (W.D. Pa. filed Oct. 16, 2024), Dkt. No. 31-10 (on file with the *Columbia Law Review*).

235. Id.

236. Id.

237. Id.

238. Id. ¶ 11.

appear in court or testify on their own behalf, their Sixth Amendment rights to confrontation[239] and compulsory process,[240] as well as the related right to be present,[241] may be jeopardized.

More generally, when an individual is obstructed from court proceedings, that obstruction subverts the Supreme Court's recognition in *Bounds v. Smith* that it is "established beyond doubt that [individuals] have a constitutional right of access to the courts."[242] That access must be "adequate, effective, and meaningful."[243] Indeed, lower courts have raised

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239. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."). The Supreme Court has recognized that "[t]he rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). Violation of the confrontation right is subject to harmless-error analysis. Coy v. Iowa, 487 U.S. 1012, 1020–21 (1988).

240. A defendant's right to compulsory process is violated if they were deprived of the opportunity to present evidence in their favor, the excluded testimony would have been material and favorable to their defense, and the deprivation was arbitrary and disproportionate to any legitimate evidentiary or procedural purpose. Rock v. Arkansas, 483 U.S. 44, 55–56 (1987).

241. See Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (describing a defendant's right to face their accusers).

242. 430 U.S. 817, 821 (1977). For a survey of the development of the access to the courts doctrine in the Supreme Court, see Alexander Linden, Note, The Library Is Closed: Disagreement Over a Prisoner's Right to Access the Courts, 104 B.U. L. Rev. 989, 997–1005 (2024).

243. *Bounds*, 430 U.S. at 822. The Supreme Court has held that access to the courts requires that an individual have access to an adequate law library, id.; assistance from nonlawyers like law students, Procunier v. Martinez, 416 U.S. 396, 421–22 (1974); free access to hearing transcripts to facilitate "adequate and effective appellate review," Griffin v. Illinois, 351 U.S. 12, 20 (1956) (plurality opinion); and adequate materials to file legal documents such as paper, pen, notarial services, and stamps, *Bounds*, 430 U.S. at 824–25. While *Bounds* and its progeny are commonly invoked to vindicate these tools to assist an individual in accessing the courts, the right certainly encompasses the predicate, basic proposition that meaningful access to the courts requires just that: access to attend court proceedings. See, e.g., id. at 830 (explaining that "adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts" and that nothing "foreclose[s] alternative means to achieve that goal"); Drew A. Swank, In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation, 54 Am. U. L. Rev. 1537, 1563 (2005) ("The Constitution requires that all individuals, whether represented or not, have more than mere physical access to the courts; the access must be adequate, effective, and meaningful."); Linden, supra note 242, at 1000–01 ("[T]he constitutional right is access to the courts, not access to a law library."). In *Lewis v. Casey*, the Supreme Court clarified that this right is violated if an individual suffers an actual injury—that is, if the challenged conduct "hindered his efforts to pursue a legal claim." 518 U.S. 343, 351 (1996) (providing as examples of actual injury an instance in which an individual prepares a complaint that is dismissed due to a defect that could have been avoided with legal assistance and an individual who is unable to put together a complaint at all because the law library was inadequate); see also Christopher v. Harbury, 536 U.S. 403, 413–14 (2002) (identifying two categories of court access claims—ones in which official action frustrates a plaintiff's ability to prepare and file future litigation and ones that look backward to a poor outcome in a case or a case that "could not have commenced"). Critics have argued that *Lewis*'s actual injury requirement poses too high a

constitutional concerns under *Bounds* when defendants are not brought to court. The Seventh Circuit's decision in *May v. Sheahan*[244] is illustrative. There, May was arrested for possession of a controlled substance and, unable to post bond, was held in the county jail and later the county hospital.[245] At issue was whether the Sheriff's Department's policy of refusing to produce hospital detainees to assigned court dates in person or virtually violated May's constitutional right of access to the courts.[246] The Seventh Circuit held that May had sufficiently stated an access-to-the-courts claim because the policy prevented him from attending court, which delayed the final disposition of his case, prolonged his detention, prevented him from requesting a lower bond, and impeded access to his attorney.[247] In so holding, the court reasoned that "[a] policy both preventing detainees from going to court and limiting drastically their access to attorneys has obvious problems under these precedents."[248] It is precisely these "obvious problems" that are at stake in obstruction of court access.[249]

Thus, obstruction of court access fueled by the accountability deficit quite literally obstructs criminal proceedings, with constitutional significance to criminal justice.

B. *Crimmigration Cyclical Obstruction*

Obstruction of court access harms noncitizen defendants in immigration proceedings as well. When individuals are obstructed from criminal proceedings and cannot resolve criminal charges against them, those unresolved charges may be used against them in immigration proceedings to deny release from detention on bond, thereby prolonging detention, and to deny immigration relief, thereby leading to deport-

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barrier to bringing access to the courts claims. See, e.g., Joseph L. Gerken, Does *Lewis v. Casey* Spell the End to Court-Ordered Improvement of Prison Law Libraries?, 95 L. Libr. J. 491, 504 (2003) ("[I]t will be virtually impossible to identify plaintiffs in sufficient numbers to support a claim for systemic relief, even where a prison's law library or advocacy services are abysmal."); see also Walters v. Edgar, 163 F.3d 430, 436 (7th Cir. 1998) (noting "the paradox that ability to litigate a denial of access claim is evidence that the plaintiff has no denial of access claim").

244. 226 F.3d 876 (7th Cir. 2000).

245. Id. at 878.

246. Id. at 878–79 (describing May's constitutional claim against the Sheriff's Department for its policies regarding hospitalized detainees).

247. See id. at 883.

248. Id.

249. See Doe v. U.S. Immigr. & Customs Enf't, 490 F. Supp. 3d 672, 694 (S.D.N.Y. 2020) (concluding that ICE's practice of arresting individuals in and around courthouses was constitutionally suspect because such arrests "created an 'atmosphere of fear' so significant that it deters [individuals] . . . from bringing meritorious suits," which was the "functional equivalent of denial of access" (internal quotation marks omitted) (first quoting Complaint ¶¶ 3–6, 58, 60, 62, 69, 77–78, 83–84, 87, 96–98; then quoting Monsky v. Moraghan, 127 F.3d 243, 247 (2d Cir. 1997))).

ation.[250] These dual consequences—detention and deportation—in and of themselves exact grave humanitarian harms.[251] While the Supreme Court has noted that immigration detention is civil in nature,[252] the consequences and harms of detention on those detained are severe.[253] Similarly, the Supreme Court "ha[s] long recognized that deportation is a particularly severe 'penalty'" that is the "equivalent of banishment or exile."[254] But the collateral impact of these harms is not isolated to immigration; rather, continued detention and deportation loop back to perpetuate obstruction of the criminal process. Another implication of obstruction of court access, then, is that adjudication norms in immigration proceedings regarding detention and deportation fuel cyclical obstruction of criminal and immigration processes and rights.[255]

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250. See, e.g., Guerra, 24 I. & N. Dec. 37, 41 (B.I.A. 2006) ("For purposes of determining bond during the pendency of removal proceedings, [respondent's criminal charges were] sufficient for the Immigration Judge to conclude that the respondent poses a risk to others, even in the absence of a conviction."); Thomas, 21 I. & N. Dec. 20, 20 (B.I.A. 1995) ("In determining whether an application for relief is merited as a matter of discretion, evidence of unfavorable conduct, including criminal conduct which has not culminated in a final conviction . . . may be considered.").

251. See, e.g., Physicians for Hum. Rts., Harvard Immigr. & Refugee Clinical Program & Peeler Immigr. Lab, "Endless Nightmare": Torture and Inhuman Treatment in Solitary Confinement in U.S. Immigration Detention 1–2, 8 (2024), https://phr.org/wp-content/uploads/2024/02/PHR-REPORT-ICE-Solitary-Confinement-2024.pdf [https://perma.cc/J78W-9WKG] ("ICE's failure to adhere to domestic and international law and its own guidelines has created dangerous conditions in detention centers . . . ." (emphasis omitted)).

252. See, e.g., Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (describing the civil nature of the detention proceedings in the case); Immigr. & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country . . . .").

253. Individuals in immigration detention suffer conditions akin to those in carceral detention, including solitary confinement, inadequate access to medical care, and lack of access to counsel, among others. See, e.g., Physicians for Hum. Rts. et al., supra note 251, at 1–2, 8; Letter from Immigrants' Rts. Advocs. to Andrea Campbell, Mass. Att'y Gen., 6–7 (Aug. 8, 2024), https://harvardimmigrationclinic.org/files/2024/08/MA-AG-Complaint-Summer-2024_FINAL.pdf [https://perma.cc/6DLK-R3XK] (providing information on civil rights violations experienced by immigrant individuals detained at Plymouth County Correctional Facility).

254. Padilla v. Kentucky, 559 U.S. 356, 365, 373 (2010) (internal quotation marks omitted) (first quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893); then quoting Delgadillo v. Carmichael, 332 U.S. 388, 390–91 (1947)); see also Sabrineh Ardalan, Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation, 48 U. Mich. J.L. Reform 1001, 1004 (2015) (explaining that individuals who are deported are separated from their families and forced to return to a country where they may fear persecution or death).

255. Obstruction of court access also impedes an individual's ability to seek post-conviction relief, which in turn impedes their ability to challenge deportation orders based on wrongful convictions or sentences. See, e.g., Baptista v. Lyons, 440 F. Supp. 3d 42, 45–46 (D. Mass. 2020) (noting that the district judge granted habeas relief in a case in which a noncitizen challenged the state court convictions underlying his immigration order of removal, but ICE failed to transport him to the post-conviction relief proceedings). While

First, immigration judges may consider unresolved charges in determining whether an individual merits release from immigration detention on bond.[256] Individuals subject to discretionary detention may request that an immigration judge review ICE's custody determination at a bond hearing.[257] An individual may be released on bond if an immigration judge determines that the individual is neither a danger to the community nor likely to abscond[258] and the immigration judge exercises discretion to grant bond.[259] In *Guerra*, the BIA determined that, in reaching these determinations, immigration judges may consider an individual's criminal record, including open charges that have not resulted in a conviction.[260] Scholars have documented that immigration judges regularly consider so-called criminal law outputs short of conviction, such as police reports, in determining whether an individual may be released on bond.[261]

Thus, when an individual stuck in detention is unable to appear in court to resolve the charges against them, that unresolved charge may be used against them to perpetuate the very detention that obstructed criminal court access in the first place. The proceedings in *Velasco Lopez v.*

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the impact of post-conviction relief on removal proceedings is beyond the scope of this Article, one example illustrates the harms of immigration obstruction of court access in the post-conviction relief context. In *Baptista*, a legal permanent resident in immigration detention was ordered deported based on a state conviction. Id. He sought a new trial in post-conviction relief, and the state court issued a writ of habeas corpus ordering that he be brought to court so that he could be heard on his motion for post-conviction relief. Id. ICE failed to produce him for several hearings. Id. When ICE did finally produce him to his criminal proceedings, he successfully vacated the state conviction. Id. As a result, he was able to reopen and terminate his immigration proceedings and was released from immigration custody. Id.

256. See, e.g., Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. 2006) (finding no error in the immigration judge's consideration of documented criminal activity absent conviction).

257. 8 C.F.R. § 1003.19 (2025).

258. Id. § 1003.19(h)(3). Generally, the individual seeking bond bears the burden of proof, though the First Circuit has shifted the burden to the government. See Hernandez-Lara v. Lyons, 10 F.4th 19, 41 (1st Cir. 2021) (holding on due process grounds that the government bears the burden of proof to show an individual subject to detention poses danger to the community or flight risk); Mary Holper, The Beast of Burden in Immigration Bond Hearings, 67 Case W. Rsrv. L. Rev. 75, 80 (2016) (arguing that the government should bear the burden of proof in bond hearings by clear and convincing evidence).

259. See, e.g., Stacy L. Brustin, A Civil Shame: The Failure to Protect Due Process in Discretionary Immigration Custody & Bond Redetermination Hearings, 88 Brook. L. Rev. 163, 166 (2022) ("Under the current statutory framework, an [immigration judge] has broad discretion to decide whether to overturn ICE's denial of bond, release on recognizance, or change the bond amount set by ICE.").

260. *Guerra*, 24 I. & N. Dec. at 40.

261. See Mary Holper, Confronting Cops in Immigration Court, 23 Wm. & Mary Bill Rts. J. 675, 677–78 (2015) (noting that an immigration judge may use police reports to decide whether to release a noncitizen detainee on bond); Sarah Vendzules, Guilty After Proven Innocent: Hidden Factfinding in Immigration Decision-Making, 112 Calif. L. Rev. 697, 708–20 (2024) (explaining that immigration adjudicators often consider criminal law outputs other than a conviction in reaching discretionary determinations).

Decker are illustrative.[262] At the time ICE discretionarily detained Velasco Lopez and placed him in removal proceedings, he faced two pending criminal proceedings in New York state courts.[263] For three and a half months, ICE repeatedly refused to produce Velasco Lopez to criminal court hearings relating to the two proceedings, resulting in a bench warrant for his arrest.[264] Meanwhile, in his immigration proceedings, Velasco Lopez sought release on bond but the immigration judge denied release "in part due to the outstanding charges."[265] Four days later, ICE finally produced Velasco Lopez to a criminal court hearing in one proceeding, and the charges were dismissed.[266] ICE, however, continued to obstruct his ability to attend hearings in the remaining criminal proceedings.[267] When Velasco Lopez sought release from immigration detention a second time four months later, the immigration judge again denied bond, this time based solely on the remaining proceedings.[268] But as the Second Circuit noted, "[T]hat case had not progressed as a result of Velasco Lopez's incarceration, and he had not yet been able to answer the charges."[269] Velasco Lopez was eventually released from detention only after he filed a writ of habeas corpus in federal district court and a federal judge concluded that his prolonged detention was unconstitutional.[270] By that point, he had been detained for fourteen months.[271]

As Velasco Lopez's case illustrates, a noncitizen defendant who suffers obstruction of court access because of immigration detention may be forced to remain in immigration detention precisely *because* of that detention. In some cases, immigration judges have explicitly instructed individuals not to apply for bond until they resolve the pending charge.[272] As one individual detained at Moshannon put it: "People here cannot get bond because they cannot close the criminal case. They cannot close the criminal case because they are stuck at Moshannon and unable to go to court. They cannot get out of Moshannon because they cannot get bond."[273] Consideration of pending charges, then, fuels the cycle of obstruction.

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262. 978 F.3d 842 (2d Cir. 2020).

263. Id. at 847–48.

264. Id.

265. Id.

266. Id.

267. Id.

268. Id.

269. Id.

270. Id.

271. Id.

272. See, e.g., Declaration of C.J.W. ¶ 19, Doe v. Dep't of Homeland Sec., No. 3:24-cv-00259 (W.D. Pa. filed Oct. 16, 2024), Dkt. No. 31-3 (on file with the *Columbia Law Review*).

273. Declaration of A.M. ¶ 12, *Doe*, No. 3:24-cv-00259 (W.D. Pa. filed Oct. 16, 2024), Dkt. No. 31-8 (on file with the *Columbia Law Review*).

Second, immigration judges may also consider pending charges to deny forms of relief from removal, resulting in the "ultimate irreparable harm—deportation."[274] Immigrants who are deemed to be removable from the United States may seek relief from removal through various forms, such as asylum,[275] cancellation of removal,[276] and adjustment of status.[277] Nearly all forms of relief from removal are discretionary.[278] This means that to be granted relief, an individual must demonstrate to an immigration judge that they meet all of the statutory eligibility requirements, and that they warrant a favorable exercise of discretion. For example, to be eligible for adjustment of status to legal permanent resident, the Immigration and Nationality Act (INA) requires that the applicant (1) was inspected and admitted or paroled upon entry to the United States; (2) has an immigrant visa immediately available to them; (3) is not subject to any enumerated bars under INA section 245(c); and (4) is admissible, meaning they have not been convicted of any offenses or engaged in any other conduct that would render them inadmissible under INA section 212(a).[279] In addition to meeting these statutory requirements, an individual must persuade the immigration judge that they warrant a favorable exercise of discretion.[280] As a result, an individual who is statutorily eligible for relief may nonetheless be denied relief as a matter of discretion—a phenomenon that Professor Shoba Sivaprasad Wadhia aptly characterizes as "Darkside Discretion."[281]

Unresolved criminal proceedings may be considered in these discretionary determinations. In *Thomas*, the BIA held that immigration judges may consider criminal conduct that has not culminated in a final conviction in determining whether an individual warrants discretionary relief.[282] It bears noting that several weeks later in *Arreguin de Rodriguez*,[283] the BIA imposed some narrow restrictions on consideration of such evidence. In *Arreguin de Rodriguez*, the BIA clarifies that while immigration

274. De Jesus Martinez v. Nielsen, 341 F. Supp. 3d 400, 409 (D.N.J. 2018).

275. 8 U.S.C. § 1158(b)(1)(A) (2018).

276. Id. § 1229b.

277. Id. § 1255(a).

278. See, e.g., id. § 1158(b)(1)(A) ("The Secretary of Homeland Security or the Attorney General may grant asylum . . . ."); id. § 1229b ("The Attorney General may cancel removal . . . ."); id. § 1255(a) ("The status of [a noncitizen] . . . may be adjusted by the Attorney General, in his discretion . . . .").

279. Id. § 1255; see also Veronica Garcia, Immigrant Legal Res. Ctr., Adjustment of Status Eligibility 2 (2024), https://www.ilrc.org/sites/default/files/2024-10/Family-Based%20Adjustment%20of%20Status%20Options.pdf [https://perma.cc/39SY-E5KB].

280. 8 U.S.C. § 1255(a).

281. Shoba Sivaprasad Wadhia, Darkside Discretion in Immigration Cases, 72 Admin. L. Rev. 367, 369–70 (2020) (proposing that Congress eliminate discretion in immigration adjudication or create a rebuttable presumption in favor of noncitizens who have met the statutory criteria for relief).

282. Thomas, 21 I. & N. Dec. 20, 23 (B.I.A. 1995).

283. Arreguin de Rodriguez, 21 I. & N. Dec. 38 (B.I.A. 1995).

judges may consider nonfinal criminal interactions, immigration judges may not give *substantial weight* to *uncorroborated* police reports and charges.[284] Outside of the narrow *Arreguin de Rodriguez* exception, however, immigration adjudicators can, and regularly do, consider pending charges to deny relief.[285] Discretionary denials of relief are difficult to challenge because of jurisdictional hurdles.[286] As a result, an individual who is statutorily eligible for relief may be denied relief and deported based at least in part on a pending charge.

Revisiting Ramirez's case is illustrative both of how unresolved criminal proceedings may be used to deport an individual and the ways such deportation fuels the cycle of obstruction.[287] Ramirez was statutorily eligible for adjustment of status to legal permanent resident after his mother naturalized, but the immigration judge denied him relief as a matter of discretion based solely on a pending criminal indictment and associated police report.[288] That pending indictment, however, had languished in criminal court for over two years without resolution because ICE detained Ramirez in immigration detention and repeatedly refused to comply with state writs ordering that he be produced to attend criminal proceedings.[289] ICE subsequently deported Ramirez while he sought review of that denial before the First Circuit.[290] More than a year after Ramirez was deported, the First Circuit held that the immigration agency had erred in denying him relief based solely on the pending indictment and remanded the case to the agency to reconsider his application for relief.[291] Moreover, the criminal court eventually dismissed the sole charge

284. Id. at 42 ("Just as we will not go behind a record of conviction to determine the guilt or innocence of [a noncitizen], so we are hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein."). Numerous circuits have confirmed that *Arreguin de Rodriguez* prohibits immigration judges from giving substantial weight to an uncorroborated police report or charge. See Rosa v. Garland, 114 F.4th 1, 16–22 (1st Cir. 2024) (listing cases).

285. See *Rosa*, 114 F.4th at 16–22 (explaining that the immigration judge and BIA denied discretionary relief based on an unresolved charge); Garcia Rogel v. Garland, No. 21-1163, 2022 WL 4244508, at *1 (4th Cir. Sep. 15, 2022) (per curiam) (same); Toomer v. Att'y Gen. U.S., 810 F. App'x 147, 149–50 (3d Cir. 2020) (same); Avila-Ramirez v. Holder, 764 F.3d 717, 719 (7th Cir. 2014) (same); Billeke-Tolosa v. Ashcroft, 385 F.3d 708, 712–13 (6th Cir. 2004) (same); cf. Doyduk v. Att'y Gen. U.S., 66 F.4th 132, 134 (3d Cir. 2023) ("[T]he language of the Immigration and Nationality Act . . . allows [immigration judges] to consider facts underlying expunged charges.").

286. See 8 U.S.C. § 1252(a)(2)(B) (2018); Wilkinson v. Garland, 144 S. Ct. 780, 792 (2024) ("As this Court said in *Guerrero-Lasprilla* and reiterated in *Patel*, [§ 1252(a)(2)'s jurisdiction-stripping] provisions still operate to exclude 'agency fact-finding from review.'" (citing Patel v. Garland, 142 S. Ct. 1614, 1623 (2022)) (quoting Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1072 (2020))).

287. See *Rosa*, 114 F.4th at 4–5; see also supra note 13 and accompanying text.

288. *Rosa*, 114 F.4th at 6–7.

289. Id. at 22 n.9; see also Petitioner's Opening Brief, *Rosa*, 114 F.4th 1 (No. 22-1523), Dkt. No. 00117950249.

290. *Rosa*, 114 F.4th at 8.

291. Id. at 22.

against him because he was unable to meaningfully defend against the charge from abroad.[292] But Ramirez remains deported, unable to return to the United States.

Once a noncitizen is deported—even if wrongly so, as in Ramirez's case—it is exceedingly difficult for them to return to the United States to appear in criminal proceedings.[293] Among numerous challenges, individuals must navigate a bureaucratic system of requesting that ICE facilitate their return,[294] which is often denied, and for individuals seeking to apply for a visa, criminal history is one of the frequent grounds for denying nonimmigrant visas.[295] Kilmar Abrego Garcia's high-profile case is a poignant example of the obstacles noncitizens may face in reversing an unlawful deportation. On March 15, 2025, ICE deported Abrego Garcia to El Salvador even though it was undisputed, which the government itself admitted, that the deportation was illegal—an immigration judge had previously granted Abrego Garcia withholding of removal, a form of relief that forbade the government from deporting him to El Salvador.[296]

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292. Commonwealth v. Ramirez, No. 1:18-cv-12452 (Mass. Super. Ct. Feb. 27, 2024) (on file with the *Columbia Law Review*).

293. See, e.g., Goddard v. Nielsen, No. 8:18-cv-1134-T-36AAS, 2018 WL 11447437, at *1 (M.D. Fla. Dec. 6, 2018) (explaining that after the individual was deported, the state judge issued a writ of habeas corpus ad testificandum compelling ICE to produce the deported individual to criminal proceedings, but "ICE 'refused to cooperate,'" forcing the state court to continue the criminal hearings at least six times).

294. Notably, the government maintains that it will pay for certain noncitizens who were wrongfully deported to be returned to the United States. See, e.g., FAQs: Facilitating Return for Lawfully Removed Aliens, ICE, https://www.ice.gov/remove/facilitating-return [https://perma.cc/5V4D-XB2V] (last updated Feb. 2, 2024); see also Oral Argument at 15:50–17:20, Peguero Vasquez v. Garland, 80 F.4th 422 (2d Cir. 2023), https://www.courtlistener.com/audio/82792/puguera-vasquez-v-garland/ (on file with the *Columbia Law Review*) (statement of Craig Newell, Trial Att'y, DOJ) (claiming that when a lawful permanent resident is wrongfully deported "the government facilitates his or her return to the country," including paying for their return). In practice, however, it is exceedingly difficult for individuals to return to the United States, even after successfully appealing a deportation order. See, e.g., N.Y.U. Sch. of L. Immigrant Rts. Clinic, Victory Denied: After Winning on Appeal, an Inadequate Return Policy Leaves Immigrants Stranded Abroad 19–28 (2014), https://www.law.nyu.edu/sites/default/files/upload_documents/Victory%20Denied.pdf [https://perma.cc/VLH2-H8VR]; Nat'l Laws. Guild, N.Y.U. Immigrant Rts. Clinic & Am. Immigr. Council, Practice Advisory: Return to the United States After Prevailing on a Petition for Review or Motion to Reopen or Reconsider 4–7 (2012), https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/return_to_the_united_states_after_prevailing_on_a_petition_for_review_or_motion_to_reopen_or_reconsider.pdf [https://perma.cc/VRT4-ATKF].

295. See Corrected Brief of Amici Curiae ACLU of Mass. & the Comm. for Pub. Couns. Servs., Immigr. Impact Unit at 20–21, Baez v. Commonwealth, 231 N.E.3d 932 (Mass. 2024) (No. SJC-13467) [hereinafter ACLU & CPCS Amicus Brief].

296. Noem v. Abrego Garcia, 145 S. Ct. 1017, 1018 (2025); see also Devlin Barrett, Justice Dept. Leader Suggested Violating Court Orders, Whistle-Blower Says, N.Y. Times (June 24, 2025), https://www.nytimes.com/2025/06/24/us/politics/justice-department-emil-bove-trump-deportations-reuveni.html (on file with the *Columbia Law Review*) (reporting that the DOJ attorney who informed the court that Abrego Garcia had been

Despite this indisputable fact, it took a district court order mandating return, a Supreme Court affirmance, a subsequent district court order mandating return, and nearly three months, during which Abrego Garcia was incarcerated in El Salvador, before the government brought him back to the United States,[297] where he remained in state custody for months to prevent ICE from immediately redetaining and removing him.[298] While Abrego Garcia's case captured national attention, in part because of the firestorm of litigation involved in seeking his return and the blatant illegality of the deportation in the first instance, many individuals are wrongfully removed in the shadows and do not have access to counsel to fight for their return. Individuals like Ramirez, for example, are deported while appealing an order of removal, and even if they are successful on appeal—meaning they should never have been deported—it is exceedingly difficult for that individual to return to the United States to attend criminal proceedings or otherwise.[299]

Deportation, then, fuels cyclical obstruction. The state criminal court in Ramirez's case articulated the conundrum succinctly:

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deported in error was fired and filed a whistleblower complaint documenting internal discussions about deportations).

297. On April 4, the U.S. District Court for the District of Maryland ordered the government to return Abrego Garcia to the United States within three days. Abrego Garcia v. Noem, No. 8:25-cv-00951-PX, 2025 WL 1024654 (D. Md. Apr. 4, 2025). The government appealed, and the Supreme Court administratively stayed the order pending a decision on the merits. *Abrego Garcia*, 145 S. Ct. at 1018. On April 10, the Supreme Court affirmed the district court's order requiring that the government "facilitate" his return but remanded the case for clarification on what was needed to "effectuate" his return. Id. (internal quotation marks omitted) (quoting *Abrego Garcia*, 2025 WL 1024654, at *1). On remand that same day, the district court explicitly ordered the government to "take all available steps to facilitate the return of Abrego Garcia to the United States as soon as possible." Abrego Garcia v. Noem, No. 8:25-cv-00951-PX, 2025 WL 1085601, at *1 (D. Md. Apr. 10, 2025). The Fourth Circuit denied the government's efforts to stay the order. Abrego Garcia v. Noem, No. 25-1404, 2025 WL 1135112 (4th Cir. Apr. 17, 2025). Throughout these proceedings, the government refused to take the necessary steps to return Abrego Garcia after erroneously claiming that he was a member of the gang MS-13 and that his return would pose a threat to public safety. See, e.g., Defendant's Memorandum of Law in Opposition to Plaintiffs' Emergency Motion for Temporary Restraining Order at 18–19, *Abrego Garcia*, No. 8:25-cv-00951-PX (D. Md. Apr. 4, 2025), Dkt. No. 11. The government did not return Abrego Garcia to the United States until June 6—eighty-three days after he was illegally deported and during which time he was incarcerated in El Salvador. Suzanne Gamboa, Tom Winter & Chloe Atkins, Kilmar Abrego Garcia Has Been Returned to the U.S. to Face Federal Criminal Charges, NBC News (June 6, 2025), https://www.nbcnews.com/news/us-news/kilmar-abrego-garcia-was-mistakenly-deported-el-salvador-will-face-fed-rcna211514 (on file with the *Columbia Law Review*) (last updated June 7, 2025).

298. Jacob Rosen & Melissa Quinn, Judge Orders Kilmar Abrego Garcia Released From Criminal Custody, Second Judge Bars ICE From Immediately Detaining Him, CBS News, https://www.cbsnews.com/news/kilmar-abrego-garcia-ordered-released-criminal-custody-ice-barred-from-immediately-detaining-him/ [https://perma.cc/7AVA-CFB5] (last updated July 23, 2025).

299. See supra notes 293–294 and accompanying text.

> [H]e is presumed innocent of this indictment, yet he has been deported by federal authorities strictly because of it, and he is now prohibited from returning to the United States to defend against the very charge that caused his deportation in the first place. He is in the precarious position of never being able to return to the United States to defend against these allegations, which will not only remain open, but will continue to prevent him from returning to address them.[300]

Cyclical obstruction is significant for two reasons. First, it demonstrates that the interaction between the immigration system and criminal system when a noncitizen defendant is detained is one of obstruction, not just encroachment.[301] Understanding the cyclical and obstructionist nature is important, as it illustrates how a noncitizen defendant faces not just immigration harms but in fact how those immigration harms fuel the criminal law harms discussed in section III.A. We should care about these harms as a matter of rule of law, as Professor Amy Kimpel argues,[302] and also as a matter of individual rights. Second, understanding the *cause* of this cycle as an evidentiary/adjudicatory problem—that is, immigration adjudicators are able to consider pending charges against an individual—helps to identify potential solutions to the problem, as discussed further in Part IV.

In short, the very criminal matter that an individual is unable to resolve because ICE is detaining them is then used against them to perpetuate detention and, eventually, deportation. Absent a system of accountability, ICE may continue to obstruct criminal court access without consequence to immigration or state prosecutors, but with severe consequences—of constitutional and humanitarian proportions—to the noncitizen defendant stuck in detention and later deported.

C. *Immigration Design: Jailor, Prosecutor, and Judge*

Relatedly, the accountability deficit and ICE's obstruction of court access reveal foundational problems with our immigration system as a matter of institutional design.[303] Regarding institutional design, Professor Rachel Barkow has effectively explained that the "model of internal separation" in administrative law provides that structural separation and

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300. Commonwealth v. Ramirez, No. 1:18-cv-12452, at 5 (Mass. Super. Ct. Feb. 27, 2024) (on file with the *Columbia Law Review*).

301. See supra notes 40–44 and accompanying text.

302. See Kimpel, supra note 43, at 242 (concluding that federal courts risk a crisis of legitimacy if immigration policy remains unchanged).

303. See Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons From Administrative Law, 61 Stan. L. Rev. 869, 873–74, 887 (2009) (drawing on principles of institutional design from administrative law to recommend ways in which "federal prosecutors' offices could be designed to curb abuses of power through separation-of-functions requirements and greater attention to supervision"); supra note 44 (citing a growing body of immigration scholarship examining immigration law through the lens of institutional design).

supervision within an agency "is a critically important means of checking agencies and holding bureaucrats accountable."[304] But obstruction of court access reveals the structural jeopardy within the immigration apparatus and the lack of meaningful checks when the jailor and immigration prosecutor are the same entity, which is, in turn, commingled with the judge.

As outlined in Part I, ICE is tasked with determining who to detain and the conditions of that confinement, including whether to produce an individual to criminal court proceedings.[305] ICE also represents the government in immigration court proceedings seeking to detain and deport individuals.[306] ICE, in other words, serves as both the jailor and immigration prosecutor. These dual roles pose structural concerns that should be glaring in light of ICE obstruction of court access and the accountability gap that has been the subject of this Article thus far.[307] ICE, as the jailor, either affirmatively or effectively obstructs an individual from appearing in criminal court to resolve pending charges against them; then ICE, as the immigration prosecutor, uses the fact of the pending charge in immigration proceedings to seek continued detention and deportation. ICE, in effect, manufactures evidence that can result in, or prevents noncitizen defendants from presenting exculpatory evidence that would weigh against, prolonged detention, deportation, and the continued obstruction of constitutional criminal law rights.

If this evidence were considered by a neutral adjudicator in bond and removability determinations, ICE's ability to effectively manufacture adverse evidence, intentional or not, would still be troubling but mitigated. But immigration scholars have persuasively questioned whether immigration judges are truly independent.[308] A brief history of the current immigration apparatus helps to contextualize the concern. For much of U.S. history, jailor, prosecutor, and judge were housed under the same agency. In 1933, Congress established the Immigration and Naturalization Service (INS) to handle all immigration matters.[309] The INA of 1952 established "special inquiry officers"—which would later be called immigration judges[310]—to adjudicate deportation cases under the

304. Barkow, supra note 303, at 874, 887.

305. See supra section I.A.

306. See supra section I.A.

307. Cf. Denezpi v. United States, 142 S. Ct. 1838, 1855 (2022) (Gorsuch, J., dissenting) (expressing concern that, in the context of double jeopardy, the "[f]ederal agency officials played every meaningful role in his case: legislator, prosecutor, judge, and jailor").

308. See supra note 45 and accompanying text.

309. Exec. Off. for Immigr. Rev., Evolution of the U.S. Immigration Court System: Pre-1983, DOJ, https://www.justice.gov/eoir/evolution-pre-1983 [https://perma.cc/257X-6BMK] [hereinafter EOIR, Evolution Pre-1983] (last updated Apr. 30, 2015). Originally established under the Department of Labor, INS was transferred to DOJ under the authority of the Attorney General in 1940 during World War II. Id.

310. In 1973, a federal regulation was promulgated permitting special inquiry officers to use the title of immigration judge and wear judicial robes. 38 Fed. Reg. 8590 (Apr. 4,

operational supervision of INS District Directors.[311] Jailor, prosecutor, and adjudicator remained under the operational umbrella of the INS until 2002.[312] It was not until 2002 that the adjudicatory function and the detention and prosecution functions were structurally separated. The Homeland Security Act of 2002[313] abolished the INS and transferred the detention and prosecution functions from the DOJ to the newly established ICE and DHS, while maintaining the adjudicatory function within the DOJ.[314] At a surface level, then, this shift would seem to achieve at least some separation of powers.

Yet, scholars have effectively argued that the separation of ICE and immigration judges into DHS and DOJ has far from resolved the commingling of the adjudicatory and enforcement functions.[315] To begin, DHS and DOJ are both law enforcement agencies. As the National Association of Immigration Judges cautioned: DOJ, which governs immigration judges, is "an agency that is closely aligned with the DHS and shares its primary mission of law enforcement rather than objective adjudication."[316] In a 2019 address to a newly appointed class of immigration judges, then–Deputy Attorney General Rod J. Rosenstein cautioned that immigration judges are "member[s] of the executive branch," and as such they must "follow lawful instructions from the Attorney General, and . . . share a duty to enforce the law."[317] Political appointees within DOJ face similar pressures, Professor Gerald Neuman posits, because they are held "politically accountable for their success in creating the reality or appearance of border control."[318] Moreover, immigration adjudicators, who, like ICE, are governed by the executive

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1973) ("[T]he terms 'immigration judge' and 'special inquiry officer' may be used interchangeably.").

311. Sidney B. Rawitz, From *Wong Yang Sung* to Black Robes, 65 Interpreter Releases 453, 454 (1988); EOIR, Evolution Pre-1983, supra note 309.

312. For a robust history of the evolution of immigration adjudication and enforcement, see Rawitz, supra note 311; see also 48 Fed. Reg. 8038, 8039 (Feb. 25, 1983) (codified at 8 C.F.R. pts. 1, 3, 100) (creating the Executive Office for Immigration); Holper, Imitation Judges, supra note 45, at 1312 ("In 1983, the adjudicators were officially moved out of the INS, with the creation of the Executive Office for Immigration Review (EOIR).").

313. Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in relevant part at 6 U.S.C. §§ 101–681g (2018)).

314. Mark Dow, American Gulag: Inside U.S. Immigration Prisons 11 (2004); see also EOIR, Evolution Pre-1983, supra note 309.

315. See supra note 45 and accompanying text.

316. Holper, Imitation Judges, supra note 45, at 1314 (internal quotation marks omitted) (quoting Dana Leigh Marks, Still a Legal "Cinderella"? Why the Immigration Courts Remain an Ill-Treated Stepchild Today, Fed. Law., Mar. 2012, at 25, 29).

317. Rod J. Rosenstein, Deputy Att'y Gen., Opening Remarks at Investiture of 31 Newly Appointed Immigration Judges (Mar. 15, 2019), https://www.justice.gov/archives/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-opening-remarks-investiture-31-newly [https://perma.cc/4ASQ-YBEG].

318. Gerald L. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 1024 (1998).

branch, are susceptible to executive policy imposition and pressure. Consider, for example, performance evaluations imposed under the second Bush Administration, production quotas imposed under the first Trump Administration that required immigration judges to rush through completing seven hundred cases per year while holding a remand rate of under 15%,[319] and performance metrics under the second Trump Administration that require immigration judges to complete 95% of cases within 365 days.[320] Indeed, Professor Stephen Legomsky has warned that the executive branch has begun a "war on independence" on immigration adjudicators,[321] and Professor Mary Holper contends that immigration judges are not neutral arbiters.[322]

The institutional design flaws, then, are twofold and compounding. When the jailor and immigration prosecutor are the same entity, that entity, ICE, may effectively manufacture evidence and then use the resulting unresolved criminal charge against an individual in immigration proceedings, with attendant criminal law and immigration law consequences. When the arbiter who decides whether and how to consider that evidence to prolong detention or order deportation is of questionable independence, those commingled functions are all the more grave.

Even so, the coterminous nature of jailor and immigration prosecutor and commingling of prosecutorial and adjudicatory functions could be ameliorated if there were meaningful alternative "administrative law checks."[323] One of the most fundamental checks in immigration proceedings is the constitutional and statutory right to a meaningful opportunity to be heard and present evidence in immigration proceedings.[324] But this check too proves an empty ritual when the evidence against the noncitizen is an unresolved criminal charge. To be sure, noncitizen defendants are generally given the opportunity to speak to the unresolved charge and associated allegations in immigration court. But many are, understandably, wary of so testifying under oath. Such testimony can be used against an individual in future criminal proceedings, even though immigration court proceedings lack the procedural protections that apply

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319. See Holper, Imitation Judges, supra note 45, at 1315–21 (describing these and other examples of executive encroachment on the neutrality of immigration judges).

320. Memorandum from Sirce E. Owen, Acting Dir., Exec. Off. for Immigr. Rev., to Exec. Off. for Immigr. Rev. Emps. (Sep. 12, 2025), https://www.justice.gov/eoir/media/1413981/dl?inline [https://perma.cc/J6U3-DKG4].

321. Legomsky, War on Independence, supra note 45, at 370.

322. Holper, Imitation Judges, supra note 45, at 1306–13.

323. See Barkow, supra note 303, at 895 (advancing the argument that administrative law checks could remedy bias).

324. See, e.g., Lieu, supra note 202, at 615–23 (discussing the right to a meaningful opportunity to be heard); see also Barkow, supra note 303, at 893–94 (explaining that the Administrative Procedure Act requirement that proceedings be "conducted in an impartial manner" is an alternative check on agency power (internal quotation marks omitted) (quoting 5 U.S.C. § 556(b)(3) (2006))).

in criminal and other civil court contexts.[325] For instance, neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure, which provide protections for what evidence can be admitted and what information is privileged, applies in immigration court, and individuals do not have the right to state-funded counsel.[326] Yet, choosing to remain silent comes at a potential cost. The BIA in *Marques* held that immigration judges may draw an adverse inference from an individual's invocation of the Fifth Amendment right against self-incrimination.[327] Individuals, then, are faced with a proverbial "heads I win, tails you lose" situation: If they invoke their right against self-incrimination, that information may be used against them in immigration court; if they choose to testify, that testimony, fraught with weakened protections, may be used against them in the criminal proceedings they are obstructed from.

Noncitizen defendants stuck in immigration detention, then, are silenced twice over: They are literally silenced by obstruction in criminal court[328] and effectively silenced again in immigration court when the jailor, prosecutor, and judge consider the still-pending criminal charge against them.

This analysis does not presume any nefarious intent on behalf of ICE. It is, rather, a critique of how the institutional design of the immigration apparatus—left unchecked—has severe consequences on both criminal and immigration rights. Part IV turns to creating checks by reassigning accountability.

IV. REASSIGNING ACCOUNTABILITY

Having established the existence of the accountability deficit in ICE obstruction of court access in Part II and the cyclical consequences it imposes on both criminal law and immigration law in Part III, this Article turns to closing that accountability deficit in Part IV. The focus of these recommendations is not on how to directly force ICE to produce noncitizen defendants to criminal court, but rather what should and

325. See Tania N. Valdez, Pleading the Fifth in Immigration Court: A Regulatory Proposal, 98 Wash. U. L. Rev. 1343, 1358 (2021) (describing how the right against self-incrimination is afforded weaker procedural protection in immigration court).

326. Id. at 1358, 1391; see also 8 U.S.C. § 1362 (2018) (providing that immigrants in removal proceedings "shall have the privilege of being represented (at no expense to the Government)").

327. Marques, 16 I. & N. Dec. 314, 316 (B.I.A. 1977); see also Rivera v. Sessions, 903 F.3d 147, 151 (1st Cir. 2018) (noting that drawing a negative inference against an individual for invoking the Fifth Amendment arguably does not violate due process); Garcia-Aguilar v. Lynch, 806 F.3d 671, 676 (1st Cir. 2015) ("[A]n IJ may draw an adverse inference from [a noncitizen's] invocation of the Fifth Amendment during removal proceedings . . . ."); Valdez, supra note 325, at 1358 (arguing for legislative reform to protect the right against self-incrimination in immigration court).

328. See supra section III.A.

should not occur when ICE in fact fails to produce an individual to criminal court.

One natural question, of course, is who is ultimately responsible for production: ICE or the prosecuting state? The answer is perhaps, as Professor Sklansky opines, "blurred."[329] The only court to have explicitly addressed the issue opined in *Doe v. DHS* that because "ICE assumed sole custody for the detainee . . . it is tasked with ensuring detainees' constitutional rights are supported."[330] After all, "[T]he institution with legal and physical custody of an individual is best situated to ensure the individual's civil rights remain intact."[331]

But the inquiry, rethought, may in fact be much simpler. Instead of who *ought* to be held accountable, the pertinent inquiry is who *ought not* be held accountable. That answer—as this Article has demonstrated—is clearer: the noncitizen defendant stuck in detention.[332] Thus, regardless of whether the immigration or prosecuting authorities are responsible for producing an individual to court, accountability mechanisms must be put in place under both systems to ensure that any breakdowns, intentional or not, do not come at the expense of the individual whose rights are jeopardized.

The first and perhaps most obvious solution is that ICE should release the individual from immigration detention. Short of such release, this Part proposes a two-part remedy to close the accountability deficit. The two-part nature of the remedy is necessary both because individuals suffer consequences in both criminal law and immigration law and, crucially, because those consequences are cyclical, as argued in Part III. On the criminal law side, this Article proposes that if the prosecuting state is unable to produce the immigrant to their criminal proceedings, those proceedings must be dismissed. On the immigration law side, immigration judges should not be permitted to consider pending criminal proceedings and related allegations when ICE obstructs the noncitizen defendant from appearing in criminal court to resolve those proceedings.

A. *Criminal Law Accountability*

Accountability must flow in criminal law proceedings when a noncitizen defendant is stuck in immigration detention. This Article proposes that if a noncitizen defendant is unable to appear in criminal

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329. Sklansky, supra note 28, at 218.

330. Doe v. U.S. Dep't of Homeland Sec., No. 3:24-cv-00259-SLH-PLD, 2025 WL 360534, at *6 (W.D. Pa. Jan. 31, 2025).

331. Id.

332. See, e.g., United States v. Castro-Guzman, No. CR-19-2992-TUC-CKJ (LCK), 2020 WL 3130395, at *5 (D. Ariz. May 11, 2020) (explaining that when ICE deports an individual who is facing federal prosecution, the fact that the "separate agencies . . . do not communicate and cooperate[] cannot serve to deprive a defendant of his rights under the Constitution" (internal quotation marks omitted) (quoting United States v. Lutz, No. CR-19-00692-001-TUC-RM (BGM), 2019 WL 5892827, at *5 (D. Ariz. Nov. 12, 2019))).

court because of obstruction of court access, the criminal charges against the individual must be dismissed. This proposal is supported by several principles.

First, dismissal of charges is the proper remedy to establish accountability when an individual is unable to appear in criminal court because they are stuck in immigration detention. As the Supreme Court has made clear, dismissal is the appropriate remedy when an individual's constitutional or statutory right is violated.[333] While dismissal may seem, as the *Barker* Court opined, an "unsatisfactorily severe remedy" because an individual who "may be guilty of a serious crime will go free, without having been tried," "it is the only possible remedy" for constitutional violations.[334] The seeming steepness of the remedy is a reflection of and proportional to the magnitude of the individual constitutional and procedural rights at jeopardy.[335]

Legislators implemented precisely this assignment of responsibility in legislating accountability through the Interstate Agreement on Detainers. Under the Agreement, the penalty for failing to produce a detained individual to criminal proceedings is that the prosecuting state must dismiss charges against the individual, no matter whether the custodial or prosecuting jurisdiction is at fault.[336] In other words, as practitioner Janet Necessary aptly pointed out, when the prison fails to produce a detained individual, the Agreement effectively holds the criminal prosecutor vicariously liable.[337]

Second, requiring dismissal of charges protects the integrity of the criminal process from both a defendants'-rights and victims'-rights perspective. To begin, requiring dismissal of charges acts as a deterrent, incentivizing government entities to hold each other accountable to ensure that individuals are produced to their criminal hearings in an expeditious manner.[338] This deterrence protects the rights of criminal

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333. See, e.g., Strunk v. United States, 412 U.S. 434, 439–40 (1973) (ordering the lower court to set aside the judgment, vacate the sentence, and dismiss the indictment because of a speedy trial violation); Dickey v. Florida, 398 U.S. 30, 38 (1970) (remanding to vacate judgment and dismiss charges when the government violated defendant's speedy trial right); 5 Crim. Proc., supra note 161, § 18.1(e) (explaining that the Supreme Court has repeatedly held that the proper remedy for a violation of an individual's speedy trial right is dismissal of the charge).

334. Barker v. Wingo, 407 U.S. 514, 522 (1972); see also *Strunk*, 412 U.S. at 439–40 ("[S]uch severe remedies are not unique in the application of constitutional standards.").

335. See supra section III.A.

336. See supra section II.A.2.

337. Necessary, supra note 173, at 1033.

338. See, e.g., United States v. Barrera-Moreno, 951 F.2d 1089, 1091 (9th Cir. 1991) (explaining that courts may dismiss an indictment in an exercise of their supervisory powers "to remedy a constitutional or statutory violation; to protect judicial integrity . . . ; or to deter future illegal conduct"); United States v. Coronado-Vejar, No. CR-19-01962-001-TUC-RM (BGM), 2020 WL 2782502, at *3 (D. Ariz. May 29, 2020) (dismissing charges with prejudice in part to "deter ICE" from detaining a noncitizen in violation of the BRA while they face

defendants by ensuring that individuals are able to have their day in court and meaningfully answer charges against them. It further protects defendants' rights by ensuring that the consequence of obstruction of court access falls on the government, not on the individual stuck in detention. As Justice William Brennan opined in *Dickey* in the speedy trial context, if the defendant did not cause the delay—as is the case when a noncitizen defendant is stuck in detention—"the responsibility for [the delay] will almost always rest with one or another governmental authority."[339] In such cases, the consequences must then flow to those government authorities, not the individual. Moreover, ensuring that a noncitizen defendant can have their day in court further protects the interests of the victims of the alleged offense in obtaining closure and ensuring that charges are prosecuted in a timely manner.[340] It also serves the interests of victims in finality: As Congress recognized in enacting the Agreement, ensuring that defendants were able to appear in court in a timely manner "diminish[ed] the possibility of convictions being vacated or reserved because of a denial of" constitutional rights.[341]

The concerns surrounding the integrity of the criminal process are all the more salient given the cyclical interaction between the criminal and immigration legal systems.[342] When a noncitizen defendant is obstructed from attending criminal court proceedings, they suffer the same criminal law consequences that a citizen defendant suffers. But the noncitizen defendant suffers even greater jeopardy: The unresolved criminal charge can and is often used against them in immigration proceedings to continue detaining them or to deport them, either of which perpetuates the obstruction of criminal justice.[343] Put differently, when noncitizen defendants are cyclically obstructed from answering charges against them, they are, in effect, "guilty until proven innocent,"[344] with no opportunity to prove their innocence.

Having established that dismissal of charges is the proper remedy, the mechanism for such dismissal may take several forms. One possibility—albeit an unlikely one—is for Congress to legislatively impose accountability. Congress could do so by expanding the scope of the

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federal prosecution (internal quotation marks omitted) (quoting United States v. Lutz, No. CR-19-00692-001-TUC-RM (BGM), 2019 WL 5892827, at *5 (D. Ariz. Nov. 12, 2019))).

339. Dickey v. Florida, 398 U.S. 30, 51 (1970) (Brennan, J., concurring).

340. See, e.g., Blanche Bong Cook, Stepping Into the Gap: Violent Crime Victims, the Right to Closure, and a Discursive Shift Away From Zero Sum Resolutions, 101 Ky. L.J. 671, 678–79 (2013) (proposing that courts apply "speedy trial analysis to a victim's right to finality"); see also Mary Margaret Giannini, The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement, 9 Drexel L. Rev. 43, 62–66 (2016) (tracing the evolution of the victims' rights movement).

341. S. Rep. No. 91-1356, at 2 (1970).

342. See supra Part III.

343. See supra section III.B.

344. Joseph Goldstein, Note, Guilty Until Proven Innocent: The Failure of DNA Evidence, 12 Drexel L. Rev. 597, 608 (2020) (internal quotation marks omitted).

Interstate Agreement on Detainers to include immigration detention or by enacting similar interstate legislation that requires dismissal as the consequence of obstruction of court access. Legislated accountability would bind ICE, as a federal agency, to honor requests for production to state criminal court proceedings as a matter of law rather than comity. It would further ensure that the consequence of any failure to bring an individual to court is dismissal of the underlying charges.[345]

Admittedly, obtaining congressional support for any form of legislated accountability may be a tall order in the current political climate.[346] Indeed, in the current era of anti-immigrant sentiment and congressional gridlock, immigration-related lawmaking has eroded, rather than protected, immigrants' rights. In January 2025, Congress enacted the Laken Riley Act, which expands the scope of mandatory detention.[347] In July 2025, Congress passed and President Trump signed into law a budget reconciliation bill[348] that grossly increases funding for immigration enforcement, allocating a total of $170 billion for the Administration's immigration agenda that is set to double immigration detention capacity to more than 100,000 beds and increase border security efforts.[349] Nonetheless, lawmakers may perhaps be moved to legislate because, as this Article has shown, ICE obstruction of court access is different: The rights at stake implicate not just the immigration system, but the criminal legal system as well. Legislating accountability thus protects the integrity of the criminal justice system, with benefit to defendants' and victims' rights.

Alternatively, criminal prosecutors and courts may also dismiss charges. When the prosecuting jurisdiction, despite its best efforts, is unable to produce a detained individual to criminal proceedings, prosecutors can and should exercise prosecutorial discretion to dismiss charges.[350] Such dismissals would conserve judicial resources, and

345. See Necessary, supra note 173, at 1031 ("The purpose of the [Interstate Agreement on Detainers] is to provide a legal basis for the detainer, so that the warden honors the detainer or request as a statutory duty rather than as a matter of comity.").

346. See Marc Jacob, Barton Lee & Gabriele Gratton, Is a Gridlocked Congress Causing More Polarization?, ProMarket (June 26, 2024), https://www.promarket.org/2024/06/26/is-a-gridlocked-congress-causing-more-polarization/ [https://perma.cc/8FPY-9G3Y]; Joe LoCascio, Benjamin Siegel & Ivan Pereira, 118th Congress on Track to Become One of the Least Productive in US History, ABC News (Jan. 10, 2024), https://abcnews.go.com/Politics/118th-congress-track-become-productive-us-history/story?id=106254012 [https://perma.cc/D66W-9MCC].

347. Laken Riley Act, Pub. L. No. 119-1, 139. Stat. 3 (2025) (codified in scattered sections of 8 U.S.C.).

348. One Big Beautiful Bill Act, Pub. L. No. 119-21, 139 Stat. 72 (2025) (codified in scattered titles of U.S.C.).

349. Lauren-Brooke Eisen, Budget Bill Massively Increases Funding for Immigration Detention, Brennan Ctr. Just. (July 3, 2025), https://www.brennancenter.org/our-work/analysis-opinion/budget-bill-massively-increases-funding-immigration-detention [https://perma.cc/Y5SV-7Z7V]; Kim, supra note 8.

350. See Leslie C. Griffin, The Prudent Prosecutor, 14 Geo. J. Legal Ethics 259, 263–74, 287–307 (2001) (examining the role and reform of prosecutorial discretion).

prosecutors have sought dismissal in cases in which ICE deports a defendant.[351] Absent prosecutorial discretion, state[352] and federal[353] courts can and should dismiss the charges upon motion by either party. When possible, state high courts should establish clear guidance[354] to grant motions to dismiss when an individual cannot be produced to criminal court proceedings because they are detained in ICE custody.[355] Admittedly, state courts may be reticent to affirmatively issue such guidance given the current sociopolitical climate, particularly when judges face elections; the Massachusetts Supreme Judicial Court, for example, has thus far sidestepped a call from advocates to issue guidance to dismiss charges.[356] That said, court-issued guidance would certainly be more expedient than federal or state legislation, and courts may be motivated to adopt such guidance to uphold noncitizen defendants' constitutional rights in criminal court.[357] By way of example, albeit on the federal level

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351. See, e.g., United States v. Ferreira-Chavez, No. 1:20-cr-00145-BLW, 2021 WL 602822, at *2 n.1 (D. Idaho Feb. 12, 2021) ("Typically, where the defendant is deported before criminal proceedings are concluded, the Government moves to dismiss the indictment."); United States v. Rojo-Alvarado, No. CR-19-00257-PRW, 2019 WL 4482712, at *1 (W.D. Okla. Sep. 18, 2019) (requesting dismissal of the indictment without prejudice because DHS deported the defendant); United States v. Alvarado-Velasquez, 322 F. Supp. 3d 857, 859 (M.D. Tenn. 2018) (requesting dismissal without prejudice when the defendant's removal was in process).

352. See, e.g., Commonwealth v. Balliro, 433 N.E.2d 434, 438 (Mass. 1982) (noting that state court judges have "the inherent right in [their] discretion" to determine that charges should be dismissed); see also Mass. R. Crim. P. 36(c) (requiring dismissal of charges upon the defendant's motion when the prosecuting attorney was not reasonably diligent in bringing the defendant to trial and such conduct prejudiced the defendant).

353. See, e.g., United States v. Hasting, 461 U.S. 499, 505 (1983) (explaining that, "'[g]uided by considerations of justice,' and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress," including "implement[ing] a remedy for [the] violation of recognized rights" (citation omitted) (quoting McNabb v. United States, 318 U.S. 332, 341 (1943))); United States v. Barrera-Moreno, 951 F.2d 1089, 1092 (9th Cir. 1991) (explaining that "[d]ismissal is appropriate when the investigatory or prosecutorial process has violated a federal constitutional or statutory right and no lesser remedial action is available").

354. For example, Massachussets law gives the Supreme Judicial Court of Massachusetts the power of "general superintendence [over] all courts of inferior jurisdiction," in the state, which permits the court to "issue all writs and processes to such courts . . . which may be necessary to the furtherance of justice and to the regular execution of the laws." Mass. Gen. Laws Ann. ch. 211, § 3 (West 2025).

355. See, e.g., ACLU & CPCS Amicus Brief, supra note 295, at 34 (urging the Massachusetts Supreme Judicial Court to "fashion a clear remedy" to the problem of ICE's obstruction of court access that would authorize lower courts to dismiss without prejudice with limited exceptions).

356. See id.; see also Baez v. Commonwealth, 231 N.E.3d 932, 932–34 (Mass. 2024) (affirming a criminal charge without addressing a request from amicus curiae to issue guidance to dismiss charges when an individual is unable to attend criminal proceedings due to immigration enforcement).

357. Non-uniform adoption of such guidance by some state high courts but not others may lead to a patchwork across the country, in which whether a detained noncitizen defendant's charge is dismissed depends on the charging state. While uniform adoption

where judges do not face elections, the U.S. District Court of Maryland issued a standing order in May 2025 enjoining the federal government from deporting any noncitizen who filed a writ of habeas corpus within the district for two business days.[358] This standing order, which the government challenged,[359] was issued by the district in response to increased federal deportations of noncitizens seeking relief in federal court and demonstrates that courts may act swiftly to establish jurisdiction-wide relief for noncitizens even amid broad anti-immigrant sentiment.

To be sure, dismissing the charge does not entirely eliminate the possibility that ICE may still attempt to use, and immigration judges may consider, a dismissed charge against an individual in immigration proceedings.[360] Nonetheless, dismissal is still the proper remedy because, from a criminal justice perspective, it protects a noncitizen defendant stuck in ICE detention from continued violation of their constitutional rights in criminal court. Moreover, in immigration proceedings, a dismissed charge will certainly be viewed more favorably than one that is still pending. In any event, the outside possibility that ICE and immigration judges may still use dismissed charges against a noncitizen defendant stuck in immigration detention is all the more reason to couple this proposal for criminal law accountability with immigration law accountability, as discussed next.

B. *Immigration Law Accountability*

Accountability must flow from the immigration system as well. As Part III demonstrates, problems at the criminal–immigration intersection abound as a matter of evidence and adjudication—that is, how immigration judges use unresolved charges against an individual to fuel cyclical obstruction—and as a matter of institutional design—that is, the lack of meaningful checks on abuse of discretion within the Agency. This Article proposes a solution that addresses these dual concerns: Immigration judges may consider unresolved or dismissed criminal matters and associated allegations in discretionary determinations *only if* they first determine that ICE properly produced the individual to criminal

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across the country would certainly be the ideal, such a patchwork would hardly be out of the norm: States already have non-uniform criminal laws.

358. Standing Order 2025-01, No. 00-308 (D. Md. filed May 21, 2025).

359. See Complaint, United States v. Russell, No. 1:25-cv-02029-CJC (D. Md. Aug. 26, 2025), Dkt. No. 1.

360. See Thomas, 21 I. & N. Dec. 20, 23–24 (B.I.A. 1995) (listing cases in which an immigration judge considered a charge that was dismissed or did not result in a conviction); Vendzules, supra note 261, at 699–700 (describing a case in which an immigration adjudicator denied relief based on dismissed charges because the mere facts of the charges "appear to show [the applicant is] a risk to the property and the public safety of others" (quoting Letter from U.S. Citizenship & Immigr. Servs. (Mar. 17, 2016))).

court proceedings relating to that unresolved charge.[361] In all cases, and particularly when an individual does not have counsel, the immigration judge should affirmatively ascertain whether ICE obstructed an individual's ability to attend criminal court proceedings before considering a pending or dismissed criminal charge.[362]

To begin, this proposal addresses the evidentiary and adjudicatory concerns outlined in section III.B. The BIA itself has long recognized that immigration judges should not and cannot assume the role of the criminal courts. In *Arreguin de Rodriguez*, for example, the BIA underscored that it would be impermissible for immigration adjudicators to "go behind a record of conviction to determine the guilt or innocence" of a noncitizen.[363] Indeed, the Supreme Court has repeatedly affirmed that immigration proceedings are civil in nature because immigration courts are distinct from criminal adjudications and do not mete out criminal punishments.[364] Yet, as Professor Sarah Vendzules persuasively argues, immigration judges are, in fact, engaged in "hidden factfinding."[365] When immigration judges port over and consider outputs from the criminal legal system, like allegations in a police report that have not been established beyond a reasonable doubt, they are impermissibly engaged in fact-finding under the guise of exercising discretion.[366] Vendzules thus proposes a framework that limits whether and how much immigration judges can consider criminal law outputs depending on how much fact-finding has occurred in criminal proceedings.[367] When no criminal law fact-finding has occurred, immigration judges must be cautious in considering that information in immigration proceedings.

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361. The INA includes examples in which immigration adjudicators need to establish a prerequisite before taking action. For example, 8 U.S.C. § 1229a(b)(5) requires that the government establish by "clear, unequivocal, and convincing evidence" that an individual received notice of a hearing before ordering them removed in absentia. 8 U.S.C. § 1229a(b)(5) (2018).

362. Federal appellate courts have unanimously agreed that immigration judges have a duty to develop the record in immigration court proceedings, which includes eliciting information from the noncitizen, particularly when the individual is unrepresented. See, e.g., Quintero v. Garland, 998 F.3d 612, 622–23 (4th Cir. 2021) (collecting cases and holding that immigration judges have a legal duty to develop the record in all cases, and particularly in pro se cases).

363. Arreguin de Rodriguez, 21 I. & N. Dec. 38, 42 (B.I.A. 1995).

364. See Woodby v. Immigr. & Naturalization Serv., 385 U.S. 276, 285 (1966) ("[A] deportation proceeding is not a criminal prosecution." (citing Harisiades v. Shaughnessy, 342 U.S. 580 (1952))); *Harisiades*, 342 U.S. at 594 ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure."). Scholars have persuasively argued, however, that this designation of deportation proceedings as civil does not comport with the present reality of deportation and the immigration statutory regime and enforcement apparatus. See, e.g., Chacón, Diversion of Attention, supra note 204, at 1573.

365. Vendzules, supra note 261, at 708–21.

366. Id. at 716–19, 746.

367. Id. at 721–23.

Immigration judges' consideration of charges that remain unresolved because of obstruction of court access, as described in this Article, is precisely one such example of hidden fact-finding. When an individual is obstructed from criminal court proceedings to confront charges and evidence against them or present evidence on their own behalf, there certainly has been no fact-finding (or process) in criminal court. When immigration judges then consider those unresolved charges to deny bond or relief as a matter of discretion, they effectively and impermissibly stand in for criminal adjudicators.

The proposal also addresses the institutional design concerns that stem from ICE's ability, as both the jailor and immigration prosecutor, to effectively (intentionally or not) manufacture evidence that has both cyclical criminal law and immigration law consequences. By preventing immigration judges from considering this evidence, this proposal establishes an internal check that mitigates any concerns about ICE's abuse of discretion. In this way, ICE is stymied from, as the jailor, preventing an individual from attending criminal proceedings to resolve charges, and then, as the immigration prosecutor, attempting to use that evidence against the individual to continue detaining or to deport them.[368]

Practically speaking, this proposal could be achieved through several judicial mechanisms. First, the BIA could issue a published decision—like *Arreguin de Rodriguez*[369] but broader in scope—providing that immigration judges categorically cannot consider pending charges when ICE detention has obstructed a noncitizen's ability to attend criminal proceedings. As the highest administrative body for interpreting and applying immigration laws, the BIA's published decisions are binding on all immigration judges across the country.[370] Second, the Attorney General could self-certify a BIA decision and issue an Attorney General decision that would be binding on the BIA and immigration judges.[371] Admittedly, the likelihood that this proposal would be achieved through Attorney General self-certification is vanishingly small. Administrations with anti-immigrant agendas, like the Trump Administration, would certainly decline to take such action to protect the rights of noncitizens, and even administrations with more

368. Preventing ICE from using evidence—in the form of a pending or dismissed charge—against an individual whose constitutional rights ICE has violated sounds in Justice Benjamin Cardozo's famous articulation of the consequences the Fourth Amendment exclusionary rule mandates: The defendant "is to go free because the constable has blundered." People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

369. Arreguin de Rodriguez, 21 I. & N. Dec. 20 (B.I.A. 1995).

370. 8 C.F.R. § 1003.1(g) (2025) ("[D]ecisions of the Board and decisions of the Attorney General are binding on all officers and employees of DHS or immigration judges in the administration of the immigration laws of the United States.").

371. The Code of Federal Regulations authorizes the Attorney General to certify cases from the Board for review. Id. § 1003.1(h)(1) ("The Board shall refer to the Attorney General for review of its decision all cases that . . . [t]he Attorney General directs the Board to refer to him."). For more information regarding the Attorney General's self-certification authority, see Lieu, supra note 202, at 588 n.49.

immigrant-friendly policies have historically been hesitant to protect the rights of noncitizens as they intersect with the criminal legal system. Finally, if the issue was properly exhausted at the administrative level, advocates could raise these arguments before federal circuit courts on a petition for review of an adverse BIA or Attorney General decision. A circuit court decision holding that it is unlawful for immigration judges to consider pending charges when ICE has obstructed an individual's ability to attend criminal proceedings would be binding on immigration judges and the BIA within the circuit. Advocates, then, should raise these arguments in immigration court, on appeal to the BIA, and in petitions for review so that the issue is ripe for an administrative or federal court decision.

This proposal suggests a change to adjudicatory practices that avoids the need for a structural overhaul of the immigration apparatus. Rather than separate the immigration jailor and prosecutor functions, this proposal meaningfully separates the immigration prosecutor and adjudicator functions. Moreover, the proposal addresses ICE's common refrain that it lacks resources to produce individuals to court.[372] Indeed, ICE's premise—however doubtful it may be as a practical matter, given that DHS has the largest budget of all enforcement agencies across the federal government[373]—is beside the point under this framework. If ICE cannot produce an individual in its custody to criminal court proceedings, it simply cannot use the unresolved charge and associated allegations that the individual has never had the opportunity to refute against the individual in immigration proceedings. ICE's supposed lack of resources and decision to detain, in other words, cannot come at the expense of an individual's constitutional rights.

Accordingly, before considering unresolved criminal proceedings to deny discretionary relief, ICE must demonstrate, and immigration adjudicators must affirmatively find, that the individual was not subject to immigration obstruction of court access.

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372. See, e.g., Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction at 32–34, Doe v. Dep't of Homeland Sec., No. 3:24-cv-00259-SLH-PLD (W.D. Pa. filed Nov. 15, 2024), Dkt. No. 60 (citing immigration agencies' "limited resources" in arguing that defendants cannot produce individuals detained at Moshannon to criminal court virtually).

373. Margy O'Herron, Big Budget Act Creates a "Deportation-Industrial Complex", Brennan Ctr. Just. (Aug. 13, 2025), https://www.brennancenter.org/our-work/analysis-opinion/big-budget-act-creates-deportation-industrial-complex [https://perma.cc/NDB6-KRFN] ("The $170 billion price tag for immigration enforcement eclipses other law enforcement expenditures at the federal, state, and local level. . . . Even the slice that goes just to ICE this year—nearly $29 billion—exceeds the budget for all other non-immigration federal law enforcement functions put together . . . .").

CONCLUSION

The accountability imperative, which has always lurked in the shadows of the U.S. criminal legal system, is more urgent now than ever as the criminal legal and immigration legal systems are poised to interact in unprecedented ways and volumes. Executive branch priorities and Congress's recent enactment of the Laken Riley Act and the One Big Beautiful Bill Act promise to increase the number of noncitizens subjected to immigration detention who also have active criminal proceedings that they must and have constitutional rights to attend. But, in the existing paradigm of the accountability deficit, those individuals may be obstructed from having their day in criminal court, with severe and cyclical criminal and immigration law consequences.

By rethinking the interaction between the criminal and immigration legal systems, this Article aims to provide a framework to understand and a proposal to address the accountability deficit. It brings out of the shadows the obstruction-of-court-access problem and the systemic lack of accountability on the part of the immigration jailor and criminal prosecutor that permits the accountability deficit to be paid by the noncitizen stuck in detention. Understanding the implications of obstruction of court access sets up the accountability imperative. As this Article sets forth, those implications are threefold: (1) The immigration legal system in obstruction of court access quite literally obstructs criminal proceedings and constitutional criminal process; (2) that obstruction is, in fact, cyclical, because immigration adjudicatory norms permit immigration judges to consider the resulting unresolved charges to continue detention and order deportation—immigration harms that only perpetuate the obstruction of criminal process; and (3) the immigration apparatus as designed lacks sufficient checks when the jailor that obstructs a noncitizen defendant's access to criminal court is the very immigration prosecutor that then seeks to use that still-pending charge against the individual before an immigration judge who is governed by the same executive to detain and deport that individual. The accountability imperative, then, is urgent.

To remedy this lack of accountability, this Article's focus is not on forcing ICE to produce individuals to court—which may become increasingly difficult as ICE subjects more noncitizen defendants to detention and transfers them widely across the country far from criminal proceedings. Instead, this Article argues that we must reassign accountability away from the noncitizen to the criminal prosecutor and the immigration jailor/prosecutor/judge, through dismissing the charge on one side of the ledger and not considering the unresolved charge on the other. Put differently, as this Article has described, the noncitizen defendant stuck in immigration detention is riddled with Hobson's choices. Whether to choose to stay in jail to avoid being put in immigration detention, where they will be cyclically obstructed from the criminal and

immigration process. Whether to testify in immigration court about criminal proceedings without criminal protections or choose to invoke their constitutional right to remain silent and have that invocation used against them in immigration court. This Article proposes to flip the paradigm. If neither immigration jailor/prosecutor nor criminal prosecutor can ensure that a noncitizen defendant has their day in criminal court, it is they, not the noncitizen defendant, that must be held to account.

NOTES

THE DECLINE OF SUMMARY REVERSALS AT THE U.S. SUPREME COURT

*By Kalvis E. Golde**

Summary reversals have a long history at the U.S. Supreme Court. These short, unsigned opinions reverse lower court decisions on the merits without briefing and oral argument on the theory that the decisions below were plainly wrong. Summary reversals used to be a regular occurrence, most often reserved by the Roberts Court for decisions granting post-conviction relief to people who are incarcerated and denying qualified immunity to police and prison officers. In the past four years, however, the number of summary reversals has declined significantly. This Note discusses possible explanations for this trend: time constraints from the shadow docket, the appointment of Justice Amy Coney Barrett, the conservative alignment of the judiciary, and critiques of the Court's institutional role. It also explores the impact of a world with fewer summary reversals, particularly for people on death row.

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INTRODUCTION

Summary reversals were once a regular feature at the U.S. Supreme Court.[1] The Court's internal rules permit them,[2] and the leading treatise on litigating before the Court discusses them at length.[3] A "summary reversal" refers to the Court's custom of wiping away a decision by a lower court without the usual, lengthy process of receiving briefs, hearing oral argument, and issuing a written opinion, on the theory that the decision was plainly wrong.[4] Although this practice has evolved over time, summary reversals are announced today by means of generally short, unsigned opinions tucked into the end of weekly order lists handling procedural issues.[5]

Recently, however, summary reversals have become a rare occurrence. During the first fifteen annual Terms of John Roberts's tenure as Chief Justice, the Court summarily reversed an average of seven lower court decisions per Term.[6] Typically, the Roberts Court has reserved this treatment for decisions granting post-conviction relief to people who are incarcerated and denying qualified immunity to police and prison officials.[7] During the last four Terms, by contrast, there has been an

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1. William Baude, Foreword: The Supreme Court's Shadow Docket, 9 N.Y.U. J.L. & Liberty 1, 1–2, 20–21 (2015) [hereinafter Baude, Shadow Docket].

2. Sup. Ct. R. 16.1.

3. Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett & Dan Himmelfarb, Supreme Court Practice § 5.12(c) (11th ed. 2019).

4. Id.

5. E.g., Sup. Ct. of the U.S., Order List: 598 U.S., at 12 (May 22, 2023), https://www.supremecourt.gov/orders/courtorders/052223zor_k5fm.pdf [https://perma.cc/NRQ9-L6WM]. This under-the-radar method of deciding cases stands in contrast to the Court's usual fanfare, especially in late June, of announcing its decisions in argued cases from the bench, accompanied by full-length, signed opinions in which all of the participating Justices indicate their agreement or disagreement with the outcome. Orin S. Kerr, Why the Big Supreme Court Cases Cluster at the End of June, Reason: Volokh Conspiracy (June 24, 2015), https://reason.com/volokh/2015/06/24/why-the-big-supreme-court-case/ [https://perma.cc/PW8M-3C49].

6. The exact average is 7.375. Across the 2005 to 2017 Terms, there were an average of eight summary reversals per Term. SCOTUSblog, Final Stat Pack for October Term 2018, at 13 (2019), https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19.pdf [https://perma.cc/HPG9-FGJ4]. In the 2018 Term, there were five summary reversals. Id. In the 2019 Term, there were four. Andrus v. Texas, 140 S. Ct. 1875 (2020) (per curiam); Davis v. United States, 140 S. Ct. 1060 (2020) (per curiam); Roman Cath. Archdiocese of San Juan v. Feliciano, 140 S. Ct. 696 (2020) (per curiam); Thompson v. Hebdon, 140 S. Ct. 348 (2019) (per curiam). And in the 2020 Term, there were eight. Dunn v. Reeves, 141 S. Ct. 2405 (2021) (per curiam); Lombardo v. City of St. Louis, 141 S. Ct. 2239 (2021) (per curiam); Pakdel v. City & County of San Francisco, 141 S. Ct. 2226 (2021) (per curiam); Alaska v. Wright, 141 S. Ct. 1467 (2021) (per curiam); Mays v. Hines, 141 S. Ct. 1145 (2021) (per curiam); Shinn v. Kayer, 141 S. Ct. 517 (2020) (per curiam); Taylor v. Riojas, 141 S. Ct. 52 (2020) (per curiam); Mckesson v. Doe, 141 S. Ct. 48 (2020) (per curiam).

7. See Edward A. Hartnett, Summary Reversals in the Roberts Court, 38 Cardozo L. Rev. 591, 594–96 (2016) [hereinafter Hartnett, Summary Reversals] (classifying forty-five out of seventy-three such summary reversals in the first decade of the Roberts Court).

average of one summary reversal per Term, and in one Term there were zero.[8]

There is plenty of discussion of summary reversals in the literature,[9] including in early discourse around the so-called "shadow docket."[10] Lately, the shadow docket has become a hot topic. Since the first Trump Administration, scholars, practitioners, and politicians have regularly criticized the Court's emergency orders responding to a flood of requests to wade into high-profile disputes on the shadow docket, particularly in terms of transparency and accountability.[11] But with all the focus on the uptick in emergency orders, there has been little to no focus on the downturn in summary reversals, previously the shadow docket's bread and butter.[12]

This Note explores the recent decline of summary reversals. Part I provides background on these rulings, including how they work today and their evolution throughout the twentieth century. Part II then places the recent decline of summary reversals in context. It examines their scarcity

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8. The exact average is 1.25. In the 2021 Term, there were two summary reversals. City of Tahlequah v. Bond, 142 S. Ct. 9 (2021) (per curiam); Rivas-Villegas v. Cortesluna, 142 S. Ct. 4 (2021) (per curiam). In the 2022 Term, there was one. Calcutt v. Fed. Deposit Ins. Corp., 143 S. Ct. 1317 (2023) (per curiam). In the 2023 Term, there were zero. Arthur D. Hellman, The Federal Question Jurisdiction Under Article III: "First in the Mind of the Framers," but Today, Perhaps, Falling Short of the Framers' Expectations, 104 B.U. L. Rev. 2143, 2193 n.349 (2024) [hereinafter Hellman, Federal Question Jurisdiction] ("In the 2023 Term, there were sixty plenary decisions and a single summary opinion. The summary opinion in the 2023 Term . . . rejected an application for emergency relief, thus effectively *affirming* the action of the court below." (citation omitted)). And in the 2024 Term, there were two: Goldey v. Fields, 145 S. Ct. 2613 (2025) (per curiam); Andrew v. White, 145 S. Ct. 75 (2025) (per curiam). The Court summarily remanded one additional case this past Term: Hamm v. Smith, 145 S. Ct. 9 (2024) (per curiam). This was likely not a summary reversal for three reasons. First, rather than disagreeing with the lower court on the merits, the Court vacated and remanded its ruling—which had held that a man on Alabama's death row met the state's threshold for intellectual disability and thus could not be executed—because it was "unclear" what standard the lower court had used to evaluate his multiple IQ scores. Id. at 10. Second, Justices Clarence Thomas and Neil Gorsuch dissented, noting merely that they would have granted the petition for full review without waiting for clarification—not that they would have let the lower court's ruling stand by denying the petition. Id. (statement of Thomas & Gorsuch, JJ.). Third, after the court of appeals affirmed its prior ruling and clarified the standard, the state returned to the Court, and the Justices did not summarily reverse, but rather granted the petition. Hamm v. Smith, 145 S. Ct. 2776, 2776 (2025) (mem.).

9. See infra section II.B.

10. Professor William Baude's 2015 article coining the term "shadow docket" focused on summary reversals. Baude, Shadow Docket, supra note 1, at 1.

11. For a thorough overview of these critiques, see generally Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic (2023) [hereinafter Vladeck, Shadow Docket].

12. The only mention of the decline in summary reversals this author could find in the literature comes from Professor Arthur Hellman in a recent article about trends affecting the reach of the federal courts. Hellman, Federal Question Jurisdiction, supra note 8, at 2193 & n.349.

both at the Court and in the discourse since 2021. And it highlights the litigants most affected by a future with fewer summary reversals: people who are incarcerated, especially those sentenced to death; people who are hurt or killed by police or prison officers, as well as their families; and law enforcement officials.[13]

Finally, Part III discusses possible explanations for the recent decline of summary reversals. The simplest explanation might be one of limited resources. The Court's merits docket—on which it decides cases with signed, written opinions after full briefing and oral argument—is shrinking.[14] Meanwhile, the Justices face a barrage of time-consuming requests for emergency relief on the shadow docket.[15] What's more, over the same period during which summary reversals have slowed to a trickle, an increasing portion of the Court's dwindling merits docket has been devoted to deciding cases on the heels of expedited briefing and oral argument in response to requests for emergency relief on the shadow docket.[16]

The rise of expedited argument can probably be traced to criticism of the shadow docket and specifically the outrage after the Court's cursory order upholding Texas's six-week abortion ban on September 1, 2021.[17] But skeptics of the shadow docket—and of summary reversals, specifically—have long questioned the Court's wisdom in entertaining requests to correct errors in individual disputes, as opposed to resolving circuit splits and wading into the occasional case of national importance.[18] Perhaps summary reversal is proving rarer because the Court is responding, in some fashion, to this criticism.

Another possible explanation for the decline of summary reversals is the appointment of Justice Amy Coney Barrett. Since she joined the Court in 2020, Justice Barrett has expressed skepticism toward ruling on the

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13. See Hartnett, Summary Reversals, supra note 7, at 594–96.

14. Id. at 609; Jimmy Hoover, As Docket Shrinks, Supreme Court Lawyers Embrace Circuit Court Work, Nat'l L.J. (Aug. 8, 2023), https://www.law.com/nationallawjournal/2023/08/08/as-docket-shrinks-supreme-court-lawyers-embrace-circuit-court-work (on file with the *Columbia Law Review*).

15. See Stephen I. Vladeck, The Solicitor General and the Shadow Docket, 133 Harv. L. Rev. 123, 125 (2019) [hereinafter Vladeck, Solicitor General] (documenting the rise in emergency applications filed by the federal government under the first Trump Administration); Litigation Tracker: Legal Challenges to Trump Administration Actions, Just Sec. (Oct. 16, 2025), https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/ [https://perma.cc/65TN-DPU9] (documenting the subsequent swell of emergency applications filed against the federal government during the second Trump Administration).

16. Edward L. Pickup & Hannah L. Templin, Emergency-Docket Experiments, 98 Notre Dame L. Rev. Reflection 1, 10–12 (2022), https://ndlawreview.org/wp-content/uploads/2022/11/NDLRR101_TemplinPickup.pdf [https://perma.cc/H4AD-4Q9P].

17. See Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495–96 (2021); see also Vladeck, Shadow Docket, supra note 11, at 239–40 (discussing the backlash).

18. For more on the Court's twin roles of declaring law and correcting errors, see infra section I.B.

merits of cases before they are briefed and argued.[19] And although—like most cases decided on the merits docket[20]—most summary reversals do not divide the Court along ideological lines,[21] they do generally require six votes, as opposed to the usual bare majority of five.[22] For lower court decisions that the Court's conservative majority considers glaringly wrong, Justice Barrett may be less inclined than her five Republican-appointed colleagues to provide a sixth vote to quickly erase them. And for decisions that the three liberal Justices might wish to summarily reverse, the Court's conservative supermajority—cemented by Justice Barrett's confirmation—makes it difficult to secure the needed votes.

Finally, the Supreme Court is not the only court becoming more conservative. The cascade of judges appointed during President Donald Trump's first term has reshaped all levels of the federal judiciary.[23] And Republicans have gained control of a swath of state supreme courts nationwide.[24] Lower courts laden with Republican-appointed or -elected

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19. For more on Justice Barrett's view, see infra section III.B.

20. See SCOTUSblog, Stat Pack for the Supreme Court's 2021–22 Term 9, 13 (2022), https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf [https://perma.cc/R2FA-U572] (finding that most merits cases in the 2021 Term were not ideologically divided 6-3, and most merits cases from the 2015 to 2019 Terms were similarly not ideologically divided 5-4).

21. See Hartnett, Summary Reversals, supra note 7, at 609 ("[T]he rate of public dissent and separate opinions is considerably lower in summary reversals than in cases decided after full briefing and argument."). Indeed, only one of the five summary reversals issued by the Court since 2021 garnered a public dissent. Andrew v. White, 145 S. Ct. 75, 83 (2025) (Thomas, J., dissenting, joined by Gorsuch, J.). However, a lack of public dissents does not mean a decision to summarily reverse is unanimous. See infra notes 37–39 and accompanying text. And summary reversals often do generate public dissents. In the 2020 Term, six of the Court's eight summary reversals did so, half of which produced 6-3 ideological splits. Dunn v. Reeves, 141 S. Ct. 2405, 2413 (2021) (Breyer, J., dissenting) (Sotomayor, J., dissenting, joined by Kagan, J.); Lombardo v. City of St. Louis, 141 S. Ct. 2239, 2242 (2021) (Alito, J., dissenting, joined by Thomas & Gorsuch, JJ.); Shinn v. Kayer, 141 S. Ct. 517, 526 (2020) (Breyer, Sotomayor & Kagan, JJ,, dissenting). As is typical for the Roberts Court, these three ideologically divided summary reversals concerned habeas relief for people in prison and civil rights lawsuits against police officers. See supra note 7 and accompanying text.

22. See infra notes 31–33 and accompanying text.

23. See John Gramlich, How Trump Compares With Other Recent Presidents in Appointing Federal Judges, Pew Rsch. Ctr. (July 15, 2020), https://www.pewresearch.org/short-reads/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ [https://perma.cc/3MHQ-5FPR] [hereinafter Gramlich, How Trump Compares] (last updated Jan. 13, 2021) (stating that, as of January 2021, 28% of active federal judges had been appointed by President Trump during his first term, which included "three of the nine sitting Supreme Court justices, 30% of the nation's active appeals court judges and 27% of active district court judges").

24. See Aaron Mendelson, How Republicans Flipped America's State Supreme Courts, Ctr. Pub. Integrity (July 24, 2023), https://publicintegrity.org/politics/high-courts-high-stakes/how-republicans-flipped-americas-state-supreme-courts [https://perma.cc/HCL7-HQ27] ("In less than a decade, Republican politicians in eight states have transformed their state supreme courts—altering the process by which justices reach the bench, or the size of

judges might issue fewer decisions that the six Republican-appointed Supreme Court Justices view as plainly wrong, warranting summary reversal. This is particularly salient for the two most common types of decisions summarily reversed by the Roberts Court: those granting post-conviction relief to people who are incarcerated and those denying qualified immunity to police and prison officials,[25] both ideologically liberal outcomes.

Summary reversals at the Court might return in full force someday. But even if their recent decline is temporary, it is noteworthy, both for what it says about rapidly changing procedural norms at the Court and for its impact on litigants who seek to undo lower court decisions that leave them out to dry.

I. THE EVOLUTION OF SUMMARY REVERSALS

A twenty-first-century lawyer with a case before the Supreme Court might view summary reversal as an established tool in the Justices' toolbox. But this modern acceptance belies a contested history. Summary reversals defy the mainstream academic view of the Court's twin, competing roles: declaring law and correcting errors. And, as with much of what the Justices do, frustratingly little about summary reversals is written down. Instead, they are governed almost entirely by flexible norms. To contextualize the recent decline of summary reversals, this Part discusses how the norms surrounding them have evolved over time.

A. *Summary Reversals Today*

How do summary reversals work? A natural starting place to look is the Rules of the Supreme Court. Posted on the Court's website, the Rules explain the steps, requirements, and deadlines for litigating a case at various stages before the Court. Several of the Rules outline the modern practice of "certiorari": the Court's broad discretion over whether to grant requests for full review of lower court decisions.[26] The last Rule in this group, Rule 16, begins with a short statement of what happens after the Court has all the documents it needs to decide whether to grant, deny, or otherwise dispose of a petition for a writ of certiorari, known as a "cert petition."[27] "After considering the documents," it reads, "the Court will enter an appropriate order. The order may be a summary disposition on the merits."[28]

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the court. The moves have pushed the courts to the right or solidified conservative control.").

25. Hartnett, Summary Reversals, supra note 7, at 594–96.

26. Sup. Ct. R. 10–16.

27. Sup. Ct. R. 16.

28. Sup. Ct. R. 16.1.

Intuitively, Rule 16 would then go on to say more about these summary dispositions. Can they both reverse and affirm lower court decisions? How many votes does either outcome require? What are the criteria for decisions that merit summary dispositions, as opposed to the usual process of briefing, argument, and (generally) signed opinions? That intuition, however, is wrong. Instead, Rule 16 turns immediately to what happens after a cert petition is either granted for full review or denied.[29] As quickly as summary reversals are mentioned, they are forgotten.

If the Court's own Rules don't regulate summary reversals, what does? As with so many of the Court's procedures, it turns out, the practice of summary reversals is dictated almost entirely by custom.[30] Two norms of summary reversals are worth noting. First, it usually takes the votes of six Justices, not five, to issue one.[31] As to why six votes, the prevailing theory relates to the firmer norm, known as the "rule of four," that it takes the votes of four Justices to grant a petition for certiorari.[32] Even if a bare, five-Justice majority of the Court could decide to reverse a lower court decision without further review, the logic goes, they should refrain from doing so if their four colleagues would vote to hear oral argument.[33]

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29. Sup. Ct. R. 16.2–16.3. The only other mention of summary dispositions in the Court's Rules comes in Rule 18, which concerns the rare process of direct appeals from decisions by three-judge panels of federal district courts, typically in redistricting and campaign-finance cases. Sup. Ct. R. 18.12; see also Joanna R. Lampe, Cong. Rsch. Serv., IF-12746, Three-Judge District Courts (2024) (listing statutes that require adjudication by three-judge panels of federal district courts); Joshua A. Douglas & Michael E. Solimine, Precedent, Three-Judge District Courts, and the Law of Democracy, 107 Geo. L.J. 413, 421–29 (2019) (discussing the Supreme Court's use of summary dispositions to resolve appeals from three-judge district court decisions and whether these dispositions have precedential weight).

30. To get up to speed on these customs, a well-resourced appellate attorney—or a law student writing a Note and fortunate to have access to their school's library—can consult a copy of *Supreme Court Practice*. Shapiro et al., supra note 3, § 5.12(c).

31. This is not a hard-and-fast rule, as the Court has summarily reversed over four dissenting votes. Id. § 5.12. But the rarity of this occurrence and the Justices' own remarks suggest that the six-vote norm is usually respected. Id.; see also Lisa Schultz Bressman, The Rise and Fall of the Self-Regulatory Court, 101 Tex. L. Rev. 1, 26 (2022) (noting that Justice Samuel Alito recently disclosed the rule of six in public remarks); Joan Biskupic, The Secret Supreme Court: Late Nights, Courtesy Votes and the Unwritten 6-Vote Rule, CNN, https://www.cnn.com/2021/10/17/politics/supreme-court-conference-rules-breyer/index.html [https://perma.cc/W5R4-X95D] (last updated Oct. 17, 2021) (noting the same from Justice Stephen Breyer).

32. Winston Bowman, The Supreme Court's Rule of Four, Fed. Jud. Ctr., https://www.fjc.gov/history/spotlight-judicial-history/rule-four [https://perma.cc/VP3X-2V2A] (last visited Aug. 7, 2025); cf. Amy Howe, Rule of Four, SCOTUSblog, https://www.scotusblog.com/election-law-explainers/rule-of-four/ [https://perma.cc/TFU4-V9MY] (last visited Aug. 7, 2025) ("The rule [of four] is an unwritten internal one; it is not dictated by any law or the Constitution.").

33. Shapiro et al., supra note 3, § 5.12.

The second notable norm about summary reversals is that they are explained. When the Court summarily reverses a lower court decision on the merits, it provides an opinion stating why the lower court's decision was wrong.[34] This is not required—indeed, it was unheard of for decades.[35] Today, these opinions tend to be short and unsigned, instead issued per curiam, or "by the court."[36] Unlike with signed opinions, Justices do not typically note when they join an unsigned opinion summarily reversing a lower court decision.[37] Accordingly, the only way to know how they all voted is if three Justices publicly dissent, in which case the six-vote norm suggests that the others all voted to summarily reverse.[38] If two or fewer Justices publicly dissent from a summary reversal, however, others could still have joined the dissenters in spirit, or taken some other view, and simply not noted their stance.[39]

That summary reversals get opinions at all distinguishes them from the orders that make up most of the action on the Court's shadow docket.[40] These unexplained orders come in all shapes and sizes. Most controversially, dozens of emergency orders each Term grant or deny requests for relief from major laws or policies.[41] Dozens more grant cert petitions, wipe away the decisions below, and send the cases back for reconsideration in light of an intervening Supreme Court ruling, with an offhand mention of that ruling as the only explanation for the order.[42] Still others wipe away

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34. Zina Makar, Per Curiam Signals in the Supreme Court's Shadow Docket, 98 Wash. L. Rev. 427, 431 (2023).

35. Arthur D. Hellman, Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review, 44 U. Pitt. L. Rev. 795, 825–26 (1983) [hereinafter Hellman, Error Correction]; see also infra section I.B.

36. Makar, supra note 34, at 431.

37. Hartnett, Summary Reversals, supra note 7, at 610.

38. The same is true for unsigned emergency orders on the shadow docket. Baude, Shadow Docket, supra note 1, at 14.

39. See id. (noting this specifically with regard to orders denying cert petitions).

40. This distinction is breaking down under the weight of the shadow docket during the second Trump Administration. See infra section III.A.

41. See, e.g., The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary, 117th Cong. 217–98 (2021) (documenting a range of critical testimony about emergency orders on the shadow docket); Vladeck, Shadow Docket, supra note 11, at 13 ("Because they are unsigned and unexplained, shadow docket orders are supposed to be exceedingly limited . . . . And yet, dozens of times each term, we're now seeing shadow docket orders that fly in the face of those understandings."); Baude, Shadow Docket, supra note 1, at 14–15 ("When [the custom of not noting disagreement with orders in emergency applications is] combined with the minimal explanations for these rulings, the result is a Court in which we know very little about what the individual Justices think about their own procedures.").

42. This type of order is called a "grant, vacate, and remand," or "GVR." See generally Aaron-Andrew P. Bruhl, The Supreme Court's Controversial GVRs—And an Alternative, 107 Mich. L. Rev. 711 (2009) (disputing the Court's authority to issue GVRs); cf. Stephen L. Wasby, Case Consolidation and GVRs in the Supreme Court, 53 U. Pac. L. Rev. 83, 98–100 (2021) (explaining the Court's use of GVRs to efficiently handle multiple cases raising the same question for review).

lower court decisions even without an intervening ruling.[43]

On the less controversial side, thousands of orders each Term deny the vast majority of cert petitions filed before the Court.[44] And hundreds more do not amount to the end of a given case at all but rather deal with small procedural steps during the case's lifetime: extensions of filing deadlines, allowances to file additional briefs, divisions of argument time, and so on.[45]

In sum, although the criteria for choosing which cases to summarily reverse are not set in stone, these rulings do, at least, come with a written explanation of why the Court thinks the lower court decision at issue was wrong.[46] But that was not always the case. For much of the Court's history, summary reversals operated rather differently.

B. *Summary Reversals Historically*

Understanding how summary reversals work today raises the question of how they came to be and used to function. And looking back is not merely an intellectual exercise. Rather, the history of summary reversals suggests that they occupy an awkward position in Supreme Court practice,

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43. This type of order is a subset of GVR called a "*Munsingwear* vacatur." Pattie Millett, Practice Pointer: Mootness and *Munsingwear* Vacatur, SCOTUSblog (June 10, 2008), https://www.scotusblog.com/2008/06/practice-pointer-mootness-and-munsingwear-vacatur/ [https://perma.cc/D4GZ-LA7D]. They arise when a case has become moot because the party who won in the court of appeals chooses to end the dispute unilaterally—say, by dismissing a lawsuit in the trial court if the party is the plaintiff, or repealing a contested policy if the party is the defendant—rather than risk the Supreme Court granting the cert petition filed by the party who lost below and then reversing. Id. Although the Justices in this scenario could simply deny the cert petition, in recent years they have increasingly decided instead to grant it and then issue a GVR, instructing the court of appeals to wipe its existing decision about the case off the books—a practice not without its critics. E.g., Chapman v. Doe, 143 S. Ct. 857, 858 (2023) (Jackson, J., dissenting) ("[I]t is crucial that we . . . limit the availability of *Munsingwear* vacatur to truly exceptional cases. To do otherwise risks considerable damage to first principles of appellate review . . . .").

44. Vladeck, Shadow Docket, supra note 11, at 12. In the 2023 Term, for example, the Court denied over 98% of the more than four thousand cert petitions it received. The Statistics, 138 Harv. L. Rev. 446, 454 tbl. II(B) (2024). Although denying cert is, in effect, a decision to let the ruling below stand, scholars caution against viewing cert denials as merits decisions. Cf. Peter Linzer, The Meaning of Certiorari Denials, 79 Colum. L. Rev. 1227, 1228–29 (1979) (noting this "orthodox view" yet arguing that, although "[n]ot every denial of certiorari means that the Court agrees with the decision and opinion below, . . . in a significant number of cases a denial does indicate that most of the Justices were not strongly dissatisfied with the actions below"). Professor Thomas Schmidt argues that contemporary critiques of the shadow docket might go further and question the Court's unexplained certiorari behavior more broadly. Thomas P. Schmidt, Orders Without Law, 122 Mich. L. Rev. 1003, 1028–33 (2024). Perhaps the most robust version of this critique was published over two decades ago by Professor Edward Hartnett. Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill, 100 Colum. L. Rev. 1643 (2000).

45. Vladeck, Shadow Docket, supra note 11, at 12.

46. Makar, supra note 34, at 432–33.

one in tension with the Court's own views of its role as the head of a coequal branch of government.

The early Court had little say over the cases it heard on appeal.[47] For the first century of its existence, the Court's job was to resolve individual disputes, charting a different course only when lower courts went wrong, and it generally had to do this whenever a party appealed.[48] In other words, the Court was originally a tribunal for error correction.

This began changing, slowly at first, around the end of the nineteenth century. By that point, the Supreme Court was overwhelmed with a backlog of appeals.[49] To alleviate the burden, Congress in 1891 created permanent circuit courts of appeals and gave them final jurisdiction over some cases.[50] Although the Supreme Court was still required to hear many appeals—for example, those about capital or other serious crimes and constitutional issues—the 1891 law used the term "certiorari" for the first time in a federal statute governing the Court's jurisdiction, giving the Justices limited discretion to take up some appeals in which circuit courts had the final word.[51] Other laws in 1914 and 1916 expanded certiorari in small steps, providing more latitude.[52]

A decade later, things changed again, this time dramatically. After World War I, the Justices aggressively lobbied Congress to hand over more control of their docket, citing a still-unmanageable number of appeals they were required to hear.[53] In the Judiciary Act of 1925—commonly known as the Judges' Bill, as it was drafted by a committee of Supreme Court Justices and championed by then–Chief Justice and former President William Howard Taft[54]—Congress complied. The Judges' Bill made certiorari the norm, rather than the exception, leaving to the Court the choice of whether to accept most cases brought to it on appeal.[55]

In doing so, the Judges' Bill rejected the view that the Court's job was merely to correct errors in favor of a different theory: that the Court's job is to declare law.[56] This debate over whether the Supreme Court is

47. Linzer, supra note 44, at 1229–32.

48. Hellman, Error Correction, supra note 35, at 797.

49. Kathryn A. Watts, Constraining Certiorari Using Administrative Law Principles, 160 U. Pa. L. Rev. 1, 10 (2011).

50. Id. at 10–11.

51. See Linzer, supra note 44, at 1234–36 (emphasizing that the 1891 law intended certiorari to allow the Justices to step in only when circuit courts either came to different conclusions on the same issue, known today as a circuit split, or certified a question of law for the Justices to answer).

52. See Watts, supra note 49, at 12 (explaining that the 1914 law expanded certiorari to appeals from state-court judgments denying federal rights); see also Linzer, supra note 44, at 1237–40 (explaining that the 1916 law expanded certiorari to appeals from state-court judgments in disputes under federal railroad-safety laws).

53. Watts, supra note 49, at 13.

54. Linzer, supra note 44, at 1241–42.

55. Watts, supra note 49, at 13.

56. Hellman, Error Correction, supra note 35, at 797–98.

primarily an error-correcting or law-declaring institution rages today, with some continuing to favor error correction.[57] But the general consensus is that law declaration has carried the day.[58]

Summary reversal, then, is an anomaly. Its purpose is not to declare new law, which takes time and careful consideration, but to quickly correct glaring mistakes.[59] As Professor Edward Hartnett explains:

> One long-noted puzzle of summary reversals is that the Supreme Court has viewed the very point of its discretionary certiorari jurisdiction as enabling it to resolve important legal issues—and avoid being a court for the correction of errors—while summary reversals target lower court decisions that strike the Court as clearly erroneous.[60]

Nonetheless, summary reversals remained a regular part of the Court's practice after the Judges' Bill. Professor Arthur Hellman notes that under Chief Justice Earl Warren in the 1950s and '60s, the Court issued hundreds of summary reversals, generally with "no more than a citation or two by way of explanation."[61]

This provoked sharp criticism. Taking up residency in the foreword to the *Harvard Law Review*'s annual issue on the Court's Term, scholars lobbed a series of blows at the Court's summary reversal habit in the late 1950s, arguing that it was both erratic and unexplained.[62] The leading treatise on litigating before the Court then took up the baton, with every edition since 1962 questioning the validity of summary reversal.[63]

For its part, the Court kept calm and carried on summarily reversing. Professor Hellman explains that under Chief Justice Warren Burger, the Court in the 1970s and early '80s did "not give[] up the practice of reversing lower-court rulings summarily."[64] Several of these rulings, he

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57. E.g., Henry Paul Monaghan, On Avoiding Avoidance, Agenda Control, and Related Matters, 112 Colum. L. Rev. 665, 668–69 (2012).

58. See id. ("The Court has in significant measure embraced the premises of the law declaration model.").

59. See Schmidt, supra note 44, at 1017 ("Law declaration is a difficult, time-intensive process.").

60. Hartnett, Summary Reversals, supra note 7, at 597.

61. Hellman, Error Correction, supra note 35, at 822. It's possible that many of these came in appeals from state-court judgments raising constitutional issues, which the Court had to hear until 1988. Watts, supra note 49, at 14.

62. See Albert M. Sacks, The Supreme Court, 1953 Term—Foreword, 68 Harv. L. Rev. 96, 103 (1954) (questioning summary reversal and urging further examination); see also Ernest J. Brown, The Supreme Court, 1957 Term—Foreword: Process of Law, 72 Harv. L. Rev. 77, 80 (1958) (emphasizing the lack of criteria for singling out rulings for summary reversal or explanation as to why individual cases were chosen); Henry M. Hart, Jr., The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 88 & n.10 (1959) (praising the prior critiques of summary reversal).

63. Baude, Shadow Docket, supra note 1, at 20 & n.60.

64. Hellman, Error Correction, supra note 35, at 825.

emphasizes, were "quite significant from a precedential standpoint."[65] Nonetheless, Hellman notes that the Burger Court heeded the critiques in part: Summary reversals began to be "accompanied by brief opinions explaining the Court's reasoning."[66]

Around the same time, the few remaining pipelines for automatic appeal to the Court grew clogged once again, driven by the expanding economy and administrative state.[67] As before, Congress stepped in. Thanks to a series of statutes enacted during the 1970s[68] and in 1988,[69] soon after William Rehnquist took the helm as Chief Justice in 1986, the only remaining category with automatic appeal to the Court was for cases decided by three-member panels of federal district judges—which remains true today.[70] And yet, the Court's near-boundless discretion did not cap the issuing of summary reversals. They continued unabated throughout the Rehnquist Court[71] and were a constant at the Roberts Court through 2021.[72]

What might it mean, then, that summary reversals at the Roberts Court have declined since 2021? The next Part will turn to examining this trend and its consequences.

II. THE DECLINE OF SUMMARY REVERSALS SINCE 2021

Part I outlined the Supreme Court's modern and historical summary reversal practices. This Part looks more closely at the recent decline of summary reversals. First, it highlights the two groups of litigants most affected by this decline: people who are incarcerated, especially those on death row, and state prison and police officials. And second, it notes that the burgeoning debate over the shadow docket has largely left summary reversals behind, over the same period that they have become less common at the Court.

A. *Consequences of the Decline of Summary Reversals*

Before 2021, the Roberts Court routinely issued summary reversals.[73] Writing in 2015, Professor William Baude described these rulings as

65. Arthur D. Hellman, Case Selection in the Burger Court: A Preliminary Inquiry, 60 Notre Dame L. Rev. 947, 955 (1985).

66. Hellman, Error Correction, supra note 35, at 825.

67. Watts, supra note 49, at 13.

68. Linzer, supra note 44, at 1243–44.

69. Watts, supra note 49, at 14.

70. See supra note 29 and accompanying text.

71. See generally Ali S. Masood & Donald R. Songer, Reevaluating the Implications of Decision-Making Models: The Role of Summary Decisions in US Supreme Court Analysis, 1 J.L. & Cts. 363 (2013) (analyzing summary reversals and GVRs under the Rehnquist Court); see also supra note 42 and accompanying text.

72. See supra notes 6–7 and accompanying text.

73. See supra notes 6–7 and accompanying text.

"lightning bolts"—as a category, they are routine and expected, yet individually, they are spontaneous and rare.[74]

But the rarity of summary reversals depends on the denominator. The Court grants a vanishingly small number of cert petitions each Term.[75] Compared not to the number of petitions the Court receives each year but to the number it grants for full review, the number of petitions that result in a summary reversal is quite significant.[76] In the words of Professor Hartnett: "[T]he odds of having a Supreme Court merits decision handled summarily rather than with full briefing and argument are considerably greater than having a Supreme Court merits decision at all."[77]

In addition, the odds of summary reversal during the Roberts Court have traditionally been higher in two types of petitions, both filed by state law enforcement officials: those in which lower courts granted post-conviction relief to people challenging their state criminal convictions or denied qualified immunity to officials accused of civil rights violations.[78] This section takes a closer look at summary reversals in these two areas.

1. *Habeas Relief for Incarcerated People.* — The largest group of summary reversals in the Roberts Court has concerned people in state prisons challenging the validity of their convictions or sentences by filing a petition for a writ of habeas corpus, known as a "habeas petition."[79] Starting in the 1950s, individuals in state prisons increasingly used the "Great Writ" to seek post-conviction relief first in state and then in federal court.[80] To obtain habeas relief, a person in prison must convince a court

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74. Baude, Shadow Docket, supra note 1, at 1–2.

75. See supra note 44.

76. See Hartnett, Summary Reversals, supra note 7, at 593–94 ("[S]ummary reversals may seem rather infrequent . . . compared to nearly nine hundred cases argued [during the tenure of Chief Justice Roberts]. But they loom larger when one compares that ratio to . . . that of certiorari petitions filed to cases argued.").

77. Id. at 594.

78. Id. at 595–96. For examples of dissenting opinions from recent denials of cert petitions filed by state law enforcement officials requesting summary reversal on both issues, see, e.g., Pina v. Estate of Jacob Dominguez, 145 S. Ct. 527, 527 (2025) (Alito, J., dissenting from denial of certiorari, joined by Thomas, J.) (qualified immunity); Davis v. Smith, 145 S. Ct. 93, 93 (2025) (Thomas, J., dissenting from denial of certiorari, joined by Alito, J.) (habeas); see also Chambers-Smith v. Ayers, 145 S. Ct. 1632, 1633 (2025) (statement of Alito, J., joined by Thomas, J.) ("Ordinarily, we would summarily reverse such a decision or, at the least, grant certiorari to bring the errant Circuit back into alignment. But Ayers has now served her prison sentence and is no longer subject to post-release control. For this reason, the Court's unwillingness to summarily reverse is understandable . . . .").

79. Hartnett, Summary Reversals, supra note 7, at 594–96. Technically speaking, federal law distinguishes between petitions for post-conviction relief and those for writs of habeas corpus brought under two different sections of the relevant statute. U.S. DOJ, Just. Manual § 9-37.000 (2020). Given their joint origins in the common law and tracking other scholarship, this Note uses the terms interchangeably. See, e.g., Z. Payvand Ahdout, Direct Collateral Review, 121 Colum. L. Rev. 159, 168–76 (2021) (using "habeas" to refer to both types of appeals).

80. Ahdout, supra note 79, at 168–69.

that the procedures used to try, convict, or sentence them violated their federal constitutional rights.[81] Many of these challenges focus on misconduct by lawyers: prosecutors burying evidence that someone is not guilty, for example, or defense attorneys entirely failing to do their job.[82]

Seeking to curtail federal judges from second-guessing state convictions and sentences, Congress in 1996 toughened the standard for federal courts to award habeas relief.[83] Since 1996, and continuing under Chief Justice Roberts, the Court has summarily reversed a slew of federal court decisions granting post-conviction relief to individuals in state prisons.[84] Pick a summary reversal of the Roberts Court at random. Odds are good that the short, unsigned opinion will explain why a federal court erred when ruling in favor of an incarcerated person challenging their conviction or sentence.[85] Scholars and commentators suggest that conservative Justices have used summary reversals to rein in what they see as lower federal courts intent on defying Congress's 1996 law, the Court's own decisions interpreting that law, or both.[86]

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81. Id. at 169.

82. Id. at 161–62.

83. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 104, 110 Stat. 1214, 1218–19 (codified at 28 U.S.C. § 2254 (2018)). Specifically, the statute bars a federal court from granting post-conviction relief unless the state court decision upholding a conviction or sentence violated "clearly established Federal law, as determined by the Supreme Court" or was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

84. Ursula Bentele, The Not So Great Writ: Constitution Lite for State Prisoners, 5 U. Denv. Crim. L. Rev. 33, 34 (2015).

85. From the 2005 to 2014 Terms, nearly half of the Roberts Court's summary reversals concerned federal habeas relief, and states won the vast majority. Hartnett, Summary Reversals, supra note 7, at 594–96. In the 2020 Term, the last Term in which the Court issued close to its average number of summary reversals, the numbers tell the same story: Half of these rulings concerned federal habeas, and the state won all of them. Dunn v. Reeves, 141 S. Ct. 2405, 2407 (2021) (per curiam) (denying habeas relief); Alaska v. Wright, 141 S. Ct. 1467, 1468 (2021) (per curiam) (same); Mays v. Hines, 141 S. Ct. 1145 (2021) (per curiam) (same); Shinn v. Kayer, 141 S. Ct. 517 (2020) (per curiam) (same).

86. E.g., Hartnett, Summary Reversals, supra note 7, at 597–98; Accelerating Pace of Supreme Court's Summary Reversals of Habeas Relief Suggests Impatience With Circuit Courts' Failure to Defer to State Tribunals, Bloomberg L. (July 10, 2012), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XDLTNV8000000?bna_news_filter=us-law-week#jcite (on file with the *Columbia Law Review*). For their part, conservative and liberal Justices openly disagree on this point. Compare Allen v. Lawhorn, 562 U.S. 1118, 1123 (2010) (Scalia, J., dissenting from denial of certiorari, joined by Thomas & Alito, JJ.) ("With distressing frequency, especially in capital cases such as this, federal judges refuse to be governed by Congress's command that state criminal judgments must not be revised by federal courts unless they [meet the 1996 law's heightened standard]. . . . We should . . . summarily reverse the Eleventh Circuit's judgment."), with *Dunn*, 141 S. Ct. at 2420–21 (Sotomayor, J., dissenting, joined by Kagan, J.) ("Today's decision continues a troubling trend in which this Court strains to reverse summarily any grants of relief to those facing execution. This Court has shown no such interest in cases in which defendants seek relief based on compelling showings that their constitutional rights were violated." (citations omitted)).

Accordingly, it might seem as though the litigants who will be most affected by the recent decline of summary reversals are the prosecutors and wardens charged with enforcing state convictions and sentences. Prior to 2021, it seems, these officials had a fair shot at getting the Court to quickly undo decisions calling those convictions or sentences into question.

For a few reasons, however, that picture is incomplete. First, the Supreme Court is not bound by the tougher standards imposed by Congress in 1996 when reviewing state court criminal decisions—the first step in the post-conviction appeals pipeline—or direct appeals from state court criminal decisions—the step before convictions become final.[87] Indeed, when they concern state court decisions, the Roberts Court's summary reversals have tended to benefit people who are incarcerated.[88] This is especially true for people challenging death sentences.[89]

Second, people on death row have historically had at least some chance at summary reversal in federal habeas. Although they still face a steep, uphill battle in light of the 1996 law—tellingly titled the Antiterrorism and Effective Death Penalty Act—individuals with death sentences are far more likely than those with life or shorter sentences to obtain habeas relief in federal court.[90] At the Court, capital cases make up a sizable chunk of all summary reversals, whether of federal or state court habeas decisions.[91] And when limited to capital cases, it turns out, summary

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87. This is so because the 1996 law only kicks in once a person files a petition for habeas corpus in federal court. 28 U.S.C. § 2254(a). If the person first files a petition for habeas corpus in state court, however, it stops the clock on the one-year deadline to file a federal habeas petition. Id. § 2244(d)(2). At the end of state habeas litigation, the losing party may petition the Supreme Court for review of the state court's decision on the state habeas petition, at which point the 1996 law's standards are not yet in effect. Hartnett, Summary Reversals, supra note 7, at 595–96.

88. From the 2005 to 2014 Terms, only four summary reversals—one of every ten summary reversals concerning habeas corpus—were of a state court habeas decision, and the person challenging their conviction won three. Hartnett, Summary Reversals, supra note 7, at 595–96. Recently, the trend has been the same. Since the 2014 Term, the Court has summarily reversed three state court habeas decisions, and the person challenging their conviction won two. Andrus v. Texas, 140 S. Ct. 1875, 1878 (2020) (per curiam) (granting habeas relief); Wearry v. Cain, 577 U.S. 385, 386 (2016) (per curiam) (same); Maryland v. Kulbicki, 577 U.S. 1, 2 (2015) (per curiam) (denying habeas relief).

89. See Hartnett, Summary Reversals, supra note 7, at 595 (noting that people sentenced to death won three out of four summary reversals concerning state habeas relief between the 2005 and 2015 Terms).

90. See Ahdout, supra note 79, at 174 ("According to one empirical study, since [the Act]'s passage, federal habeas relief is afforded in only 0.29% of noncapital cases and 12.4% of capital cases." (citing Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, Final Technical Report: Habeas Litigation in U.S. District Courts 51–52 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf [https://perma.cc/TAF7-3KSC])).

91. From the 2009 to 2014 Terms, nearly half of the Roberts Court's summary reversals denying federal habeas relief, and all but one of those granting federal habeas relief, concerned death sentences. Bentele, supra note 84, at 56–58. For state habeas, three-fourths

reversals favor the person in prison roughly 40% of the time.[92]

Third, the costs to parties of seeking Supreme Court review in capital habeas cases are asymmetric. On the one hand, people on death row risk the ultimate cost: If the Supreme Court refuses to disturb a federal court's denial of habeas relief, they can become eligible for an execution warrant.[93] On the other hand, state officials risk the cost of further litigation: The most common habeas remedy is not release from prison but rather a new trial or sentencing.[94] And even when awarded this remedy, the typical outcome for a person on death row is resentencing to life in prison without the possibility of parole.[95]

Finally, the Justices have a third option besides denying cert or summarily reversing in response to a cert petition in a habeas case. They can also grant the petition for full briefing and argument on the merits. In theory, summary reversals and cert grants serve different purposes.[96] But the Court has blurred the lines.[97] Accordingly, people seeking post-

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of the Roberts Court's summary reversals from the 2005 to 2014 Terms involved death sentences. Hartnett, Summary Reversals, supra note 7, at 595.

92. From the 2005 to 2015 Terms, 40% of all summary reversals in capital cases—including federal and state habeas decisions as well as on other kinds of claims raised—provided relief to the person sentenced to death. Hartnett, Summary Reversals, supra note 7, at 606–07. In the state habeas category, 100% of summary reversals did. Id. at 595.

93. Kristine M. Fox, Fed. Jud. Ctr., Capital § 2254 Habeas Cases: A Pocket Guide for Judges 2 (2012), https://www.govinfo.gov/content/pkg/GOVPUB-JU13-PURL-gpo31368/pdf/GOVPUB-JU13-PURL-gpo31368.pdf [https://perma.cc/XN2R-PJH8].

94. Id. at 1. And litigating death penalty appeals is expensive. Costs, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/policy-issues/costs [https://perma.cc/E3PF-WMPB] (last visited Aug. 6, 2025). Indeed, this is often cited as an argument for abolishing the death penalty. See, e.g., Death Penalty Cost, Amnesty Int'l, https://www.amnestyusa.org/issues/death-penalty/death-penalty-facts/death-penalty-cost/ (on file with the *Columbia Law Review*) (last updated June 26, 2023) (stating that "[e]ven if all post-conviction proceedings (appeals) were abolished, the death penalty would still be more expensive than alternative sentences"); Equal Just. USA, Wasteful & Inefficient: The Alarming Cost of the Death Penalty, https://ejusa.org/wp-content/uploads/EJUSA-DP-factsheet-cost.pdf [https://perma.cc/WL5Y-YX82] (last visited Oct. 17, 2025) ("[The death penalty] is a bloated and expensive system that has bogged down law enforcement, delayed justice for victims' families, and squandered millions of crime-fighting dollars."). In light of these costs, the state can always settle, agreeing not to contest a court's resentencing of someone on death row to life if they are awarded habeas relief.

95. See Federal Death Penalty: Case Summaries for Modern Federal Death Sentences, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/case-summaries-for-modern-federal-death-sentences [https://perma.cc/HXH4-HL88] (last visited Aug. 7, 2025) (showing that most people awarded habeas relief from federal death row received a new sentence of life without parole—whether after commutation, settlement, or new proceedings).

96. The former is intended for correcting errors, the latter for declaring law. See supra notes 56–60 and accompanying text.

97. See Shapiro et al., supra note 3, § 5.12(c) ("Individual Justices accordingly protest when they perceive that the Court's grant of certiorari and summary reversal is premised not on clear error correction but on one of the 'compelling reasons' for granting plenary review of a certiorari case.").

conviction relief often present the Court with all available alternatives: summary reversal, full merits review, and other options in between.[98] Indeed, although the Court has grown more hostile to federal habeas relief on both its summary reversal and merits dockets,[99] it remains open to state habeas relief on its merits docket—and, prior to 2021, on its summary reversal docket.[100] Given both the efficiency of resolving cases without additional briefing or argument and the negligible chance of convincing the Court to seek those additional steps,[101] summary reversals are an important judicial tool.

Justice Thurgood Marshall famously remarked that "death is different."[102] In a similar vein, Professor Hartnett has suggested that "to the extent summary reversals are (to use Baude's phrase) 'lightning bolts'" in the Roberts Court, "they are lightning bolts used predominantly for the benefit of those sentenced to death."[103] If summary reversal has fallen out of fashion, then that rare benefit to people on death row risks becoming more difficult to obtain.[104]

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98. Id. ("In view of the possibility that the Court may summarily reverse a decision below on the merits, a petitioner who believes that his or her case may be deemed suitable for such summary disposition may so state at the end of the petition."); see, e.g., Petition for Writ of Certiorari at 32–35, King v. Emmons, 144 S. Ct. 2501 (2024) (No. 23-668), 2023 WL 8848815 (seeking full review on the merits, vacatur and remand, or summary reversal of the Eleventh Circuit's decision in a capital case that alleged evidence of the state's racial discrimination in jury selection did not warrant habeas relief).

99. In recent years, the Court has issued a few monumental decisions after full briefing and argument that further limit federal habeas relief. E.g., Jones v. Hendrix, 143 S. Ct. 1857, 1863 (2023) (holding that people convicted under a statute that has subsequently been found not to apply to their conduct cannot get relief from their convictions through a second federal habeas petition); Shinn v. Ramirez, 142 S. Ct. 1718, 1728 (2022) (holding that a person arguing that their attorney in state habeas proceedings was unconstitutionally deficient cannot develop evidence on that claim when raised for the first time, with new counsel, in federal habeas proceedings).

100. See Ahdout, supra note 79, at 180–83 (discussing several decisions across the 2015 to 2020 Terms on both the merits and summary reversal dockets awarding state habeas relief, which the author labels "direct collateral review"). Compare, e.g., *King*, 144 S. Ct. at 2502 (Jackson, J., dissenting from denial of certiorari, joined by Sotomayor, J.) (arguing for summary reversal of a federal habeas decision denying relief in a capital case alleging clear evidence of racial discrimination in jury selection), with Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019) (reversing a state habeas decision denying relief in a capital case alleging the same). Just last Term, the Court granted state habeas relief on the merits docket to an Oklahoma man, who had been convicted and sentenced to death based on testimony from a key witness that the state knew was false, after the state ultimately confessed error and supported his petition for relief in the Supreme Court. Glossip v. Oklahoma, 145 S. Ct. 612, 618 (2025).

101. See supra note 44.

102. Ford v. Wainright, 477 U.S. 399, 411 (1986) (plurality opinion).

103. Hartnett, Summary Reversals, supra note 7, at 607.

104. Not impossible, however. In January 2025, the Supreme Court summarily reversed a decision by the Fifth Circuit that had refused to provide federal habeas relief to the only woman on death row in Oklahoma. Supreme Court Grants a New Hearing for the Only Woman on Oklahoma's Death Row, AP News, https://apnews.com/article/supreme-court-

2. *Qualified Immunity for Government Officials.* — After habeas cases, the second-largest group of summary reversals in the Roberts Court has concerned qualified immunity for government officials in civil rights lawsuits.[105] Federal law permits individuals to sue state officials for violating their constitutional rights, such as the right to be free from excessive force.[106] But those officials, the Supreme Court has held, are only liable for a civil rights violation if the right was "clearly established" at the time.[107] Known as "qualified immunity," this doctrine has, in recent decades, operated to shield state police officers and prison officials who inflict physical—often deadly—harm from liability.[108]

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oklahoma-brenda-andrew-death-row-1ee00fbdfba3de8e8e35315cb383befb (on file with the *Columbia Law Review*) (last updated Jan. 21, 2025). The Justices wrote that the Fifth Circuit was wrong to hold that it was not a clear violation of due process for prosecutors to introduce reams of irrelevant and prejudicial evidence about the woman's sex life at her trial. Andrew v. White, 145 S. Ct. 75, 78 (2025) (per curiam). Short of such a uniquely salacious miscarriage of justice, summary reversal for people on death row who were denied habeas relief has almost become a nullity; the last time the Court had issued one was five years before. See Andrus v. Texas, 140 S. Ct. 1875, 1886–87 (2020) (per curiam) (reversing a decision by the Texas Court of Criminal Appeals that failed to adequately address whether a man on Texas's death row was prejudiced by his constitutionally deficient counsel at trial).

105. William Baude, Is Qualified Immunity Unlawful?, 106 Calif. L. Rev. 45, 85 (2018) [hereinafter Baude, Qualified Immunity]; see also Makar, supra note 34, at 433–34 & n.34 (cataloguing twelve qualified immunity summary reversals under the Roberts Court through 2021).

106. 42 U.S.C. § 1983 (2018); see also Baude, Qualified Immunity, supra note 105, at 69 (discussing this and other federal civil rights statutes). The Supreme Court has recognized a similar cause of action against federal officials. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397 (1971). But it has severely limited the scope of this pathway in the decades since. See, e.g., Egbert v. Boule, 142 S. Ct. 1793, 1802–04 (2022) (holding that *Bivens* does not extend to Fourth Amendment excessive force or First Amendment retaliation claims against immigration officers at the border). At the end of the 2024 Term, the Court even did so through an increasingly rare summary reversal—at the explicit request of the Acting Solicitor General. Goldey v. Fields, 145 S. Ct. 2613, 2615 (2025) (per curiam). In that case, a Virginia man sued federal prison officials for violating his constitutional right to be free from excessive force after guards physically abused him while in solitary confinement, including by ramming his head into a concrete wall while his hands and feet were in chains. Fields v. Fed. Bureau of Prisons, 109 F.4th 264, 268 (4th Cir. 2024), rev'd, *Goldey*, 145 S. Ct. 2613. After the court of appeals ruled that his claim against the prison could move forward under *Bivens*, the federal government took the "unusual step of filing an uninvited certiorari-stage amicus brief" asking the Court to summarily reverse, citing the "severity of the court of appeals' error and the gravity of the decision's potential consequences"—namely, authorizing lawsuits against federal prison guards for severe abuse. Brief for the United States as Amicus Curiae in Support of Petitioners at 1–2, *Goldey*, 145 S. Ct. 2613 (No. 24-809), 2025 WL 735005. A few weeks later, the Court did as the Acting Solicitor General requested, chastising the lower court for "extend[ing] *Bivens* to new contexts." *Goldey*, 145 S. Ct. at 2615.

107. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

108. Andrew Chung, Lawrence Hurley, Jackie Botts, Andrea Januta & Guillermo Gomez, For Cops Who Kill, Special Supreme Court Protection, Reuters (May 8, 2020), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/ (on file with the *Columbia Law Review*).

The Roberts Court has traditionally been fond of qualified immunity. With real vigor since 2012, the Justices have summarily reversed a steady stream of lower court decisions denying qualified immunity to government officials.[109] Indeed, two of the last few summary reversals issued by the Roberts Court in 2021 did just that.[110] Only once, faced with a particularly appalling set of facts, has the Roberts Court ever issued a summary reversal—or any opinion, for that matter—denying qualified immunity because officers violated a person's clearly established constitutional rights.[111]

Like with habeas, then, the impact of the decline of summary reversals for litigants in qualified immunity cases seems clear. Police and prison officers benefit the most from these summary reversals, the thinking goes, so they have the most to lose if these rulings remain in remission.

But like with habeas, litigants in civil rights disputes face asymmetric costs. On the one hand, plaintiffs, especially those suing on behalf of family members killed by police or prison officers, are often left without redress if those officers are shielded by qualified immunity.[112] On the other hand, officers denied qualified immunity are virtually always indemnified by the state from personal liability for settlement costs or damages.[113] Nonetheless, scholars have argued that concern over liability for police

109. See City of Tahlequah v. Bond, 142 S. Ct. 9 (2021) (per curiam); Rivas-Villegas v. Cortesluna, 142 S. Ct. 4 (2021) (per curiam); City of Escondido v. Emmons, 139 S. Ct. 500 (2019) (per curiam); Kisela v. Hughes, 138 S. Ct. 1148 (2018) (per curiam); White v. Pauly, 580 U.S. 73 (2017) (per curiam); Mullenix v. Luna, 577 U.S. 7 (2015) (per curiam); Taylor v. Barkes, 575 U.S. 822 (2015) (per curiam); Carroll v. Carman, 574 U.S. 13 (2014) (per curiam); Stanton v. Sims, 571 U.S. 3 (2013) (per curiam); Ryburn v. Huff, 565 U.S. 469 (2012) (per curiam); Los Angeles County v. Rettele, 550 U.S. 609 (2007) (per curiam).

110. *City of Tahlequah*, 142 S. Ct. at 9; *Rivas-Villegas*, 142 S. Ct. at 5.

111. Taylor v. Riojas, 141 S. Ct. 52, 53 (2020) (per curiam) (summarily reversing a decision that Texas prison officials could not have known keeping a man with open wounds in facilities covered with feces and flooded with sewage violated his constitutional rights because they held him there for only six days). *Taylor* might also have signaled some hesitancy about qualified immunity in light of the public firestorm following the police killing of George Floyd earlier that year. Katherine Mims Crocker, The Supreme Court's Reticent Qualified Immunity Retreat, 71 Duke L.J. Online 1, 2, 7–13 (2021), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1089&context=dlj_online [https://perma.cc/V6GY-VZAR]. Indeed, four months after *Taylor*, the Court issued a GVR, see supra note 42 and accompanying text, in another decision that had granted qualified immunity to Texas state prison officials "for further consideration in light of *Taylor*." McCoy v. Alamu, 141 S. Ct. 1364, 1364 (2021) (mem.); see also Crocker, supra, at 5–6 (elaborating on the implications of *McCoy*).

112. Chung et al., supra note 108.

113. See Joanna C. Schwartz, Police Indemnification, 89 N.Y.U. L. Rev. 885, 890 (2014) (reporting the results of a landmark study that found the state indemnified police and prison officers 99.59% of the time, paid 99.98% of all settlement and damages costs, and paid 100% of punitive damages in misconduct cases).

and prison officers is precisely what has driven the Court's summary reversal habit in qualified immunity cases.[114]

Unlike habeas, however, qualified immunity has nearly disappeared from the Court's merits docket.[115] The Roberts Court's qualified immunity agenda began on the merits docket, with notable early decisions first streamlining[116] and then super-charging[117] qualified immunity in favor of government officials. But whereas the Court has issued some landmark habeas decisions on the merits docket in recent years,[118] the last time the Court heard oral argument in a qualified immunity case was in 2017—ultimately ruling in favor of the police.[119]

Finally, an unusual pair of Justices has recently begun expressing concerns with qualified immunity.[120] The most vocal critic of the doctrine has been Justice Clarence Thomas, who in 2021—the year summary reversals began slowing to a trickle—suggested that today's robust form of qualified immunity should be weakened or reconsidered entirely.[121] And

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114. E.g., Kit Kinports, The Supreme Court's Quiet Expansion of Qualified Immunity, 100 Minn. L. Rev. Headnotes 62, 64 (2016), https://www.minnesotalawreview.org/wp-content/uploads/2016/02/Kinports_PDF1.pdf [https://perma.cc/62SR-RXAG]. And like with habeas, conservative and liberal Justices have openly expressed their conflicting views of this project. Compare *Mullenix*, 577 U.S. at 12 ("We have repeatedly told courts . . . not to define clearly established law [for purposes of qualified immunity] at a high level of generality." (first alternation in original) (internal quotation marks omitted) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) (opinion of Scalia, J.))), with Salazar-Limon v. City of Houston, 581 U.S. 946, 953–54 (2017) (Sotomayor, J., dissenting from denial of certiorari, joined by Ginsburg, J.) (noting "a disturbing trend regarding the use of this Court's resources . . . to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force").

115. Hellman, Federal Question Jurisdiction, supra note 8, at 2185 n.297.

116. See Pearson v. Callahan, 555 U.S. 223, 227 (2009) (collapsing the original two-step qualified immunity inquiry into a single step: whether the constitutional right was clearly established at the time).

117. See *al-Kidd*, 563 U.S. at 741 (emphasizing that clearly established rights must be "beyond debate" and clear from the view of not merely "a" reasonable officer but "every" such officer); Kinports, supra note 114, at 65 (discussing the impact of these changes).

118. See supra notes 99–100 and accompanying text.

119. District of Columbia v. Wesby, 138 S. Ct. 577 (2018). In fall 2023, the Court agreed to hear argument in a dispute over New York officials' restrictions on the free speech rights of the National Rifle Association but declined to weigh in on the qualified immunity question. See Petition for a Writ of Certiorari at i, NRA v. Vullo, 144 S. Ct. 1316 (2024) (No. 22-842), 2023 WL 2413355 (presenting both a First Amendment and a qualified immunity question); see also NRA v. Vullo, 144 S. Ct. 375, 375 (2023) (mem.) (granting cert on the First Amendment question alone).

120. David D. Coyle, Getting It Right: Whether to Overturn Qualified Immunity, 17 Duke J. Const. L. & Pub. Pol'y 283, 294–96 (2022).

121. Justice Thomas first voiced this view on the merits docket, on the grounds that qualified immunity's current form is inconsistent with both the text of the federal statute authorizing civil rights suits against state officials and the common law principles against which that law was enacted. Ziglar v. Abbasi, 582 U.S. 120, 156–60 (2017) (Thomas, J., concurring in part and concurring in the judgment). But his most vocal criticisms of the doctrine, including calls to reconsider it entirely, have come outside of full decisions on the

Justice Sonia Sotomayor has recently echoed the view that the bar for plaintiffs to overcome qualified immunity is set too high.[122] She has also specifically criticized the Court for expanding qualified immunity through summary reversals.[123]

If "death is different," Professor Baude has remarked that "qualified immunity is special."[124] Baude was specifically noting the Court's preferential treatment of the doctrine on its summary reversal docket.[125] But his and others' concerns with the Court's summary reversal practice go deeper than qualified immunity. The next section turns to those criticisms.

B. *The Decline of Public Debate Over Summary Reversals*

Summary reversal is no stranger to criticism. Scholars and practitioners have questioned the legitimacy of the Court's summary reversal practice since the late 1950s.[126] Over the past decade, this critique has taken on a new angle: that summary reversals play a key role in the Court's broader, controversial practice of resolving cases on a short time frame without full briefing and argument, known as the shadow docket.

Coined in 2015 by Professor Baude, the term "shadow docket" originally focused on the Court's summary reversal practice.[127] He defined the term to encompass "a range of orders and summary decisions that defy [the Court's] normal procedural regularity" and "lack . . . transparency."[128] Summary reversals were of "particular" interest to Baude.[129] Although "summary reversals have become more transparent and procedurally regular over time," he contended, "the selection of cases for summary reversal remains a mystery," which "makes it difficult to tell whether the Court's selections are fair."[130]

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merits. See, e.g., Hoggard v. Rhodes, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting denial of certiorari) ("[I]n an appropriate case, we should reconsider either our one-size-fits-all test [for clearly established law] or the judicial doctrine of qualified immunity more generally.").

122. Kisela v. Hughes, 138 S. Ct. 1148, 1161 (2018) (Sotomayor, J., dissenting).

123. See id. at 1162 ("This unwarranted summary reversal is symptomatic of 'a disturbing trend regarding the use of this Court's resources' . . . 'to summarily reverse courts for wrongly denying officers the protection of qualified immunity' but 'rarely intervene[ing] where courts wrongly afford officers the benefit of qualified immunity in these same cases.'" (quoting Salazar-Limon v. City of Houston, 137 S. Ct. 1277, 1282 (2017) (Sotomayor, J., dissenting from denial of certiorari, joined by Ginsburg, J.))).

124. Baude, Qualified Immunity, supra note 105, at 85.

125. Id. Justice Sotomayor has cited Baude's piece in her own criticisms of the Court's summary reversal habit in qualified immunity cases. See *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting) (citing Baude, Qualified Immunity, supra note 105, at 82).

126. See supra notes 62–63 and accompanying text.

127. Baude, Shadow Docket, supra note 1, at 1–2.

128. Id. at 1.

129. Id.

130. Id. at 2–3.

This lack of transparency was the primary motivation for the shadow metaphor Baude invoked. But the critique soon took on a life of its own. The other phenomenon Baude examined was the practice of "debatable and mysterious" grants of "stays and injunctions" in response to emergency applications for relief from lower court decisions.[131] Typically, these emergency orders decide whether a contested government policy can go into effect while a full-fledged legal challenge crawls its way through the lower courts.[132]

Today, emergency orders have come to dominate public debate over the shadow docket.[133] Perhaps no one is a more forceful critic of the Court's emergency orders than Professor Stephen Vladeck. In his recent book on the shadow docket, Vladeck explains that since Baude's initial observations in "the mid-2010s, there has been a radical shift in how (and how often) the justices use the shadow docket."[134] The Court now uses emergency orders, Vladeck notes, to "intervene[] preemptively, if not prematurely, in some of our country's most fraught political disputes."[135] Vladeck places original responsibility for this shift with the first Trump Administration's novel strategy of leapfrogging lower courts whenever its policies were challenged, asking the Justices to green-light the policies while litigation continued—decisions that, while supposedly temporary, often gave the final word.[136]

Like Baude, Vladeck primarily takes issue with the lack of transparency in the Court's emergency orders. "The problem is not the shadow docket itself," he emphasizes, but rather that its "rulings . . . are unsigned and unexplained (or, at least, insufficiently explained)."[137] Opacity, however, is not the only charge levied against emergency orders. Critics note that the Justices tend to vote more frequently along ideological lines when intervening on an emergency basis.[138] Scholars question where emergency orders fit on the spectrum from law declaration to error

131. Id. at 3.

132. Vladeck, Solicitor General, supra note 15, at 130–32.

133. See supra note 41 and accompanying text. But see Greg Goelzhauser, The Applications Docket, 58 Ga. L. Rev. 97, 104–08 (2023) (arguing that both the shadow docket and emergency orders are misleading baselines for critique).

134. Vladeck, Shadow Docket, supra note 11, at 12.

135. Id. at 12–13.

136. Vladeck, Solicitor General, supra note 15, at 125–26.

137. Vladeck, Shadow Docket, supra note 11, at 247–48.

138. E.g., id. at 19–20, 145; Nicholas D. Conway & Yana Gagloeva, Out of the Shadows: What Social Science Tells Us About the Shadow Docket, 23 Nev. L.J. 673, 686–705 (2023) (noting that "close to 97% of [emergency orders producing dissents from 2013 to 2021] reflect[] ideological purity" and "ideologically extreme Justices appear to be[] even more ideologically consistent 'in the shadows' than they [appear] on the merits docket"); Ian Millhiser, The Supreme Court's Enigmatic "Shadow Docket," Explained, Vox (Aug. 11, 2020), https://www.vox.com/2020/8/11/21356913/supreme-court-shadow-docket-jail-asylum-covid-immigrants-sonia-sotomayor-barnes-ahlman (on file with the *Columbia Law Review*).

correction.[139] And judges debate whether these orders—particularly unexplained ones—have binding, precedential effect.[140]

Each of these points has also been raised about summary reversals. Whether about transparency,[141] polarization,[142] identity,[143] or precedent,[144] questions abound over the Court's habit of reversing lower court decisions on the merits without full briefing or argument. But although summary

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139. See Schmidt, supra note 44, at 1018 ("[T]he modern emergency docket should be understood as a small pocket of dispute resolution (or dispute *preservation*) in a predominantly law-declaration Court. . . . The circumstances of the emergency docket call for judicial minimalism—for doing less rather than more."); cf. Vladeck, Shadow Docket, supra note 11, at 247 ("[T]he justices . . . are deciding significant questions that impact millions of people through these emergency applications.").

140. Justice Alito has publicly stated that shadow docket orders are not precedential. Katie Barlow, Alito Blasts Media for Portraying Shadow Docket in "Sinister" Terms, SCOTUSblog (Sep. 30, 2021), https://www.scotusblog.com/2021/09/alito-blasts-media-for-portraying-shadow-docket-in-sinister-terms/ [https://perma.cc/YWL2-VZLG]. But the Court's own emergency orders seem to belie that notion. See, e.g., Trump v. Boyle, 145 S. Ct. 2653, 2654 (2025) (emphasizing that a previous emergency order permitting President Trump to fire members of the National Labor Relations Board and Merits Systems Protection Board "squarely controlled" the question of his ability to fire members of the Consumer Product Safety Commission); Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) (relying on emergency orders granting relief from policies barring religious services during the pandemic in New York when granting an emergency injunction from a California policy doing the same). Accordingly, lower courts disagree over how to weigh the Justices' emergency orders. Trevor N. McFadden & Vetan Kapoor, The Precedential Effects of the Supreme Court's Emergency Stays, 44 Harv. J.L. & Pub. Pol'y 827, 831 (2021).

141. See, e.g., Michael R. Dreeben, Case Selection and Review at the Supreme Court: Statement for the Presidential Commission on the Supreme Court of the United States 11–12 (2021) (on file with the *Columbia Law Review*) ("[T]he Court's error-correction role may be one of its least transparent areas . . . . Those concerns may be amplified for summary reversals because the Court bypasses merits briefing and a public hearing and resolves often-intricate factual questions . . . .").

142. See, e.g., Richard C. Chen, Summary Dispositions as Precedent, 61 Wm. & Mary L. Rev. 691, 694 (2020) ("Indeed, summary reversals have been far more commonly used to reach results the conservative Justices generally support, favoring government officials in qualified immunity cases and the state in federal habeas cases."); Robert M. Yablon, Justice Sotomayor and the Supreme Court's Certiorari Process, 123 Yale L.J. Forum 551, 562 (2014), https://www.yalelawjournal.org/pdf/9.Yablon_FINAL_dpysu1mt.pdf [https://perma.cc/QP2U-4QTK] ("[T]he current Court's disdain for error correction is selective. In a steady trickle of cases, the Court has been granting certiorari and summarily reversing decisions favorable to criminal defendants and habeas petitioners."); Will Baude, *Tolan v. Cotton*—When Should the Supreme Court Interfere in 'Factbound' Cases?, Wash. Post (May 7, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/07/tolan-v-cotton-when-should-the-supreme-court-interfere-in-factbound-cases/ (on file with the *Columbia Law Review*) (suggesting a "crude[]" conclusion from this trend: that conservative Justices "like police officers and don't like" people who are incarcerated).

143. See supra notes 56–60 and accompanying text.

144. See, e.g., Chen, supra note 142, at 719 (suggesting that "the Supreme Court use summary dispositions as a means of developing the meaning of high-level legal standards" because "even short, per curiam opinions can have precedential value"); Makar, supra note 34, at 436–42 (discussing the precedential value of summary reversals on qualified immunity).

reversals and emergency orders held equal focus in Baude's initial observations on the shadow docket in 2015,[145] the heated debate over emergency orders since 2021[146] has seemingly sucked the oxygen out of the conversation about summary reversals.[147] And this shift has occurred over the same period in which emergency orders have proliferated, while summary reversals have seemingly fallen out of fashion.[148]

This might be a coincidence. But it was not inevitable. Increased scrutiny of emergency orders could have shined a light on summary reversals, too. Part III will explore whether these twin patterns might, in fact, be very much related.

III. POSSIBLE REASONS FOR THE DECLINE OF SUMMARY REVERSALS

Parts I and II set the stage to theorize about the decline of summary reversals at the Court since 2021. This trend is notable regardless of the explanation—especially, as Part II notes, for people on death row. But it does cry out for an account. This Part will explore possible reasons for the decline of summary reversals: time constraints from the shadow docket, particularly from the rise of tools to quickly reach the merits in cases arising there; the appointment of Justice Barrett, particularly for ideologically divisive summary reversals; the conservative alignment of lower courts and the Supreme Court, particularly in the context of habeas and qualified immunity; and internalized critiques of the Court's dabbling, through summary reversals, in error correction.

Which of these factors predominates is impossible to say so long as the Court continues to operate in the shadows. In all likelihood, it is a combination working in tandem.

A. *Time Constraints From the Shadow Docket*

One explanation for the recent decline of summary reversals could be workload. The Justices might simply have less bandwidth to issue them.

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145. See supra note 129 and accompanying text.

146. See supra note 17 and accompanying text.

147. See Makar, supra note 34, at 430 ("This debate [over the shadow docket], for the most part, has largely been situated around the review of emergency petitions. But the Court reviews many other cases on its orders docket, [including], although not having engendered as much public scrutiny, summary reversals . . . ."); Schmidt, supra note 44, at 1015 & n.69 ("[W]hile . . . criticisms [of summary reversals] have force, summary reversals are not a focus of Vladeck's book . . . ."). Some scholars, however, continue to critique summary reversals in light of the shadow docket. See Alexander V. Hirsch, Jonathan P. Kastellec & Anthony R. Taboni, Reviewing Fast or Slow: A Theory of Summary Reversal in the Judicial Hierarchy 1–7 (Nov. 22, 2024) (unpublished manuscript), https://jkastellec.scholar.princeton.edu/sites/g/files/toruqf3871/files/documents/Reversal_Without_Review_11_22_2024.pdf [https://perma.cc/QBC6-8XJL] (outlining a mathematical model that demonstrates the negative effects of summary reversals and other unexplained shadow-docket orders on lower-court decisionmaking).

148. See supra notes 6–8 and accompanying text.

By one measure, the Justices' workload is lighter than ever. In recent Terms, the Court has issued fewer decisions on its merits docket than it has at any time since the Civil War.[149] It rarely fills all the available slots on its argument calendar.[150] And this is by design. Alleviating caseload was a key justification for granting the Justices more discretion over their docket during the twentieth century.[151] As expected, centralizing control has corresponded to a shrinking docket, alongside the evolution of views about the Court's institutional role.[152]

Ask a Supreme Court clerk, however, and they are unlikely to say that they—or their boss—have an easy job.[153] That's because the shadow docket is busier than ever. "Even as the total number of cases the Supreme Court is deciding [on its merits docket] has declined (significantly) in recent Terms," Professor Vladeck has noted, "the number of cases in which the Court is reaching and resolving the merits in some kind of preliminary procedural posture has grown—in absolute terms and, thus, in even more significant proportional terms."[154] And this is largely occurring in the most contentious cases.[155] Succumbing to a stream of requests to wade into major disputes before lower courts have resolved them—a stream that has become a torrent during the second Trump Administration—the Court has breathed new life into previously rare procedural tools, blurring the lines between the shadow and merits dockets to stay afloat.[156]

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149. Stephen I. Vladeck, A Court of First View, 138 Harv. L. Rev. 533, 537–38, 542–43 & fig. 1 (2024) [hereinafter Vladeck, Court of First View].

150. Hartnett, Summary Reversals, supra note 7, at 611–12. For example, 80% of the Court's second-of-two argument slots per day were empty in the calendar for the February 2023 sitting. See Sup. Ct. of the U.S., October Term 2022: For the Session Beginning February 21, 2023 (Feb. 16, 2023), https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalFebruary2023.pdf [https://perma.cc/6962-TV9V].

151. See supra notes 53–55 and accompanying text.

152. See Monaghan, supra note 57, at 679–83 & n.80 (hypothesizing that the shift toward law declaration and embrace of agenda control "may be the result of the decline in the Court's workload").

153. Cf. Hoover, supra note 14 (noting that a veteran Supreme Court advocate has speculated whether the Justices have realized that "[i]f you can get by on 60 cases, then maybe that's a better way than to work yourself half to death" (internal quotation marks omitted) (quoting Carter Phillips, Partner, Sidley Austin LLP)).

154. Vladeck, Court of First View, supra note 149, at 536.

155. Id. at 538.

156. See id. at 536–38 (outlining three categories of tools: deciding the merits in appeals from preliminary injunctions, doing the same in emergency applications, and taking cases on the merits before the courts of appeals hear them). Some Justices have openly encouraged this practice. See Labrador v. Poe, 144 S. Ct. 921, 933–34 (2024) (Kavanaugh, J., concurring, joined by Barrett, J.). As to the blurred lines between the merits and shadow dockets, starting in 2021, the *Harvard Law Review*'s annual report of Supreme Court statistics began tracking the Court's emergency orders—with over two pages of footnotes trying to parse the divide between the two dockets, as well as other thorny questions. The Statistics, 135 Harv. L. Rev. 491, 505–07 (2021).

Three of these tools are worth highlighting. The first is called "certiorari before judgment."[157] Provided by Congress for cases of "great importance," the power to grant cert before judgment allows the Court to hear disputes on the merits directly from trial courts, without waiting for courts of appeals to weigh in.[158] After going fourteen years without granting it once, Professor Vladeck emphasizes that, between 2019 and 2024, the Court granted cert before judgment a whopping twenty-one times.[159] As to the timing, he speculates that "the increasing use of cert before judgment could be a way of mitigating the number of major rulings the court is handing down through emergency orders."[160]

A second tool is expedited briefing and oral argument. Ordinarily, parties in a case on the Court's merits docket have months to file their briefs and prepare to argue before the Justices.[161] In rare cases when the parties don't have months to wait, the Court has fast-tracked the process in a matter of weeks or days.[162] Previously, that only occurred on the merits docket.[163] Beginning in 2021, however, the Justices began ordering expedited briefing and argument in cases arising on the shadow docket.[164] They first did so in response to the public outcry over the Court's late-night, unsigned, single-paragraph emergency order allowing Texas's bounty hunter–style abortion ban to go into effect on September 1, 2021, by a vote of 5-4.[165] Since then, it has become, if not the norm, then no longer a rare exception.[166] As Professor Vladeck notes, the Court now

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157. Vladeck, Court of First View, supra note 149, at 544–45.

158. Michael Morley, Congressional Intent and the Shadow Docket, Harv. L. Rev. Blog (Jan. 24, 2020), https://harvardlawreview.org/blog/2020/01/congressional-intent-and-the-shadow-docket [https://perma.cc/KUV8-3B4Y] (internal quotation marks omitted) (quoting H.R. Rep. No. 100-660, pt. 3, at 11 (1988)).

159. Vladeck, Court of First View, supra note 149, at 545–47.

160. Steve Vladeck, The Rise of Certiorari Before Judgment, SCOTUSblog (Jan. 25, 2022), https://www.scotusblog.com/2022/01/the-rise-of-certiorari-before-judgment/ [https://perma.cc/QDN8-GR6Z].

161. Generally, briefs on the merits are filed over 105 days, Sup. Ct. R. 25, and oral argument takes place at least two weeks after the respondent files their brief, Sup. Ct. R. 27.

162. Shapiro et al., supra note 3, § 13.2 n.3. See, e.g., Trump v. Anderson, 144 S. Ct. 539, 539 (2024) (mem.) (ordering expedited briefing and argument over Colorado's exclusion of Donald Trump from the state's 2024 electoral ballot so a decision could be reached before the deadline to print ballots).

163. Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary, 117th Cong. 88 (2021) (testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, Univ. of Tex. Sch. of L.).

164. Pickup & Templin, supra note 16, at 9–12.

165. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021) (emergency order green-lighting the ban); see also Whole Woman's Health v. Jackson (*Whole Woman's Health II*), 142 S. Ct. 522, 531 (2021) (expediting briefing and argument when the ban returned to the Court). For the full story, see Vladeck, Shadow Docket, supra note 11, at 239–40, 250–51.

166. The Court has recently ordered expedited briefing and argument through a range of procedural vehicles on the shadow docket: granting petitions for cert before judgment, e.g., *Whole Woman's Health II*, 142 S. Ct. at 531; granting cert petitions accompanying

regularly "hustle[s] disputes onto the merits docket to avoid having to grapple with complicated legal questions on the shadow docket"—spending considerable time and effort to brief, argue, and decide them.[167]

A third tool is unsigned opinions in response to emergency applications for relief. Traditionally, the Court has issued two types of rulings on the shadow docket: unsigned opinions summarily reversing lower court decisions in response to cert petitions[168] and unsigned orders granting or denying emergency applications for relief from lower court decisions on challenges to controversial government policies.[169] Today, this line is blurring under the crush of emergency requests for relief in disputes over challenges to unprecedented policies enacted during the second Trump Administration. In response to these requests, the Court has begun issuing a mix of unsigned opinions[170] and orders[171]—sometimes even in the same dispute[172]—with no clear rationale for the distinction.

Is it a coincidence that summary reversals have declined over the same period in which these procedural changes have occurred? Perhaps. But it could also simply be that emergency orders have come to dwarf summary reversals in the Court's shadow docket workload, as well as in the public discourse over it.[173] Decades ago, Justice John Paul Stevens repeatedly

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emergency applications for stays of execution, e.g., Ramirez v. Collier, 142 S. Ct. 1264, 1274 (2022); treating emergency applications as petitions for writs of certiorari, e.g., TikTok Inc. v. Garland, 145 S. Ct. 1001, 1001 (2024) (mem.); treating emergency applications as petitions for writs of certiorari before judgment, e.g., Biden v. Nebraska, 143 S. Ct. 477, 477 (2022) (mem.); and even by ordering argument over emergency applications themselves by issuing so-called "administrative stays" of lower-court rulings, e.g., Trump v. CASA, Inc., 145 S. Ct. 1917, 1917 (2025) (mem.). Though not always with an expedited argument order, the Court deployed the move of treating emergency applications as cert petitions and then granting them seventeen times between October 2020 and December 2024. Vladeck, Court of First View, supra note 149, at 540 n.34.

167. Vladeck, Shadow Docket, supra note 11, at 251.

168. See supra notes 34–36 and accompanying text.

169. See supra note 41 and accompanying text.

170. E.g., Dep't of Educ. v. California, 145 S. Ct. 966, 968–69 (2025) (per curiam) (permitting, by a 5-4 vote, the government to cancel millions of dollars in federal grants to public schools).

171. E.g., McMahon v. New York, 145 S. Ct. 2643, 2643 (2025) (mem.) (allowing, by a 5-4 or 6-3 vote, the Secretary of Education to fire half of her Agency's workforce).

172. The saga over President Trump's efforts to deport scores of Venezuelan residents whom the government alleges are part of a group known as Tren de Aragua is illustrative. In early April 2025, the Court issued an unsigned opinion turning away a handful of the challengers, by a 5-4 vote, because they had filed their case in the wrong court. Trump v. J.G.G., 145 S. Ct. 1003, 1005–06 (2025) (per curiam). Two weeks later, the Court issued an unsigned order temporarily barring the government from deporting hundreds more of the challengers while their class action lawsuit proceeded in the correct court. A.A.R.P. v. Trump, 145 S. Ct. 1034, 1034 (2025) (mem.). In May, the Court issued another unsigned opinion, this time extending its temporary bar on the deportations because the government had not given the challengers proper notice. A.A.R.P. v. Trump, 145 S. Ct. 1364, 1367 (2025) (per curiam).

173. See supra section II.B.

chided his colleagues for wasting time with summary reversals.[174] "This Court is much too busy to spend its time correcting harmless errors," he once wrote, for example, in dissent from one.[175] Maybe today's Justices—swamped with requests for emergency relief, petitions for cert before judgment, and briefing and oral argument on tight timelines—have unintentionally come around to Justice Stevens's point of view.

B. *Justice Barrett and the Six-Vote Norm*

Another explanation for the recent decline of summary reversals could be skepticism from Justice Barrett. Since her appointment to the Court, she has criticized issuing decisions without full briefing and oral argument, a critique that might impact summary reversals.

Justice Barrett's confirmation in the fall of 2020 cemented a conservative, six-member supermajority on the Supreme Court.[176] That shift had begun two years earlier with the retirement of Justice Anthony Kennedy, the Court's longtime swing vote, and his subsequent replacement by Justice Brett Kavanaugh.[177] Although Chief Justice Roberts enjoyed a brief period of control as the Court's new median Justice after Justice Kennedy's retirement,[178] that quickly changed after Justice Ruth Bader Ginsburg's death on September 18, 2020.[179] In the throes of the COVID-19 pandemic

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174. Shapiro et al., supra note 3, § 5.12(c).

175. Alabama v. Pugh, 438 U.S. 781, 782–83 (1978) (Stevens, J., dissenting).

176. Lawrence Hurley & Andrew Chung, Barrett Finds Own Voice at Center of Conservative U.S. Supreme Court, Reuters (July 2, 2021), https://www.reuters.com/world/us/barrett-finds-own-voice-center-conservative-us-supreme-court-2021-07-02/ (on file with the *Columbia Law Review*).

177. Did Anthony Kennedy Just Destroy His Own Legacy?, Politico Mag. (June 27, 2018), https://www.politico.com/magazine/story/2018/06/27/anthony-kennedy-legacy-supreme-court-218900/ (on file with the *Columbia Law Review*). Indeed, in public remarks a year after Justice Kennedy's retirement, Justice Ruth Bader Ginsburg called it "the event of greatest consequence for the current [T]erm and perhaps for many [T]erms ahead." Debra Cassens Weiss, Ginsburg Says Kennedy's Retirement Was 'Event of Greatest Consequence' for Current Term, A.B.A. J. (June 10, 2019), https://www.abajournal.com/news/article/justice-ginsburg-suggests-sharply-divided-decisions-will-increase-as-term-ends [https://perma.cc/TY2B-BYFP]; see also Tessa Berenson Rogers, Inside Brett Kavanaugh's First Term on the Supreme Court, Time (June 28, 2019), https://time.com/longform/brett-kavanaugh-supreme-court-first-term/ [https://perma.cc/TE59-5QHA] (documenting Kavanaugh's early, decisive impact in cases with 5-4 rulings along ideological lines).

178. Adam Liptak, John Roberts Was Already Chief Justice. But Now It's His Court., N.Y. Times (June 30, 2020), https://www.nytimes.com/2020/06/30/us/john-roberts-supreme-court.html (on file with the *Columbia Law Review*).

179. Justice Ruth Bader Ginsburg Passes, Justice Amy Coney Barrett Seated as Replacement, ABA (Jan. 25, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/year-end-2020/amy-coney-barrett-replaces-ginsburg-on-supreme-court/ (on file with the *Columbia Law Review*) [hereinafter Justice Ruth Bader Ginsburg Passes]. Indeed, as observers had cautioned, the Chief's "pivotal role on the court could be fleeting. Were President Trump able to appoint a replacement for Justice Ruth Bader Ginsburg, who is 87, . . . the chief justice would almost certainly be outflanked by a conservative majority on his right." Liptak, supra note 178.

and the heat of a presidential election, President Trump nominated, and Senate Republicans rapidly confirmed, then-Judge Barrett to the Supreme Court.[180] At the end of her first Term, the Court seemed to have not one controlling vote, but three: the newly confirmed Justice Barrett alongside Chief Justice Roberts and Justice Kavanaugh.[181] This uneasy triumvirate has since remained in control of the most conservative Supreme Court in nearly a century.[182]

Speculation about Barrett's potential impact abounded during her rushed confirmation.[183] Perhaps a first for a Supreme Court nominee, she faced questions about the shadow docket. Senator Richard Blumenthal unsuccessfully sought her stance on the shadow docket during her confirmation hearing.[184] And before the hearing, buried in dozens of pages of written answers to 150 questions from Senator Sheldon Whitehouse, Barrett had dodged another one-off inquiry about it: "As a sitting judge," she wrote, "it would not be appropriate for me to offer an opinion on the circumstances in which the Supreme Court should resolve issues without argument or written opinions."[185]

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180. Justice Ruth Bader Ginsburg Passes, supra note 179.

181. Laura Bronner & Elena Mejia, The Supreme Court's Conservative Supermajority Is Just Beginning to Flex Its Muscles, FiveThirtyEight (July 2, 2021), https://fivethirtyeight.com/features/the-supreme-courts-conservative-supermajority-is-just-beginning-to-flex-its-muscles/ [https://perma.cc/2V5H-XHTN].

182. Adam Liptak & Abbie VanSickle, A Triumphant Supreme Court Term for Trump, Fueled by Emergency Rulings, N.Y. Times (June 28, 2025), https://www.nytimes.com/2025/06/28/us/supreme-court-trump-victories.html (on file with the *Columbia Law Review*) (last updated June 30, 2025); Nina Totenberg, The Supreme Court Is the Most Conservative in 90 Years, NPR (July 5, 2022), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative [https://perma.cc/TX4J-5JKZ].

183. Initially, Democrats argued the Senate shouldn't consider a Supreme Court nominee before the next President was elected. Alex Woodward, Ruth Bader Ginsburg Death: Top Democrat Quotes Republican's Own Words to Demand Delay on New SCOTUS Appointment, Independent (Sep. 19, 2020), https://www.independent.co.uk/news/world/americas/us-politics/bader-ginsburg-schumer-mcconnell-scotus-rbg-latest-b490830.html [https://perma.cc/8M56-7R2Z]. Republican Party pressure overcame Democratic resistance, however. Rich Lowry & John McCormack, How Republicans Quickly Lined Up to Confirm a Supreme Court Nominee, Nat'l Rev. (Sep. 26, 2020), https://www.nationalreview.com/2020/09/how-republicans-quickly-lined-up-to-confirm-a-supreme-court-nominee/ (on file with the *Columbia Law Review*). When it became clear that Barrett's nomination would move forward, Democrats then turned to scrutinizing her record for signs of how she might rule on hot-button issues from abortion to healthcare. Jeremy Herb & Clare Foran, Democrats Grill Barrett on Health Care and Abortion as Trump Pick Refuses to Say How She'll Rule, CNN, https://www.cnn.com/2020/10/13/politics/barrett-supreme-court-hearing-day-two/index.html [https://perma.cc/D2BJ-EEDE] (last updated Oct. 13, 2020).

184. Confirmation Hearing on the Nomination of Hon. Amy Coney Barrett to Be an Associate Justice of the Supreme Court of the United States, 116th Cong. (2020) (statement of Sen. Blumenthal).

185. Responses from Amy Coney Barrett, Judge, 7th Cir., to Questions for the Record by Sheldon Whitehouse, Sen. for R.I. ¶ 133 (Oct. 16, 2020), https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20QFRs.pdf [https://perma.cc/RBG2-ENAK] [hereinafter Barrett Senate Questionnaire].

A year into her tenure, Justice Barrett took an opportunity to revisit Senator Whitehouse's question. During the pandemic, Maine required frontline healthcare workers to be vaccinated against COVID-19.[186] A group of healthcare workers went to the federal courthouse in Bangor, seeking to prevent the rule from going into effect because of their religious objections to vaccines.[187] After failing in the lower courts, the workers turned to the Supreme Court, filing an emergency request on the shadow docket to put Maine's policy on hold.[188]

In *Does 1–3 v. Mills*, the Court denied that request.[189] Its decision, as is usually the case with emergency orders, was unsigned and unexplained. But Justice Barrett wrote separately to explain her vote in favor of Maine's new policy. In a single, brief paragraph, she stressed that requests for emergency relief on the shadow docket should turn on not only the merits of plaintiffs' claims and the balance of harms to both parties but also on "whether the Court should grant review" of the dispute if it later resurfaces on the merits docket, after lower courts have considered it in full.[190] "Were the standard otherwise," she continued, "applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument."[191] That concern weighed against relief in this case, Justice Barrett concluded, because it was the Court's first encounter with a novel issue.[192]

Justice Barrett's concern about making decisions "on a short fuse" was directed at emergency orders.[193] But it could apply just as easily to summary reversals. Those rulings are similarly handed down "without benefit of full briefing and oral argument."[194] They likewise reflect a judgment that a case is one the Court "would be unlikely to take."[195]

186. Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021) (Gorsuch, J., dissenting).

187. Verified Complaint at 2–7, Does 1–6 v. Mills, 566 F. Supp. 3d 34 (D. Me. 2021) (No. 1:21-cv-00242-JDL), 2021 WL 3781097.

188. Emergency Application for Writ of Injunction at 4, *Mills*, 142 S. Ct. 17 (No. 21A90), https://www.supremecourt.gov/DocketPDF/21/21A90/196983/20211020152710123_Application%20-%20Emergency%20Writ%20of%20Injunction%20Pending%20Cert%20FINAL.pdf [https://perma.cc/6NSN-B7AP].

189. 142 S. Ct. at 17 (mem.).

190. Id. at 18 (Barrett, J., concurring).

191. Id.

192. Id.

193. Id.

194. Id.

195. Id. Though with summary reversals, the justification for not granting full review is different: The lower court's error is so clear that further briefing and argument is unnecessary to resolve the issue. Shapiro et al., supra note 3, § 5.12(c). But the factors for granting certiorari ordinarily do not bear on whether to grant emergency stays, either. Pickup & Templin, supra note 16, at 12–13; cf. Labrador v. Poe, 144 S. Ct. 921, 933–34 (2024) (Kavanaugh, J., concurring, joined by Barrett, J.) (arguing that they should). Whether for summary reversals or emergency orders, Justice Barrett's proposal in *Mills* that the Justices should avoid wading into disputes in which they would not grant full review

And more than a "merits preview,"[196] they are decisions on the merits themselves.

In light of *Mills*, Justice Barrett's past statements take on a new meaning. Responding to Senator Whitehouse's questionnaire before her confirmation hearing in 2020, then-Judge Barrett answered another question about the standard she would use when deciding whether a case is an "appropriate candidate for summary reversal."[197] After briefly citing the Court's Rules, Barrett demurred that she "would consider the relevant legal framework, the factual record, the arguments of the parties, and the views of [her] colleagues."[198] *Mills* suggests a different approach. Far from deferring to the views of her colleagues, Justice Barrett might be willing to question their habit of summarily reversing lower court decisions without full briefing and oral argument.

Justice Barrett is not alone on the Court in criticizing the shadow docket.[199] Nor have her votes uniformly pumped the brakes. Professor

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"gives the Court an interesting new tool" to "sidestep difficult [shadow-docket] cases altogether." Pickup & Templin, supra note 16, at 13–14. Justice Kavanaugh, in an opinion joined by Justice Barrett, has broadly endorsed using "as many tools as feasible and appropriate to make the most informed and best decision" in disputes on the shadow docket. *Labrador*, 144 S. Ct. at 933 (Kavanaugh, J., concurring, joined by Barrett, J.). And Justice Barrett could be uniquely influential on this point, given her apparent hesitancy—especially compared to Justice Kavanaugh and the Court's three most conservative Justices—to vote to grant cert. See Josh Blackman, Justices Thomas, Alito, Gorsuch, and Kavanaugh Are Active on the Cert Docket, Reason: Volokh Conspiracy (Dec. 9, 2024), https://reason.com/volokh/2024/12/09/justices-thomas-alito-gorsuch-and-kavanaugh-are-active-on-the-cert-docket/ [https://perma.cc/TH6E-SEFV] (noting that "Justice Barrett remains the most gun-shy Justice" on the certiorari docket).

196. *Mills*, 142 S. Ct. at 18 (Barrett, J., concurring).

197. Barrett Senate Questionnaire, supra note 185, ¶ 132.

198. Id.

199. Justice Kavanaugh joined Justice Barrett's *Mills* concurrence. *Mills*, 142 S. Ct. at 17 (Barrett, J., concurring, joined by Kavanaugh, J.). He later specifically endorsed her stance that whether the Court would take a case on the merits should influence whether to grant relief requested on the shadow docket. *Labrador*, 144 S. Ct. at 931 (Kavanaugh, J., concurring) (quoting *Mills*, 142 S. Ct. at 17 (Barrett, J., concurring)). Justice Elena Kagan has been an even more strident critic of the Court's issuing emergency orders that "make changes in the law[] without anything approaching full briefing and argument." Merrill v. Milligan, 142 S. Ct. 879, 889 (2022) (Kagan, J., dissenting). Dissenting from the emergency order upholding Texas's six-week abortion ban in September 2021—an order that Justices Barrett and Kavanaugh joined a month before *Mills*—Justice Kagan called the Court's shadow docket behavior "unreasoned, inconsistent, and impossible to defend." Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting). And since *Mills*, Justice Kagan has quoted Justice Barrett's opinion in that case when the Court declares further law through emergency orders. Trump v. Boyle, 145 S. Ct. 2653, 2655 (2025) (Kagan, J., dissenting, joined by Sotomayor & Jackson, JJ.) (quoting *Mills*, 142 S. Ct. at 18 (Barrett, J., concurring)). In the Texas abortion case, the reason we know that Justices Barrett and Kavanaugh both voted to uphold the state's ban is because Chief Justice Roberts dissented alongside the Court's three liberal Justices. *Whole Woman's Health*, 141 S. Ct. at 2496 (Roberts, C.J., dissenting). Although he stopped short of joining Justice Kagan's broader critique of the shadow docket, the Chief Justice did express concern for ruling on the novel Texas scheme "without ordinary merits briefing and without oral argument." Id.

Vladeck has noted that the Court's rate of issuing emergency orders actually "accelerated precipitously after . . . the confirmation of Justice Amy Coney Barrett."[200] Her "impact was especially visible," Vladeck emphasized, "in the context of emergency orders directly blocking state policies that lower courts refused to freeze pending appeal"—the precise relief sought by the healthcare workers in *Mills*.[201]

The countervailing decrease in summary reversals, by contrast, took a year after Justice Barrett's confirmation to materialize.[202] Yet it began almost immediately after *Mills*.[203] If Justice Barrett soured on summary reversals a year into her tenure, it might help explain their decline.

That is especially so because, unlike emergency orders, summary reversals generally require six votes.[204] When it was routinely issuing summary reversals, the Roberts Court tended to do so in favor of conservative outcomes in habeas and qualified immunity cases.[205] With Justice Barrett on the bench, the three Justices on either end of the Court's ideological spectrum need her vote, in addition to those of Chief Justice Roberts and Justice Kavanaugh, to summarily reverse ideologically divisive rulings.[206] During Justice Barrett's first Term—before *Mills*, and the last in

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A year later, the Chief Justice for the first time joined an opinion that leveled a broader critique at the shadow docket. See Louisiana v. Am. Rivers, 142 S. Ct. 1347, 1349 (2022) (Kagan, J., dissenting, joined by Roberts, C.J.) (criticizing the Court for treating the "emergency docket" as "not for emergencies at all" but "only another place for merits determinations—except made without full briefing and argument").

200. Vladeck, Shadow Docket, supra note 11, at 17.

201. Id.

202. A blink of an eye in judicial time. In Justice Barrett's first Term, the Court issued eight summary reversals—on par with its average since the start of the Roberts Court. See supra note 6. Justice Barrett did not participate in two, issued right after her confirmation. Taylor v. Riojas, 141 S. Ct. 52 (2020) (per curiam); Mckesson v. Doe, 141 S. Ct. 48 (2020) (per curiam).

203. *Mills* was decided on October 29, 2021, one year and three days after Justice Barrett was confirmed. 142 S. Ct. at 17.

204. See supra notes 31–33 and accompanying text.

205. See supra notes 84–86 and accompanying text (illustrating this in the habeas context); supra notes 109–111 and accompanying text (demonstrating the same for qualified immunity). But cf. supra notes 120–123 and accompanying text (cataloguing concerns with qualified immunity from Justices at opposite ends of the ideological spectrum).

206. In addition, two of this Term's summary rulings in capital habeas cases both tend to show that this holds when divisive summary rulings produce imperfectly ideological lineups. In one ruling—a difficult-to-categorize summary remand without reaching the merits against a person on death row in habeas, an ideologically conservative outcome—we can't determine the precise lineup, because only Justices Thomas and Gorsuch dissented. Hamm v. Smith, 145 S. Ct. 9, 10 (2024) (statement of Thomas & Gorsuch, JJ.); see also supra notes 37–39 and accompanying text (explaining why, if fewer than three Justices dissent from a summary opinion, it is impossible to determine the votes). In the other ruling—a summary reversal in favor of a person on death row in habeas, an ideologically liberal outcome—Justice Alito wrote a one-paragraph concurring opinion, indicating that he might have provided a sixth vote. Andrew v. White, 145 S. Ct. 75, 83 (2025) (Alito, J., concurring

which the Court summarily reversed a significant number of lower court decisions—the Court issued eight summary reversals.[207] Three of them, nearly 40%, divided the Court 6-3 along ideological lines. Justice Barrett was in the majority of all three.[208]

On the Court's merits and emergency dockets, where five votes decide cases, Justice Barrett occupies one seat on a triumvirate.[209] On the summary reversal docket, by contrast, she might be a lone swing vote. And if she has grown skeptical of summary reversals without briefing or argument, as her writings might suggest, it could be a factor in their recent decline.

C. *Conservative Alignment of the Judiciary*

The previous section discussed Justice Barrett's influence on an increasingly conservative bench as one possible explanation for the recent decline of summary reversals. But the Supreme Court is not the only court that has shifted further to the right. As both lower federal and state courts have become more conservative, the resulting alignment among all levels of the judiciary might also explain why summary reversals are suddenly scarce.

Summary reversals are reserved, in theory, for a rare scenario. According to the leading treatise on litigating before the Supreme Court, they "reflect[] the feeling of a majority of the Court that the lower court result is so clearly erroneous . . . that full briefing and argument would be a waste of time."[210] Some errors are obvious,[211] and many summary reversals are (at least publicly) unanimous.[212] But as Professor Hartnett explains, the largest subset of decisions summarily reversed by the Roberts Court "are not really 'errors' at all," but rather examples of "resistance" by lower courts that are "out-of-sync" with the Justices.[213] The bulk of these, he notes, are in habeas and qualified immunity cases.[214]

Professor Hartnett was writing in 2016, examining the first decade of Chief Justice Roberts's tenure. For fifteen of the twenty-four years before

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in the judgment). Justices Thomas and Gorsuch dissented. Id. (Thomas, J., dissenting, joined by Gorsuch, J.). Justice Barrett was silent.

207. See supra note 6 (listing summary reversals in the 2020 Term).

208. See supra note 21.

209. See supra notes 181–182 and accompanying text.

210. Shapiro et al., supra note 3, § 5.12(a).

211. See Hartnett, Summary Reversals, supra note 7, at 603–05 (classifying twelve summary reversals in the first decade of the Roberts Court as interventions when lower courts were "out to lunch" and made an indisputable mistake).

212. See supra note 21 and accompanying text.

213. Hartnett, Summary Reversals, supra note 7, at 597.

214. Id. at 598–99. Professor Hartnett separately classifies habeas decisions in which lower courts were resistant not to Supreme Court directives themselves but to the notion that only the Supreme Court can "clearly establish" constitutional rights for purposes of the 1996 law restricting habeas relief in federal court. Id. at 601–03; see also 28 U.S.C. § 2254(d) (2018).

then, Democratic presidents had appointed federal judges.[215] The Supreme Court, which has had a majority of Republican appointees for decades,[216] has frequently summarily reversed courts of appeals laden with Democratic appointees.[217]

President Trump's election soon after Hartnett's observation ushered in a rapid transformation of the judiciary. During his first term, Trump appointed not only a third of the Supreme Court but also more federal judges than any prior recent President had in a single term.[218] Although President Joseph Biden broke Trump's appointment record,[219] he failed to shift the ideological balance of the courts of appeals or the Supreme Court, on which Trump's impact was greatest.[220] That balance promises to tilt further rightward in Trump's second term, the effects of which on the judiciary are only just emerging.[221] And there is a parallel trend in state

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215. From 1993 to 2001, President Bill Clinton appointed 203 federal judges, thirty to courts of appeals; from 2009 to 2016, President Barack Obama appointed 173, thirty to courts of appeals. Judicial Appointments Tracker, Heritage Found., https://datavisualizations.heritage.org/courts/judicial-appointments-tracker [https://perma.cc/CX4U-KECD] (last updated Oct. 16, 2025). Obama's judicial appointments ground to a halt during his last year, following Senator Mitch McConnell's refusal to consider D.C. Circuit Judge Merrick Garland's nomination to the Supreme Court in March 2016. See Charles Homans, Mitch McConnell Got Everything He Wanted. But at What Cost?, N.Y. Times Mag. (Jan. 22, 2019), https://www.nytimes.com/2019/01/22/magazine/mcconnell-senate-trump.html (on file with the *Columbia Law Review*) ("The decision not to fill the Scalia vacancy . . . [is] the most consequential thing I've ever done." (internal quotation marks omitted) (quoting Sen. McConnell)).

216. Ron Elving, How the Supreme Court's Conservative Majority Came to Be, NPR (July 1, 2023), https://www.npr.org/2023/07/13/1185496055/supreme-court-conservative-majority-thomas-trump-bush [https://perma.cc/K3RR-5BLU].

217. See, e.g., Diarmuid F. O'Scannlain, A Decade of Reversal: The Ninth Circuit's Record in the Supreme Court Since October Term 2000, 14 Lewis & Clark L. Rev. 1557, 1558–59 (2010) ("[A]pproximately one in ten Ninth Circuit cases reviewed by the Supreme Court [between the 2000 and 2009 Terms] result[ed] in a summary reversal.").

218. Gramlich, How Trump Compares, supra note 23.

219. Alexander Bolton, Senate Confirms 235th Biden Judge, Surpassing Trump's Record, The Hill (Dec. 20, 2024), https://thehill.com/homenews/senate/5051917-biden-judges-trump-record/ (on file with the *Columbia Law Review*).

220. Trump appointed more judges than Biden (or any recent President in one term) to the courts of appeals. John Gramlich, How Biden Compares With Other Recent Presidents in Appointing Federal Judges, Pew Rsch. Ctr. (Jan. 9, 2025), https://www.pewresearch.org/short-reads/2025/01/09/how-biden-compares-with-other-recent-presidents-in-appointing-federal-judges/ [https://perma.cc/S6E5-HJNB]. This tipped the majority of federal appellate judges from Democratic to Republican appointees, in which the balance remains. Suzanne Monyak, Liberals Face More Conservative Courts to Fight Trump Policies, Bloomberg L. (Nov. 6, 2024), https://news.bloomberglaw.com/us-law-week/liberals-face-more-conservative-courts-to-fight-trump-policies (on file with the *Columbia Law Review*).

221. Russell Wheeler, How Much Will Trump's Second-Term Judicial Appointments Shift Court Balance?, Brookings Inst. (May 12, 2025), https://www.brookings.edu/articles/how-much-will-trumps-second-term-judicial-appointments-shift-court-balance/ [https://perma.cc/5WLU-DUAW]. As of October 16, 2025, President Trump has appointed eight more federal judges—one more than he had by that point in his first term. Judicial Appointments Tracker, supra note 215.

supreme courts, which, over the same period, have become increasingly Republican controlled.[222]

What might this mean for summary reversals? In the context of habeas and qualified immunity, the two most frequent topics of the Roberts Court's summary reversals, one purpose of these rulings has been to rein in supposedly recalcitrant lower courts.[223] Accordingly, if lower courts have grown stingier with post-conviction relief and more generous with qualified immunity—either because they have taken the hint and fallen in line, or because they are increasingly staffed by judges with views on these issues similar to those of the six conservative Justices—then the Supreme Court might simply have less of a need for summary reversals to send, in Professor Hartnett's words, a "corrective message . . . in the face of resistance."[224]

Reality, in all likelihood, is more complicated. First, this factor might predict a more gradual decline in summary reversals, as opposed to the rapid decrease since 2021. Second, in the habeas context, it is not clear that lower courts were quite so recalcitrant before the Roberts Court's summary reversals of decisions granting post-conviction relief.[225] Headbutting still occurs over death sentences,[226] to be sure, though with

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222. Mendelson, supra note 24.

223. See supra note 86 and accompanying text. Detractors argue that summary reversal is too dismissive a way of accomplishing this goal, especially because some Justices frequently disagree that the error was clear enough to rule without full briefing and argument, or that there was an error at all. E.g., Bentele, supra note 84, at 35.

224. Hartnett, Summary Reversals, supra note 7, at 613. The Court's latest summary reversal in a civil rights lawsuit against federal (as opposed to state) prison officers suggests that is one area in which the Court has still felt a need to send a corrective message. Goldey v. Fields, 145 S. Ct. 2613, 2614 (2025) (per curiam) (stating that "[d]espite [decades of] precedents" declining to extend the right to sue federal officers over constitutional violations, "the U. S. Court of Appeals for the Fourth Circuit permitted the plaintiff here to maintain an Eighth Amendment excessive-force . . . claim for damages against federal prison officials").

225. A 2007 study found that, after passage of the 1996 law restricting federal habeas relief, grants of habeas relief in federal court dropped precipitously: Among cases filed from 2000 to 2005, federal courts granted habeas relief to people not sentenced to death less than 0.3% of the time. Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, Final Technical Report: Habeas Litigation in U.S. District Courts 52 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf [https://perma.cc/TAF7-3KSC].

226. See supra notes 86, 90–92 and accompanying text. One summary reversal issued in a death penalty case in 2021, just before President Biden took office, is particularly illustrative. By a vote of 6-3, along ideological lines, the Court green-lit the execution of a man on federal death row by—for possibly the first and only time ever—granting cert before judgment to then GVR a federal district court's ruling in his favor before the court of appeals had the chance to hear the appeal. United States v. Higgs, 141 S. Ct. 645, 645 (2021) (mem.); see also Vladeck, Court of First View, supra note 149, at 548–50 (emphasizing how aberrant this ruling was).

decreasing frequency.[227] Third, in the qualified immunity context, the Court has seemingly grown hesitant to aggressively promote the doctrine—in light of public backlash,[228] the jurisprudential doubts of Justices Thomas and Sotomayor,[229] or both. This would track the curious absence of qualified immunity cases from not only the Court's summary reversal docket[230] but also its merits docket, compared to the continuation of habeas cases on the latter.[231]

In the end, these questions might simply add another angle to the explanation. Whether because lower courts have reluctantly or willingly fallen in line with the Supreme Court on habeas and qualified immunity or because the sands of both doctrines at the Court are shifting, the recent decline of summary reversals might be an unintended consequence.

D. *Internalized Critiques of Error Correction*

A final factor in the recent decline of summary reversals could be that public debate over the shadow docket has convinced some Justices that they should be more hesitant to issue them. To explore that idea, this section returns to the topics discussed in Part I: the Court's Rules, the Judges' Bill, and the tension between error correction and law declaration.

As discussed in Part I, Supreme Court Rule 16 allows for the possibility of summary reversals, a vestige of when the Court mostly corrected errors.[232] Rule 16 concludes the set of the Court's Rules describing certiorari—the legacy of the Judges' Bill, which kickstarted the Court's evolution from a body for correcting errors to one for declaring law.[233] The first Rule in this set is Rule 10, which outlines the most common reasons

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227. See Goelzhauser, supra note 133, at 118–19 (reporting that the number of emergency applications regarding stays of execution steadily decreased between the 2003 and 2021 Terms, in line with the concurrent nationwide decrease in state death sentences).

228. See Crocker, supra note 111, at 7–13 (suggesting that "the movement to reform the doctrine has gathered so much steam that even the majority-conservative Supreme Court recognizes the need for restraint, at least at the margins"); Patrick Jaicomo & Anya Bidwell, Recalibrating Qualified Immunity: How *Tanzin v. Tanvir*, *Taylor v. Riojas*, and *McCoy v. Alamu* Signal the Supreme Court's Discomfort With the Doctrine of Qualified Immunity, 122 J. Crim. L. & Criminology 105, 130–35 (2022) (noting that although the Justices denied thirteen cert petitions asking them to reconsider qualified immunity in the summer of 2020, later summary rulings rolling back qualified immunity might have signaled that lower courts were taking the doctrine too far).

229. See supra notes 120–123 and accompanying text.

230. Curiously, however, two of the Court's last three summary reversals were of lower court decisions that had denied qualified immunity. See supra note 110 and accompanying text.

231. See supra notes 99–101, 115–119 and accompanying text. Professor Hartnett has remarked that deciding cases on the merits docket with "full briefing and argument threatens to undermine the corrective message" sent by summary reversals "by suggesting that they—like most cases the Court selects to decide—present difficult and close issues that have divided the lower courts." Hartnett, Summary Reversals, supra note 7, at 614.

232. See supra notes 27–28 and accompanying text.

233. See supra notes 54–56 and accompanying text.

the Court will grant a cert petition.[234] In many ways, these reasons are the Court's answer to the error-correction versus law-declaration debate.[235]

According to Rule 10, the most common reason for granting cert is to answer an "important federal question" of law that has either divided the lower courts[236] or demands an urgent answer.[237] The Rule contains two further guidelines. On the one hand, it notes that the Court may grant cert when a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."[238] On the other hand, the Rule concludes: "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."[239]

Rules 10 and 16, then, raise a pair of important questions. If the Court views itself as a law-declaring institution, one that will not review petitions that merely "assert[] error[s]" of fact or of applying settled law,[240] then why summarily reverse any of these errors at all? And when has an error "so far departed from the accepted and usual course"[241] that, instead of ordering further briefing or argument, the Justices will simply grant cert, reverse the lower court, and move on?[242]

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234. Sup. Ct. R. 10.

235. The essence of the Rule has remained largely unchanged since it was added to the Court's Rules in the wake of the Judges' Bill in 1925. See Robert C. Post, The Taft Court: Making Law for a Divided Nation, 1921–1930, at 497 n.51 (2024) (reproducing the original Rule).

236. Sup. Ct. R. 10(a)–(b).

237. Sup. Ct. R. 10(c).

238. Sup. Ct. R. 10(a). Then-Judge Barrett cited this provision of Rule 10 in response to Senator Whitehouse's question about when she would consider a case to be an appropriate candidate for summary reversal. Barrett Senate Questionnaire, supra note 185, ¶ 132; see also supra notes 197–198 and accompanying text.

239. Sup. Ct. R. 10. Indeed, *Supreme Court Practice* advises counsel for the party opposing a cert petition to do so by arguing, whenever relevant, that the petition is precisely the type proscribed by this guideline: a fact-bound request for error correction. See Shapiro et al., supra note 3, § 6.37(i) ("The respondent's counsel should remember that the aim is to induce the Court to deny the petition for certiorari . . . [and thus] emphasize that the decision below turns upon its own facts, and that it will affect few others besides the litigants, if that is the case.").

240. Sup. Ct. R. 10.

241. Sup. Ct. R. 10(a).

242. Indeed, *Supreme Court Practice* acknowledges the quagmire that this question poses for advocates. See Shapiro et al., supra note 3, § 5.12(c) ("To minimize the risk of a summary reversal . . . a respondent's counsel who reasonably fears that the decision below may be in jeopardy may feel compelled to add a substantial argument on the merits to the opposing brief. In most cases, this will turn out to be unnecessary and counterproductive." (footnote omitted)). One commentator has suggested that, because of this discrepancy, the Roberts Court's summary reversal practice has distorted both its error-correcting and law-declaring functions: the former by encouraging the Court to wade into fact-bound disagreements between federal and state courts in the name of deference to state tribunals, and the latter

Recall Justice Stevens's objection that the Court has no time for summary reversals.[243] That objection rested on a second premise: that summary reversals are less important than the Court's other work. "It is not appropriate for this Court to expend its scarce resources crafting opinions that correct technical errors" by means of summary reversals, Justice Stevens explained, "where the correction in no way promotes the development of the law."[244] In other words, Justice Stevens had answers to the two questions raised by the Court's Rules about when and why the Justices should issue summary reversals: They shouldn't, because it isn't their job.

Rather than subconsciously aligning with Justice Stevens because of the impact of the shadow docket on their workload, as section III.A suggested, might some Justices have instead come to consciously agree with him that summarily reversing errors is rarely worth their time? As section III.B explored, Justice Barrett has suggested as much for granting emergency relief in disputes that don't meet the traditional certiorari factors in Rule 10.[245] Justice Kavanaugh seems to agree.[246] And other Justices might well have reached similar conclusions about emergency orders, summary reversals, or both without publicly expressing their views.[247]

When it comes to summary reversals, the Justices have the option to issue them less often by denying cert petitions. For that, the Justices can thank their predecessors who drafted and lobbied for the Judges' Bill a century ago, which gave the Court discretion over most of its docket.[248] By contrast, as Justice Kavanaugh has noted, "When an emergency application comes to th[e] Court, [the Justices] must decide it—grant or deny."[249] It is an irony of the Judges' Bill that, in granting the Justices new procedural tools to shape their merits docket, it also helped pave the way for emergency applications on the shadow docket a century later.[250]

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by claiming to apply settled questions of law while in fact answering those questions anew without the benefit of slow, considered judgment. Alex Hemmer, Courts as Managers: *American Tradition Partnership v. Bullock* and Summary Disposition at the Roberts Court, 122 Yale L.J. Online 209, 219–23 (2013), https://www.yalelawjournal.org/pdf/1133_kc9wdzv5.pdf [https://perma.cc/97GP-PUDY].

243. See supra notes 174–175 and accompanying text.

244. Anderson v. Harless, 459 U.S. 4, 12 (1982) (Stevens, J., dissenting).

245. Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring); supra notes 189–192 and accompanying text. For further discussion of Justice Barrett's infusion of certiorari considerations into requests for emergency relief, see also Vladeck, Shadow Docket, supra note 11, at 251; Pickup & Templin, supra note 16, at 12–14.

246. See supra note 199.

247. Justices are not required, by custom, to note when they agree or disagree with unsigned dispositions such as summary reversal opinions or emergency orders. See supra note 37 and accompanying text.

248. See supra notes 53–55 and accompanying text.

249. Labrador v. Poe, 144 S. Ct. 921, 928 (2024) (Kavanaugh, J., concurring).

250. The Judges' Bill did more than expand the reach of certiorari; it also gave the Court two procedural powers that enable the shadow docket. The first is the power to issue stays of lower-court decisions pending the filing of cert petitions. Judiciary Act of 1925, ch. 229, § 8(d), 43 Stat. 936, 940–41 (codified as amended at 28 U.S.C. § 2101(f) (2018)). The

Forced to wade into dispute after high-profile dispute on the shadow docket, the Court is increasingly using emergency orders not merely to resolve these disputes but to declare new law. This began during the COVID-19 pandemic, when the Court transformed both death penalty and religious free exercise jurisprudence through emergency orders.[251] Recently, the Court did the same for administrative law, expanding the President's ability to fire federal officials.[252] Sustained disapproval of this

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second is the power to grant cert before judgment. Id. § 1 at 938–39 (codified as amended at 28 U.S.C. §§ 1254(1), 2101(e)). In combination with a provision of the very first Judiciary Act, these provisions allow the Court—at the request of the parties or of the Justices' own volition—to pause or erase lower court decisions temporarily restraining or reinstating government policies, temporarily restrain or reinstate those policies themselves, or bypass the lower courts altogether and issue final opinions on the merits of the policies. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 1651(a)); see also Vladeck, Solicitor General, supra note 15, at 129 (explaining how this statute, known as the All Writs Act, and the Judges' Bill interact to enable the Court's shadow-docket procedures).

251. See Alexander Gouzoules, Clouded Precedent: *Tandon v. Newsom* and Its Implications for the Shadow Docket, 70 Buff. L. Rev. 87, 91–92 (2022) (concluding that an emergency order lifting a bar on church services during the pandemic ushered in a "dramatic reinterpretation of the longstanding . . . standard" for neutral and generally applicable laws under the Free Exercise Clause); Jay Clayton, Case Note, Willfully Blind to the Machinery of Death: The State of Execution Challenges After *Barr v. Lee*, 2021 U. Chi. L. Rev. Online, https://lawreview.uchicago.edu/online-archive/willfully-blind-machinery-death-state-execution-challenges-after-barr-v-lee [https://perma.cc/GVH7-FV7V] (arguing that an emergency order green-lighting the first federal execution in nearly twenty years under the first Trump Administration, also during the pandemic, took a "step toward a total refusal to examine execution procedures for potential Eighth Amendment violations"); see also *Labrador*, 144 S. Ct. at 933 n.5 (Kavanaugh, J., concurring) ("[T]he emergency docket during the COVID-19 pandemic in essence *was* the merits docket as to certain COVID-19-related issues.").

252. In May 2025, the Court lifted an emergency injunction barring President Trump from firing without cause members of the National Labor Relations Board and Merits Systems Protection Board, both of whose members have for-cause removal protection. Trump v. Wilcox, 145 S. Ct. 1415, 1415 (2025). In dissent, Justice Kagan remarked that the Court's emergency order "allows the President to overrule" *Humphrey's Executor v. United States*—a landmark decision that upheld the constitutionality of so-called independent agencies, multimember commissions whose members can only be removed by the President for cause—"by fiat." Id. at 1419 (Kagan, J., dissenting, joined by Sotomayor & Jackson, JJ.). In July, the Court allowed the President to fire members of the Consumer Product Safety Commission over a lower-court order blocking their removal. Trump v. Boyle, 145 S. Ct. 2653, 2654 (2025). In September, the Court then allowed the same for a member of the Federal Trade Commission, this time taking the further step of construing the government's emergency application for relief as a petition for certiorari before judgment and setting the issue of whether to overrule *Humphrey's Executor* for oral argument this Term. Trump v. Slaughter, Nos. 25A264, 25-332, 2025 WL 2692050 (U.S. Sep. 22, 2025) (mem.). Again in dissent, Justice Kagan lamented that "[o]ur emergency docket should never be used, as it has been this year, to permit what our own precedent bars" or "to transfer government authority from Congress to the President, and thus to reshape the Nation's separation of powers." Id. at *1 (Kagan, J., dissenting, joined by Sotomayor & Jackson, JJ.). In the latest chapter of this fight, the Court deferred President Trump's request to lift a lower court order barring him from firing Federal Reserve Governor Lisa Cook—this time, Trump alleges, for cause—until after the Justices hear oral argument in the dispute in January 2026. Trump v. Cook, No. 25A312, 2025 WL 2784699 (U.S. Oct. 1, 2025) (mem.).

practice, from both inside and outside the Court, has led to changes in how the Court handles emergency applications.[253] Professor Vladeck explains that "as criticism of the Justices' growing use of emergency applications . . . has grown, the Court has gravitated toward other means of expediting its [merits] consideration of" urgent cases.[254]

The same criticisms of emergency orders have been lodged against summary reversals.[255] When summary reversals were common, Justices routinely dissented from them "when they perceive[d]" that the rulings were "premised not on clear error correction but on" deciding a "novel, complex, or substantial constitutional question"—in other words, declaring law.[256] Others, like Justice Stevens, dissented when they felt the rulings did the opposite: corrected errors without declaring new law and thus wasted the Court's time.[257]

This tension between summary reversals and the Court's evolving identity is nothing new.[258] What is new, however, is the proliferation of criticism over the shadow docket and the parallel tension with emergency orders.[259] Perhaps the recent decline of summary reversals is a sign that some Justices have heeded the critiques and "gravitated toward other means"[260] of resolving cases.

CONCLUSION

Summary reversals have long been a misfit in Supreme Court practice. Nonetheless, litigants have counted on their existence, especially those in disputes over post-conviction relief for people on death row and civil rights violations by police and prison officials. If the recent decline of summary reversals holds true, it will be the latest change to the Court's procedures in the age of the shadow docket. As with other similar changes, the Justices have provided no explanation for the decline of summary reversals. "But whatever (or whoever) is responsible for these developments," in the words of Professor Vladeck, "the critical takeaway for present purposes is that there has been a quietly significant shift in the last few Terms not just in the shape of the Supreme Court's docket, but in the nature of the Justices' decisionmaking."[261]

253. Vladeck, Court of First View, supra note 149, at 540.
254. Id.
255. See supra notes 141–144 and accompanying text.
256. Shapiro et al., supra note 3, § 5.12(c).
257. See supra notes 243–244 and accompanying text.
258. See supra notes 59–61 and accompanying text.
259. See supra section II.B.
260. Vladeck, Court of First View, supra note 149, at 540.
261. Id. at 540–41.

AN UPDATED PRO CODES ACT: ENHANCING PUBLIC ACCESS TO PRIVATELY COPYRIGHTED LAWS

*Ryan Jarratt**

Often, private organizations composed of subject matter experts draft technical standards that describe safety recommendations or "best practices" for certain industries. Legislators and regulators on the federal, state, and local levels will, on occasion, provide legal weight to these privately created standards by incorporating them by reference into the law. Following these standards thus becomes mandatory, but the American people frequently do not have free and unrestricted access to them: The standards' private copyright holders often charge users high fees to even read them. To address this issue, Congress is currently considering the Pro Codes Act, legislation intended to balance the importance of having these private organizations develop industry standards while also ensuring that citizens have sufficient access to the laws that govern them. The present draft of the legislation, however, falls short of truly providing Americans with access to these critical technical standards. This Note proposes various provisions that would strengthen the Pro Codes Act and more appropriately balance the interests of both standards development organizations and the American public.

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"[T]he Roman despot Caligula . . . had laws written in fine print and hung them high up on pillars so that they were not available to nor readable by the Roman citizens affected by such laws."

— *United States v. Kilkenny*.[1]

INTRODUCTION

In 2022, an estimated 6,200 children in the United States were treated in emergency rooms as a result of fallen or tipped-over home furniture.[2] Seeking to prevent these dangerous situations, the U.S. Consumer Product Safety Commission (CPSC) promulgated a new regulation that "prescribes safety requirements for clothing storage units . . . to protect children up to 72 months of age from tip-over-related death or injury."[3] This regulation specifies that all clothing storage units that meet certain criteria "shall comply" with "ASTM F2057-23, *Standard Safety Specification for Clothing*

1. 493 F.3d 122, 126 (2d Cir. 2007) (citing 1 William Blackstone, Commentaries *46).

2. Adam Suchy, U.S. Consumer Prod. Safety Comm'n., Product Instability or Tip-Over Injuries and Fatalities Associated With Televisions, Furniture, and Appliances: 2023 Report 12 tbl. 2 (2024), https://www.cpsc.gov/s3fs-public/2023_Annual_Tip_Over_Report_Posted_2024Feb_FINAL_0.pdf [https://perma.cc/BRE5-EKWG].

3. 16 C.F.R. § 1261.1 (2025).

Storage Units."[4] But the mandatory, legally binding requirements detailed in *ASTM F2057-23* that are designed to reduce child injuries are *not* available in the Code of Federal Regulations (CFR)[5] or the Federal Register.[6] Instead, the CPSC regulation merely *incorporates by reference ASTM F2057-23*,[7] which is a privately created and copyrighted set of standards drafted by ASTM International, a nongovernment organization that develops safety and regulatory standards.[8] As such, the CPSC directs individuals and organizations interested in reading the complete *ASTM F2057-23* standard to either (1) purchase the publication directly from ASTM International[9]—which costs ninety-nine dollars[10]—or (2) travel to view a free library copy at a federal office building near Washington, D.C.[11] The relative inaccessibility of this binding law creates a substantive barrier that prevents the American people from reading—or even knowing—the contents of these mandatory regulations.

This issue of incorporation by reference (IBR) extends far beyond the subject of furniture tip-overs. Estimates indicate that the CFR today contains over twenty-seven thousand incorporations by reference to standards that are often not fully and freely accessible to the public.[12] Indeed, both executive and congressional mandates specifically encourage or—in some instances—require government agencies to utilize references to external

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4. Id. § 1261.2.

5. See id.

6. See Safety Standard for Clothing Storage Units, 88 Fed. Reg. 28,403 (May 4, 2023) (codified at 16 C.F.R. § 1261).

7. 16 C.F.R. § 1261.2.

8. See ASTM Int'l, Helping Our World Work Better 4 (2023), https://www.astm.org/media/wysiwyg/Helping-Our-World-English.pdf [https://perma.cc/X94C-CZ4M] ("More than 30,000 people from 155+ countries create and update standards through ASTM International, one of the world's most respected standards development organizations.").

9. See 16 C.F.R. § 1261.2 (stating that the public "may also obtain a copy [of *ASTM F2057-23*] from ASTM International").

10. ASTM Int'l, ASTM F2057-23: Standard Safety Specification for Clothing Storage Units (2023). Members of the public can purchase either a print copy or a PDF copy of *ASTM F2057-23* for ninety-nine dollars from ASTM's website. ASTM F2057-23: Standard Safety Specification for Clothing Storage Units, ASTM Int'l, https://www.astm.org/f2057-23.html [https://perma.cc/CR5B-24UA] (last visited Aug. 6, 2025). A read-only online version of the document that cannot be downloaded or printed is currently viewable in ASTM International's digital reading room. Reading Room, ASTM Int'l, https://www.astm.org/products-services/reading-room.html [https://perma.cc/YG54-HV8Z] (last visited Aug. 6, 2025). ASTM provides this read-only access voluntarily, and no law prevents the revocation of this access. See Off. of the Fed. Reg., Incorporation by Reference in the CFR, Nat'l Archives, https://www.archives.gov/federal-register/cfr/ibr-locations.html [https://perma.cc/8V8Q-JEFU] (last visited Sep. 7, 2025) ("There is no legal requirement that the general public be able to freely access IBR material online.").

11. See 16 C.F.R. § 1261.2 ("[*ASTM F2057-23*] is available for inspection at the U.S. Consumer Product Safety Commission and at the National Archives and Records Administration (NARA).").

12. Standards Incorporated by Reference (SIBR) Database, Nat'l Inst. Standards & Tech., https://sibr.nist.gov/ [https://perma.cc/3VBJ-SVSF] (last visited Aug. 6, 2024).

standards when possible.[13] Such incorporated references to privately developed standards appear in regulations related to nearly every sector of the economy, "from transportation systems and robotics to the construction of nuclear power plants."[14] Furthermore, attempts to standardize an industry by reference to materials not publicly available extend beyond the federal administrative law and regulatory spaces: Legislative bodies on the state and local levels have also deployed IBR when drafting laws, often leaving crucial municipal regulations (such as model building codes) locked behind a paywall.[15] This Note argues that the most effective solution to increase access to incorporated standards is for Congress to pass a modified version of the Pro Codes Act that includes specific, additional pro-access provisions.

Part I of this Note discusses the background of this "incorporation by reference" practice and further explains the extent to which modern law and regulation rely on it. Part I also details steps that Congress has taken to alter the copyright status of works incorporated by reference and elaborates upon the recently introduced Protecting and Enhancing Public Access to Codes (Pro Codes) Act. Part II explains the problems that IBR creates for Americans and describes why attempts to place all incorporated materials into the public domain are dangerous to our nation's regulatory practices. It also elaborates on why proposals to solve this problem through judicial, executive, and private means are insufficient, inconsistent, or unlikely. In Part III, this Note concludes by proposing a new piece of federal legislation that builds on the basic principles of the Pro Codes Act while incorporating new provisions that will improve Americans' capacity to access incorporated standards.

I. THE ORIGINS AND EXTENT OF INCORPORATION BY REFERENCE

A. *Overview of Incorporation by Reference*

Standards Developing Organizations (SDOs) are private nongovernment organizations that develop "voluntary consensus standards" that provide standardized recommendations and guidelines for a particular industry to "assur[e] quality, compatibility, and other highly desired market characteristics."[16] SDOs in the United States are numerous, produce voluntary standards in nearly every sector of our economy, and include organizations such as the American Petroleum Institute, the

13. See infra notes 33–35 and accompanying text.

14. About, Stop the Pro Codes Act, https://www.stopprocodesact.com/about [https://perma.cc/ZN98-HC37] (last visited Aug. 27, 2025).

15. See, e.g., Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 793 (5th Cir. 2002) (en banc) (discussing a situation in which privately developed model building codes were adopted by local governments to become the official building codes of two small towns in Texas).

16. Peter L. Strauss, Private Standards Organizations and Public Law, 22 Wm. & Mary Bill Rts. J. 497, 499–500 (2013) (internal quotation marks omitted).

American Dental Association, the American Concrete Institute, the Specialty Vehicle Institute of America, and the Telecommunications Industry Association.[17] Lawmakers and regulators often attempt to harmonize certain areas of law through "standardization by reference" to standards created by these SDOs, which transforms the SDO-developed standards from voluntary to obligatory.[18] In these instances, government lawmakers typically incorporate (and make binding) an external standard by *referencing* that standard in the text of the law *without reproducing* the full standard in the written law.[19]

This practice of incorporation by reference benefits government lawmakers in several ways. First, relying on SDO-created standards allows the government to effectively outsource the development of regulations and standards to private expert bodies that would otherwise need to be created through government funding and effort.[20] SDOs are generally made up of subject matter experts, and their voluntary standards are often developed in concert with relevant private sector actors and function as a means of assuring "quality, compatibility, and other highly desired market characteristics" in a specific industry.[21] The incorporation of these standards into the law allows agencies and government groups to "protect public safety by integrating federal regulatory requirements with an extensive, pre-existing private regulatory infrastructure."[22] This practice thus prevents government organizations such as the CPSC from having to reinvent the wheel and develop complex, technical regulation specifications in-house and on the taxpayer's dime. Indeed, government agencies rely on SDO standards because they often impose no cost to the taxpayer,

17. Am. Nat'l Standards Inst., ANSI Accredited Standards Developers 18, 27, 186, 193 (2025), https://share.ansi.org/Shared%20Documents/Standards%20Activities/American%20National%20Standards/ANSI%20Accredited%20Standards%20Developers/AUG2025ASD.pdf [https://perma.cc/BD5D-K6TC].

18. See, e.g., Strauss, supra note 16, at 502–03 ("At the federal level, the conversion of standards into legal obligations through incorporation by reference had its origin . . . in the hope of giving a kick-start to new federal safety programs, by converting to legal obligations consensus standards already in place.").

19. See, e.g., supra notes 2–11 and accompanying text.

20. See Administrative Conference Recommendation 2011-5: Incorporation by Reference, 77 Fed. Reg. 2257, 2257 (adopted Dec. 8, 2011) ("[Incorporation by reference] furthers important, substantive regulatory policies, enabling agencies to draw on the expertise and resources of private sector standard developers to serve the public interest."); Press Release, Sen. Chris Coons, Senators Coons, Cornyn, Tillis, Whitehouse Introduce Legislation to Ensure Copyright Protection and Public Access to Safety Standards (Mar. 16, 2023), http://coons.senate.gov/news/press-releases/senators-coons-cornyn-tillis-whitehouse-introduce-legislation-to-ensure-copyright-protection-and-public-access-to-safety-standards [https://perma.cc/L8HW-HP5Z] [hereinafter Sen. Coons, Press Release] ("Safety standards protect lives and property, and our country's exceptional system for developing them is independent, consensus-based and doesn't cost the taxpayer a dime." (quoting Jim Pauley, President & CEO, Nat'l Fire Prot. Ass'n)).

21. Strauss, supra note 16, at 499.

22. Emily S. Bremer, On the Cost of Private Standards in Public Law, 63 U. Kan. L. Rev. 279, 282 (2015) [hereinafter Bremer, Cost].

as agencies can "incorporate" SDO standards without paying any sort of licensing fee or other compensation to the SDO.[23] Furthermore, incorporating these standards "by reference" rather than reproducing them completely in the CFR (or another relevant law compilation) is a "more efficient process"[24] that "protect[s] the utility of the Federal Register and the Code of Federal Regulations, reducing their otherwise necessary size by thousands of printed pages."[25]

But this practice comes with potent drawbacks. The only accessibility requirement of incorporated standards is that they be "reasonably available to the class of persons affected thereby."[26] As implemented, "reasonably available" merely means that a physical copy of the IBR standard must be available for examination in a Washington, D.C., reading room.[27] In most instances, the only alternative means for accessing SDO standards—other than traveling to the nation's capital—is to purchase them directly from the SDO.[28] These fees vary significantly, from $76 for a copy of *ASTM F2167-22: Standard Consumer Safety Specification for Infant Bouncer Seats*[29] to $825 for an annual subscription needed to access *NCPDP*

23. See Stop the Pro Codes Act, https://www.stopprocodesact.com/ [https://perma.cc/8FFZ-D8GJ] (last visited Aug. 6, 2025) ("SDOs . . . are incapable of preventing citation [to an SDO standard] by a governmental agency into laws or regulations.").

24. Shyamkrishna Balganesh, Authoring the Law, 68 J. Copyright Soc'y U.S.A. 353, 406 (2021).

25. Strauss, supra note 16, at 502. Several scholars have critiqued whether this motivation to limit the size of the CFR is relevant in the modern digital age. See id. at 523 ("The arrival of the Internet and the creation of agency electronic reading rooms have both eliminated the space-saving rationale for incorporation by reference and created new obligations of government transparency."); see also Pamela Samuelson, Questioning Copyrights in Standards, 48 B.C. L. Rev. 193, 222 (2007) ("[T]he Internet and World Wide Web now make it very cheap and easy to disseminate standards.").

26. 5 U.S.C. § 552 (2018). As it relates to rulemakings, agencies must also "[d]iscuss, in the preamble of the final rule, the ways that the materials it incorporates by reference are reasonably available to interested parties and how interested parties can obtain the materials" and "[s]ummarize, in the preamble of the final rule, the material it incorporates by reference." 1 C.F.R. § 51.5(b)(2)–(3) (2024).

27. See Strauss, supra note 16, at 503 (explaining that the "reasonably available" requirement has not been implemented to demand more than "requiring single copies to be deposited with the National Archives and retained in agency libraries" (internal quotation marks omitted)); James M. Sweeney, Note, Copyrighted Laws: Enabling and Preserving Access to Incorporated Private Standards, 101 Minn. L. Rev. 1331, 1338 (2017) ("'Reasonably available' simply means providing a physical copy for inspection in Washington, D.C.").

28. See Nina A. Mendelson, Private Control Over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards, 112 Mich. L. Rev. 737, 806 (2014) ("[W]e must consider the message the government sends by providing free access to IBR rules only in a Washington, D.C., reading room and acquiescing in private entities' charging significant fees for access.").

29. ASTM Int'l, ASTM F2167-22: Standard Consumer Safety Specification for Infant Bouncer Seats (2022); see also ASTM F2167-22: Standard Consumer Safety Specification for Infant Bouncer Seats, ASTM Int'l, https://www.astm.org/f2167-22.html [https://perma.cc/FA65-XQUC] [hereinafter *ASTM F2167-22* Purchase Page] (last visited Aug. 6,

Formulary and Benefit Standard, Implementation Guide, Version 60.[30] Even if one was willing to pay these high fees, the relevant SDO sometimes removes privately copyrighted standards from sale, thus preventing even judges from knowing what "the law" commands.[31]

B. *History and Extent of Incorporation by Reference*

President Ronald Reagan's administration issued Circular A-119,[32] which "directs [federal] agencies to use voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical."[33] In 1988, the formation of the Commerce Department's National Institute of Standards and Technology (NIST) provided a bureaucratic mechanism to effectuate this preference for privately created standards.[34] In 1996, Congress passed the National

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2025) (purchase page for the standard). *ASTM F2167-22* was incorporated by reference into the law by 16 C.F.R. § 1229.2 (2025).

30. Nat'l Council for Prescription Drug Programs, NCPDP Formulary and Benefit Standard, Implementation Guide, Version 60 (2023); see also Access to Standards, Nat'l Council for Prescription Drug Programs, https://standards.ncpdp.org/Access-to-Standards.aspx [https://perma.cc/KN46-P9UR] (last visited Aug. 6, 2025) (explaining that an NCPDP subscription is necessary to view the organization's incorporated standards); Join Today, Nat'l Council for Prescription Drug Programs, https://ncpdp.org/Join-Today.aspx? [https://perma.cc/4KZV-M4NH] (last visited Sep. 21, 2025) (allowing users to sign up to be an NCPDP member and to pay the annual fee). *NCPDP Formulary and Benefit Standard, Implementation Guide, Version 60* was incorporated by reference into the law by 45 C.F.R. § 170.205(u)(1) (2025).

31. See, e.g., Getty Petroleum Mktg., Inc. v. Cap. Terminal Co., 391 F.3d 312, 320 (1st Cir. 2004) (per curiam) (discussing a lawsuit in which neither the federal district court judge nor the attorneys could find the text of a particular incorporated safety standard, which prevented the judge from determining a company's responsibilities to pay for fire prevention equipment); see also infra notes 177, 189 and accompanying text. In one of the most egregious instances of this practice, the Sheet Metal and Air Conditioning Contractors (SMACNA) discontinued the sale of a 1985 standard regarding air-duct leakage that had been incorporated into federal law, but SMACNA nonetheless accused Public.Resource.Org of copyright infringement when the latter organization published the standard on its own website. Corynne McSherry, EFF Fights Courtroom Shenanigans After Wrongheaded Copyright Claim Blocks Publication of Federal Law, Elec. Frontier Found. (May 29, 2013), https://www.eff.org/deeplinks/2013/05/eff-fights-courtroom-shenanigans-after-wrongheaded-copyright-claim-blocks (on file with the *Columbia Law Review*). Public.Resource.Org sued to protect its right to publish the standards, and SMACNA ultimately declined to defend this lawsuit in court. Id.

32. OMB Circular No. A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 63 Fed. Reg. 8546 (Feb. 19, 1998).

33. Id. at 8554.

34. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 5111–5115, 102 Stat. 1107, 1427–33 (codified as amended at 15 U.S.C. §§ 271–286 (2018)). NIST is tasked with (among other duties) "cooperat[ing] with other departments and agencies of the Federal Government, with industry, with State and local governments, with the governments of other nations and international organizations, and with private org-anizations in establishing standard practices, codes, specifications, and voluntary consensus standards." Id. § 5112(b)(9), 102 Stat. at 1429.

Technology Transfer and Advancement Act of 1995, *requiring* federal agencies to "use technical standards that are developed or adopted by voluntary consensus standards bodies . . . as a means to carry out policy objectives or activities."[35]

Relying on these rules, federal regulators have allowed the number of federally incorporated SDO standards to balloon in recent years. Today, the CFR contains over twenty-seven thousand IBR standards,[36] a figure that has more than doubled in the last decade.[37] This CFR approximation both underestimates the total number of federal-level incorporations[38] and does not account for state, local, or judicial incorporations.

C. *Previous Legislative Actions*

For the most part, Congress has been hesitant to pursue legislative change that would so dramatically alter either the copyright system or the nation's regulatory practices. Although the Constitution gives the legislative branch the authority to grant copyrights,[39] Congress has largely let the battle over the status of incorporated standards play out in the courts[40] and executive agencies.[41] But in 2012, Congress expressed at least some degree of amenability to legislative actions expanding access to IBR standards. After an SDO told a congressional office that it would need to pay one thousand dollars for a copy of a pipeline safety standard that had been incorporated into the law by agency regulation,[42] Congress enacted

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35. National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12(d)(1), 110 Stat. 775, 783 (codified as amended in 15 U.S.C. § 272). Some scholars have argued that this Act and OMB Circular A-119 only apply to "technical standards," which are allegedly different from "regulatory standards or requirements." Strauss, supra note 16, at 559 (internal quotation marks omitted). Thus far, however, agencies have largely "failed to note the differentiation" between these two categories of standards in practice. Id. at 530.

36. Nat'l Inst. of Standards & Tech., supra note 12.

37. See Bremer, Cost, supra note 22, at 280 n.6 (stating that, as of December 2014, the CFR contained over eleven thousand total incorporations by reference).

38. See Emily S. Bremer, Incorporation by Reference in an Open-Government Age, 36 Harv. J.L. & Pub. Pol'y 131, 135 n.11 (2013) [hereinafter Bremer, Open-Government] (noting that the SIBR Database "underestimates the total number of regulatory incorporations, because it includes only *standards*" and "[o]ther kinds of materials which may be copyrighted . . . are routinely incorporated by reference" (emphasis added)); Nat'l Inst. of Standards & Tech., supra note 12 (noting that the SIBR Database does not include incorporation records related to several federal agencies, such as the Department of Transportation).

39. See U.S. Const. art. I, § 8 ("The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .").

40. See infra section II.B.

41. See infra section II.C.

42. See Bremer, Open-Government, supra note 38, at 175 (attributing the passage of 49 U.S.C. § 60102(p) to Congress's negative experience attempting to access the SDO's pipeline standards); Charles Duan, Mandatory Infringement, 75 Fla. L. Rev. 219, 241 (2023) (same). But see An Edicts of Government Amendment, Public.Resource.Org, https://

49 U.S.C. § 60102(p), which provided that the Pipeline and Hazardous Materials Safety Administration (PHMSA) "may not issue guidance or a regulation pursuant to this chapter that incorporates by reference any documents or portions thereof unless the documents or portions thereof are made available to the public, free of charge, on an Internet Web site."[43] For the next decade, Congress did not pick up the issue of expanding access to IBR standards.

In 2023, Senator Chris Coons (D-DE) and Representative Darrell Issa (R-CA) returned to the topic by introducing the Protecting and Enhancing Public Access to Codes Act (Pro Codes Act), a piece of federal legislation that proposed a solution for inaccessible IBR standards.[44] Echoing 49 U.S.C. § 60102(p), the most updated version of this Act provided that:

> A standard to which copyright protection subsists under section 102(a) [of the Copyright Act] at the time of its fixation shall retain such protection, notwithstanding that the standard is incorporated by reference, if the applicable standards development organization, within a reasonable period of time after obtaining actual or constructive notice that the standard has been incorporated by reference, makes all portions of the standard so incorporated publicly accessible online at no monetary cost and in a format that includes a searchable table of contents and index, or equivalent aids to facilitate the location of specific content.[45]

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public.resource.org/edicts/ [https://perma.cc/XC25-WKTE] (last visited Aug. 6, 2025) (attributing the passage of 49 U.S.C. § 60102(p) to congressional shock at "the high cost of crucial, legally-mandated safety documents during the BP Gulf Oil Spill").

43. Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, § 24, 125 Stat. 1904, 1919 (2012) (codified at 49 U.S.C. § 60102(p) (2018)). To satisfy this statutory provision, PHMSA's website features hyperlinks to the webpages of SDOs that "have posted free viewable copies of their [incorporated] standards." Pipeline & Hazardous Materials Safety Admin., Standards Incorporated by Reference, DOT, https://www.phmsa.dot.gov/standards-rulemaking/pipeline/standards-incorporated-reference [https://perma.cc/T44A-QJMY] (last updated Jan. 13, 2025). PHMSA's website also affirms that the agency "will provide temporary access to any standard that is incorporated by reference per 49 U.S.C. § 60102(p) or proposed for incorporation that is not otherwise available from the relevant SDO." Id. To request this temporary access to an incorporated standard, an individual or business must email PHMSA with their request and include their phone number, physical address, and email address. Id. Studies researching the effect of 49 U.S.C. § 60102(p) have found that it largely failed at truly expanding free access to IBR standards and even impaired PHMSA's ability to regulate. Bremer, Cost, supra note 22, at 282 (explaining that "the law did not much expand the free online availability of PHMSA's incorporated standards" and even "threatened PHMSA's ability to protect public safety" when the agency could not successfully negotiate agreements to make SDO standards publicly available).

44. S. 835, 118th Cong. (2023); H.R. 1631, 118th Cong. (2023). The updated version of the bill introduced in the 119th Congress is H.R. 4009, 119th Cong. (2025).

45. H.R. 4009, 119th Cong. (2025).

Although the 118th Congress did not pass the Pro Codes Act,[46] the legislation sparked intense public debate about the ideal copyright status of IBR codes. SDO supporters of the Pro Codes Act argued that it would "help to preserve the current system . . . which incentivizes standards development organizations to continue creating codes and standards that benefit society, the economy, and public safety" while also "guaranteeing that the public has access to [standards] when they are incorporated by reference into law."[47] Various members of Congress have expressed their support for this legislation.[48] A wide variety of SDOs have also announced their endorsement of the Pro Codes Act, including the Copyright Alliance, the International Code Council, the American Hospital Association, and the National Fire Protection Association.[49]

Public interest organizations and legal scholars, however, have raised concerns about the Act's "publicly accessible online" provision, contending that this specific phrasing would allow for SDOs to provide "access" that is hindered by unideal document formatting, cumbersome login requirements, and the use of issue-prone online "reading rooms."[50] Those opposed to the Act allege that "[w]hen standards are made available [as specified in the Act], they are often inaccessible to people with print

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46. Although a majority of the House of Representatives voted to pass the Act in July 2024, it fell two votes short of satisfying the two-thirds majority vote requirement necessary to suspend the House rules and pass the Act without debate. See Roll Call 357—Bill Number: H. R. 1631, Clerk of the U.S. House of Representatives (Jul. 22, 2024), https://clerk.house.gov/Votes/2024357 [https://perma.cc/PJQ8-5T5D]. The full Senate never voted on the Act. See S.835—Pro Codes Act, Congress.gov, https://www.congress.gov/bill/118th-congress/senate-bill/835 [https://perma.cc/NV2S-SDQH] (last visited Aug. 6, 2025).

47. Press Release, Copyright All., Copyright Alliance CEO Issues Statement in Support of Pro Codes Act (Mar. 16, 2023), https://copyrightalliance.org/press-releases/support-pro-codes-act/ [https://perma.cc/VYS6-6XCL] (internal quotation marks omitted) (quoting Keith Kupferschmid, CEO, Copyright All.).

48. See, e.g., Sen. Coons, Press Release, supra note 20; Press Release, Congressman Darrell Issa, Congressman Issa, Ross Introduce Legislation to Protect Public Access to Federal Rules (Mar. 18, 2023), https://issa.house.gov/media/press-releases/congressman-issa-ross-introduce-legislation-protect-public-access-federal [https://perma.cc/K4JW-XR4M].

49. Tell Congress to Pass the Pro Codes Act, Int'l Code Council, https://www.procodesact.com/ [https://perma.cc/6D8T-KJWA] (last visited Aug. 6, 2025). But not all major SDOs have endorsed the Pro Codes Act. For example, the American Society of Mechanical Engineers and ASTM International have joined an advocacy coalition that claims the Pro Codes Act would "[p]ut[] the entire standards-writing industry in jeopardy and risk[] American public safety and national security." About, Stop the Pro Codes Act, supra note 14.

50. See Ass'n of Rsch. Librs., The Real Truth About the "Pro Codes" Act 4 (2024), https://www.arl.org/wp-content/uploads/2024/03/The-Real-Truth-about-the-Pro-Codes-Act.pdf [https://perma.cc/EME6-72DF] (internal quotation marks omitted) (stating that the Act would allow SDOs to provide standards access through "reading rooms [with] technical and legal limitations that create barriers to users," such as "prohibit[ing] users from copying, printing, or downloading text" and requiring users to enter "personal information" before being granting access to the "reading rooms").

disabilities; the public is restricted in how they can use and share to the standards; and they must sacrifice their personal privacy for the privilege [to access the standards online]."[51] Representative Zoe Lofgren (D-CA) echoed similar concerns during a congressional markup of the Pro Codes Act, describing the difficult and invasive steps necessary for one to access standards on SDO websites under the Act.[52] These critics of the Pro Codes Act share a common belief: "When it comes to mandates adopted into law, any barriers to access, however small, are unacceptable."[53]

II. THE DRAWBACKS OF THE STATUS QUO AND PREVIOUSLY PROPOSED SOLUTIONS

The United States has long embraced the idea that "the law" should be known by and accessible to the people.[54] The increasing reliance on laws written and controlled by private organizations, however, has placed significant segments of our binding rules behind paywalls.[55] Although "[e]very citizen is presumed to know the law,"[56] incorporated SDO

51. Am. Council of the Blind et al., Re: Opposition to S. 835, the "Protecting and Enhancing Public Access to Codes Act" (Pro Codes Act) 1 (2024), https://www.arl.org/wp-content/uploads/2024/04/Pro-Codes-Judiciary.pdf [https://perma.cc/39ZB-G4FA]; accord Canyon Brimhall, The Pro Codes Act Attempts to Copyright the Law. But Is It Constitutional?, R St. Inst. (Dec. 4, 2024), https://www.rstreet.org/commentary/the-pro-codes-act-attempts-to-copyright-the-law-but-is-it-constitutional/ [https://perma.cc/YH7L-M5NT] (stating that the Pro Codes Act "would allow companies to upload their standards in ways that are difficult to access, read, or understand" and would "give SDOs the right to require the creation of an account . . . in order to read the codes").

52. See House Judiciary GOP, Markup of H.R. 1631, H.R. 7737, H.R. 3591, H.R. 3269, H.R. 7581, and H.R. 4951, at 59:37 (Youtube, Apr. 16, 2024), https://www.youtube.com/watch?v=Qy5ZOzD90WE (on file with the *Columbia Law Review*) [hereinafter Pro Codes Act 2024 House Markup] (statement of Rep. Lofgren) ("[P]eople cannot be held to a standard of law if they have to pay or give up personal rights or information to know what that law is.").

53. Brimhall, supra note 51.

54. See, e.g., Nash v. Lathrop, 6 N.E. 559, 560 (Mass. 1886) ("Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access . . . and that it is against sound public policy to prevent this . . . ."); James Madison, Notes of Debates in the Federal Convention of 1787, at 434 (Ohio Univ. Press 1966) (1840) ("The people have a right to know what their Agents are doing or have done . . . ." (quoting James Wilson)); see also D.R. Jones, Under the Umbrella: Promoting Public Access to the Law, 29 J. Intell. Prop. L. 1, 4–5 (2021) ("It is a fundamental principle of law in the United States that the government must make laws known to people since people must obey the laws.").

It should be emphasized that this Note deals with the theme of "access to the law" in its most basic sense: the ability to physically read and know the written law. It does not address more complicated issues related to the accessibility of the legal system generally or the capacity of nonlawyers to understand "the law."

55. See 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright, § 5.12[A] (2025) (describing the "increasing trend toward state and federal adoptions of model codes"); see also supra notes 36–37 and accompanying text.

56. Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1507 (2020) (internal quotation marks omitted) (quoting *Nash*, 6 N.E. at 560).

standards today are often inaccessible to the American population. As discussed, many IBR SDO standards are accessible only by either purchasing the standard from the SDO or by traveling to a reading room in Washington, D.C.[57] According to some SDOs, this status quo is unproblematic or even necessary.[58] These organizations aspire to have their voluntary consensus standards incorporated into the law due to the financial incentives that incorporation brings. Much of the revenue gained by SDOs stems from their sale of standards (particularly, binding standards), which, in turn, allows them to fund the development of updated standards.[59] Furthermore, "those directly governed by a particular standard should find the cost of obtaining it . . . both trivial in relation to their other costs and beneficial to them in avoiding the otherwise substantial cost of personally obtaining the same information."[60] This business focus, however, ignores that (1) individuals outside of major businesses may have interests in knowing these IBR laws and (2) citizens more generally have the right to know the laws that bind them.[61] While it is widely agreed that private standards development is beneficial for American society,[62] the status quo must be improved upon to ensure that the American people, small businesses, and interested parties can know *and follow* the laws of this nation. The principle that ignorance of the law is no excuse for having broken it[63] can only be effectuated if authorities do not write the law on high pillars in the town square or lock it behind the paywalls of privately run storefronts.

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57. See supra notes 26–28 and accompanying text.

58. See, e.g., About, Stop the Pro Codes Act, supra note 14 ("[The current] standards development system has worked for decades, providing health and safety codes and standards for the most integral components of our society from transportation systems and robotics to the construction of nuclear power plants.").

59. See Tell Congress to Pass the Pro Codes Act, supra note 49 ("[C]opyright protection for the codes and standards [that SDOs] develop . . . ensures [that SDOs] can recoup development costs and are incentivized to create new codes and keep existing ones updated . . . .").

60. Strauss, supra note 16, at 508. This claim has some merit: It is unlikely that major furniture manufacturers such as Williams-Sonoma or IKEA would struggle to pay the ninety-nine-dollar cost to access *ASTM F2057-23*. See FY24 Year in Review, IKEA, https://www.ikea.com/global/en/our-business/how-we-work/year-in-review-fy24/ [https://perma.cc/4H7T-ZUEL] (last visited Aug. 6, 2025) (listing IKEA's fiscal year 2024 sales as over forty-five billion euros); Williams-Sonoma, Inc. (WSM), Yahoo Fin., https://finance.yahoo.com/quote/WSM/ (on file with the *Columbia Law Review*) (last visited Aug. 13, 2025) (listing Williams-Sonoma's market capitalization as over twenty-five billion dollars).

61. See supra note 54 and accompanying text.

62. See supra notes 20–25 and accompanying text.

63. See, e.g., Letter from Thomas Jefferson to André Limozin (Dec. 22, 1787), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Jefferson/01-12-02-0460 [https://perma.cc/3GBL-WY8J] ("[I]gnorance of the law is no excuse in any country. If it were, the laws would lose their effect, because it can be always pretended.").

As this Note argues, the best way to increase access to IBR standards in the current political climate is for Congress to pass a modified version of the Pro Codes Act that includes additional pro-access provisions. Despite receiving much support,[64] the Pro Codes Act leaves fundamental gaps that will still prevent Americans from reading the laws that bind them. These gaps can be closed with commonsense modifications to the legislation, which this Note discusses in Part III. Prior to discussing these modifications, this Note addresses the variety of alternative judicial, administrative, and private remedies that others have previously proposed and explains why they are insufficient to address the problem at issue.

A. Placing Standards in the Public Domain

Activists in the copyright space most commonly propose that all incorporated SDO works that have the binding force of law should be placed in the public domain. Many have argued that such a rule should stem from congressional legislation[65] or from a judicial interpretation of existing copyright law.[66] In this vein, organizations like Public.Resource.Org[67] and the Electronic Frontier Foundation[68] advocate for and bring suit in court to expand access to copyrighted IBR standards. Carl Malamud, the founder of Public.Resource.Org, has embraced the idea that these rules should be in the public domain,[69] and his

64. See, e.g., Tell Congress to Pass the Pro Codes Act, supra note 49 (listing various organizations, SDOs, and members of Congress that support the Pro Codes Act).

65. See, e.g., An Edicts of Government Amendment, supra note 42 ("As this Committee considers revisions to the Copyright Act, there is one simple change that would make a world of difference to the functioning of our system of government, which is to specify . . . that 'edicts of government . . . are not copyrightable for reasons of public policy.'" (second alteration in original) (quoting U.S. Copyright Off., Compendium of Copyright Office Practices II § 206.01 (1984))); see also Sweeney, supra note 27, at 1362 ("This Note suggests that Congress create a provision specifically altering the copyright of a protected work that has been given legal force, by assigning that work to the public domain.").

66. See infra section II.B.

67. See Carl Malamud, Public.Resource.Org, Comment Letter on Commercial Diving Operations—Reopening of Comment Period 3 (Oct. 23, 2015), https://www.regulations.gov/comment/USCG-1998-3786-0216 [https://perma.cc/D622-DA9V] (arguing that "it is essential that citizens of the United States have the ability to freely read and speak the law" and that "materials proposed to be incorporated by reference would be under severe restrictions on access and use").

68. See Freeing the Law With Public.Resource.Org, Elec. Frontier Found., https://www.eff.org/cases/publicresource-freeingthelaw (on file with the *Columbia Law Review*) (last visited Aug. 6, 2025) ("Private organizations must not be allowed to abuse copyright to control who can read and speak the law, or where and how laws can be accessed.").

69. See id. ("Technical standards incorporated into law are some of the most important rules of our modern society. In a democracy, the people must have the right to read, know, and speak about the laws by which we choose to govern ourselves." (internal quotation marks omitted) (quoting Carl Malamud, President & Founder, Public.Resource.Org)).

organization has made these arguments before Congress, administrative agencies, and U.S. courts of appeals.[70]

But a unilateral rule placing IBR works into the public domain would threaten to impair the important contributions that SDOs make in the realm of standards development.[71] Professors Melville and David Nimmer assert that the wholesale placement of IBR works into the public domain could "prove destructive of the copyright interest in encouraging creativity in connection with the increasing trend toward state and federal adoptions of model codes."[72] The Administrative Conference of the United States has emphasized the "significant value of the public–private partnership in standards,"[73] and a blanket public domain assignment jeopardizes that partnership, as SDOs have repeatedly emphasized that their business models rely on the purchase of their model codes and standards.[74] Without this revenue, some SDOs claim that they would be unable to benefit society with their expertly developed modern standards.[75] Furthermore, requiring SDOs' works to be placed in the public domain when they are incorporated into the law could raise issues under the Takings Clause of the U.S. Constitution, which prohibits the government from taking "private property" for "public use" without providing "just compensation."[76] Members of the judiciary and legal scholars have acknowledged this concern,[77] although some have argued that the Takings Clause is not

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70. See, e.g., Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc., 896 F.3d 437, 444 (D.C. Cir. 2018) (making this argument before a court of appeals); supra notes 65, 67 and accompanying text (making this argument before Congress and administrative agencies).

71. See Facility Guidelines Inst., Inc. v. UpCodes, Inc., 677 F. Supp. 3d 955, 968 (E.D. Mo. 2023) (noting "potential risks of adopting a bright line rule that any privately developed model code adopted into state law automatically becomes part of the public domain" because it "could disincentivize private organizations from developing, publishing, and updating essential technical regulations and may raise significant concerns under the Takings Clause").

72. Nimmer & Nimmer, supra note 55, § 5.12[A].

73. Administrative Conference Recommendation 2011-5: Incorporation by Reference, 77 Fed. Reg. 2257, 2258 (adopted Dec. 8, 2011).

74. See, e.g., About, Stop the Pro Codes Act, supra note 14 (arguing that "mak[ing] standards available for free online" could "strip [SDOs] entirely of their ability to generate revenue"); Press Release, Copyright All., supra note 47 ("Without effective copyright protections, there is grave risk that [SDOs] will no longer be able to produce the high-quality codes and standards that the public and lawmakers have come to rely on." (internal quotation marks omitted) (quoting Keith Kupferschmid, CEO, Copyright All.)); supra note 59 and accompanying text.

75. See supra note 74 and accompanying text.

76. U.S. Const. amend. V.

77. See, e.g., CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reps., Inc., 44 F.3d 61, 74 (2d Cir. 1994) ("[A] rule that the adoption of [an IBR standard] by a state legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution."); Emily S. Bremer, Technical Standards Meet Administrative Law: A Teaching Guide on Incorporation by Reference, 71 Admin. L. Rev. 315, 334 (2019) (posing the question: "[If] [c]opyright protection for

applicable in those instances in which SDOs market their codes to government agencies and actively pursue the incorporation of their standards.[78] Despite ambiguity as to whether copyrights are "private property" to which the Takings Clause would apply,[79] automatically placing all IBR standards into the public domain would jeopardize a regulatory system highly reliant on the private development of necessary safety standards and would risk requiring the government to retroactively pay for all standards that have been previously incorporated.

B. *Judicial Involvement*

Over the years, disputes about access to SDO materials that have been incorporated by reference in the law have appeared before various courts. Courts have contemplated (and occasionally ruled) that materials incorporated by reference have limited or completely dissolved copyright protection as a result of their incorporation. Nevertheless, judicial solutions to increase access to IBR works not only are detrimental to the extent that they could possibly unilaterally place IBR works into the public domain[80] but also have been inconsistently determinative in cases that have arisen so far. Courts of appeals have split as to whether IBR standards lose copyright protection upon incorporation,[81] and it is unclear how recent Supreme Court decisions will impact this issue.[82] The following sections discuss this ambiguity in courts' rulings as it relates to the dominant doctrines of copyright law that scholars argue could be used to justify a judicial rule placing IBR works into the public domain.

1. *Government Edicts Doctrine*

a. *Early Cases.* — The government edicts doctrine is the most oft-cited area of copyright law through which some have argued that incorporated standards might lose copyright protection and enter the public domain. Generally, Congress prescribes the guidelines and extent of copyright

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incorporated materials, including standards, could be eliminated legislatively, . . . would the incorporation by reference of a standard into a regulation effectuate a taking that requires compensation under the Constitution's Takings Clause?").

78. See Int'l Code Council, Inc. v. UpCodes, Inc., No. 17 Civ. 6261 (VM), 2020 WL 2750636, at *14 (S.D.N.Y. May 27, 2020) (stating that, when an SDO "undisputedly encourages the adoption of its model codes into law as a general matter," this solicitation "counsels against according . . . Takings Clause concerns particularly great weight").

79. See Kevin J. Hickey, Cong. Rsch. Serv., R47656, Copyright in Standards Incorporated by Reference Into Law and the Pro Codes Act 10–11 & nn.123–124 (2023) (examining and summarizing many scholarly works on the subject and reaching the conclusion that "[t]he weight of authority" suggests that copyrights *are* subject to the Takings Clause).

80. See supra section II.A.

81. See infra section II.B.1.a.

82. See infra section II.B.1.b.

protections in the United States.[83] But the unique government edicts doctrine refers to the *judicially created* doctrine holding that (certain) government materials cannot be copyrighted.[84] The government edicts doctrine was formed by a series of three Supreme Court decisions from the nineteenth century: In *Wheaton v. Peters*, the Court held that neither judges nor court reporters can hold copyright in judicial opinions.[85] In *Banks v. Manchester*, the Court expanded this principle, stating that judges cannot hold copyright in *any* writings they create "in their capacity as judges," including statements of cases and headnotes that do *not* carry the force of law.[86] Finally, in *Callaghan v. Myers*, the Court held that a court reporter *can* hold copyright in the explanatory materials they create, such as case headnotes, tables of contents, and indices.[87] The Supreme Court did not take up another government edicts doctrine case until 2020.[88]

During the intervening 125 years, various courts made attempts to interpret and apply these nineteenth-century holdings. Some circuits formulated a broad interpretation of the government edicts doctrine, holding that *any* binding legal materials—including IBR standards—could *not* be copyrighted. The First Circuit embraced this theory in its 1980 decision *Building Officials & Code Administrators v. Code Technology, Inc.*,[89]

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83. See U.S. Const. art. I, § 8 ("The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .").

84. See Balganesh, supra note 24, at 360 ("The rule denying copyright protection to edicts of government (the 'government edicts doctrine') can be traced back to nineteenth century judicial opinions. In the years since, it has continued to remain a common law doctrine, operating without direct recognition in the text of the copyright statute.").

85. 33 U.S. 591, 668 (1834) (holding "that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right").

86. 128 U.S. 244, 253 (1888) (holding that "[j]udges . . . can themselves have no pecuniary interest or proprietorship, as against the public at large, in . . . whatever work they perform in their capacity as judges, and as well to the statements of cases and head notes prepared by them as such, as to the opinions and decisions themselves").

87. 128 U.S. 617, 649 (1888) (holding that "the title-page, table of cases, head-notes, statements of facts, arguments of counsel, and index" are "work[s] of the reporter" that "may be the lawful subject of copyright"); see also id. at 647 ("[I]n the absence of any inhibition forbidding him to take a copyright for that which is the lawful subject of copyright in him, or reserving a copyright to the government[,] . . . [a court reporter] is not deprived of the privilege of taking out a copyright, which would otherwise exist.").

88. Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498 (2020).

89. 628 F.2d 730 (1st Cir. 1980). This case involved a model building code created and copyrighted by Building Officials and Code Administrators International, Inc. (BOCA) that was ultimately chosen to become the official "Commonwealth of Massachusetts State Building Code." Id. at 732. BOCA sued a publisher that attempted to sell copies of this building code, claiming that it had copyright in the work and could be the only authorized seller of it. Id. Interpreting the government edicts doctrine, the First Circuit held that "[t]he citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process." Id. at 734. The court grounded this framing of

and the Fifth Circuit followed suit in its 2002 en banc decision in *Veeck v. Southern Building Code Congress International, Inc.*[90] Other circuits, however, rejected a broad interpretation of the government edicts doctrine. Contrary to the First and Fifth Circuits, the Second Circuit *upheld* protections for an IBR standard in its 1994 decision *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*,[91] and the Ninth Circuit reached a similar conclusion in its 1997 ruling in *Practice Management Information Corp. v. American Medical Ass'n.*[92] The Supreme Court effectively resolved

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the government edicts doctrine in due process: "[I]f access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them." Id.; see also id. at 734–35 ("[T]he holder of a copyright has the right to refuse to publish the copyrighted material . . . and may prevent anyone else from doing so, thereby preventing any public access to the material. . . . [T]his . . . can[not] be squared with the right of the public to know the law . . . ." (citing Fox Film Corp. v. Doyal, 286 U.S. 123 (1932))). Although the court declined to decide this case finally (as this appeal was merely on the matter of a preliminary injunction), the court asserted that "the same policies applicable to statutes and judicial opinions" under the government edicts doctrine may "apply equally to regulations of this nature." Id. at 735.

90. 293 F.3d 791 (5th Cir. 2002) (en banc). The Fifth Circuit found these early Supreme Court cases to "enunciate the principle that 'the law,' whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law." Id. at 800. Based on this interpretation, the Fifth Circuit held that a website's sharing of a privately developed model building code did *not* infringe the code author's copyright because the model codes had been adopted "wholesale" as the official building codes of two Texas towns. Id. at 804. The court affirmed that "public ownership of the law means precisely that 'the law' is in the 'public domain' for whatever use the citizens choose to make of it." Id. at 799.

91. 44 F.3d 61 (2d Cir. 1994). This case involved the copyright status of a privately developed compilation of used car values that had been incorporated by reference into the law by various state insurance statutes and regulations. Id. at 63. Regarding whether this compilation had entered the public domain, the court stipulated that it was "not prepared to hold that a state's reference to a copyrighted work as a legal standard . . . results in loss of the copyright." Id. at 74; see also id. at 73 (rejecting the argument that "if a copyrighted work is incorporated into the laws, the public need for access to the content of the laws requires the elimination of the copyright protection"). Specifically, the court noted that such a holding could potentially violate the Takings Clause of the Constitution. Id. at 74. For more discussion of the Takings Clause as it relates to IBR standards, see supra notes 76–79 and accompanying text; infra section III.B.4.

92. 121 F.3d 516 (9th Cir. 1997), amended by, 133 F.3d 1140 (9th Cir. 1998). In this case, the Ninth Circuit declined to hold that a privately authored coding system that was incorporated into a government reimbursement scheme through publication in the Federal Register lost its copyright protection. Id. at 521. The court discussed two factors that it believed underpinned the Supreme Court's decision in *Banks*: the goals of copyright and the due process requirement of free access to the law. Id. at 518–19. On this first point, the Ninth Circuit explained that, "'[t]o vitiate copyright, in such circumstances, could, without adequate justification, prove destructive of the copyright interest, in encouraging creativity,' a matter of particular significance in this context because of 'the increasing trend toward state and federal adoptions of model codes.'" Id. at 518 (quoting 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 5.06[C], at 5–92 (1996)). On the free access question, the court stated that the "due process requirement of free access to the law[] may be relevant" but that it did not "justify termination of the [plaintiff's] copyright" when "[t]here is no evidence that anyone wishing to use the [IBR code] has any difficulty

this circuit split in 2020 when it took up its first government edicts doctrine case since the 1800s.

b. *Georgia v. Public.Resource.Org, Inc.* — In *Georgia v. Public.Resource.Org, Inc.*, the Supreme Court addressed whether the State of Georgia could hold copyright in an annotated version of its state code and charge individuals to access it.[93] In this case, the annotated state code was voted on and approved by the state legislature, and the only *official* version of the state code that could be cited by parties in court was the annotated version.[94] Clarifying the meaning of its three early government edicts cases, the Supreme Court held:

> The animating principle behind [the government edicts doctrine] is that no one can own the law. "Every citizen is presumed to know the law," and "it needs no argument to show . . . that all should have free access" to its contents. Our cases give effect to that principle in the copyright context through construction of the statutory term "author." Rather than attempting to catalog the materials that constitute "the law," the doctrine bars the officials responsible for creating the law from being considered the "author[s]" of "*whatever work* they perform in their capacity" as lawmakers.[95]

Under this new interpretation of the government edicts doctrine as a ban on *lawmakers* being "authors" of works created in their capacity as lawmakers (rather than a ban on the copyright of "the law" more generally), private standards likely *retain* their copyright protection after being incorporated into the law. SDOs are not "authors" that create works "in their capacity as lawmakers."[96] Although IBR standards become "the law" upon incorporation, *Georgia v. Public.Resource.Org, Inc.* indicates that classification as "the law" has no impact on copyright protections under the government edicts doctrine: "Instead of examining whether given material carries 'the force of law,' [courts] ask only whether the author of the work is a judge or a legislator."[97] In this clarified framework of the government edicts doctrine, the model building codes at issue in *Building*

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obtaining access to it" and where "[t]he [plaintiff's] right under the Copyright Act to limit or forgo publication of the [IBR code] poses no realistic threat to public access" because "[t]he [plaintiff] has no incentive to limit or forgo publication." Id. at 519.

93. 140 S. Ct. 1498, 1505 (2020).

94. Id. at 1504–05.

95. Id. at 1507 (second and third alterations in original) (footnote omitted) (citations omitted) (first quoting Nash v. Lathrop, 6 N.E. 559, 560 (Mass. 1886); then quoting Banks v. Manchester, 128 U.S. 244, 253 (1888)).

96. Id.

97. Id. at 1513; see also Ronald Mann, Opinion Analysis: Sharply Divided Bench Rejects Georgia's Copyright in Annotations of Georgia Statutes, SCOTUSblog (Apr. 27, 2020), https://www.scotusblog.com/2020/04/opinion-analysis-sharply-divided-bench-rejects-georgias-copyright-in-annotations-of-georgia-statutes/ [https://perma.cc/NUX6-N8PQ] (summarizing the holding in *Georgia v. Public.Resource.Org, Inc.* as affirming that "the 'government edicts' doctrine . . . prevent[s] copyright protection for . . . annotations of . . . statutes that are prepared at the behest of the legislature").

Officials & Code Administrators and *Veeck* would likely have had their copyrighted status upheld.[98]

2. *Fair Use Doctrine.* — Since *Georgia v. Public.Resource.Org, Inc.*, the government edicts doctrine has fallen out of favor as a theoretical judicial tool for improving the incorporation by reference problem.[99] Professor Shyamkrishna Balganesh summed up this impact most accurately: "The government edicts doctrine . . . does not—when understood through the authorship rationale—operate as a blunt instrument to deny copyright protection to any expression that the government renders obligatory."[100] As such, many courts post-*Georgia v. Public.Resource.Org, Inc.* have turned to the doctrine of fair use to find that the sharing of privately developed codes incorporated into the law is not copyright infringement,[101] a solution echoed, in part, by Professors Nimmer and Nimmer.[102]

The fair use doctrine is a statutory affirmative defense to copyright infringement that involves a judicial balancing of four factors:

> (1) the purpose and character of the use . . . ;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[103]

Many recent decisions about incorporated standards that rely on the fair use doctrine are grounded in *American Society for Testing & Materials v. Public.Resource.Org, Inc.*, a pre-*Georgia v. Public.Resource.Org, Inc.* decision

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98. But see Canadian Standards Ass'n v. P.S. Knight Co., 112 F.4th 298, 307 (5th Cir. 2024) (relying on *Veeck* post-*Georgia v. Public.Resource.Org, Inc.* to hold that "because [an SDO's] model codes are incorporated into Canadian law, [defendant's] copying of those codes is not infringement"), cert denied, 145 S. Ct. 1135 (2025) (mem.).

99. See Int'l Code Council, Inc. v. UpCodes, Inc., No. 17 Civ. 6261 (VM), 2020 WL 2750636, at *8 (S.D.N.Y. May 27, 2020) ("Because [an SDO] is a private party that lacks the authority to make or interpret the law, the Government Edicts doctrine is clearly not dispositive of this case. But the doctrine provides significant guidance that this Court must keep in mind when addressing . . . the [adopted codes].").

100. Balganesh, supra note 24, at 410.

101. See, e.g., Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc., 82 F.4th 1262, 1267 (D.C. Cir. 2023) ("[Defendant's] copying of material incorporated by reference into law, for free dissemination to the public, was fair use."); Facility Guidelines Inst., Inc. v. UpCodes, Inc., 677 F. Supp. 3d 955, 973 (E.D. Mo. 2023) ("[T]he Court is persuaded that [defendant's] posting of the [SDO's standards] that have been adopted into law likely constitutes fair use."); Nat'l Fire Prot. Ass'n v. UpCodes, Inc., No. CV 21-5262 DSF (E), 2021 WL 4913276, at *2 (C.D. Cal. Aug. 9, 2021) (stating that "[t]he Court need not reach the parties' various arguments about the importance of authorship and merger, or whether guiding notes are part of the law" because the plaintiff did not demonstrate that "[defendant's] reproduction of its standards is not fair use").

102. See Nimmer & Nimmer, supra note 55, § 5.12[A] ("[F]ailure to allow widespread access to governing law could . . . require recognition of a fair use defense for a defendant who reproduced such a copyrighted code for his own personal use." (footnote omitted)).

103. 17 U.S.C. § 107 (2018).

from the D.C. Circuit in which the court reached a determination that "in many cases, it may be fair use . . . to reproduce part or all of a technical standard in order to inform the public about the law."[104] Here, the D.C. Circuit held that "standards incorporated by reference into law are, at best, at the outer edge of 'copyright's protective purposes.'"[105] The court explained that because IBR standards "fall at the factual end of the fact-fiction spectrum"[106] and because "the consequence of the incorporation by reference [at issue] is virtually indistinguishable from a situation in which the standard had been expressly copied into law,"[107] Public.Resource.Org's online posting of several incorporated standards could qualify for a fair use defense.[108]

This fair use doctrine, however, is not a permanent solution to expand access to incorporated codes, as the application of the fair use factors "is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."[109] With the fair use status of IBR standards being "assessed standard by standard and use by use,"[110] the fair use doctrine requires both SDOs and public access organizations to spend time and resources litigating in court over the access to specific standards. A legislative solution clarifying the copyright status of IBR standards would limit the need for parties to appear in court and would provide a sense of consistency for SDOs that develop these critically important standards.[111]

3. *Merger Doctrine*. — It has also been argued that IBR standards should be considered part of the public domain under copyright's merger doctrine. Copyright law protects the *expression of ideas* but does not protect

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104. 896 F.3d 437, 453 (D.C. Cir. 2018).

105. Id. at 451 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994)).

106. Id.

107. Id. at 452. But the court stipulated that "where the incorporation does not lend to such easy substitution, fair use is harder to justify." Id.

108. In this case, the district court had granted summary judgment to the SDOs, but the D.C. Circuit reversed and remanded for further factual development. Id. at 458. When it later reached the merits, the D.C. Circuit found that Public.Resource.Org's posting of the incorporated standards was a fair use. See Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc., 82 F.4th 1262, 1267, 1272 (D.C. Cir. 2023) (finding fair use when the "[t]he first three [fair use] factors strongly support holding that Public Resource's posting of incorporated standards was fair use" and that "the fourth fair-use factor does not significantly tip the balance one way or the other").

109. *Campbell*, 510 U.S. at 577; accord *Am. Soc'y for Testing & Materials*, 896 F.3d at 451 ("Faithfully reproducing the relevant text of a technical standard incorporated by reference for purposes of informing the public about the law obviously has great value, but whether [Public.Resource.Org's] specific use serves that value must be assessed standard by standard and use by use.").

110. *Am. Soc'y for Testing & Materials*, 896 F.3d at 451.

111. But see Hickey, supra note 79, at 13 (stating that, "even if the Pro Codes Act were enacted, groups like [Public.Resource.Org] may still assert fair use arguments").

ideas themselves.[112] Under the merger doctrine, however, "expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself."[113] In these instances, "the idea 'merges' with the expression, such that a given idea is inseparably tied to a particular expression."[114]

"[M]ost merger cases involve works that are uncopyrightable when first created," but "some courts have held that an initially copyrightable work may be disqualified for copyright protection over time."[115] The Fifth Circuit applied the merger doctrine in *Veeck* and invalidated the plaintiff's copyright in its model building codes because, upon incorporation into the law, the model codes "were transformed into the 'fact' and 'idea' of the towns' building codes" such that the defendant thus "could not express the enacted law in any other way."[116] But the Ninth Circuit rejected

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112. See 17 U.S.C. § 102(b) (2018) ("In no case does copyright protection for an original work of authorship extend to any idea . . . ."); see also Baker v. Selden, 101 U.S. 99, 105 (1879) ("The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. . . . The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters-patent.").

113. BellSouth Advert. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc., 999 F.2d 1436, 1442 (11th Cir. 1993) (internal quotation marks omitted) (quoting Kregos v. Associated Press, 937 F.2d 700, 705 (2d Cir. 1991)); see also Kohus v. Mariol, 328 F.3d 848, 856 (6th Cir. 2003) ("To this end, the merger doctrine establishes that '[w]hen there is essentially only one way to express an idea, the idea and its expression are inseparable [i.e., they merge,] and copyright is no bar to copying that expression.'" (alterations in original) (quoting Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 606 (1st Cir. 1988))). This rationale, which has its roots in "preventing anticompetitive behavior," seeks to ensure that future creators are able to express ideas "without seeking permission from [a] copyright owner." Shubha Ghosh, Legal Code and the Need for a Broader Functionality Doctrine in Copyright, 50 J. Copyright Soc'y U.S.A. 71, 101–02 (2003).

114. Nimmer & Nimmer, supra note 55, § 13D.29 (citing Ross, Brovins & Oehmke, P.C. v. Lexis Nexis Grp., 348 F. Supp. 2d 845, 854 (E.D. Mich. 2004)).

115. Samuelson, supra note 25, at 215. This process mirrors aspects of trademark law's genericide doctrine. Paul Goldstein, Goldstein on Copyright § 2.3.2.1 (3d ed. 2025). This doctrine dictates that "a once-viable trademark may become unprotectable because widespread public use of the mark as a common name for a product or service causes it to lose its source significance." Samuelson, supra note 25, at 219; see also 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 12:1 (5th ed. 2025) ("[I]f one seller develops trademark rights in a term which a majority of the relevant public then appropriates as the name of a product, the mark is a victim of 'genericide' and . . . the designation enters the 'linguistic commons' and is free for all to use.").

116. Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 802 (5th Cir. 2002) (en banc). In this case, the Fifth Circuit invalidated the plaintiff's copyright on two distinct grounds: the government edicts doctrine, see supra note 90 and accompanying text, and the merger doctrine.

Scholars such as Professor Shubha Ghosh have argued for an even broader interpretation of the merger doctrine, asserting that courts should apply the doctrine by considering "whether protection of the expression would foreclose or limit potentially valuable uses of the work," rather than deploying "a mechanical application of categories like ideas and expression." Ghosh, supra note 113, at 104, 109. Under this framework,

the merger doctrine in the similar case of *Practice Management Information Corp. v. American Medical Ass'n*.[117] There, the court stated that it "has not allowed the owners of copyrights in expressions mandated by industry standards to use their copyrights to stifle independent creative expression in the industry."[118] Nevertheless, the court further stipulated that the copyright of the code at issue "simply prevents wholesale copying of an existing system" but does not "stifle independent creative expression in the medical coding industry" or "prevent . . . competitors from developing comparative or better coding systems and lobbying the federal government and private actors to adopt them."[119] As such, the Ninth Circuit rejected the argument that the merger doctrine should invalidate the copyright of an IBR standard.[120]

The Supreme Court's decision in *Georgia v. Public.Resource.Org, Inc.* seems to refute the Fifth Circuit's arguments in *Veeck*. According to the Court, the general principle that "'[e]very citizen is presumed to know the law[]' and . . . 'should have free access' to its contents"[121] is "give[n] effect . . . in the copyright context through construction of the statutory term 'author' . . . [r]ather than attempting to catalog the materials that constitute 'the law.'"[122] In other words, the "materials that constitute 'the law'" are only exempt from copyright protection insofar as they are drafted by a lawmaker acting in their lawmaking capacity.[123] Even though SDO-drafted IBR standards are "the law," they are not works created by "officials responsible for creating the law" acting "'in their capacity as' lawmakers."[124] Thus, under *Georgia v. Public.Resource.Org, Inc.*'s focus on authorship, it is unlikely that the merger doctrine will be deployed as a means of expanding access to IBR standards.

4. *Systems, Methods of Operation, and Procedures.* — Beyond the government edicts, merger, and fair use doctrines, some scholars have argued that certain technical standards incorporated into the law should be ineligible for copyright protection under the general prohibition on the copyright of procedures, processes, systems, and methods of operation.[125] Professor Pamela Samuelson explains that, under § 102(b) of the

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Ghosh contends that courts considering issues of incorporated standards should pay attention to whether "protection would constrain too many uses." Id. at 104.

117. 121 F.3d 516, 520 n.8 (9th Cir. 1997), amended by, 133 F.3d 1140 (9th Cir. 1998).

118. Id. (citing Sega Enters. Ltd. v. Accolade, Inc, 977 F.2d 1510, 1523–24 (9th Cir. 1992)).

119. Id.

120. Id. at 520.

121. 140 S. Ct. 1498, 1507 (2020) (quoting Nash v. Lathrop, 6 N.E. 559, 560 (Mass. 1886)).

122. Id. (quoting Banks v. Manchester, 128 U.S. 244, 253 (1888)).

123. Id.

124. Id. (quoting *Banks*, 128 U.S. at 253).

125. 17 U.S.C. § 102(b) (2018).

Copyright Act, coding systems should be ineligible for copyright.[126] Coding systems are technical standards that "typically use numbers, abbreviations, or other symbols to represent certain data elements in accordance with rules or organizing principles."[127] According to Samuelson, "Such codes and other systematic organizations of information are certainly uncopyrightable if they are dictated by rules or functionality."[128] She further identifies several additional factors that "may be relevant to whether systematic organizations of information are unprotectable under § 102(b)."[129] These factors are:

> (1) when the system is a useful art and copyright in it would give patent-like protection, (2) when second-comers need to use the system to compete or communicate effectively, (3) when systematizing information is necessary to achieve efficiencies, (4) when the system is incidental to uncopyrightable transactions or processes, and (5) when systematizing the information will produce social benefits from uniformity and the social costs of diversity would be high.[130]

But courts have inconsistently applied such a theory of § 102(b).[131] In fact, several courts have *upheld* copyright protections for coding systems (some of which had been incorporated by reference into the law). For example, in *Practice Management Information Corp. v. American Medical Ass'n*, the Ninth Circuit upheld the copyright of a privately developed coding system that had been incorporated into federal law despite § 102(b)'s prohibition on the copyright of systems.[132] The Ninth Circuit reached this holding even though it referred to the copyrighted work at issue as a "system" eleven times throughout the opinion.[133] Judge Frank Easterbrook, writing for the Seventh Circuit, reached a similar conclusion when he affirmed the copyright protection of a taxonomy system for dental procedures in *American Dental Ass'n v. Delta Dental Plans Ass'n*.[134]

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126. Samuelson, supra note 25, at 196.

127. Id. Examples of such coding systems would include: (1) a company's product identification numbering system in which each digit in a specific identification number signifies a relevant characteristic of the product, see Southco, Inc. v. Kanebridge Corp. (*Southco III*), 390 F.3d 276, 278 (3d Cir. 2004) (en banc); and (2) a numbering system used to identify (with great specificity) different surgical procedures completed by dentists, see Am. Dental Ass'n v. Delta Dental Plans Ass'n, 126 F.3d 977, 979 (7th Cir. 1997).

128. Samuelson, supra note 25, at 214–15.

129. Id. at 215.

130. Id.

131. See Balganesh, supra note 24, at 410 n.276 (stating that, "[f]or the most part, courts have . . . refused to apply § 102(b) consistently" as it relates to the copyright status of coding systems).

132. 121 F.3d 516, 520 (9th Cir. 1997), amended by, 133 F.3d 1140 (9th Cir. 1998).

133. Id. at 517–21.

134. 126 F.3d 977, 977 (7th Cir. 1997) (addressing a copyrighted coding system in which "[a]ll dental procedures are classified into groups; each procedure receives a number, a short description, and a long description"). In this decision, Judge Easterbrook rejected the argument that the dental coding scheme at issue could qualify as a system under § 102(b):

Judge Easterbrook also expressed great concern that a blanket, judicially determined prohibition on the copyright of taxonomies would strip the copyright from many important SDO-created coding systems, including "manuals issued by the Financial Accounting Standards Board," "tests and answers devised by the Educational Testing Service," and "most commercial software."[135]

Some courts, however, have accepted a slightly broader theory of § 102(b), in line with Samuelson's arguments. Writing for the Third Circuit, then-Judge Samuel Alito asserted in the *Southco, Inc. v. Kanebridge Corp.* series of cases that a taxonomy system used to assign identification numbers to a company's various products was *not* protectable under § 102(b). Judge Alito stated that, "For purposes of copyright law, . . . Southco's numbering system itself and the actual numbers produced by the system are two very different works."[136] He further explained that, "[b]ecause ideas may not be copyrighted, Southco does not assert any claim of copyright in its numbering *system,* but instead focuses on *the part numbers themselves.*"[137] The Sixth Circuit similarly rejected the copyright of a taxonomy system in *ATC Distribution Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc.*[138] Each of these cases, however, held that a *system* was not copyrightable because it was an *idea* rather than because of § 102(b)'s prohibition on the copyright of "systems."

These cases indicate that courts have hardly reached a robust consensus regarding the applicability of § 102(b)'s reference to "systems" to SDO-developed coding schemes.[139] Furthermore, even if Samuelson's interpretation of § 102(b) was unilaterally applied by courts, only a limited number of IBR standards would enter the public domain: The cases discussed here have only involved taxonomy-like coding schemes, not complex, lengthy IBR standards.[140] As such, expanded use of this judicial practice would still retain much of the status quo and leave many of the most complex IBR standards in use today insufficiently accessible to the general public. In this way, the copyright prohibition for "systems,

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"But what could it mean to call the Code a 'system'? This taxonomy does not come with instructions for use . . . . The Code is a taxonomy, which may be put to many uses. These uses may be or include systems; the Code is not." Id. at 980–81.

135. Id. at 978.

136. Southco, Inc. v. Kanebridge Corp. (*Southco I*), 258 F.3d 148, 151 (3d Cir. 2001).

137. *Southco III*, 390 F.3d 276, 282 (3d Cir. 2004) (en banc).

138. 402 F.3d 700, 707 (6th Cir. 2005). Stating that "[o]riginal and creative *ideas*" are not copyrightable under § 102(b), the court held that "all of the creative aspects" of the classification scheme at issue "are just that: ideas." Id.

139. See id. at 708 (describing the rationale of Judge Easterbrook's majority opinion in *American Dental Ass'n* as "rather opaque" (citing 126 F.3d at 979)).

140. E.g., supra text accompanying note 14; supra notes 29–30.

methods of operation, and procedures" is an unlikely vehicle to truly solve the issue of IBR standards' inaccessibility.[141]

C. *Administrative Remedies Have Failed to Improve the Situation*

Beyond seeking relief from the courts, many pro-access advocates have called for modifications to agency practices to ensure citizens have greater access to the law. Thus far, however, agencies have declined to embrace substantive policies improving this situation, and they lack incentives to do so.

In 2011, the Administrative Conference of the United States recommended that agencies make greater efforts to enable public access to incorporated legal texts, stating that the copyright of such works was "particularly problematic."[142] This recommendation, in part, motivated a coalition of legal scholars and practitioners to petition the Office of the Federal Register (OFR) to require free online publication of all texts that have acquired the force of law through incorporation by reference in a regulation.[143] Members of this coalition alleged that incorporated, binding materials cannot meet the statutory requirement of "reasonably

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141. A similarly limited theoretical argument for the judicial expansion of access to IBR standards is the scenes a faire doctrine. This doctrine, which was "originally developed to recognize that certain plot structures are to be expected from works exploring certain literary or dramatic themes, has been adapted, especially in the software copyright case law, to recognize that expressive choices of subsequent authors may become constrained over time by the emergence of industry standards." Samuelson, supra note 25, at 215 (footnote omitted). As Professor Samuelson explains:

> This doctrine "exclude[s] from protection . . . those elements of a work that necessarily result from external factors inherent in the subject matter of the work," such as "hardware standards and mechanical specifications, software standards and compatibility requirements, computer manufacturer design standards, industry programming practices, and practices and demands of the industry being served."

Id. at 217 (alternations in original) (quoting Mitel, Inc. v. Iqtel, Inc., 124 F.3d 1366, 1375 (10th Cir. 1997)). In *Southco III*, Judge Edward Becker applied the scenes a faire doctrine, stating that Southco's taxonomy system merely consisted of "values—such as screw thread sizes, screw lengths, or ferrule types—[that] were determined by industry standards rather than through any exercise of originality by Southco." 390 F.3d at 288 (Becker, J., concurring). As such, the product numbers at issue were "determined solely by the part identity, rather than through some exercise of creative expression," which Judge Becker proposed as an independent justification for invalidating copyright protection for the system at issue. Id. Like the argument that coding systems should be denied copyright protection, the scenes a faire doctrine has been seldom applied to the issue of IBR standards. Even if it were applied, only taxonomy-like codes would be impacted. Complex regulatory standards would remain fully protected and insufficiently accessible. E.g., supra text accompanying note 14; supra notes 29–30.

142. See Administrative Conference Recommendation 2011-5: Incorporation by Reference, 77 Fed. Reg. 2257, 2257–58 (adopted Dec. 8, 2011).

143. Petition for Rulemaking on Incorporation by Reference (Off. of the Fed. Reg. Feb. 10, 2012), https://law.resource.org/pub/us/cfr/regulations.gov.docket.01/NARA-12-0002-0002.pdf (on file with the *Columbia Law Review*).

available"[144] if they "cannot freely be found in or through an agency's electronic library."[145] Nevertheless, the OFR declined to impose this more substantive proposed rule, asserting that it lacked the "resources" and "statutory authority" to overcome copyright interests.[146] Instead, OFR chose to implement a more limited requirement: "[A]gencies must set out, in the preambles of their proposed and final rules, a discussion of the actions they took to ensure the materials are reasonably available to interested parties and that they summarize the contents of the materials they wish to incorporate by reference."[147] This decision, coupled with broader inaction on the part of individual agencies,[148] has resulted in federal regulatory agencies standing on the sidelines when it comes to genuine attempts to improve access. This is hardly surprising, as agencies are statutorily compelled to utilize "technical standards" when possible,[149] and the current system of incorporation by reference allows them to use these standards for free. Without statutory modifications, agencies have little incentive to improve the public's access.

D. *Private Remedies Have Proved Insufficient*

Finally, some scholars have called for private SDOs to take steps that improve the public's capacity to use their developed standards.[150] Some SDOs have made commendable efforts in this regard by providing free

144. See supra notes 26–27 and accompanying text.

145. Petition for Rulemaking on Incorporation by Reference, supra note 143.

146. Incorporation by Reference, 79 Fed. Reg. 66,267, 66,268, 66,273 (Nov. 7, 2014).

147. Id. at 66,267.

148. Regarding potential changes at the individual agency level, scholars like Professor Peter Strauss have called for agencies to "take the contractual route of purchasing the desired standard for an agreed price rather than permitting its price to be passed along to the affected public; . . . [and] [r]estrict the use of incorporation by reference . . . to technical standards, and not 'regulatory standards or requirements.'" Strauss, supra note 16, at 560–61 (quoting OMB Circular No. A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 63 Fed. Reg. 8546, 8549 (Feb. 19, 1998)). By and large, these recommendations have yet to be embraced. See supra text accompanying notes 23, 36–37 (indicating that government entities tend not to pay for incorporated standards and that the number of federally incorporated regulatory standards has increased dramatically since Strauss's 2013 recommendations).

149. 15 U.S.C. § 272 (2018).

150. For example, in listing several such recommendations for individual SDOs, Strauss called for SDOs to

> assur[e] would-be commenters some form of free access to standards proposed for incorporation by reference during rulemaking notice-and-comment periods[;] . . . [w]ork with agencies to limit incorporations by reference where possible to relevant parts, and not the whole, of voluntary consensus standards[;] . . . [and] mak[e] any standard that incorporation has converted into legal obligations freely available.

Strauss, supra note 16, at 560.

digital copies of their incorporated standards on their websites.[151] In recent years, however, the government's reliance on incorporated standards has only increased,[152] and SDOs continue to maintain that charging citizens for binding IBR laws is a necessary aspect of their business models.[153] Americans' access to the law cannot be dependent on the voluntary goodwill of private organizations. Permanent, enduring, and authoritative solutions to this issue must be enacted through legislative means, effectuating in perpetuity some of the goals elaborated upon by Professor Peter Strauss[154] and others.

III. IMPROVING THE PRO CODES ACT

A. *The Pro Access Act*

This Note proposes that Congress pass legislation that draws from the high-level principles of the Pro Codes Act while making improvements to further protect public access to the law and address copyright scholars' and advocates' concerns. The mock-up legislative provisions below demonstrate the dominant principles that this Note argues should be included in any future legislative attempt at improving the issue of IBR standards:

> (1) A standard to which copyright protection subsists under section 102(a) of the Copyright Act at the time of its fixation shall retain such protection, notwithstanding that the standard is incorporated by reference, if, at the time of incorporation or within ten years after the enactment of this Act:
>
> (a) The applicable standards development organization:
>
> (i) Consented to the incorporation by reference; and
>
> (ii) Authorized the relevant government agency or authority to make *publicly and freely accessible online* on a government website all portions of a given standard that have been incorporated into law; and
>
> (b) The relevant government agency or authority makes all portions of a given standard that have been incorporated into law *publicly and freely accessible online* on a government website.
>
> (c) "Publicly and freely accessible online" shall be defined as:

151. See, e.g., Free Access, Nat'l Fire Prot. Ass'n, https://www.nfpa.org/for-professionals/codes-and-standards/list-of-codes-and-standards/free-access [https://perma.cc/QU2N-4HMD] (last visited Aug. 6, 2025) ("As part of its commitment to enhancing public safety, NFPA makes its codes and standards available online to the public for free."). But these online codes exist in a "read-only" format, cannot be downloaded or printed, and can only be accessed if an aspiring viewer creates an account. Id.

152. See supra notes 36–37 and accompanying text.

153. See supra note 74 and accompanying text.

154. See Strauss, supra note 16.

> (i) Available at no monetary cost on an internet website that does not require users to enter personal information to access the content therein; and
> (ii) In a format that includes:
>
> (1) A searchable table of contents and index (or equivalent aids to facilitate the location of specific content);
>
> (2) The ability to both download and print the standard; and
>
> (3) Any other functionalities and user permissions that may be available on digital copies of the standard as sold by the standards development organization.
>
> (2) Beginning three years after the enactment of this Act, federal agencies and departments shall not incorporate standards without such consent and authorization from the applicable standards development organization.
> (3) Federal agencies and departments shall make all portions of a given standard that have been incorporated into law, for which appropriate consent and authorization from the relevant standards development organization has been given, *publicly and freely accessible online* on a government website.
> (4) Federal agencies and departments shall make all attempts to obtain such consent and authorization for standards that have been incorporated into federal regulatory law without such consent and authorization. If such consent and authorization cannot be obtained from the applicable standards development organization within seven years of the enactment of this Act, an agency or department should make reasonable efforts to remove the provision incorporating the standard.

B. *Overview*

Under this proposed legislation, which this Note will refer to as the Pro Access Act, the copyright of IBR standards is affirmed when government organizations and SDOs reach an agreement under which the relevant government authority will be able to share the incorporated standard (or the incorporated portions of a standard) on its website for the public to access. This version of the standard posted on the government website must be available to members of the public: (1) for free, (2) without requiring any form of login or account creation, and (3) in a format that allows for downloading, printing, and content searching. If the SDO agrees to this sharing, then it is confirmed to have copyright in the standard, allowing it to be the only seller of bound copies of the standard and digital versions of the standard with "value-added" nonbinding materials. This framework provides significant flexibility for government authorities to negotiate with SDOs to find mutually agreeable terms of incorporation while also providing substantial incentives for SDOs to utilize this system of copyright assurance.

1. *Flexibility for Government.* — Under this Pro Access Act, government entities have great latitude to negotiate with SDOs to find mutually agreeable terms under which the agency or government organization may share the standard online. These terms could include the agency choosing to purchase the copyright of SDO standards outright,[155] to license the standard from the SDO at a set rate,[156] to limit the portions of standards that are incorporated to only those specifically relevant to the regulation/law at issue,[157] or to adopt an alternative standard from a competing SDO that offers more favorable access terms.[158] This would undoubtedly "impose undesirable transaction costs on both [SDOs and government groups];"[159] however, requiring such costs to be borne by the government rather than the American public is a dramatic improvement on the status quo.[160]

One of the original sponsors of the Pro Codes Act, Representative Issa, argued that the status quo already enabled government entities to negotiate with SDOs to acquire, for example, advanced searching capabilities and no-login access for digital copies of incorporated standards.[161] But his claim ignores the reality that SDOs would be entirely disincentivized from even engaging in this bargaining. Currently, SDOs earn money (in part) by monopolizing not only the *sale of* but also *access to* the law. SDOs maximally profit off their incorporated standards when they are the only point of access. The relinquishment of control necessary

155. Cf. Strauss, supra note 16, at 560 (contending that agencies should "take the contractual route of purchasing the desired standard for an agreed price rather than permitting its price to be passed along to the affected public").

156. Cf. Zoie Mestayer, Note, Have Your Cake and Eat It Too: Providing Free Public Access of Copyrighted Standards Incorporated by Reference Into Law Through Compulsory Licensing, 51 AIPLA Q.J. 309, 351 (2023) (explaining that, in the context of a compulsory licensing regime for IBR standards, "[a] pre-determined annual fee is a moderate approach that would ease some of the hardship imposed on the agencies while encouraging them to innovate and reevaluate the standards they have incorporated in the past").

157. Cf. Strauss, supra note 16, at 561 (encouraging agencies to limit incorporation by reference to "only those elements of a voluntary consensus standard essential to its regulation").

158. Cf. Mendelson, supra note 28, at 802, ("[C]ontracting would have the salutary effect of permitting the agency to solicit bids to supply standards, thus increasing competition among groups to do so and enabling the agency to specify more open and accessible processes for standards development."); Mestayer, supra note 156, at 346 (discussing how a government contracting regime for IBR standards would allow agencies to "solicit bids from SDOs to promulgate standards, thereby increasing competition amongst SDOs and allowing agencies to include procedural safeguards that satisfy the Administrative Procedure Act . . . in the agreements").

159. Mestayer, supra note 156, at 346–47.

160. See Strauss, supra note 16, at 547 ("It seems problematic, however, to transform the prospective price for a taking—unmistakably a governmental obligation that may be judicially fixed if agreement on it cannot be reached—into a price unilaterally set by monopolists on private parties with little choice about purchase.").

161. Pro Codes Act 2024 House Markup, supra note 52, at 1:08:01 (statement of Rep. Issa).

to appease the desires of a single government entity in Representative Issa's hypothetical would be so substantial that it seems unlikely that SDOs would even contemplate agreeing to such terms.

Nevertheless, some agencies have demonstrated competency at negotiating with SDOs to lower some (but not all) barriers to access.[162] Extending this existing practice of agency–SDO negotiation, this legislative proposal allows for the methods by which standards are incorporated and made publicly accessible to flexibly adapt to different agency and SDO dynamics. As such, this proposal ensures that agencies "retain the flexibility to integrate private standards into public law as necessary to further the public interest and protect health and safety"[163] without placing the written law out of reach from the American people. It also allows for more agency involvement in "[e]ffectively outsourc[ed] rulemaking," improving the voice of the people's representatives in standards development itself without fully placing the burden of the work on the government's shoulders.[164]

2. *Incentives for SDOs.* — This legislation offers significant incentives for SDOs to negotiate with government entities and consent to the sharing of their standards on government websites in accordance with the Act. First and foremost, it allows SDOs to pursue compensation from government organizations and groups through means that fit best with an individual SDO's business model.[165] This guarantees SDOs compensation for their developed codes. Additionally, as the *Veeck* court discussed:

> [T]o enhance the market value of its model codes, [SDOs] could easily publish them as do the compilers of statutes and judicial opinions, with "value-added" in the form of commentary, questions and answers, lists of adopting jurisdictions and other information valuable to a reader. The organization could also charge fees for the massive amount of interpretive information about the codes that it doles out.[166]

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162. See Administrative Conference Recommendation 2011-5: Incorporation by Reference, 77 Fed. Reg. 2257, 2258 (adopted Dec. 8, 2011) ("[S]ome agencies have successfully worked with copyright owners to further . . . transparency and public–private collaboration. Some agencies have, for example, secured permission to make a read-only copy of incorporated material available in the agency's public, electronic docket during the pendency of the rulemaking proceeding relating to the material.").

163. Bremer, Cost, supra note 22, at 282. If a standard is sufficiently important such that failing to incorporate it would impair the agency's ability "to further the public interest and protect health and safety," id., then the agency can purchase that standard legitimately from the SDO or pay the price of a taking as determined by a court, see supra notes 155, 160 and accompanying text.

164. Strauss, supra note 16, at 545. Strauss has explained that negotiated government contracting of standards development would provide agencies with a greater voice in the development process and improve transparency. Id.

165. See supra text accompanying notes 155–160.

166. Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 806 (5th Cir. 2002) (en banc); see also Goldstein, supra note 115, § 2.5.2.1(c) ("Trade organizations have powerful reasons stemming from industry standardization, quality control and self-regulation to

Some SDOs are already offering supplementary materials related to their standards at a premium cost.[167] Furthermore, while some SDOs may claim to depend extensively on the funding provided by the sale of their incorporated standards to the public,[168] some scholars have pushed back on this contention, asserting that SDOs "generally use the revenues they derive from selling or licensing the standards to subsidize other activities of their organizations, rather than to recoup investments in making the standards."[169] In this way, the Pro Access Act could help to eliminate perverse practices in the standards development industry, such as SDOs investing in "persuading governments to mandate use of their standards" instead of investing in the improvement of the standards themselves.[170] Thus, the Pro Access Act guarantees that SDOs are compensated for the efforts they put into standards development without allowing those standards to become a "cash cow"[171] that all users of a standard must independently purchase.

3. *Previously Incorporated Standards*. — The Pro Access Act also instructs federal agencies and authorities to attempt to receive retroactive consent and permission to share incorporated standards on government websites. While SDOs have ample incentives to engage in these negotiations,[172] it is almost certain that SDOs will be unable to reach agreement with the pertinent government entity as it relates to *some* percentage of the over twenty-seven thousand previously incorporated

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produce these codes; it is unlikely that without copyright they will cease producing them."); Samuelson, supra note 25, at 222 ("Even without copyright in the standards, [SDOs] can derive revenues from sales of print materials embodying the standard and value-added products or services.").

167. For example, ASTM International often offers "Standard + Redline Bundle[s]" that include both a digital copy of a certain standard and a "PDF redline," which is "a quick and easy way to compare all of the changes between the current, active standard and the previous version." *ASTM F2167-22* Purchase Page, supra note 29 (click the "i" symbol next to "What is a Redline?"). ASTM International charges an approximately twenty percent markup for "Standard + Redline Bundle[s]" as compared to only digital copies of a standard. See, e.g., id. (charging seventy-six dollars for a PDF copy of *ASTM F2167-22* while charging ninety-one dollars for the *ASTM F2167-22* "Standard + Redline Bundle").

168. See, e.g., Press Release, Copyright All., supra note 47 ("Without effective copyright protections, there is grave risk that [SDOs] will no longer be able to produce the high-quality codes and standards that the public and lawmakers have come to rely on." (internal quotation marks omitted) (quoting Keith Kupferschmid, CEO, Copyright All.)).

169. Samuelson, supra note 25, at 222; see also id. ("It is simply not credible to claim that organizations like the [American Medical Association] and [American Dental Association] would stop developing standard nomenclature without copyright protection. The fields they serve need these standards for effective communication with other health care providers, insurers, and government agencies.").

170. Id. at 223.

171. See id. at 223–24 ("The long-term credibility of [SDOs] depends on their ability . . . to produce standards in which the [SDOs] do not have such a strong financial interest that they . . . abuse the standards process by making their standards into a cash cow that must be purchased by anyone affected by the standard.").

172. See supra section III.B.2.

federal standards.[173] In those cases, the standards at issue will not be posted on a government website in accordance with this proposed legislation, and the pertinent government agency will make reasonable efforts to remove the incorporation of such standards from regulatory law. As these unposted standards are: (1) removed from the regulatory landscape, (2) supplanted by updated standards over time, (3) replaced with standards created by competing SDOs with which the government has been able to reach an agreement, (4) determined by the courts to have limited or no copyright enforcement capabilities,[174] or (5) ultimately enter the public domain upon the expiration of their copyright,[175] the public will eventually gain access to *all* applicable IBR federal standards under this legislative framework. Furthermore, this review of previously incorporated standards, while a daunting task,[176] will have the added benefit of requiring agencies to clean up previously incorporated standards and address issues involving standards that are nonexistent, unsafe, and not available for purchase.[177]

4. *Constitutional Takings Concerns.* — The Takings Clause requires that the government pay "just compensation" when it takes private property for public use.[178] The requirements of this constitutional amendment "bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[179] While the applicability of the Takings Clause to copyrights is somewhat unclear,[180] the Pro Access Act's requirement that

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173. See supra note 12 and accompanying text.

174. See supra section II.B.

175. Copyright for works created by corporate authors expires ninety-five years after publication or 120 years after creation, whichever comes first. 17 U.S.C. § 302 (2018).

176. The proposed text of the Pro Access Act includes a seven-year period during which federal agencies will review their incorporations by reference and attempt to retroactively receive the appropriate consent and authorization. See supra section III.A. With the advice of federal administrative authorities, Congress could modify future drafts of this proposed legislation to allow a longer or shorter time period to accommodate the realistic time demands of this task without overburdening agencies.

177. See Public.Resource.Org, Comment Letter on Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities (Apr. 11, 2012), https://law.resource.org/pub/us/cfr/regulations.gov.docket.02/0900006480fed9f0.pdf [https://perma.cc/GSM2-74TN] [hereinafter PRO Comment Letter] (discussing an audit of all standards incorporated by reference in federal regulatory law and discovering that a number of incorporated standards were either no longer purchasable from the relevant SDO, were considered unsafe by modern scientific knowledge, or could not be located at all); see also Strauss, supra note 16, at 506 ("[T]he costs of rulemaking and limitations on agency resources have resulted in incorporated standards being left in place as legal obligations long after they have been abandoned by their creators as voluntary standards.").

178. U.S. Const. amend. V.

179. Armstrong v. United States, 364 U.S. 40, 49 (1960).

180. See Hickey, supra note 79, at 9–11 ("[I]t is not completely settled that copyrights are 'private property' subject to the Takings Clause."). But see id. at 10–11 & nn.123–124 (summarizing many scholarly works on the subject and reaching the conclusion that "the weight of authority" suggests that copyrights are subject to the Takings Clause).

SDOs and government authorities reach an agreement prior to incorporation of a standard avoids this potential constitutional issue.[181] As it relates to federal regulatory standards that have already been incorporated,[182] SDOs will have three options: (1) attempt to negotiate with government authorities to find agreeable circumstances by which the government may post the previously incorporated standard online (which very likely would include some form of compensation to the SDO),[183] (2) have their incorporated standards removed from federal regulatory law after seven years,[184] or (3) risk a court finding that infringing uses of the SDO's copyright constitute a fair use of the standard.[185]

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181. See Int'l Code Council, Inc. v. UpCodes, Inc., No. 17 Civ. 6261 (VM), 2020 WL 2750636, at *14 (S.D.N.Y. May 27, 2020) (stating that, when an SDO "undisputedly encourages the adoption of its model codes into law as a general matter," this solicitation "counsels against according its Takings Clause concerns particularly great weight").

182. While the first provision in this draft of the Pro Access Act would impact standards incorporated by federal, state, and local governments, the provisions mandating actions from federal agencies and authorities would (naturally) *not* apply to state and local governments. As such, in its current form, the Pro Access Act would ostensibly "encourage" state and local governments that have incorporated (or will incorporate) standards by reference to negotiate with relevant SDOs and share those standards on their government websites. Congress cannot *require* state and local governments to act in a certain way due to the anticommandeering principle. See Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may n[ot] issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."). As such, these more localized government entities may choose not to negotiate with SDOs or share the SDOs' standards on government websites. But the Takings Clause of the U.S. Constitution, which applies to state governments, could position SDOs whose copyrights have been stripped away by the action (or inaction) of state governments to sue for "just compensation" in court. See Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 236 (1897) ("Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public."); see also Green v. Frazier, 253 U.S. 233, 238 (1920) (noting that "[b]efore the adoption of the Fourteenth Amendment," state governments' power of eminent domain "was unrestrained by any federal authority"). Therefore, the Pro Access Act, as it relates to state and local governments, would transform the status quo of prices for state-level incorporated standards being "unilaterally set by monopolists" and imposed on "private parties with little choice about purchase" into (at worst) "a taking—unmistakably a governmental obligation that may be judicially fixed if agreement on it cannot be reached." Strauss, supra note 16, at 547.

183. See supra section III.B.1.

184. See supra section III.A.

185. See Hickey, supra note 79, at 13 ("[E]ven if the Pro Codes Act were enacted, groups like [Public.Resource.Org] may still assert fair use arguments[,] . . . although the enactment might be interpreted by courts to inform the fair use analysis."); see also supra note 101. Although this version of the Pro Access Act affirms that copyright protections continue after incorporation, unauthorized private users of SDO copyrights will still also be able to assert First Amendment and Due Process Clause defenses to rebut a claim of copyright infringement under this legislative framework. Hickey, supra note 79, at 13.

C. *Breakdown of Proposed Provisions*

1. *Delayed Implementation.* — This Act, like the Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011,[186] includes a delayed implementation requirement in order to allow federal agencies and departments the time necessary to formulate agency procedures for negotiating with SDOs (in accordance with provision (2)) and for reviewing previously incorporated standards and negotiating for the needed consent and authorization with the creators of those standards (in accordance with provisions (3) and (4)). The specific time delays detailed in the current draft of the Pro Access Act could be modified after receiving feedback from relevant agency officials about their expected capabilities and labor demands.

2. *Government Websites.* — While the original version of the Pro Codes Act allowed for public access to standards through SDOs' websites,[187] this Note's proposed legislation requires that IBR standards be available on government websites.[188] This requirement addresses several key issues with the status quo. First, making the government the distributor of standards prevents confusion, ambiguity, and unavailability. Explaining the results of an extensive audit of the Code of Federal Regulations conducted by Public.Resource.Org, Carl Malamud and David Halperin described several incorporated standards that, over time, have become "impossible to procure" because the relevant SDOs had stopped offering those standards for sale, meaning that some current binding laws are unavailable altogether.[189] To prevent these instances of binding laws becoming unavailable due to the whims of private organizations, it is imperative that IBR standards be shared through government-controlled mediums.

Additionally, SDO websites often present navigational challenges or obscure the location of freely available standards.[190] Allowing SDOs to be the distributors of binding law makes "challenges of locating IBR material on websites"[191] a matter of broad concern to Americans. Some scholars have specifically contended that "[m]aking SDOs the sole distributors of

186. Pub. L. No. 112-90, § 24, 125 Stat. 1904, 1919 (2012) (codified at 49 U.S.C. § 60102(p) (2018)).

187. H.R. 4009, 119th Cong. (2025).

188. Cf. Mendelson, supra note 28, at 800 ("Ideally, reform [on the issues of IBR standards] would provide access to IBR rules through text or direct links on the Government Printing Office and Federal Register websites, and additionally through federal agency websites."); Strauss, supra note 16, at 561 (recommending that agencies "[m]ake incorporated standards public, as by posting them on agency websites").

189. PRO Comment Letter, supra note 177, at 10–11. They also detail instances in which the CFR incorporates (1) standards that failed to specify which version of the standard has been incorporated and (2) standards that seem to have never existed. Id.

190. See Mendelson, supra note 28, at 753 (describing the challenges in accessing free standards "reading rooms" on SDO websites because the freely available versions of the standards "are not easy to locate and the home pages of the websites do not advertise their existence" (internal quotation marks omitted)).

191. Id. at 790.

the law (or even portions of the law) is . . . a dereliction of" "the government's duty to make citizens aware of the law as quickly and thoroughly as possible."[192] These concerns can be ameliorated by ensuring that the *government* is the distributor of IBR materials under this new legislative framework. In this way, IBR standards will not be able to be hidden away in difficult-to-find pages of a website or removed from access altogether once the government has begun to maintain publicly available repositories of IBR standards.

3. *"Publicly and Freely Accessible".* — "When it comes to mandates adopted into law, any barriers to access, however small, are unacceptable."[193] The versions of SDO standards presented to the public through this legislation must be unencumbered by any restrictions differentiating them from the full versions of standards currently sold by the SDOs.

a. *No Monetary Cost.* — It is a foundational element of a democratic society that "'[e]very citizen is presumed to know the law' and . . . 'should have *free* access' to its contents."[194] As it relates to IBR standards, Congress has endorsed this principle in both the enacted Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011[195] and the proposed Pro Codes Act.[196] Although it is not practiced by all SDOs, this proposition is supported explicitly by numerous SDOs in their statements supporting the Pro Codes Act[197] and forms one of the fundamental cornerstones of the Pro Codes Act itself.

b. *No Credentials.* — One of the dominant critiques of the Pro Codes Act is that it allows SDOs to require that users create accounts and provide personal information in order to access freely provided IBR standards. This is problematic for two reasons: Requiring that users share information like their legal names or email addresses to access binding law is not only an unnecessary step that impedes one's access to the laws that govern them but also is a threat to privacy.[198] For example, the American

192. Brimhall, supra note 51.

193. Id.

194. Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1507 (2020) (emphasis added) (quoting Nash v. Lanthrop, 6 N.E. 559, 560 (Mass. 1886)).

195. Pub. L. No. 112-90, § 24, 125 Stat. 1904, 1919 (2012) (codified at 49 U.S.C. § 60102(p) (2018)).

196. H.R. 4009, 119th Cong. (2025).

197. See, e.g., Press Release, Copyright All., supra note 47 ("If implemented, what the Pro Codes Act would do is simple—it would ensure that the codes and standards created by standards development organizations continue to be protected against infringers while guaranteeing that the public has access to them when they are incorporated by reference into law."(internal quotation marks omitted) (quoting Keith Kupferschmid, CEO, Copyright All.)).

198. See Brian X. Chen, Everyone Wants Your Email Address. Think Twice Before Sharing It., N.Y. Times (Jan. 25, 2023), https://www.nytimes.com/2023/01/25/technology/personaltech/email-address-digital-tracking.html (on file with the *Columbia Law Review*) ("An email address . . . can be linked to other data, including where you went to school, the make and model of the car you drive, and your ethnicity.").

Petroleum Institute (API) requires users to enter their first and last name, place of employment, and email address to access its "free" IBR standards.[199] Furthermore, API's website "automatically capture[s] certain information from the devices and browsers that [viewers] use including, but not limited to, [users'] IP address or mobile device identifier[s]."[200] In its privacy policy, API states that it may share this personal information with "business partners that help [API] . . . serve advertisements and content about API's mission."[201] API further claims that it "may provide [users'] personal information to law enforcement authorities,"[202] which creates the strange situation in which one needs to effectively offer their personal information to law enforcement authorities in order to even know what the law itself consists of. To circumvent such varied methods of data collection, one would need to (1) provide a false name and place of employment, (2) create and supply a new, anonymous email address,[203] and (3) utilize a virtual private network (VPN) to mask their IP address.[204] Americans should not be forced to engage in such convoluted practices to protect their privacy and personal information while accessing the laws that govern them. This proposed legislation improves on the Pro Codes Act by guaranteeing that these login barriers are not present for IBR standards in the future.

c. *Searchable Table of Contents.* — This Note and the Pro Codes Act agree that versions of binding IBR law available to the public need to have convenient mechanisms for navigating these standards in a digital format.[205] Many of these SDO standards are hundreds if not thousands of pages long and cover incredibly complex, technical subject matters.[206] To ensure usefulness, standards provided to the public through this legislation must include these searchability functions.

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199. IBR Reading Room, Am. Petroleum Inst., https://publications.api.org/Default.aspx [https://perma.cc/6XQ5-E7MU] (last visited Aug. 6, 2025).

200. Privacy Policy, Am. Petroleum Inst., https://www.api.org/privacy [https://perma.cc//V72E-RUU9] (last visited Aug. 6, 2025); see also Irma Šlekytė, What Can Someone Do With Your IP Address?, NordVPN: Blog (May 25, 2023), https://nordvpn.com/blog/what-can-someone-do-with-your-ip-address/ (on file with the *Columbia Law Review*) (discussing several "malicious purposes" for which a user's IP address may be exploited by external actors).

201. Privacy Policy, supra note 200.

202. Id.

203. See supra note 198.

204. See What Is a VPN?, Microsoft Azure, https://azure.microsoft.com/en-us/resources/cloud-computing-dictionary/what-is-vpn [https://perma.cc/5CWE-A3ZB] (last visited Aug. 7, 2025) ("A VPN, which stands for virtual private network, establishes a digital connection between your computer and a remote server owned by a VPN provider, creating a point-to-point tunnel that encrypts your personal data, masks your IP address, and lets you sidestep website blocks and firewalls on the internet.").

205. See H.R. 4009, 119th Cong. § 3 (2025) (proposing that IBR standards be "publicly accessible online at no monetary cost and in a format that includes a searchable table of contents and index, or equivalent aids to facilitate the location of specific content").

206. E.g., supra text accompanying note 14; supra notes 29–30.

d. *Download and Print.* — The inability to download and print incorporated SDO standards has been a major point of critique from access-focused organizations.[207] Almost all versions of standards currently provided for "free" by SDOs are limited to "read-only" access, meaning that the standards are only accessible while connected to the internet and cannot be printed (in part or in whole).[208] Representative Lofgren alleged that limiting functionalities such as these make standards "not accessible to the disabled," potentially "violat[ing] the Americans [With] Disabilit[ies] Act."[209] Allowing for the government-shared versions of these standards to be downloaded and printed (as proposed in the Pro Access Act) resolves these accessibility issues for users with disabilities and provides Americans with truly sufficient access to these vital documents. Furthermore, allowing users to download and print IBR standards will not destroy the SDOs' profitability, as SDOs will still be the sole authorized seller of printed and bound copies of their standards as well as enhanced digital versions of the standards.[210] In this light, SDOs' concerns about providing users with download and print capabilities are perhaps overstated. Additionally, to the extent that SDOs do consider these capacities to be too detrimental to their markets, a print and download requirement encourages SDOs to limit the portions of their standards that are incorporated by reference—as this preserves the content that they alone can provide to the public.[211] Critically, many of the standards

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207. See, e.g., Ass'n of Rsch. Librs., supra note 50, at 4 (critiquing the Pro Codes Act because it would allow SDOs to "prohibit users from copying, printing, or downloading text").

208. See, e.g., Charles A. Samuels, Evelyn A. French & Evan Moore, CPSC Sued Over Lack of Access to Consensus Standard Incorporated Into CPSC Regulation, Mintz (May 26, 2020), https://www.mintz.com/insights-center/viewpoints/53846/2020-05-26-cpsc-sued-over-lack-access-consensus-standard [https://perma.cc/63XY-86DM] ("[ASTM International] has a virtual 'reading room' on its website where it states all of its standards incorporated by reference into a U.S. regulation are available for free for reading only (no downloading or printing)."); supra note 151.

209. Pro Codes Act 2024 House Markup, supra note 52, at 1:02:40 (statement of Rep. Lofgren).

210. See Samuelson, supra note 25, at 222 ("Even without copyright in the standards, [SDOs] can derive revenues from sales of print materials embodying the standard and value-added products or services."). Furthermore, consumers consistently purchase physical copies of written works that are nevertheless available for free online. To provide one example: Jane Austen's 1813 novel *Pride and Prejudice* sold over one million print copies between 2001 and 2021 in the United Kingdom alone. Jennifer Ruby, Jane Austen Takes Pride of Place for Book Sales in Lockdown as Sales of Her Famous Novel Soar, Daily Mail (Mar. 18, 2021), https://www.dailymail.co.uk/news/article-9378975/Jane-Austen-takes-Pride-place-book-sales-lockdown-sales-famous-novel-soar.html [https://perma.cc/M8Q8-CHAS]. A digital copy of *Pride and Prejudice* can be accessed for free online through Project Gutenberg. Jane Austen, Pride and Prejudice (Hugh Thomson illus., London, George Allen 1894) (1813) (ebook), https://www.gutenberg.org/cache/epub/1342/pg1342-images.html (on file with the *Columbia Law Review*).

211. See Strauss, supra note 16, at 560 (encouraging SDOs to "[w]ork with agencies to limit incorporations by reference where possible to relevant parts, and not the whole, of

developed and sold by SDOs are merely *voluntary* consensus standards that are nonbinding on the American people, so the business models of SDOs are not *entirely* reliant on the sale of incorporated materials.

e. *Other Functionalities and User Permissions.* — One of the original sponsors of the Pro Codes Act characterized the legislation as merely allowing SDOs to charge individuals "a nominal fee" for a copy of an incorporated standard with "enhanced capabilit[ies]."[212] While these enhanced capabilities are most commonly the ability to download and print a certain incorporated standard, they could conceivably include other features. As such, this catch-all provision of the Pro Access Act ensures that SDOs are not able to offer versions of incorporated, binding law that have enhanced technical functions beyond the version provided for free on a government website. In line with the Supreme Court's discussions, the copy of IBR standards available from a government organization must not be an "economy-class version" of the law.[213] If access to laws drafted by SDOs is going to be restricted from the citizenry—in violation of the general principle that the text of "the law" is available "for whatever use the citizens choose to make of it"[214]—then they must be available to the public in the maximally functional manner.

CONCLUSION

This Note's proposed modifications of the Pro Codes Act would address many of the dominant concerns activists have voiced about the legislation in its current form. Congress's need to remove the current ambiguity regarding the copyright of IBR standards and to affirm the people's access to the laws that bind them has positioned legislation like the Pro Access Act (or select provisions therein) as a valuable solution as Congress continues to grapple with how to address this decades-old issue.

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voluntary consensus standards, thus reducing the stakes in having the incorporated portions made public and arguably heightening the value of the standards as a whole").

212. Pro Codes Act 2024 House Markup, supra note 52, at 47:06 (statement of Rep. Issa).

213. Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1512 (2020). The Court expounds upon this idea, stating

> Georgia minimizes the [Official Code of Georgia Annotated] annotations as non-binding and non-authoritative, but that description undersells their practical significance. Imagine a Georgia citizen interested in learning his legal rights and duties. If he reads the economy-class version of the Georgia Code available online, he will see laws . . . [that] have been held unconstitutional by the Georgia Supreme Court. Meanwhile, first-class readers with access to the annotations will be assured that these laws are, in crucial respects, unenforceable relics that the legislature has not bothered to narrow or repeal.

Id. (citations omitted).

214. Veeck v. S. Bldg. Code Cong. Int'l, Inc., 293 F.3d 791, 799 (5th Cir. 2002).

ESSAY

CRIMINAL COURT'S DISABILITY

*Zohra Ahmed**

Do criminal courts meaningfully accommodate psychiatric disability? A review of competency proceedings across the United States suggests not. In competency to stand trial (CST) proceedings, criminal courts offer a narrow vision of psychiatric disability that excludes many defendants. Ultimately, the institutional context of criminal court under-mines even the meager accommodations that the competency framework provides.

CST proceedings are the constitutional accommodations available to disabled defendants if they can establish that they are unable to consult with their lawyers or if they do not have a rational or factual understanding of the proceedings against them.

Criminal court judges and examiners systematically deny recognition to one group of diagnoses: personality disorders (PDs). Even when defense attorneys argue that defendants' PD symptoms impede their ability to collaborate, courts and some forensic experts insist that the defendants are competent. Examiners and courts reframe these difficulties as deliberate acts of subversion and conclude that defendants with PDs choose to be uncooperative. In doing so, they give PDs an exceptional and paradoxical status: They are considered psychiatric conditions, yet their expressions are deemed volitional. This Essay argues that the outcomes of CST proceedings reveal court actors' preoccupation with determining responsibility rather than advancing defendants' trial rights. In the process, courts selectively apply the competency standard, discounting its interpersonal dimensions and prioritizing the accused person's cognitive capacities.

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CST proceedings illustrate that it may not be possible for criminal courts to embrace and adapt to the reality of neurodivergence while also pursuing criminalization.

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INTRODUCTION

A national review of competency to stand trial (CST) proceedings reveals that criminal court actors persistently exclude one category of psychiatric conditions, namely personality disorders (PDs), from consideration. Their repeated exclusion betrays a central tension criminal court actors face between recognizing the reality of neurodiversity[1] and pursuing criminalization.

1. Neurodiversity is a term that seeks to describe one of many aspects of human biodiversity, namely the diverse ways humans understand and relate to themselves and the

Any person facing criminal charges can assert that they are unfit to stand trial due to their mental or intellectual disability.[2] In *Dusky v. United States*, the Supreme Court enunciated the minimum capacities a person accused of a crime must possess before they can be prosecuted.[3] The Court fashioned this procedural protection to enforce a basic intuition: As a matter of due process, a defendant must be able to participate in their own defense.[4] The *Dusky* test asks courts to determine whether the accused has "sufficient present ability to consult with [their] lawyer with a reasonable degree of rational understanding" and whether they have "a rational as well as factual understanding of the proceedings."[5] Usually, competency assessments rely on mental health experts, like psychologists and psychiatrists, to produce knowledge about the defendant and their neurodiver-

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world around them. Understanding Neurodiversity: Exploring Differences in Brain Function, Nw. Med. (Apr. 2024), https://www.nm.org/healthbeat/healthy-tips/Understanding-Neurodiversity [https://perma.cc/VX7Q-WWMH]; see also Monique Botha, Robert Chapman, Morénike Giwa Onaiwu, Steven K. Kapp, Abs Stannard Ashley & Nick Walker, The Neurodiversity Concept Was Developed Collectively: An Overdue Correction on the Origins of Neurodiversity Theory, 28 Autism 1591, 1592–93 (2024) (discussing the origins and coinage of the term neurodiversity); Martijn Dekker, A Correction on the Origin of the Term 'Neurodiversity', Martijn "McDutchie" Dekker's Blog (July 13, 2023), https://www.inlv.org/2023/07/13/neurodiversity-origin.html [https://perma.cc/7G8N-EWJV] (same). The word first emerged from the autistic community, intended to describe autism without pathologizing the condition. Botha et al., supra, at 1593. The term now refers to the full spectrum of mental, psychiatric, and intellectual differences that are reflected in the human species. See Understanding Neurodiversity: Exploring Differences in Brain Function, supra ("[Neurodivergence] refers to people who process information in a way that is not typical . . . ."). The terms "neurodivergent" or "neurodivergence" refer to someone whose emotional state or cognitive and adaptive functioning diverge from dominant norms, standards, and expectations. Id. The terms can apply to a person with autism, epilepsy, schizophrenia, or a personality disorder. See Kiera Lyons, Note, The Neurodiversity Paradigm and Abolition of Psychiatric Incarceration, 123 Colum. L. Rev. 1993, 1996 n.12 (2023) (listing common conditions associated with neurodivergence); Kassiane Asasumasu (@sherlocksflataffect), Tumblr, PSA From the Actual Coiner of "Neurodivergent" (2015), https://sherlocksflataffect.tumblr.com/post/121295972384/psa-from-the-actual-coiner-of-neurodivergent [https://perma.cc/GJR4-V4HS] (listing a variety of conditions that fall under the umbrella of "neurodivergent").

2. See Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (reversing and remanding a case due to insufficient evidence of a defendant's competency); see also Pate v. Robinson, 383 U.S. 375, 378 (1966) ("[T]he conviction of an accused person while he is legally incompetent violates due process . . . ." (citing Bishop v. United States, 350 U.S. 961 (1956) (per curiam))).

3. *Dusky*, 362 U.S. at 402.

4. See Drope v. Missouri, 420 U.S. 162, 171 (1975) (discussing when a defendant lacks the capacity to stand trial); Richard J. Bonnie, The Competence of Criminal Defendants: A Theoretical Reformulation, 10 Behav. Scis. & L. 291, 293 (1992) [hereinafter Bonnie, A Theoretical Reformulation] ("The relevant dimensions of a defendant's 'competence' in most situations are [their] capacity to assist counsel[,] conduct an adequate investigation of the case[,] and . . . make whatever decisions a defendant is required or expected to make in order to defend and/or resolve the case without a trial.").

5. *Dusky*, 362 U.S. at 402 (internal quotation marks omitted) (quoting J. Lee Rankin, U.S. Solic. Gen.).

gence.[6] If a court finds the defendant unfit, it can institutionalize them until it finds that they have been restored to legal capacity.[7] The CST framework following *Dusky* and *Drope v. Missouri*, which modified *Dusky*, posits that legal equality can be achieved for individuals with disabilities through short-term treatment in carceral settings.[8]

Broadly defined, disability is a "chronic impairment that significantly impacts the daily life of a given individual."[9] It is a fluid and complex category.[10] Its recognition in different domains has always depended on ascribed institutional, cultural, social, and political meanings, and its impact has varied with context.[11] In CST proceedings, examiners parse through defendants' neurodivergence, which may include psychiatric conditions. The experts determine whether the defendants have demonstrated impairments that merit recognition as disabilities under the *Dusky–Drope* standard.

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6. See, e.g., Mark Walker, How Court-Ordered Competency Evaluations Work, Argus Leader, https://www.argusleader.com/story/news/2015/11/14/how-court-ordered-competency-evaluations-work/75493920/ [https://perma.cc/BZX9-YM9W] (last updated Nov. 14, 2015) ("The psychiatrist submits a report recommending whether a person is competent to stand trial.").

7. See 1 Wayne R. LaFave, Substantive Criminal Law § 8.1(b) (3d ed. 2024) ("[I]n most jurisdictions the practice has been to institutionalize because of incompetence to stand trial . . . without reference to the legal criteria for civil commitability (generally, whether the person is dangerous to society or is in need of treatment and unable to care for himself)."); Substance Abuse & Mental Health Servs. Admin., Foundation Work for Exploring Incompetence to Stand Trial Evaluations and Competence Restoration for People With Serious Mental Illness/Serious Emotional Disturbance 56–99 (2023), https://store.samhsa.gov/sites/default/files/pep23-01-00-005.pdf [https://perma.cc/3H4Z-5E5C] (providing a state-by-state survey of adult CST procedures, including whether outpatient restoration is a possibility); Amanda Wik, Vera Hollen & William H. Fisher, Nat'l Ass'n of State Mental Health Program Dirs., Forensic Patients in State Psychiatric Hospitals: 1999–2016, at 29 (2017), https://nri-inc.org/media/1318/tac-paper-9-forensic-patients-in-state-hospitals-final-09-05-2017.pdf [https://perma.cc/G966-BE96] (reporting that twenty-three of thirty-seven states surveyed indicated that "their state psychiatric hospitals accepted both misdemeanants and felons for those evaluations").

8. In this Essay, the form of neurodivergence discussed is also generally considered a psychiatric disability. As a result, the terms are used interchangeably.

9. Cassandra Hartblay, Disability Expertise: Claiming Disability Anthropology, 61 Current Anthropology S26, S26 (2020).

10. See Tanya Titchkosky, The Question of Access: Disability, Space, Meaning 24–27 (2011) (arguing that the social construction of disability emerges from a collective perspective grounded, in part, in how members of a group understand themselves, their bodies, and their access to shared spaces, literal and figurative).

11. See Syrus Ware, Joan Ruzsa & Giselle Dias, It Can't Be Fixed Because It's Not Broken: Racism and Disability in the Prison Industrial Complex, *in* Disability Incarcerated: Imprisonment and Disability in the United States and Canada 163, 165 (Liat Ben-Moshe, Chris Chapman & Allison C. Carey eds., 2014) ("[W]e consider the stories of criminalized, racialized, and disabled prisoners, intentionally making a connection between the experience of ableism and racism/colonialism and the [prison industrial complex].").

This Essay reveals a hierarchy of psychiatric disabilities embedded in the competency standard.[12] State and federal courts frequently recognize psychotic disorders (such as schizophrenia) and the cognitive impairments they produce (like hallucinations and disorganized thoughts) as grounds for incompetency.[13] Meanwhile, judges and forensic examiners have tended to discount PDs, a group of disabilities that manifest as personality traits that frustrate interpersonal relations and court administration.[14] PDs are characterized as enduring patterns of inner experience and behavior that deviate from cultural expectations.[15] One cluster of PDs discussed at length in this Essay includes antisocial, borderline, histrionic, and narcissistic personality disorders.[16] Clinical literature describes that people with these disorders may appear dramatic, emotional, or erratic.[17] Even in the face of evidence that an accused struggles to collaborate with their attorney because of a diagnosed PD, courts have been reluctant to recognize such claims of disability as triggering incompetency protections.[18] They have asserted that these conditions are different from psychotic disorders because defendants retain control over their behavior.[19] They characterize these defendants as intentionally uncooperative, ascribing the challenges they face with their attorneys as instances of misconduct, not the product of disability.[20] Examiners have explained and courts have declared that defendants with PDs are more likely to manipulate proceedings to their advantage and feign disability.[21] In turn, courts have gone as far as to categorically reject PDs as a basis for incompetency claims.[22]

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12. See infra Part III.

13. See infra Part III.

14. See infra section III.D.2.

15. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 733 (5th ed., text rev. 2022) [hereinafter DSM-5-TR].

16. Id.

17. Id. at 734.

18. See infra section III.D.2.

19. See infra section III.C.

20. See infra section III.C.

21. See infra section III.D.1 (discussing cases in which a personality disorder was treated as evidence of malingering).

22. See, e.g., United States v. Clements, 522 F.3d 790, 795 (7th Cir. 2008) ("Clements has not provided us with a single example of his conduct that would suggest incompetence; instead, Clements has focused his argument on the statements . . . which do nothing more than acknowledge that Clements exhibited behavior consistent with Antisocial Personality Disorder."); United States v. Savage, 505 F.3d 754, 759 (7th Cir. 2007) (finding that the defendant did not prove "why either [post-traumatic stress disorder or dependent personality disorder] would necessitate a finding of incompetence"); United States v. Teague, 956 F.2d 1427, 1432 (7th Cir. 1992) (affirming the conviction because the defendant did not have any diagnoses "that would prevent a defendant from understanding the proceedings against him and interfere with his ability to confer with his attorney on his own behalf"); United States v. Rosenheimer, 807 F.2d 107, 112 (7th Cir. 1986) (per curiam) (affirming the district court's finding of competency and sanity because "the defendant did not suffer

But clinical research does not support the neat conclusion that PDs are categorically distinct from psychotic disorders, and there is no evidence to establish that the symptoms of PDs are simply the product of bad choices.[23] Clinicians and bioethicists note PDs' ambiguous status in psychiatry[24]: They pose a genuine moral and scientific dilemma.[25] Neither psychologic nor psychiatric expertise can authoritatively answer whether someone with a PD can exercise control over their behavior. Where to draw the line between the person and the disorder, between deviance and ability, is a normative—rather than strictly descriptive—question.[26] When a criminal defendant refuses to speak to their lawyer, and the defense alleges that this refusal is consistent with their chronic incapacity to trust others, to conclude that the accused chose not to control their symptoms is a moral judgment.

While expert forensic examiners do not explicitly confront this vexed issue of responsibility, they do so implicitly when they pronounce such defendants competent.[27] When experts opine on the accused person's competency, their testimony effectively stretches clinical expertise and the rules of evidence.[28] Their approach in these moments is empirically

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from any mental disease or defect, but rather from a narcissistic personality disorder which is separate and distinct from suffering from a mental disease or defect"); United States v. Mitchell, 706 F. Supp. 2d 1148, 1220 (D. Utah 2010) ("[T]he court finds that Mitchell's personality disorders do not affect his ability to rationally understand the proceedings against him or his ability to consult with his lawyers with a reasonable degree of rational understanding."); State v. Walther, 581 S.W.3d 702, 709 (Mo. Ct. App. 2019) ("Viewing the evidence in the light most favorable to Appellant establishes, at best, Appellant suffered from a personality disorder and not from a statutorily cognizable mental disease or defect."); Emily Stork, Note, A Competent Competency Standard: Should It Require a Mental Disease or Defect?, 44 Colum. Hum. Rts. L. Rev. 927, 957 (2013) (arguing against the inclusion of "mental disease or defect" in competency determinations because "it invites unnecessary line-drawing and battles of the experts").

23. See Robert Kinscherff, Proposition: A Personality Disorder May Nullify Responsibility for a Criminal Act, 38 J.L. Med. & Ethics 745, 750 (2010) ("The functional impairments associated with personality disorders can be severe and similar to the functional impairments associated with mental disorders that would be permitted for consideration of nullification of criminal responsibility." (emphasis omitted)).

24. See infra section II.B.

25. See Jill Peay, Personality Disorder and the Law: Some Awkward Questions, 18 Phil. Psychiatry & Psych. 231, 242 (2011) (describing the "acute" dilemma posed by those with personality disorders).

26. See Ben Bursten, Beyond Psychiatric Expertise 55 (1984) (arguing that distinctions in legal standards about what counts as a cognitive impairment are ultimately a matter of policy that implicates fairness and moral responsibility); Jonas B. Robitscher, Tests of Criminal Responsibility: New Rules and Old Problems, 3 Land & Water L. Rev. 153, 173 (1968) ("[T]he test [of criminal responsibility] is less important than the spirit and wisdom with which it is applied and the climate in which the determination is made[,] . . . [and it] is of concern not only to lawyers, psychiatrists and malefactors, it is also a matter of public concern.").

27. See infra section IV.A.

28. Rules 702(c) and (d) of the Federal Rules of Evidence authorize an expert to offer their opinion if, inter alia, the proponent can show that the expert's testimony is "the

suspect, subjective, and confused.[29] Expert conclusions elicited in CST proceedings launder weighty deontological and substantive considerations about moral responsibility.[30] At their most extreme, examiners' opinions trigger miniature trials about the accused person's character.[31] In CST proceedings, experts opine not simply about whether the accused is incompetent but about whether they deserve to be held incompetent.[32] In so doing, their interventions transform a modest procedural protection into a substantive decision point.[33] That is, examiners focus more on defendants' moral responsibility, a core concern in substantive criminal law, than on defendants' ability to fairly contribute to their defense, the procedural concern ostensibly underlying the *Dusky–Drope* standard. Experts enjoy this wide latitude in CST proceedings because courts have abdicated their adjudicative function.[34] The problem is systemic rather than individual.

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product of reliable principles and methods" and that their "opinion reflects a reliable application of the principles and methods to the facts of the case." Fed. R. Evid. 702. The *Daubert* standard requires courts to critically assess the reliability of expert opinions by scrutinizing the methods they use to arrive at their conclusions. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593–95 (1993). Factors that courts evaluate under *Daubert* inquiries include: (1) whether the technique or theory in question can be and has been tested; (2) whether it has been subjected to publication and peer review; (3) whether the technique has a known or potential error rate; (4) whether there are standards controlling its operation; and (5) whether it is widely accepted within a relevant scientific community. Id.

29. See Michael L. Perlin, The Hidden Prejudice: Mental Disability on Trial 5–9 (2000) [hereinafter Perlin, Hidden Prejudice] (discussing the way courts distort disability, both factually and conceptually, across areas of law).

30. See id. at 15 (arguing that experts rely on nonclinical factors, such as personality characteristics or a crime's seriousness, when making competency decisions).

31. See, e.g., People v. Berg, No. B236694, 2013 WL 492553, at *3 (Cal. Ct. App. Feb. 11, 2013) ("Dr. Dudley diagnosed appellant with having longstanding problems with social interactions, e.g. the capacity to read social cues and respond appropriately. As a result, appellant consistently misperceived the behavior of other people, and responded inappropriately."); see also Michel Foucault, Lecture of 15 January 1975, *in* Abnormal: Lectures at the Collège de France 1974–1975, at 39–41 (Valerio Marchetti & Antonella Salomoni eds., Graham Burchell trans., Verso 2003) (1999) [hereinafter Foucault, Jan. 15 Lecture] (narrating the historical evolution of the relationship between psychiatry and law from one of antagonism to embracing one another, culminating in a consolidated medico-judicial power where "both justice and psychiatry are adulterated" in the expert opinion commissioned to describe abnormal individuals).

32. See infra section IV.A.

33. Substance refers to the rules that govern conduct outside courtrooms and specifically the prohibitions of the criminal law; procedure denotes the rules that govern legal actors. See Jenny S. Martinez, Process and Substance in the "War on Terror", 108 Colum. L. Rev. 1013, 1020–21 (2008) (defining substance as "rules that control the primary conduct of human beings outside the litigation or lawmaking process" and procedure as questions of process "within courts" and "among different government actors"); see also infra section IV.B.

34. See Patricia A. Zapf, Karen L. Hubbard, Virginia G. Cooper, Melissa C. Wheeles & Kathleen A. Ronan, Have the Courts Abdicated Their Responsibility for Determination of Competency to Stand Trial to Clinicians?, 4 J. Forensic Psych. Prac. 27, 39 (2004)

Understanding examiners' motivations is beyond the scope of this Essay. Rather, this Essay expounds on the *function* that examiners' opinions and courts' rulings play in the wider system of criminal court.[35] Specifically, it looks at how the knowledge examiners produce facilitates criminalization[36] and contributes to an epistemology of criminalization.[37] More precisely, when examiners conclude that defendants with PDs are engaged in procedural misconduct, and hence are competent to stand trial, their decisions mimic outcomes in insanity litigation.[38] Courts and legislatures have typically denied both incompetency claims and insanity defenses to defendants diagnosed with PDs because their symptoms too closely resemble traits of criminality, like lack of empathy,[39] manipulation, and deceit.[40] Across both insanity and competency law, courts and examiners interpret misconduct as prima facie proof of capacity, not disability.[41] The apparent consistency in experts' findings across these two distinct areas of law is remarkable because each serves a very different purpose. This consistency reveals the insertion of substantive concerns

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[hereinafter Zapf et al., Have the Courts Abdicated?] ("The courts tend to ignore the rule that experts cannot give evidence on the ultimate issue in relation to competency evaluations." (citation omitted) (citing Gary B. Melton, John Petrila, Norman G. Poythress & Christopher Slobogin, Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers 20 (2d ed. 1997))).

35. See generally Mark B. Couch, Causal Role Theories of Functional Explanation, Internet Encyc. Phil., https://iep.utm.edu/func-exp/ [https://perma.cc/A2QX-597W] (last visited Oct. 16, 2024) (explaining that functional explanations are ones in which "researchers appeal to the functions that a structure or system has" but that such accounts can "commit us to problematic views about the existence of teleology").

36. See Michel Foucault, Lecture of 8 January 1975, *in* Abnormal: Lectures at the Collège de France 1974–1975, supra note 31, at 1, 15 [hereinafter Foucault, Jan. 8 Lecture] ("[E]xpert psychiatric opinion allows the offense . . . to be doubled with a whole series of other things . . . presented in the discourse of the psychiatric expert as the cause, origin, motivation, and starting point of the offense.").

37. For another example of a contribution to an epistemology of criminalization, see generally Anna Lvovsky, Vice Patrol: Cops, Courts, and the Struggle Over Urban Gay Life Before Stonewall 17–23 (2021) (describing "the history of antihomosexual policing" as "provid[ing] a useful case study of the politics of knowledge underlying the administration of the criminal law—what we can think of as the epistemology of law enforcement").

38. See infra section IV.A.

39. See Catherine Young, Janice Habarth, Bruce Bongar & Wendy Packman, Disorder in the Court: Cluster B Personality Disorders in United States Case Law, 25 Psychiatry, Psych. & L. 706, 707 (2018) (noting that some researchers have argued that "the predominant theme" of Cluster B personality disorders—such as antisocial, borderline, histrionic, or narcissistic personality disorders—"is a lack of empathy" (citing George Kraus & David J. Reynolds, The "A-B-C's" of the Cluster B's: Identifying, Understanding, and Treating Cluster B Personality Disorders, 21 Clinical Psych. Rev. 345 (2001))).

40. See, e.g., United States v. Gabrion, 719 F.3d 511, 533 (6th Cir. 2013) (noting that people with certain personality disorders "tend to be highly manipulative"); State v. Dahl, 783 N.W.2d 41, 46–49 (N.D. 2010) (describing the accused person's vandalism of his jail cell as an attempt to manipulate the judicial system rather than irrational behavior stemming from mental illness).

41. See infra section III.D.1.

into procedural law. Criminality acts as a foil for disability when examiners and courts undertake competency decisions. They frame disability as a limited deviation from the normative figure of the able-bodied, free-willed perpetrator.

The story here is not about a clash between law and psychiatry, commonly treated in the literature as two incommensurable forms of knowledge.[42] Nor does this Essay seek to expose forensic psychiatry as a junk science; rather, it illuminates the unavoidable moral dimensions of the practice of forensic psychology as it animates legal doctrine.[43] It concludes that the ultimate task of distinguishing between those disabilities that deserve recognition and those that do not is best reserved for legal actors rather than forensic experts.[44]

These observations suggest that the CST framework fails on its own terms: Even the fiction of formal legal equality for neurodivergent defendants is out of reach for those diagnosed with a PD. There are groups

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42. See Holloway v. United States, 148 F.2d 665, 667 (D.C. Cir. 1945) ("A complete reconciliation between the medical tests of insanity and the moral tests of criminal responsibility is impossible."); Sheila Jasanoff, Science at the Bar: Law, Science, and Technology in America 7–8 (Harvard Univ. Press paperback ed. 1997) (1995) (discussing common tropes in law, science, and technology studies); Gary B. Melton, John Petrila, Norman G. Poythress, Christopher Slobogin, Randy K. Otto, Douglas Mossman & Lois O. Condie, Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers 32–33 (4th ed. 2018) (discussing the conflict between law and psychiatry regarding standards of evidence); David L. Bazelon, The Interface of Law and the Behavioral Sciences: The Lowell Institute Lecture, 271 NEJM 1141, 1141 (1964) ("The recurrent problem at the interface of law and the behavioral sciences . . . can be put this way: which of us, lawyer or psychiatrist, has primary responsibility for determining the issue of responsibility? Who is responsible for responsibility?").

43. See Foucault, Jan. 8 Lecture, supra note 36, at 18 ("Expert psychiatric opinion makes it possible to transfer the point of application of punishment from the offense defined by the law to criminality evaluated from a psychologico-moral point of view."); Lyons, supra note 1, at 1998 ("Science, however, is characterized by subjective, value-laden choices made at every step of the process, from data collection to experimental design and result interpretation."); see also Sandra Harding, Whose Science? Whose Knowledge?: Thinking From Women's Lives 81 (1991) ("[M]odern science has been constructed by and within power relations in society, not apart from them."); Jonathan M. Metzl, The Protest Psychosis: How Schizophrenia Became a Black Disease, at xi–xvii (2010) (critiquing the influence of racial bias in the psychiatric definition of schizophrenia and interrogating its pathological conceptualization); Heather Douglas, Inductive Risk and Values in Science, 67 Phil. Sci. 559, 563–64 (2000) ("First, values (both epistemic and non-epistemic) play important roles in the selection of problems to pursue. Second, the direct use to which scientific knowledge is put in society requires the consideration of non-epistemic values. . . . Third, non-epistemic values place limitations on methodological options . . . .").

44. See Bruce J. Winick, Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie, 85 J. Crim. L. & Criminology 571, 623 (1995) [hereinafter Winick, Reforming Incompetency to Stand Trial and Plead Guilty] ("Moving competency determinations from clinicians to defense attorneys should increase the accuracy of competency decisionmaking, . . . [and] would recognize that competency in the criminal process is more a legal than a clinical question, involving legal and normative judgements and not merely clinical ones.").

of people who claim disability but are excluded.[45] Recognition is the minimum in any effort to combat the marginalization of those who are differently abled. But if the problems this Essay exposes are excluded defendants, unprincipled analyses, and usurped roles, the solution is more difficult than the diagnosis. It is both undesirable and untenable to demand that all neurodivergent defendants, including those who are diagnosed with PDs, be recognized in CST proceedings.

It is undesirable because asking examiners and courts to recognize a greater diversity of mental disabilities in CST proceedings would lead to more people being forcibly committed to underfunded state hospitals. Scholars and advocates have noted the harsh conditions of those settings.[46]

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45. It is unclear how often this occurs. But even if it is a small number of people, their exclusion reveals the deeper workings of the competency standard. See, e.g., United States v. Wayt, 24 F. App'x 880, 882–83 (10th Cir. 2001) (affirming that the accused person's personality disorder did not meet the statutory standards for incompetency and that the defendant was competent to stand trial).

46. Since the 1930s, state mental hospitals and residential facilities that housed individuals with intellectual or developmental disabilities have been mired in abuse scandals. See, e.g., Albert Q. Maisel, Bedlam 1946: Most U.S. Mental Hospitals Are a Shame and a Disgrace, LIFE, May 6, 1946, at 102, 102 https://www.jerrycookearchives.com/photo-essays/bedlam-1946/ (on file with the *Columbia Law Review*) ("Through public neglect and legislative penny-pinching, state after state has allowed its institutions for the care and cure of the mentally sick to degenerate into little more than concentration camps on the Belsen pattern."); Ben Cosgrove, Strangers to Reason: LIFE Inside a Psychiatric Hospital, 1938, LIFE, https://www.life.com/history/strangers-to-reason-life-inside-a-psychiatric-hospital-1938/ [https://perma.cc/LKN4-82VK] (last visited Jan. 28, 2025) (featuring Alfred Eisenstaedt's photographs of patients at Pilgrim State Hospital, whom he described as "the most neglected, unfortunate group in the world" (quoting Alfred Eisenstaedt, LIFE photographer)). By the 1960s, the steady stream of grievances and complaints had culminated in political momentum to shutter these types of institutions, leading to deinstitutionalization. See Peter Nolan, Mental Health Nursing in the 1960s Remembered, 28 J. Psychiatric & Mental Health Nursing 462, 467 (2021) ("The institutions were to be replaced by care in the community, thus ending mass incarceration, facilitating civic inclusion and recovery, and empowering patients to become active participants in their own care."). Today, despite the far smaller number of individuals segregated on account of their mental disability, the institutions remain haunted by neglect. See Liat Ben-Moshe, Decarcerating Disability: Deinstitutionalization and Prison Abolition 3 (2020) [hereinafter Ben-Moshe, Decarcerating Disability] ("The population of people with intellectual and/or developmental disabilities (I/DD) in large residential institutions . . . peaked at 194,650 in 1967. By 2015, this number had declined to 69,557." (citing David L. Braddock, Richard E. Hemp, Emily S. Tanis, Jiang Wu & Laura Haffer, The State of the States in Intellectual and Developmental Disabilities (11th ed. 2017))); see also Neil Bedi, You're Trapped. They're Cashing In., Tampa Bay Times (Sep. 18, 2019), https://projects.tampabay.com/projects/2019/investigations/north-tampa-behavioral-health/ [https://perma.cc/GLY5-X6VR] ("[North Tampa Behavioral Health] illegally cuts patients off from their families. Then it uses loopholes in the statute to hold them longer than allowed, running up their bills while they are powerless to fight back. Some patients describe getting virtually no psychiatric treatment."); Liz Kowalczyk, Families Trusted This Hospital Chain to Care for Their Relatives. It Systematically Failed Them, Bos. Globe (June 10, 2017), https://www.bostonglobe.com/metro/2017/06/10/arbour/AcXKAWbi6WLj8bwGBS2GFJ/story.html (on file with the *Columbia Law Review*) (exposing recent conditions in Massachusetts psychiatric facilities run by Arbour Health System, which has extracted "robust profits" while

Nonetheless, by outlining arguments for incompetency, this Essay intends to support a harm-reduction strategy in instances when a defense attorney can clearly discern a net benefit to their client being found incompetent. In many cases, however, there are no good choices for defendants with psychiatric disabilities in criminal court. Although both the disability justice and disability rights movements advocate for greater inclusion in public life,[47] that demand seems misguided here. Inclusion is a paradox in the carceral state.[48]

It may also be untenable to expect more expansive accommodations because criminal courts may not be able to recognize all psychiatric disabilities. Even if a person's disability shapes their chances in court, recognizing the manifestations of some disabilities could undermine criminal law's core commitments to assigning blame and responsibility. Furthermore, courts may be drawing lines to produce a narrow exception out of "a fear of too much justice."[49] That is, courts may be drawing a firm rule to prevent a proliferation of incompetency claims.[50] Among people in state and federal prisons in 2016, an estimated 40.4% reported having a psychiatric disability.[51] Of those diagnoses, PDs are among the most overrepresented in carceral settings.[52] Examiners' exclusion of PDs in CST proceedings preserves the rapacious administration of criminal law.[53] There are strong institutional incentives to define disability narrowly.

CST proceedings should also serve as a cautionary tale for ongoing efforts to address neurodivergence in criminal court, particularly those

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"repeatedly and sometimes egregiously shortchanging patient care"); Public Crisis, Private Toll: The Hidden Costs of the Mental-Health Industry's Expansion, Seattle Times (Aug. 23, 2019), https://projects.seattletimes.com/2019/public-crisis-private-toll-prologue/ [https://perma.cc/N2Z7-XQTM] (investigating the harms of the expansion of private psychiatric care, designed to address inadequate state capacity, in Washington).

47. See infra section I.B.

48. But see Jamelia N. Morgan, The Paradox of Inclusion: Applying *Olmstead*'s Integration Mandate in Prisons, 27 Geo. J. on Poverty L. & Pol'y 305, 312–17 (2020) [hereinafter Morgan, Paradox of Inclusion] (arguing that although the legal mandate to integrate individuals who have disabilities conflicts with the central features and functions of the American punishment system, this paradox is potentially productive for those seeking to transform the carceral state).

49. McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

50. See id. ("The Court next states that its unwillingness to regard petitioner's evidence as sufficient is based in part on the fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing.").

51. Laurin Bixby, Stacey Bevan & Courtney Boen, The Links Between Disability, Incarceration, and Social Exclusion, 41 Health Affs. 1460, 1462 (2022).

52. See Janet I. Warren, Mandi Burnette, Susan Carol South, Preeti Chauhan, Risha Bale & Roxanne Friend, Personality Disorders and Violence Among Female Prison Inmates, 30 J. Am. Acad. Psychiatry & L. 502, 507 (2002) (finding antisocial, borderline, and paranoid PDs to be common diagnoses among women incarcerated at a maximum security prison).

53. See Perlin, Hidden Prejudice, supra note 29, at 72 ("The legal system selectively—teleologically—either accepts or rejects social science evidence depending on whether or not the use of that data meets the *a priori* needs of the legal system.").

that propose mental health expertise as a key ingredient for decarceration. Across jurisdictions, criminal court actors have embraced alternatives to incarceration, particularly for those with psychiatric needs.[54] In such cases, a person can accept a plea to a criminal charge and can undergo treatment, broadly defined, as their sentence.[55] To implement these alternatives, courts have assembled teams of interdisciplinary experts to identify those who stand to benefit from softer penal interventions. Mental health specialists play a critical role in these efforts, drawing on their diagnostic expertise to educate judges, prosecutors, and defense attorneys about neurodivergence and appropriate interventions.[56] Many progressive reforms treat mental health expertise as a humanizing antidote to criminalization.[57] But CST proceedings suggest that the diagnostic

54. See Amy J. Cohen, Trauma and the Welfare State: A Genealogy of Prostitution Courts in New York City, 95 Tex. L. Rev. 915, 923–25 (2017) (detailing the rise of "socialized courts"); Erin R. Collins, The Problem of Problem-Solving Courts, 54 U.C. Davis L. Rev. 1573, 1575 (2021) [hereinafter Collins, Problem of Problem-Solving] (describing the proliferation of "mental health courts" and other specialized courts); Allegra M. McLeod, Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law, 100 Geo. L. J. 1587, 1605–11 (2012) (describing the movement for specialized criminal courts, which began to combat "the miscarriages of justice" occurring in regular criminal court); see also Michela Lowry & Ashmini Kerodal, Ctr. for Ct. Innovation, Prosecutor-Led Diversion: A National Survey, at v (2019) https://www.innovatingjustice.org/wp-content/uploads/2019/03/prosecutor-led_diversion.pdf [https://perma.cc/P98G-VXU5] ("Across both urban and rural counties, the most commonly available mandates and services were community service (77%), substance abuse education (69%), substance abuse treatment (59%), and individual therapy (42%).").

55. See Collins, Problem of Problem-Solving, supra note 54, at 1582 ("Problem-solving courts are specialized criminal or quasi-criminal courts that often offer treatment and enhanced supervision in addition to or in lieu of incarceration."); Erin R. Collins, Status Courts, 105 Geo. L.J. 1481, 1488–89 (2017) (stating that, for example, "[d]rug courts embrace the idea that . . . treating the [drug] addiction instead of incarcerating the defendant is a more effective and long-lasting response to drug-related criminal behavior"); Leah Wang & Katie Rose Quandt, Building Exits off the Highway to Mass Incarceration: Diversion Programs Explained, Prison Pol'y Initiative (July 20, 2021), https://www.prisonpolicy.org/reports/diversion.html [https://perma.cc/2AUN-2N4Y] (discussing the benefits and limitations of alternatives to incarceration).

56. See Council on Psychiatry & L., Am. Psychiatric Ass'n, Resource Document on Mental Health Courts 5 (2020), https://www.psychiatry.org/getattachment/b808a481-c996-4c88-8afe-41605412dd48/Resource-Document-2020-Mental-Health-Courts.pdf [https://perma.cc/U3R6-Z9VU] (noting the important role of mental health professionals in mental health courts).

57. See, e.g., Renée Binder, Mental Health Courts: An Effective Alternative to Incarceration, Psychiatric News, Nov. 20, 2015, at 8, 8 ("Mental health courts take a therapeutically oriented approach. . . . They use a harm-reduction model and try to facilitate treatment adherence."); see also Akhi Johnson & Mustafa Ali-Smith, Vera Inst. of Just., Diversion Programs, Explained 2 (2022), https://vera-institute.files.svdcdn.com/production/inline-downloads/diversion-programs-explained.pdf? [https://perma.cc/39LJ-CDHU] (discussing pre- and post-arrest diversion programs, including diversion to mental health services); Wang & Quandt, supra note 55 (enumerating the types of diversion offered by various criminal legal actors).

framework mental health experts deploy is not necessarily distinct from criminal law's deontological framework.[58]

This Essay engages with four intellectual currents. First, legal scholars have recently illuminated the central but underappreciated role of disability in jurisprudence governing search and seizure,[59] state–federal relations,[60] and family law.[61] Second, law-and-social-movement scholars have expanded scholarly horizons by applying the insights of prison abolition to legal doctrine and reform.[62] This body of work shakes foundational myths about criminal legal institutions and conventional modes of reform.[63] If criminal legal institutions operate as tools of social

58. See infra section IV.B.

59. See, e.g., Jamelia Morgan, Disability's Fourth Amendment, 122 Colum. L. Rev. 489, 516 (2022) [hereinafter Morgan, Disability's Fourth Amendment] ("[T]he reasonable person standard in the Court's test for whether a seizure has occurred does not adequately take into consideration disability. . . . As a result, this test fails to adequately protect the Fourth Amendment rights of disabled people.").

60. See, e.g., Katie Eyer & Karen M. Tani, Disability and the Ongoing Federalism Revolution, 133 Yale L.J. 839, 845 (2024) ("In the 1970s and 1980s, disability cases regularly provided the site for the Court's early revival of federalism doctrines, as well as its development of new ones.").

61. See, e.g., Sarah H. Lorr, Disabling Families, 76 Stan. L. Rev. 1255, 1262–64 (2024) (arguing that the family regulation system constructs the social category of disability, renders people disabled or more disabled, and reinforces the belief that people with disabilities are categorically unable and unfit to parent).

62. See, e.g., Amna A. Akbar, An Abolitionist Horizon for (Police) Reform, 108 Calif. L. Rev. 1781, 1788 (2020) ("By contending with abolitionist critique and organizing, we deepen our understanding of policing and cogenerate strategies that have the potential for political, economic, and social transformation."); Amna A. Akbar, Toward a Radical Imagination of Law, 93 N.Y.U. L. Rev. 405, 464 (2018) (unpacking the movement for prison and police abolition's "critique of traditional criminal law reforms"); Jocelyn Simonson, Police Reform Through a Power Lens, 130 Yale L.J. 778, 800–01 (2021) (noting a shift in recent scholarship toward "self-governance, or at least . . . reduc[ing] the subjugating effects of policing"). These authors' works draw on a rich scholarly tradition of highlighting the often underappreciated role that social movements play in legal reform. See Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, Movement Law, 73 Stan. L. Rev. 821, 826 (2021) (describing the methodology of "movement law" as one that "approaches scholarly thinking and writing about law, justice, and social change as work done in solidarity with social movements, local organizing, and other forms of collective struggle"); Scott L. Cummings, The Puzzle of Social Movements in American Legal Theory, 64 UCLA L. Rev. 1554, 1559 (2017) (discussing "movement liberalism," in which "social movements are positioned as leaders of progressive legal reform in ways that promise to reclaim the transformative potential of law while preserving traditional roles for courts and lawyers"); Lani Guinier & Gerald Torres, Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements, 123 Yale L.J. 2740, 2749–50 (2014) (advancing demosprudence, which "focuses on the ways that ongoing collective action by ordinary people can permanently alter . . . democracy by changing the people who make the law and the landscape in which that law is made," over jurisprudence, which focuses on "the work of judges").

63. Professor Amna Akbar notes the distinctions leftist organizers make between reformism and nonreformist reforms. Amna A. Akbar, Non-Reformist Reforms and Struggles Over Life, Death, and Democracy, 132 Yale L.J. 2497, 2518–30 (2023) [hereinafter Akbar, Non-Reformist Reforms]. In the legal academy, reformism is the mainstay. Id. at 2502. Reformism, according to Akbar, "assume[s] the legitimacy of the prevailing political,

control instead of providing safety, and if procedural safeguards actually entrench state violence,[64] then legal scholars may need to rethink their favored solutions and consider shrinking rather than fixing criminal law and its institutions.[65] By engaging with this literature, this Essay hopes to challenge legalist modes of reform, like the CST framework.

Third, this account also draws on the insights of an older intellectual tradition, the antipsychiatry movement, which emerged in the 1960s.[66] Spurred by the neglect, cruel experimentation, and abuse in state mental hospitals, scholars and organizers in this tradition argued that these institutional excesses were features of a system of knowledge that constructed and enforced psychological normality and enabled deprivations of liberty.[67] Theorist Michel Foucault drew and expanded on these insights

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economic, social, and juridical order," involving mere "tweaks" to doctrine and policy. Id. "Reformism telegraphs to the public that the system, institution, or set of relations it seeks to tweak are here to stay; that the problem is not structural or symptomatic but stray." Id. at 2519. Nonreformist reforms, by contrast, "aim[] to undermine the political, economic, and social system or set of relations as [they] gesture[] at a fundamentally distinct system or set of relations in relation or toward a particular ideological and material project of worldbuilding." Id. at 2527. Such a program of transformation "draws from and builds the popular strength, consciousness, and organization of revolutionary or agential classes or coalitions—most clearly, in doctrinaire Marxism, for example, the working class." Id.

64. See, e.g., Zohra Ahmed, Bargaining for Abolition, 90 Fordham L. Rev. 1953, 1955–58 (2022) (arguing that criminal legal actors engage in violence work); Dorothy E. Roberts, The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism, 133 Harv. L. Rev. 1, 7 (2019) (stating that abolition posits that "the expanding criminal punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime"); Marbre Stahly-Butts & Amna A. Akbar, Reforms for Radicals? An Abolitionist Framework, 68 UCLA L. Rev. 1544, 1550 (2022) ("For an abolitionist, the criminal legal system does not seek justice, repair harm, neutrally arbitrate between good and bad, or create public safety. . . . It maintains and legitimizes unequal and exploitative power relationships.").

65. See Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California 242 (2007) (developing the heuristic of nonreformist reforms in the context of antiprison organizing); see also Akbar, Non-Reformist Reforms, supra note 63, at 2529–31 (discussing the emergence of nonreformist reforms in the context of battles for decarceration).

66. See David J. Rissmiller & Joshua H. Rissmiller, Evolution of the Antipsychiatry Movement Into Mental Health Consumerism, 57 Psychiatric Servs. 863, 863 (2006).

67. Psychoanalysts, psychiatrists, and sociologists formed the first generation of antipsychiatry activists who came together in opposition "to what were perceived as biological psychiatry's abuses in the name of science." Rissmiller & Rissmiller, supra note 66, at 863. Thomas Szasz, a psychiatrist in the United States and one of the prominent proponents of this view, criticized the foundational precepts of psychiatry and abnormal psychology in his 1960 seminal essay. See Thomas S. Szasz, The Myth of Mental Illness, 15 Am. Psych. 113, 113 (1960) ("My aim in this essay is to raise the question 'Is there such a thing as mental illness?' and to argue that there is not."). Namely, in Szasz's view, the fields drew a false equivalence between bodily disease and mental illness. Id. According to mental health experts, Szasz explained, *"[a]ll problems in living* are attributed to physicochemical processes which in due time will be discovered by medical research." Id. This view, he posited, mystified the true source of psychological distress: So-called mental illnesses were at base difficulties with living, rooted in "differences in personal needs, opinions, social

aspirations, values, and so on." See id. at 113, 118. Szasz thus called for social intervention rather than biological remedies. See id. at 115 ("Since medical action is designed to correct only medical deviations, it seems logically absurd to expect that it will help solve problems whose very existence had been defined and established on nonmedical grounds."); see also id. at 114 ("The norm from which deviation is measured whenever one speaks of a mental illness is a *psychosocial and ethical one*. Yet, the remedy is sought in terms of *medical* measures which—it is hoped and assumed—are free from wide differences of ethical value."). Because of the unacknowledged ethical and hence political content of psychiatric practice, "Szasz argued for a similarly clear division between 'psychiatry and state,'" and helped establish the Libertarian Party. Rissmiller & Rissmiller, supra note 66, at 864.

Szasz also wrote at a time when psychiatry and psychology were under attack from other social groups. Ken Kesey's 1962 novel, *One Flew Over the Cuckoo's Nest*, invited the public into the conditions of psychiatric institutions. See Ken Kesey, One Flew Over the Cuckoo's Nest (Penguin Books 1962). In Britain, R. D. Laing was an influential critic of psychiatry. See R.D. Laing, The Divided Self: An Existential Study in Sanity and Madness (Penguin Books 1965) (1960) (providing a phenomenological account of schizophrenia, madness, and sanity). In Italy, Franco Basaglia founded the democratic psychiatry movement and helped to bring about deinstitutionalization. See generally John Foot, The Man Who Closed the Asylums: Franco Basaglia and the Revolution in Mental Health Care (2015) (narrating the evolution of the movement Basaglia founded to close mental institutions in Italy). The antipsychiatry movement accompanied deinstitutionalization, which involved the closure of both psychiatric hospitals and large state institutions for those with developmental disabilities from the 1950s through the 1980s. See Ben-Moshe, Decarcerating Disability, supra note 46, at 38 (noting that "antipsychiatry . . . advanced a new conceptualization of human worth and difference that made deinstitutionalization necessary and possible").

In the 1970s, the professional-led antipsychiatry movement waned, and patients took up the mantle of activism. See Beatrice Adler-Bolton & Artie Vierkant, Health Communism 137–38 (2022). For example, in Germany, the Socialist Patients' Collective championed an ethos of turning illness into a weapon in the fight against capitalism, the most important determinant of health, in their view. Id. at 136–39. In their efforts to liberate themselves from medical paternalism, activists described themselves not as patients but as consumers, clients, or even survivors. See Nancy Tomes, Remaking the American Patient: How Madison Avenue and Modern Medicine Turned Patients Into Consumers 263 (2016) (describing the debate between the terms "consumer," "client," "survivor," and "patient" (internal quotation marks omitted)). Instead of medical therapies, radical groups that opposed psychiatry proposed peer support and mutual aid for individuals who were neurocognitively different. See Judi Chamberlin, On Our Own: Patient-Controlled Alternatives to the Mental Health System 18–19, 86–87 (McGraw-Hill Book Co. 1979) (1978) (articulating nonmedical and peer mechanisms to improve the lives of people who are neurodivergent).

This upheaval coincided with the LGBTQ movement's challenge to the psychiatric profession's hostility to homosexuality. From 1952 to 1973, the American Psychiatric Association classified homosexuality as a "sociopathic personality disturbance." Robert Paul Cabaj, Working With LGBTQ Patients, Am. Psychiatric Ass'n, https://www.psychiatry.org/psychiatrists/diversity/education/best-practice-highlights/working-with-lgbtq-patients [https://perma.cc/6FY6-8ED6] (last visited Feb. 15, 2025); see also John J. Conger, Proceedings of the American Psychological Association, Incorporated, for the Year 1974: Minutes of the Annual Meeting of the Council of Representatives, 30 Am. Psych. 620, 633 (1975) ("The American Psychological Association supports the action taken on December 15, 1973, by the American Psychiatric Association, removing homosexuality from that Association's official list of mental disorders."). In 1970, gay activist Frank Kameny interrupted an American Psychiatric Association meeting, declaring that "[p]sychiatry is the enemy incarnate" and that "[p]sychiatry has waged a relentless war of extermination against us. You may take this as a declaration of war against you." Donald Beaulieu, 50 Years

in his meticulous study of forensic psychiatry.[68] Psychology and abnormal psychology were not neutral disciplines that illuminated the truth of the human mind but rather techniques of governance.[69] The antipsychiatry movement in turn sought to denaturalize the study of the brain and of human behavior.[70] This Essay takes inspiration from this line of critique, uncovering the political, moral, and normative dimensions to the practice of psychiatry and psychology.[71] But it does not fully embrace antipsychiatry in that it does not suggest that psychiatry ought to be abolished, nor does it contend that the brain, human behavior, and psychopathology cannot be meaningfully examined. This Essay does, however, embrace antipsychiatry's invitation to critically scrutinize the discipline and profits from the hermeneutical space that the antipsychiatry movement created. Indeed, the "Mad Pride" and "Crip" movements, antipsychiatry's intellectual descendants, have illuminated the recalcitrant ableism that permeates law and medicine.[72]

Ago, Psychiatrists Stopped Calling Homosexuality a Mental Illness, Wash. Post (Dec. 15, 2023), https://www.washingtonpost.com/history/2023/12/15/homosexuality-disorder-dsm-apa-psychiatry/ (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting activist Frank Kameny).

In courts, individuals with psychiatric disabilities also pushed to change the standard of care, so as to force medical and therapeutic institutions to prioritize care in community settings rather than in segregated warehouses. See, e.g., Lake v. Cameron, 364 F.2d 657, 660 (D.C. Cir. 1966) (en banc) ("Deprivations of liberty solely because of dangers to the ill persons themselves should not go beyond what is necessary for their protection.").

68. See generally Abnormal: Lectures at the Collège de France 1974–1975, supra note 31 (using criminal cases to demonstrate the moral and political dimensions of psychiatry and psychology); Michel Foucault, Madness and Civilization: A History of Insanity in the Age of Reason (Richard Howard trans., Vintage Books 1988) (1965) (offering a genealogy of the construction of madness in Western societies).

69. See Foucault, Jan. 15 Lecture, supra note 31, at 39–41 (describing the ways in which, for example, medico-psychological services are used in prison to monitor detainees).

70. See supra note 67.

71. As Judi Chamberlin argued:

> Although many psychiatrists claim that their training gives them the expertise to detect symptoms of the various mental illnesses, it is the very existence of mental illness that is in question. Leaving the determination of whether mental illness exists strictly to the psychiatrists is like leaving the determination of the validity of astrology in the hands of professional astrologers.

Chamberlin, supra note 67, at 9; see also Szasz, supra note 67, at 116 (stating that the author seeks "to criticize and counter a prevailing contemporary tendency to deny the moral aspects of psychiatry"). Professor Liat Ben-Moshe summarized Chamberlin's argument, stating: "Altered states, anger, and pain should not be characterized as illness but as a consequence of a system of power and inequality that denies people their basic human needs." Ben-Moshe, Decarcerating Disability, supra note 46, at 96. It is psychiatry, not stigma, that is "the force that most oppresses those psychiatrized." Id. On Szasz, she added: "Szasz's goal was to untie the knot between deviance/abnormality and biomedicalization, leading to psychiatric confinement." Id.

72. As Ben-Moshe explains:

The fourth area of new scholarship that this Essay draws on comes from social science scholars examining the underappreciated connections between carceral expansion and other areas of law and policy, such as municipal finance, taxation, land use, and community economic development.[73] Professor Liat Ben-Moshe has persuasively exposed the logic of incarceration as it permeates the treatment of individuals with disability.[74] This Essay brings these scholarly threads together, attending to the logic of criminalization as it trespasses into other areas of public policy and fields of inquiry.

> Probably the most pervasive way in which alternatives to psychiatry are conceptualized, imagined and practiced are through national and international networks and organizations created by psychiatric survivors, ex-patients, and consumers, as well as people within the anti-psychiatry movement more generally (and those who don't fit neatly into any of these categories). The importance of such organizations is that they build an alternative community to psychiatry, one that is supportive, caring, and often defiant. As in the critique of restorative justice, the point of these networks is not to restore the person to some sort of normative mental health but to discuss the social conditions that led to distress and, in many instances, to increased distress and oppression caused by attempts to biomedically "treat" a perceived behavior or outcome. People who self identify as Mad, for example, claim the category as a form of difference, one in which they find community and home, culture and pride. In a similar fashion to other disability rights and disability justice advocates, madness is seen as an identity, and not a disease. As such, it is a source for frustration, pride, and an entry point into a political stance.

Liat Ben-Moshe, Alternatives to (Disability) Incarceration, *in* Disability Incarcerated: Imprisonment and Disability in the United States and Canada, supra note 11, at 255, 262; see also Ryan Thorneycroft, Crip Theory and Mad Studies: Intersections and Points of Departure, Canadian J. Disability Stud., Feb. 2020, at 91, 95, 107–08 (explaining that disability activists have sought to reclaim terms such as "crip" and "mad").

73. See, e.g., Gilmore, supra note 65, at 28 ("[R]esolutions of surplus land, capital, labor, and state capacity congealed into prisons . . . ."); Jasmine Heiss, A Quiet Jail Boom, *in* The Jail Is Everywhere: Fighting the New Geography of Mass Incarceration 19, 19–24 (Jack Norton, Lydia Pelot-Hobbs & Judah Schept eds., 2024) (describing the jail boom in small cities and rural areas as the consequence of municipal resource concentration in jails and prisons, fragmentation of the social safety net, hollowing-out of industry, and prioritization of the criminal legal system to solve social problems).

74. See Ben-Moshe, Decarcerating Disability, supra note 46, at 1–2 (discussing the "carceral archipelago" as the "variety of enclosures, especially prisons, jails, psychiatric hospitals, and residential institutions for those with intellectual or developmental disabilities" that make apparent the interconnections between practices of incarceration and psychiatry (internal quotation marks omitted) (quoting Chris Chapman, Allison C. Carey & Liat Ben-Moshe, Reconsidering Confinement: Interlocking Locations and Logics of Incarceration, *in* Disability Incarcerated: Imprisonment and Disability in the United States and Canada, supra note 11, at 3, 10, 14, 18)). For further elaboration on the logic of incarceration, see Dylan Rodríguez, Abolition as Praxis of Human Being: A Foreword, 132 Harv. L. Rev. 1575, 1587 (2019) ("[I]ncarceration *as a logic and method of dominance* is not reducible to the particular institutional form of jails, prisons, detention centers, and other such brick-and-mortar incarcerating facilities . . . .").

This Essay also addresses the relative dearth of scholarly writing about disability and criminal procedure.[75] The insanity doctrine has captivated generations of academics,[76] but it is a substantive rule that excuses

75. For two important exceptions, see Perlin, Hidden Prejudice, supra note 29, at 206 ("The public's obsession with the use of the insanity defense is matched by its profound disinterest in the role of incompetency in the criminal trial process."); Morgan, Disability's Fourth Amendment, supra note 59, at 494–95 (arguing that disability is undertheorized in the Supreme Court's Fourth Amendment jurisprudence, demonstrating how "disability mediates interactions with law enforcement" and exposing how Fourth Amendment doctrine renders individuals with disabilities further vulnerable to police violence).

76. For comparison, a search to find secondary literature, like law review articles, on CST turns up 1,611 articles, while a search responsive to insanity delivers 2,339 law review articles. Memorandum from Zohra Ahmed to Columbia L. Rev. (Jan. 22, 2025) (on file with the *Columbia Law Review*). For the literature on the insanity defense, see generally ABA, Insanity Defense, 16 Mental & Physical Disability L. Rep. 266 (1992) (surveying legislative and judicial developments in insanity defense law; examining shifts in legal standards, including the narrowing of the irresistible impulse test and the exclusion of volitional impairments in some jurisdictions; and discussing due process concerns regarding competency evaluations and post-acquittal commitment of insanity acquittees); Carl Cohen, Criminal Responsibility and the Knowledge of Right and Wrong, 14 U. Mia. L. Rev. 30 (1959) (critiquing and describing the history of the *M'Naghten* Rules in insanity determinations); Federica Coppola, Motus Animi in Mente Insana: An Emotion-Oriented Paradigm of Legal Insanity Informed by the Neuroscience of Moral Judgments and Decision-Making, 109 J. Crim. L. & Criminology 1, 50 (2019) (proposing a neuroscience-based reform of the insanity defense that expands traditional cognitive and volitional prongs to include an emotional capacity test and advocating for a tripartite insanity standard that integrates cognitive, volitional, and emotional impairments as grounds for legal insanity); R.J. Gerber, Is the Insanity Test Insane?, 20 Am. J. Juris. 111, 119–31 (1975) (analyzing empirical data on how different insanity defense standards influence juror perceptions and verdicts and emphasizing inconsistencies in lay evaluations of legal insanity); Jerome Hall, Mental Disease and Criminal Responsibility, 45 Colum. L. Rev. 677, 695, 708–09 (1945) (analyzing the philosophical and legal foundations of the insanity defense and defending the *M'Naghten* Rules as grounded in traditional, commonsense psychology while critiquing the inconsistencies in psychiatric challenges to legal standards of responsibility); Stephen J. Morse, Diminished Rationality, Diminished Responsibility, 1 Ohio St. J. Crim. L. 289, 299–301 (2003) (proposing a partial responsibility doctrine that takes into account degrees of diminished responsibility and advocating for a "Guilty But Partially Responsible" verdict to achieve more proportional justice in criminal law (internal quotation marks omitted)); James R.P. Ogloff, A Comparison of Insanity Defense Standards on Juror Decision Making, 15 L. & Hum. Behav. 509, 522–26 (1991) (empirically evaluating how different insanity defense standards influence juror decisionmaking, finding that jurors struggle to comprehend legal insanity instructions and rely more on their own perceptions of mental illness and culpability than on formal legal standards); Walter Sinnott-Armstrong & Ken Levy, Insanity Defenses, *in* The Oxford Handbook of Philosophy of Criminal Law 299 (John Deigh & David Dolinko eds., 2011) (providing a comprehensive philosophical analysis of the insanity defense, examining its historical development, legal justifications, and moral underpinnings, while critiquing both retributive and consequentialist objections to excusing mentally ill offenders from full criminal responsibility); Laura Reider, Comment, Toward a New Test for the Insanity Defense: Incorporating the Discoveries of Neuroscience Into Moral and Legal Theories, 46 UCLA L. Rev. 289 (1998) (arguing for a neuroscience-informed reform of the insanity defense, contending that traditional tests inadequately account for the role of impaired emotional processing and moral reasoning in criminal responsibility, and proposing a broader standard that incorporates empirical findings on brain function and decisionmaking).

defendants from criminal liability. Despite the popular fascination with the insanity defense, it is invoked far less often than one might expect, in fewer than 1% of cases.[77] By contrast, public defenders express concerns

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For the literature on competency, see generally Henry J. Steadman, Beating a Rap?: Defendants Found Incompetent to Stand Trial (1979) (filling in the profile of defendants found incompetent to stand trial); Bonnie, A Theoretical Reformulation, supra note 4, at 291–316 (proposing a two-part framework for criminal competency by distinguishing between "competence to assist counsel" and "decisional competence," arguing that current legal standards conflate these distinct constructs, and advocating for competency evaluations that consider the specific cognitive and decisional demands of each stage of criminal proceedings); Alison J. Lynch & Michael L. Perlin, "I See What Is Right and Approve, but I Do What Is Wrong": Psychopathy and Punishment in the Context of Racial Bias in the Age of Neuroimaging, 25 Lewis & Clark L. Rev. 453 (2021) (examining the legal and psychological distinctions between psychopathy and ASPD; critiquing the use of psychopathy labels in federal sentencing as reinforcing racial bias; and exploring how neuroimaging research challenges assumptions about psychopathy, punishment, and recidivism in criminal justice policy); Robert A. Nicholson & Karen E. Kugler, Competent and Incompetent Criminal Defendants: A Quantitative Review of Comparative Research, 109 Psych. Bull. 355 (1991) (conducting a meta-analysis of thirty studies comparing competent and incompetent criminal defendants; identifying key predictors of incompetency, including poor performance on forensic competency tests, psychotic diagnoses, and severe psychiatric symptoms; and highlighting potential biases in competency determinations based on demographic and legal history factors); Michael L. Perlin, Beyond *Dusky* and *Godinez*: Competency Before and After Trial, 21 Behav. Scis. & L. 297, 300–09 (2003) (critiquing the narrow application of competency standards in criminal proceedings; arguing that competency determinations should extend beyond trial participation to include pretrial, sentencing, appeal, and post-conviction processes; and highlighting due process concerns arising from inconsistent judicial treatment of mentally ill defendants across different procedural stages); Gianni Pirelli, William H. Gottdiener & Patricia A. Zapf, A Meta-Analytic Review of Competency to Stand Trial Research, 17 Psych. Pub. Pol'y & L. 1 (2011) (conducting a comprehensive meta-analysis of sixty-eight studies spanning four decades and examining demographic, psychiatric, and psycho-legal factors distinguishing competent from incompetent defendants); Christopher Slobogin, Mental Illness and Self-Representation: *Faretta*, *Godinez* and *Edwards*, 7 Ohio St. J. Crim. L. 391, 391–93, 399–402, 406–10 (2009) [hereinafter Slobogin, Mental Illness and Self-Representation] (arguing that Indiana v. Edwards, 55 U.S. 164 (2008), improperly limited defendants' autonomy by allowing courts to deny self-representation even when defendants are competent to stand trial and proposing a competency standard that differentiates between adjudicative and decisional competence to ensure fair trial rights for defendants with psychiatric disabilities); Patricia A. Zapf & Ronald Roesch, Future Directions in the Restoration of Competency to Stand Trial, 20 Current Directions Psych. Sci. 43, 43–47 (2011) (reviewing research on competency restoration, identifying key predictors of restorability, critiquing the effectiveness of existing treatment programs, and advocating for competency restoration approaches tailored to specific psychiatric and cognitive deficits rather than broad diagnostic categories); Patricia A. Zapf, Tina M. Zottoli & Gianni Pirelli, Insanity in the Courtroom: Issues of Criminal Responsibility and Competency to Stand Trial, *in* 2 Psychology in the Courtroom 79, 89–95 (Daniel A. Krauss & Joel D. Lieberman eds., 2009) (overviewing doctrine, history, and literature related to the competency to stand trial); Stork, supra note 22, at 927–69 (describing how federal courts treat PDs in CST proceedings).

77. Henry J. Steadman, Margaret A. McGreevy, Joseph P. Morrissey, Lisa A. Callahan, Pamela Clark Robbins & Carmen Cirincione, Before and After *Hinckley*: Evaluating Insanity Defense Reform 149–51 (1993) (reporting results from a four-state study over a ten-year period and finding that the defense was raised in 0.9% of cases).

about clients' competency in 10% to 15% of cases.[78] Competency assessments are a central feature of criminal litigation in a way that insanity is not. With a few notable exceptions, existing legal scholarship has not engaged in a granular critique of CST proceedings.[79] This Essay aims to do just that, while offering constructive guidelines for reform.

To make its critique, this Essay dives into the disciplines of psychology and psychiatry—and their constructions of disease and ability—to assess forensic practices on their own terms. Psychology and psychiatry are fields of knowledge oriented toward understanding and treating what they discern to be mental diseases.[80] But the term "disease" is an awkward fit for neurodivergence. As a general matter, when a branch of medicine labels something an "illness" or "disease," this involves identifying an undesirable "cluster of characteristics" that has a rational explanation and an expected course.[81] Furthermore, to label something an illness is to root the problem in the individual's biology rather than powerful social forces that often determine health. Psychiatric diagnoses trouble these biomedical definitions of disease—none more so than PDs, in part because their biological origins are uncertain.[82] These disciplinary uncertainties seep into CST determinations too.

One problem with embracing psychology and psychiatry's framework is that these fields of knowledge describe certain differences as abnormal, disordered, and ill, whereas the disability justice movement rejects such

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78. See Melton et al., supra note 42, at 193 ("Surveys of public defenders indicate that defense lawyers have concerns about their clients' competence in between 10 and 15% of their cases."); Wik et al., supra note 7, at 43 (showing a national average of over two hundred patients per state in state psychiatric hospitals institutionalized for being incompetent to stand trial in 2014).

79. Cf. Perlin, Hidden Prejudice, supra note 29, at 205–08 (discussing general public disinterest in CST proceedings, despite their broad implications).

80. See DSM-5-TR, supra note 15, at 21 ("The primary purpose of DSM-5 is to assist trained clinicians in the diagnosis of mental disorders as part of a case formulation assessment that leads to an informed treatment plan for each individual."); About APA, Am. Psych. Ass'n, https://www.apa.org/about [https://perma.cc/9SRY-X3N5] (last visited Feb. 21, 2025) ("Psychologists study both normal and abnormal functioning and treat patients with mental and emotional problems."); What Is Psychiatry?, Am. Psychiatric Ass'n, https://www.psychiatry.org/patients-families/what-is-psychiatry [https://perma.cc/G8QM-NQZW] (last visited Feb. 21, 2025) ("Psychiatry is the branch of medicine focused on the diagnosis, treatment and prevention of mental, emotional and behavioral disorders.").

81. Bursten, supra note 26, at 5, 27; see also W. Miller Brown, On Defining 'Disease', 10 J. Med. & Phil. 311, 312 (1985) (describing the prominent view that "disease may be an impairment, i.e., deviation from the normal structural or functional integrity of the body, organ-system, or biosynthetic process").

82. See Robert F. Krueger, Continuity of Axes I and II: Toward a Unified Model of Personality, Personality Disorders, and Clinical Disorders, 19 J. Personality Disorders 233, 245–47 (2005) ("[G]enetic influences do not provide the entire story with respect to the etiology of psychopathology."); G. E. Partridge, Current Conceptions of Psychopathic Personality, 87 Am. J. Psychiatry 53, 64 (1930) (describing Robert Gaupp's view that "[t]he psychopathic is something that lies between mental normality and mental disease, which is not dependent upon a purely physical condition").

discourse as ableist and dehumanizing.[83] This Essay will use the terms "disorder," "illness," "disease," "symptom," and "impairment," not because these are correct ways to frame neurocognitive difference, but because these are the terms that actors in CST proceedings use.

Critically, while experts in psychology and psychiatry approach their epistemic practices as scientific, this Essay underscores the underappreciated moral dimension of the knowledge they produce. Assembling a diagnostic typology, or nosology, involves discerning undesirable traits and abnormal conditions and identifying who deserves compassion and accommodation.[84] These normative endeavors require more than merely identifying statistical deviations in human experience.[85] Not all psychological differences establish a psychiatric diagnosis. Those cognizable psychiatric conditions are enshrined in the *Diagnostic and Statistical Manual of Mental Disorders* (*DSM*)—the most recent edition of which is the *Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition, Text Revision* (*DSM-5-TR*)—which serves as these disciplines' authoritative catalog.[86] This Essay relies on the *DSM-5-TR*'s categories of disorders, but it does not assume that these accurately capture a stable constellation of behaviors and experiences.

This Essay proceeds as follows. Part I traces the origins of the competency process, describes how it typically unfolds, and surveys the pertinent critiques of competency assessments. Part II examines the controversial status of PDs in psychology and psychiatry, as well as in public life. Part III presents the results of a national survey of CST proceedings, which reveal that examiners abide by a hierarchical scheme of diagnoses. Case law and examiners' testimony establish disability as something that is externally verifiable and primarily acts on a person's perception of reality. Part IV probes examiners' conclusions to expose the buried moral dimensions of their epistemic practices. It draws on moral philosophy to expose the parallels between examiners' reasoning in insanity and CST proceedings and, after enumerating the distinct concerns animating these different areas of law, it asserts that such consistency is undesirable. Part V

83. See Sins Invalid, Skin, Tooth, and Bone: The Basis of Movement Is Our People 5, 19 (2d ed. 2019) (noting that the disability justice movement rejects that disabled individuals are "deviant or aberrant" and instead sees disabled individuals as "powerful, not despite the complexities of [their] bodies, but because of them").

84. See Bursten, supra note 26, at 27–28 (describing the definition of illness via the identification of an undesirable "cluster of characteristics").

85. See, e.g., Ron Amundson, Against Normal Function, 31 Stud. Hist. & Phil. Biological & Biomedical Scis. 33, 52 (2000) ("[V]ersions of biological determinism have buttressed racist and sexist doctrines. Celebrated for their scientific objectivity, they had little objective biological foundation. Their plausibility was enhanced by their congruence with the social prejudices of their time.").

86. See Katia Romelli, Alessandra Frigerio & Monica Colombo, DSM Over Time: From Legitimisation of Authority to Hegemony, 11 BioSoc'ys 1, 12, 17 (2016) ("[T]he APA is positioning itself as the only legitimate actor that can establish the nature of valid knowledge in this domain.").

teases out the implications for reform, in and outside of court. This Essay concludes by suggesting that the study of CST proceedings should serve as a cautionary tale for ongoing efforts to address neurodivergence in criminal court.

I. AN OVERVIEW OF COMPETENCY PROCEEDINGS

This Part identifies the doctrinal foundations for CST proceedings, summarizes current research on how these proceedings tend to unfold in courts across the United States, and critically unpacks the assumptions about psychiatric disability that undergird the CST framework.

Deemed necessary to realize due process and Sixth Amendment protections, CST proceedings certify that the accused can contribute to their defense and is in the mental state to be held accountable.[87] A finding of incompetence denotes that the accused's disability prevents meaningful participation.[88] If a person is found incompetent, the proceedings are suspended or dismissed.[89] If the prosecution is suspended, the person is sent for restoration.[90] During restoration, the accused undergoes treatment.[91] In some jurisdictions, they attend classes to learn about the criminal legal process.[92] Although community-based restoration is gaining traction in some jurisdictions,[93] the default is that the accused is institutionalized in a state hospital and placed under carceral supervision,[94]

87. See Note, Incompetency to Stand Trial, 81 Harv. L. Rev. 454, 454–55 (1967) [hereinafter Note, Incompetency to Stand Trial] ("[T]he Supreme Court has held that where the circumstances at trial create doubt about the defendant's competency, due process requires a hearing on the issue.").

88. See id. at 454 ("The question of competency to stand trial relates rather to the appropriateness of conducting the criminal proceeding in light of the defendant's present inability to participate effectively.").

89. See, e.g., N.Y. Crim. Proc. Law § 730.40 (McKinney 2025) (providing for dismissal of the criminal case if the defendant is found unfit on a misdemeanor charge in local criminal court but pausing the proceedings in felony cases).

90. See Melton et al., supra note 42, at 187 ("If the criminal proceeding is not short-circuited through an arrangement of this type, the court often orders the defendant to a public-sector psychiatric hospital for treatment to restore competence.").

91. Id.

92. See Hallie Fader-Towe & Ethan Kelly, Council of State Gov'ts Just. Ctr., Just and Well: Rethinking How States Approach Competency to Stand Trial 1 (2020), https://csgjusticecenter.org/wp-content/uploads/2020/10/Just-and-Well27OCT2020.pdf [https://perma.cc/5C9V-9CD3] (noting that some restorative processes focus on "legal education").

93. See *Trueblood et al v. Washington State DSHS*, Wash. St. Dep't Soc. & Health Servs., https://www.dshs.wa.gov/bha/trueblood-et-al-v-washington-state-dshs [https://perma.cc/9HQV-4FXT] (last visited Aug. 4, 2025) (discussing the Department's responsibilities to provide competency evaluation services and restoration services).

94. See Wik et al., supra note 7, at 29 (reporting that twenty-three of thirty-seven states surveyed indicated that "their state psychiatric hospitals accepted both misdemeanants and felons for those evaluations").

where they may be forcibly medicated.[95] As of 2014, 58% of people in state hospitals were forensic patients, referred there by the criminal legal system.[96] Of those forensic patients, the largest proportion are restoration cases.[97] In some jurisdictions, if the person is charged with a misdemeanor and found unfit, the case is dismissed.[98] Today, some jurisdictions are witnessing a sudden increase in requests for competency assessments and a parallel surge in institutionalizations.[99] In Alabama and Georgia, for example, defendants face seemingly endless delays as they wait to be assessed.[100] This current institutional crisis is layered on top of more enduring problems that scholars have criticized: the Supreme Court's unsatisfactory legal guidance, trial courts' abdication of adjud-icative responsibility, and forensic practitioners' erratic practices.[101]

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95. See, e.g., Sell v. United States, 539 U.S. 166, 179 (2003) ("[I]n principle, forced medication in order to render a defendant competent to stand trial for murder was constitutionally permissible.").

96. W. Neil Gowensmith, Resolution or Resignation: The Role of Forensic Mental Health Professionals Amidst the Competency Services Crisis, 25 Psych. Pub. Pol'y & L. 1, 2 (2019).

97. Id.

98. See, e.g., N.Y. Crim. Proc. Law § 730.40 (McKinney 2025).

99. See, e.g., Trueblood v. Wash. State Dep't of Soc. & Health Servs., 101 F. Supp. 3d 1010, 1016, 1023 (W.D. Wash. 2015) (finding that Washington's delays in evaluation and restoration of CST were unconstitutional because the state did not have sufficient capacity to keep up with the 82% increase in competency evaluations between 2001 and 2011), vacated, 822 F.3d 1037 (9th Cir. 2021); Gowensmith, supra note 96, at 2, 4 (discussing the national increase in CST evaluations).

100. See Mike Cason, Alabama Agrees to Speedier Mental Health Evaluations in Jails, AL.com (Jan. 26, 2018), https://www.al.com/news/2018/01/alabama_agrees_to_speedier_men.html [https://perma.cc/HS39-TG3K] (finding that "the state [of Alabama] failed to follow the Due Process Clause of the 14th Amendment because people were forced to wait up to nine months for evaluation and treatment after orders by a judge"); Andy Miller & Rebecca Grapevine, Long Wait for Justice: People in Jail Face Delays for Mental Health Care Before They Can Stand Trial, The Current (June 11, 2022), https://thecurrentga.org/2022/06/11/long-wait-for-justice-people-in-jail-face-delays-for-mental-health-care-before-they-can-stand-trial/ [https://perma.cc/22Z7-79PE] ("In Georgia . . . [m]ore than 900 [people] are waiting for just the first step in the process, a 'forensic evaluation.'"); see also Nathaniel P. Morris & Jacob M. Izenberg, Hidden Behind Bars—The Public Health Implications of Incompetency to Stand Trial, 389 NEJM 2314, 2315 (2023) ("In many states, hospital-admission wait lists for competency restoration have swelled to hundreds or thousands of defendants; at least a dozen states have faced litigation over these delays. We believe these backlogs represent a public health crisis . . . ." (footnotes omitted)).

101. See Richard Schwerner, State Just. Inst., Competence to Stand Trial 1 (2020), https://documents.ncsl.org/wwwncsl/Summit/2023/Session-Resources/Competence_to_Stand_Trial_Interim_Final.pdf [https://perma.cc/6XPK-YAE4] ("[D]efendants are often held involuntarily, or committed, either in jail or in a locked treatment facility . . . for periods of time that bear no rational or proportionate relationship to the nature of the offense they are alleged to have committed . . . or to their clinical needs."); Amanda Beltrani & Patricia A. Zapf, Competence to Stand Trial and Criminalization: An Overview of the Research, 25 CNS Spectrums 161, 169 (2020) (noting the shortcomings of approaches to mental health in the criminal legal system); Bonnie, A Theoretical Reformulation, supra note 4, at 293 ("The items listed in the most widely used protocols [for incompetency

A. Dusky *and Its Progeny*

The Court in *Dusky* declined to adopt a competency standard that required only that the defendant be oriented to time and place and have some recollection of events.[102] Instead, the standard asks courts to assess the capacities for participation. Subsequently, in *Drope*, the Court modified the standard: "[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."[103] *Drope* enhances the *Dusky* standard by focusing on the accused person's capacity to assist, rather than simply consult with, their attorney. The federal statutory standard introduces another element, specifying that incompetence must stem from a "mental disease or defect."[104] State legislators and state courts have adapted their standards to approximate the federal constitutional standard.[105] In

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determination] have . . . not been derived either from a theory of competence or from empirical study of the difficulties encountered by attorneys representing defendants with mental disabilities."); Lisa Callahan & Debra A. Pinals, Challenges to Reforming the Competence to Stand Trial and Competence Restoration System, 71 Psychiatric Servs. 691, 691 (2020) ("There is little debate among mental health and justice professionals that the system that manages both competence to stand trial (CST) evaluation and competence restoration (CR) processes in criminal cases is in crisis."); Michael L. Perlin, Pretexts and Mental Disability Law: The Case of Competency, 47 U. Mia. L. Rev. 625, 653–54 (1993) [hereinafter Perlin, Pretexts and Mental Disability Law] ("Because of the ambiguities of the Supreme Court's test and the difficulties experienced in applying these standards . . . [t]he ultimate legal decision as to competence often has thus fallen, perhaps by default, to the examiner."); Winick, Reforming Incompetency to Stand Trial and Plead Guilty, supra note 44, at 572 (stating that the Supreme Court "has not examined the premises underlying the incompetency doctrine or the need for broad reform in [the] area"); Bruce J. Winick, Restructuring Competency to Stand Trial, 32 UCLA L. Rev. 921, 926 (1985) ("The lack of empirical studies in this area prevents our understanding the true costs imposed by the competency doctrine—the fiscal and administrative costs borne by society . . . and the severe burdens the doctrine places on mentally ill defendants."); Zapf et al., Have the Courts Abdicated?, supra note 34, at 30 ("[J]udges seldom disagree with mental health professionals about a defendant's competency . . . [but] research has indicated that the factors most related to clinical findings of incompetence were poor performance on psychological tests that specifically evaluate competence-related skills, psychotic disorders, and severe symptoms of psychopathology." (citations omitted)).

102. See Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (agreeing with "the suggestion of the Solicitor General that it is not enough for the district judge to find that 'the defendant [is] oriented to time and place and [has] some recollection of events'" (alterations in original) (quoting J. Lee Rankin, U.S. Solic. Gen.)).

103. 420 U.S. 162, 171 (1975).

104. 18 U.S.C. § 4241(a) (2018).

105. See, e.g., La. Code Crim. Proc. Ann. art. 641 (2025) ("Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense."); N.Y. Crim. Proc. Law § 730.10(1) (McKinney 2025) ("'Incapacitated person' means a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense."); 1 LaFave, supra note 7, § 8.1(a) n.13 ("Most States have a statutory test at least approximating the *Dusky* test just quoted, although many in addition specify the kind of condition that must be the source of the incompetency . . . .").

practice, notwithstanding discrepancies in legislation and case law, states use the *Dusky–Drope* and statutory standards interchangeably.[106]

The *Dusky–Drope* test contains three key elements: (1) Does the accused lack the capacity to understand the proceedings against them?; (2) does the accused lack the capacity to consult with their attorney?; and (3) are these impairments the product of a mental disability? The first element focuses on the accused's cognitive capacities to make sense of their prosecution. The second envisions the possibility of a functional relationship between the attorney and defendant. The third focuses on attribution.

In *Drope*, the Supreme Court suggested the standard emerges out of the accused's right to be present at their prosecution "as a by-product of the ban against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself."[107] The Court noted that the prohibition against prosecuting someone who is incompetent is "fundamental to an adversary system of justice."[108] Commentators have argued that competency enhances both the fairness and the accuracy of proceedings by ensuring defendants' participation and meaningful adversarial testing.[109] Professor Richard J. Bonnie explains that CST proceedings enhance the reliability of the process and respect the dignity of the accused.[110] To

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106. See Douglas Mossman et al., AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial, 35 J. Am. Acad. Psychiatry & L. S3, S59–67 & tbl.3 (2007) (surveying state and federal statutes); Stork, supra note 22, at 931 ("Courts and legal scholars have treated [the *Dusky* and the statutory] standards as if they are essentially interchangeable."). Further research would determine whether there are grounds to interpret state standards more expansively than the constitutional *Dusky* standard. See United States v. Mitchell, 706 F. Supp. 2d 1148, 1154 n.4 (D. Utah 2010) (discussing the difference between the Utah and federal competency standards).

107. *Drope*, 420 U.S. at 171 (emphasis omitted) (internal quotation marks omitted) (quoting Caleb Foote, A Comment on Pre-Trial Commitment of Criminal Defendants, 108 U. Pa. L. Rev. 832, 834 (1960)).

108. Id. at 172. The Supreme Court in *Faretta v. California* also noted:

> [T]he Confrontation Clause of the Sixth Amendment gives the accused a right to be present at all stages of the proceedings where fundamental fairness might be thwarted by his absence. This right to "presence" was based upon the premise that the "defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself."

422 U.S. 806, 816 (1975) (emphasis omitted) (quoting Snyder v. Massachusetts, 291 U.S. 97, 106 (1934)).

109. See Note, Incompetency to Stand Trial, supra note 87, at 458 ("The adversary form of the criminal proceeding necessarily rests on the assumption that defendant will be a conscious and intelligent participant; the trial of a defendant who cannot fulfill this expectation appears inappropriate and irrational.").

110. Christopher Slobogin, Minding Justice: Laws that Deprive People With Mental Disability of Life and Liberty 192 (2006).

prosecute an individual who is incompetent, Bonnie argues, "offends the moral dignity of the process because it treats the defendant not as an accountable person, but as an object of the state's effort to carry out its promises."[111]

To "jealously guard[]" the right to a fair trial and the promise of due process of law, the Supreme Court has asked trial courts to inquire if there were doubts about the accused person's capacities.[112] The law presumes that people accused of crimes are competent.[113] Generally, defense counsel can raise the issue of competency or the court can do so sua sponte.[114] Due process dictates that the person accused and their lawyer have "a reasonable opportunity to demonstrate" incompetency.[115] Defendants are expected to establish their incompetency by a preponderance of the evidence,[116] but a heavier standard of proof would violate due process.[117]

More recent Supreme Court decisions have underscored that the *Dusky–Drope* doctrine sets minimal standards for capacities. In *Godinez v. Moran*, the Rehnquist Court considered a capital case in which the defendant wanted to waive counsel and go to trial pro se.[118] The Court rejected the Ninth Circuit's attempt to create a higher competency threshold for when a person wants to proceed to trial without an attorney.[119] Rejecting that rule, the Supreme Court also clarified that

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111. Id. (internal quotation marks omitted) (quoting Richard J. Bonnie, The Competence of Criminal Defendants: Beyond *Dusky* and *Drope*, 47 U. Mia. L. Rev. 539, 551 (1993)).

112. Pate v. Robinson, 383 U.S. 375, 385 (1966).

113. See Medina v. California, 505 U.S. 437, 440 (1992) (stating that California's penal code presumes that a defendant is competent to stand trial unless the defendant proves otherwise). The federal courts of appeals disagree about which party carries the burden of proving competency or incompetency. Compare United States v. Robinson, 404 F.3d 850, 856 (4th Cir. 2005) (placing the burden on the defendant), and United States v. Smith, 521 F.2d 374, 377 (10th Cir. 1975) (same), with United States v. Frank, 956 F.2d 872, 875 (9th Cir. 1992) (placing the burden on the prosecution), United States v. Velasquez, 885 F.2d 1076, 1089 (3d Cir. 1989) (same), and United States v. Hutson, 821 F.2d 1015, 1018 (5th Cir. 1987) (same).

114. See *Drope*, 420 U.S. at 164 ("[Defendant] filed a motion for a continuance . . . [so that he] might be examined and receive psychiatric treatment."); Yang v. United States, 114 F.4th 899, 907 (7th Cir. 2024) ("Congress has provided the district courts with the authority—in conjunction with and independent of the parties—to sua sponte raise the issue of competency . . . .").

115. *Medina*, 505 U.S. at 451.

116. Id. at 441 (stating that the trial judge instructed the jury that the defendant had to prove his incompetence "by a preponderance of the evidence" (internal quotation marks omitted) (quoting App. at 87)).

117. Cooper v. Oklahoma, 517 U.S. 348, 369 (1996) ("The *prohibition* against requiring the criminal defendant to demonstrate incompetence by clear and convincing evidence safeguards the fundamental right not to stand trial while incompetent.").

118. 509 U.S. 389, 392 (1993).

119. Id. at 402. In a later case, *Indiana v. Edwards*, the Supreme Court allowed a trial court to deny a defendant the right to represent himself at trial on competency grounds. 554 U.S. 164, 177–78 (2008). It did not, however, create a different federal constitutional

competency is a "modest" aim: "While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while States are free to adopt competency standards that are more elaborate than the [*Dusky*–*Drope*] formulation, the Due Process Clause does not impose these additional requirements."[120] As a result, when a trial court evaluates a defendant for competency, the federal constitutional standard is the same whether the person is representing themselves or proceeding with an attorney, going to trial, or taking a plea.[121]

Defense advocates and scholars have frequently commented on and challenged the low bar for competency that state-appointed experts apply and courts enforce.[122] Scholars have argued in favor of raising the threshold for competency and have elaborated on the specific competencies that courts ought to assess.[123] Bonnie has argued that competence implies two elements: "[A] foundational concept of competence to assist counsel, and a contextualized concept of decisional competence."[124] Distinct from being able to collaborate with one's attorney, "Decisional competence refers to the additional abilities required for legally valid decisionmaking."[125] Bonnie also argues the test should vary according to the circumstances, something the Supreme Court specifically rejected.[126] Professor Christopher Slobogin argues for a single standard that involves two inquiries: first, "whether the defendant gives non-delusional reasons for the decision," and second, whether the defendant shows a "willingness

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standard for proceeding to trial pro se than in other situations. Id. at 178. The holding in *Godinez*, therefore, still stands. While courts are permitted to require a greater show of competency from defendants seeking to proceed to trial pro se, there is no federal constitutional standard requiring as much. Id.

120. *Godinez*, 509 U.S. at 402; see also United States v. Brown, 669 F.3d 10, 17 (1st Cir. 2012) ("The 'understanding' required is of the essentials—for example, the charges, basic procedure, possible defenses—but not of legal sophistication." (internal quotation marks omitted) (quoting Robidoux v. O'Brien, 643 F.3d 334, 339 (1st Cir. 2011))).

121. *Godinez*, 509 U.S. at 398 ("[W]e reject the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard.").

122. See, e.g., Bonnie, A Theoretical Reformulation, supra note 4, at 297 ("The capacities required to assure the dignity of the process . . . seem to include the ability to understand the nature of wrongdoing and punishment and the purpose and effect of a criminal prosecution and conviction, together with the ability to relate this understanding to one's own situation as a defendant.").

123. See Jennifer L. Moore & Katherine Ramsland, Competence Assessment, Diverse Abilities, and a Pro Se Standard, 39 J. Psychiatry & L. 297, 309–10, 312–13 (2011) (arguing that *Indiana v. Edwards* was too vague about the "'basic tasks' needed to represent oneself" and the required levels of skill).

124. Richard J. Bonnie, The Competence of Criminal Defendants: Beyond *Dusky* and *Drope*, 47 U. Mia. L. Rev. 539, 548 (1993).

125. Id.

126. Id.

to exercise the autonomy one has, which can usually be demonstrated by a willingness to consider alternative scenarios."[127]

Across areas of law dealing with mental health, courts and examiners have incorporated what could be called a "product test."[128] They have done the same with the *Dusky–Drope* standard.[129] It requires fact finders to attribute the defendant's conduct to a mental disease or defect.[130] It essentially imposes a causation requirement.[131] Forensic experts, jurors, and judges are supposed to distinguish when conduct can be attributed to the disease and when it cannot. Courts and examiners must thus be convinced that any difficulties the defendant faces in meeting the *Dusky–Drope* standard are rooted in an identified mental or intellectual disability. As a result, much of the litigation this Essay discusses in Part III revolves around whether the defendants' difficulties are rooted in mental disability and which difficulties amount to a mental disability. Attorney Emily Stork has argued against the inclusion of "mental disease or defect" in the CST standard because "it invites unnecessary line-drawing and battles of the experts."[132]

The product test can be traced to the insanity standard enunciated in *Durham v. United States*.[133] The *Durham* standard allowed the jury to pronounce the defendant not criminally responsible "if his unlawful act was the product of mental disease or mental defect."[134] The test posits an artificial division in the human mind between the normal and abnormal parts.[135] If an action is consistent with the clusters of characteristics or symptoms that define the diagnosis, it lies outside of the accused's control and reflects their impairment.[136] In practice, courts have noted that jurors

127. Slobogin, Mental Illness and Self-Representation, supra note 76, at 402.

128. See Bursten, supra note 26, at 5 (discussing the proliferation of the product test across areas of law touching upon mental health).

129. See infra Part III.

130. See Bursten, supra note 26, at 4 ("Many of the practical decisions that professionals have to make rest on whether a particular behavior is a *product of mental illness*.").

131. See Carter v. United States, 252 F.2d 608, 616 (D.C. Cir. 1957) ("There must be a relationship between the disease and the criminal act; and the relationship must be such as to justify a reasonable inference that the act would not have been committed if the person had not been suffering from the disease.").

132. Stork, supra note 22, at 957.

133. See Bursten, supra note 26, at 5 ("[*P*]*roduct of mental illness* and the concept it stands for is referred to as the *Durham* standard.").

134. Durham v. United States, 214 F.2d 862, 874–75 (D.C. Cir. 1954).

135. See Bursten, supra note 26, at 55 (differentiating between "the sick and the healthy parts" of someone that can influence behavior); Joshua Dressler & Stephen P. Garvey, Criminal Law: Cases and Materials 656 (9th ed. 2022) (underscoring that the success of an insanity defense lies in being able to establish that the defendant's criminal behavior is the product of their mental abnormality).

136. See Bursten, supra note 26, at 55 (discussing the difficulty of determining behaviors considered to be the product of mental illness and those that are not).

struggle to apply the test.[137] In both the insanity and competency contexts, courts have tended to allow experts to explain attribution.[138] As this Essay discusses, courts have tended to defer to forensic experts regarding all elements of competency tests.[139] But professional best practice insists that forensic examiners refrain from concluding on any ultimate issue, such as competency or insanity.[140] Similarly, Rule 704 of the Federal Rules of Evidence forbids experts in criminal cases from opining on the defendant's mental state as an element of either the offense charged or a possible defense, which includes competency.[141]

Although the Supreme Court has not specified how competency ought to be assessed, in practice, trial courts have enlisted forensic experts—psychologists, psychiatrists, and clinical social workers—to assist in their determinations.[142] These court-employed experts are tasked with conducting examinations and filing reports with the court.[143] But the law does not prescribe any parameters for that examination. In response to the *Dusky–Drope* standard, and its subsequent refinements in case law, researchers have developed screening instruments, questionnaires, and tests to assist forensic examiners.[144] Examiners can use any number of instruments to ascertain the accused's fitness to stand trial.[145] None are constitutionally mandated.[146]

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137. See, e.g., State v. Johnson, 399 A.2d 469, 474 (R.I. 1979) ("[T]he elusive, undefined concept of productivity . . . gave the jury inadequate guidance."(citing United States v. Freeman, 357 F.2d 606, 621 (2d Cir. 1966))).

138. See infra section III.C.

139. See infra notes 206–213 and accompanying text.

140. See Melton et al., supra note 42, at 40 ("Mental health professionals should be neither permitted nor cajoled to give opinions on the ultimate legal issue . . . .").

141. See Fed. R. Evid. 704(b) ("In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense."); see also United States v. Eff, 524 F.3d 712, 716 (5th Cir. 2008) ("An expert is thus prohibited from testifying that a severe mental disease or defect does or does not prevent a defendant from appreciating the nature and quality or wrongfulness of his acts." (citing United States v. Dixon, 185 F.3d 393, 400 (5th Cir. 1999))). But see United States v. Levine, 80 F.3d 129, 134–35 (5th Cir. 1996) (finding that an expert can testify to the similarity of the facts in the present case and of a hypothetical manic person).

142. Mossman et al., supra note 106, at S8–S9 (highlighting cases in which forensic experts were called in to testify and provide clarity).

143. See id. at S14 (discussing a case in which the trial court had appointed a physician to conduct an examination and file a report).

144. Melton et al., supra note 42, at 198–209 (outlining various screening tools and tests that examiners use to ascertain competency).

145. See id. at 209 (noting that a review of current tools "reveals a variety of approaches").

146. Professor Deborah Denno suggests that, in the federal system, "some courts appear more willing to rely on so-called 'objective tests,' rather than an expert's testimony interpreting test results." Deborah W. Denno, How Prosecutors and Defense Attorneys Differ in Their Use of Neuroscience Evidence, 85 Fordham L. Rev. 453, 471 (2016) [hereinafter Denno, Prosecutors and Defense Attorneys].

B. *The Disability Justice Movement's Critiques of Competency*

As a standard that is ostensibly aimed at protecting neurodivergent defendants, the *Dusky–Drope* framework has few friends in the disability justice movement. This section discusses the CST framework's conceptual and practical flaws. Namely, the *Dusky–Drope* standard embraces a disability rights framework that relies on a biomedical model of disability, which mobilizes sanist conceptions about disability and metes out degrading treatment. In broad terms, there are two sets of axes that distinguish various current efforts to address ableist oppression: disability justice versus disability rights and the social model versus the biomedical model of disability. On the first axis, the disability rights movement is a single-issue agenda for social change that affords legal recognition to ability-based discrimination.[147] The passage of the Americans with Disabilities Act (ADA) in 1990[148] was one of the movement's crowning achievements. The ADA mandates private and public actors to make reasonable accommodations for individuals with disabilities.[149] Failure to offer those accommodations amounts to discrimination. The ADA also encodes a strong presumption against institutionalization.[150] It considers the isolation and segregation of individuals with disabilities to be "a serious and pervasive social problem."[151] Public health providers are instead ordered to administer services "in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[152]

Rights and legal process serve as central engines for social reform in the disability rights framework.[153] The hope is that if individuals with disabilities obtain the legal means to combat their exclusion, litigation will compel institutional reform.[154] But the ADA and its antidiscrimination

147. See Mia Mingus, Changing the Framework: Disability Justice, Leaving Evidence (Feb. 12, 2011), https://leavingevidence.wordpress.com/2011/02/12/changing-the-framework-disability-justice/ [https://perma.cc/X9XE-N628].

148. Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (codified in scattered sections of 42 U.S.C. (2018)).

149. See Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 592 (1999) (noting that "[a]nother regulation requires public entities to 'make reasonable modifications' to avoid 'discrimination on the basis of disability'" (quoting 28 C.F.R. § 35.130(b)(7) (1998))).

150. See id. at 613 (Kennedy, J., concurring in the judgment) ("[U]nnecessary institutionalization may be the evidence or the result of the discrimination the ADA prohibits.").

151. 42 U.S.C. § 12101(a)(2).

152. 28 C.F.R. § 35.130(d) (2025).

153. See Marta Russell, What Disability Civil Rights Cannot Do, *in* Capitalism and Disability: Selected Writings by Marta Russell 62, 63 (Keith Rosenthal ed., 2019) ("[T]he [disability rights movement] has sought to alter the historical exclusion of disabled persons from the workforce through the establishment of individual legal rights and remedy . . . ."); see also Ruth Colker, The Reactive Model of Reasonable Accommodation, LPE Project: Blog (Oct. 11, 2022), https://lpeproject.org/blog/the-reactive-model-of-reasonable-accommodation/ [https://perma.cc/YFK2-S2HY] (noting what the disability rights movement cannot achieve, given its focus on the ADA and legal reform more generally).

154. See Russell, supra note 153, at 63 (noting that the ADA was "intended to end employer discrimination" by providing "disabled persons redress . . . in the courts").

framework are ill-equipped to deal with the stubborn material realities that shorten the lives and limit the educational achievements and incomes of individuals with disabilities.[155] In opposition, the disability justice movement cohered precisely to address the problems of the disability rights framework, which had "invisibilized the lives" of disabled individuals with intersectional identities.[156] The disability justice movement takes aim at the multiple systems of oppression that produce ableist and sanist supremacy.[157] It rejects formal legal equality as sufficient to guarantee the dignity and equality of individuals with disabilities.[158]

The CST standard embraces a disability rights framework. It grants a procedural accommodation in the hopes of levelling the playing field in criminal court. It expects to deliver some basic equality in criminal court between the state and the disabled defendant. In assuming mental disabilities are defects to be cured through restoration, the CST standard underestimates and overestimates the potential impacts of a mental disability.[159] What if disability under neoliberalism so diminishes life chances that it is impossible for any court to fairly judge an accused person who is disabled? What if court processes are fundamentally inaccessible to some neurodivergent defendants, in spite of restoration? Relatedly, the CST standard also ignores how criminalization itself can produce forms of disability.[160] Restoration is pointless if incarceration pending trial can cause disability. For these reasons, a disability justice perspective rejects the premise that rights in the criminal legal system can meaningfully address ableism, given the institution's persistent role in perpetuating it.[161]

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155. See Sins Invalid, supra note 83, at 15 (noting that the rights-based framework of the disability rights movement is not "appropriate for all situations"); see also Marta Russell & Ravi Malhotra, Introduction toCapitalism and Disability: Selected Writings by Marta Russell, supra note 153, at 1, 3 ("In the US . . . one third of disabled adults live in a household with an annual income of less than $15,000, while the 300 to 400 million living in developing countries have even less chance of employment and exist in abject poverty, usually with no social safety nets at all." (footnote omitted)).

156. Sins Invalid, supra note 83, at 15.

157. See id. at 18 ("Disability justice activists, organizers, and cultural workers understand that able-bodied supremacy has been formed in relation to other systems of domination and exploitation.").

158. See Colker, supra note 153 ("The primary problem [with the reasonable accommodation model] is its intense individual rights perspective.").

159. See Sins Invalid, supra note 83, at 52 (stating that the minds and bodies of people with disabilities "are not controllable and cannot always comply").

160. See Ben-Moshe, Decarcerating Disability, supra note 46, at 8 (discussing how the trauma, inhumane conditions, and lack of adequate medical care that often accompany incarceration can contribute to new or worsening disability); cf. id. at 10 (arguing that "demands for inclusion of people with disabilities in employment or education do not critique or change the system of exploitative racial capitalism or the settler ableist system of education but only expand it to fit more people").

161. See Adler-Bolton & Vierkant, supra note 67, at 14 (discussing Marta Russell's and Dean Spade's critiques of liberal, legalist reform strategies like the disability rights movement for "seek[ing] to expand rights within the framework of the courts, ignoring the fact that the resulting policies rarely shift the political economy of oppression"); see also

Disability justice activists have thus exposed the criminal legal system as one that disables individuals and entrenches ableist oppression.[162] The experience of jail, prisons, and prosecution triggers psychiatric distress and medical conditions,[163] and state agencies in the United States have historically used their punitive authority to eradicate, warehouse, and stigmatize neurodiversity and physical disability.[164] Thus, instead of focusing on CST proceedings or disability accommodations in criminal court, disability justice groups have placed the abolition of the prison industrial complex at the center of their demands.[165]

A second axis in this field of advocacy and analysis separates the social model from the biomedical model of disability. The biomedical model attributes psychiatric disability to biological and physiological processes—like chemical imbalances in the brain.[166] Because of its etiological claims, the biological model tends to account for the disadvantages associated with disability as natural and inevitable consequences of aberrations from the biophysiological norm.[167] At its worst, a biomedical vision of disability reduces disability to a sort of "personal tragedy which the individual must

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Ware et al., supra note 11, at 163 ("Because of the ways that prisons are constructed, imagined, and maintained, rampant ableism and racism affect the daily lives of many prisoners.").

162. See Ben-Moshe, Decarcerating Disability, supra note 46, at 8–9 ("[T]he prison environment itself is disabling so that even if an individual enters prison without a disability or mental health diagnosis, she is likely to get one . . . .").

163. See id. at 7–9 (explaining the disabling effects of the prison environment for both those who enter with preexisting disabilities and those who do not); Marta Russell & Jean Stewart, Disablement, Prison, and Historical Segregation, *in* Capitalism and Disability: Selected Writings by Marta Russell, supra note 153, at 86, 86–96 (exploring the connection between incarceration and disablement).

164. See Laura I. Appleman, Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration, 68 Duke L.J. 417, 436–37 (2018) (arguing that the history of eugenics, also known as the "science of good breeding," which emerged in the Progressive Era as a means to "control those citizens with mental illness and physical and cognitive disabilities," is intertwined with the "history of the carceral state"(internal quotation marks omitted)); Jamelia N. Morgan, Rethinking Disorderly Conduct, 109 Calif. L. Rev. 1637, 1670–76 (2021) (demonstrating how disorderly conduct statutes have been used to police and punish individuals for their physical and mental disabilities).

165. In a campaign to oppose a police training program in Oakland, California, the disability justice organization Sins Invalid reasoned that "[i]ncreased militarization of the police leads directly to increased police violence, particularly against disabled people of color." Sins Invalid, supra note 83, at 52. Sins Invalid's opposition, however, is not simply predicated on the harms that policing poses to individuals who are disabled. Rather, because it adopts an intersectional approach that does not value one identity category over another but instead embodies a "cross-movement solidarity" approach, it posits that disability justice is not only concerned with ableist oppression but also with racial justice, an anti-capitalist future, and environmental justice. Id. at 23–24.

166. See Chloé Deambrogio, Judging Insanity, Punishing Difference: A History of Mental Illness in the Criminal Court 26–30 (2024) (discussing the various ways twentieth-century psychiatrists pointed to "human biology" to explain mental illnesses).

167. See Amundson, supra note 85, at 51 (critiquing the biomedical model's view that "the disadvantages of disabled people result from their own abnormality").

overcome."[168] Attributing psychiatric disability to biology can also reduce sympathy toward individuals with disabilities by stressing their perennial difference and by intimating their incorrigibility.[169] The biomedical model diminishes the human contributions to shaping the experience of disability.[170] Psychiatric disabilities fit awkwardly into the biomedical model because it is not possible to establish clear biophysical origins for all psychiatric diagnoses, a point to be revisited.[171]

By contrast, the social model of disability offers a different formulation.[172] As the Union of the Physically Impaired Against Segregation explained, "[D]isability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society."[173] The social model emphasizes the social forces that amplify differences in ability and convert those into political, social,

168. Russell & Malhotra, supra note 155, at 1; see also Mingus, supra note 147 ("Disability is framed as lacking, sad and undesirable: a shortcoming at best, a tragedy at worst.").

169. See Russell & Malhotra, supra note 155, at 4 (discussing how the biomedical model led to the segregation of "those who could not be cured"); see also Deambrogio, supra note 166, at 145–48 (discussing how the biological model worsened the "social stigma" surrounding individuals' conditions).

170. See Szasz, supra note 67, at 114 ("Mental illness . . . is then regarded as the *cause* of the human disharmony. It is implicit in this view that social intercourse between people is regarded as something *inherently harmonious*, its disturbance being due solely to the presence of 'mental illness' in many people.").

171. See Deambrogio, supra note 166, at 148 (decrying the "biological reductionism proposed by the new psychiatry movement"). The biomedical model of disability became dominant in mental health studies in the twenty-first century, alongside the ascendance of the *DSM* as the "universally and uncritically accepted . . . ultimate authority on psychopathology and diagnosis." Nancy C. Andreasen, *DSM* and the Death of Phenomenology in America: An Example of Unintended Consequences, 33 Schizophrenia Bull. 108, 111 (2007). Scholar Chloé Deambrogio argues that the biomedical model emerged to salvage psychiatry's reputation as a veritable medical discipline after it had been "relegated to a caregiving function" by other branches of medicine. Deambrogio, supra note 166, at 25. Biological explanations of insanity became popular because "[t]hey enhanced psychiatrists' professional status among the various branches of medicine, justified their claims for authority and expertise over mental disease, and supported their approach to criminal responsibility." Id. And although the *DSM* has formally integrated both "medical and psychosocial components of the clinical evaluation," scholars have alleged that, in practice, the *DSM* has sacrificed the psychosocial in favor of the biomedical. Id. at 146. The orthodox view of mental illness—the term favored by the *DSM*—is that it emerges from chemical imbalances, thus making medication critical to any treatment regime. Id. The *DSM* distilled symptoms to checklists to aid in diagnosis, but one result of this simplicity is that it "tended to privilege organic factors over sociopsychological ones." Id.; see also Andreasen, supra, at 110.

172. See Ben-Moshe, Decarcerating Disability, supra note 46, at 31 ("Disability studies offers the powerful idea of disability as empowering, enabling, productive, and political.").

173. Russell & Malhotra, supra note 155, at 1 (internal quotation marks omitted) (quoting Union of the Physically Impaired Against Segregation, Fundamental Principles of Disability 3 (1976)).

and economic disadvantages.[174] But both models of disability still embrace "the statistical construction of a biological 'normal,'" explains Kiera Lyons.[175] Professor Therí Alyce Pickens argues that even "[t]he social model privileges a particular kind of mental agility and cognitive processing to combat the stigma and material consequences that arise as a result of ableism. In turn, the model dismisses madness as a viable subject position . . . ."[176] That is, both the social and biomedical models endorse the distinction between the rational and irrational, the sane and mad, that express in a person's body, even if each offers distinct causal narratives.

The two sets of axes—justice versus rights, social versus biomedical—converge because the disability justice framework explicitly embraces a social model that attends to the production of disability.[177] The social model rejects biological determinism and accounts of disability that locate the source solely in the body of the person deemed disabled. Instead, a social model forces us to scrutinize the social forces that maim, debilitate, and traumatize groups and render their members more likely to be disabled.[178] It also seeks to dismantle the multiple "systems of domination and exploitation" that produce "able-bodied supremacy."[179]

Reflecting its biomedical orientation, the CST standard refers to neurodivergence as a mental disease or mental defect.[180] The standard invites examiners to test for deficits in functioning, rather than identify the person's potential for capacity.

Furthermore, in identifying cognitive difference as a defect, the standard is guilty of sanism.[181] Sanism refers to the beliefs, practices, and institutional arrangements that posit certain mental, cognitive, emotional, and psychological modalities as superior by virtue of being normal.[182]

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174. See Mike Oliver, The Social Model of Disability: Thirty Years On, 28 Disability & Soc'y 1024, 1024–26 (2013) (assessing the success and failures of the social model of disability).

175. Lyons, supra note 1, at 2005 (quoting Elizabeth F. Emens, Framing Disability, 2012 U. Ill. L. Rev. 1383, 1401).

176. Therí Alyce Pickens, Black Madness :: Mad Blackness 32 (2019).

177. See Russell & Malhotra, supra note 155, at 1–10 (describing the efforts of certain radical disability advocacy groups in the 1970s and 1980s that resisted the medical model's individualism and embraced the social model and its invitation to confront the production of impairments).

178. See generally Jasbir K. Puar, The Right to Maim: Debility, Capacity, Disability (2017) (describing the process of debility, whereby state violence and structural injustice produce bodily injury and social exclusion).

179. See Sins Invalid, supra note 83, at 18–19, 52–53 (calling for the abolition of, among other things, Immigration and Customs Enforcement and the prison industrial complex).

180. See Drope v. Missouri, 420 U.S. 162, 173 (1975) (describing a Missouri statute that refers to defendants with "mental disease or defect" (internal quotation marks omitted) (quoting Mo. Ann. Stat. § 552.020 (1969))).

181. See Perlin, Hidden Prejudice, supra note 29, at 43–47 (enumerating the "myths" of sanism).

182. Id.

Sanism relies on a socially constructed vision of normality and categorizes divergence as problematic.[183] In contrast, Sins Invalid, a disability justice group, affirms: "All bodies are unique and essential. All bodies have strengths and needs that must be met. We are powerful, not despite the complexities of our bodies, but because of them."[184]

A finding of incompetence deprives individuals with disabilities of the autonomy to make important decisions about their legal affairs, which amounts to discrimination.[185] The Convention on the Rights of Persons with Disabilities (CRPD), the relevant international human rights treaty, explicitly rejects legal distinctions made on the basis of disability, particularly ones that deprive individuals of decisionmaking power because of their neurodivergence.[186] The CRPD framework "encourage[s] legal systems to abandon the emphasis on identifying the point at which a person is unable to express their will and preferences and therefore unable to exercise legal capacity."[187] As an alternative, the CRPD stresses the importance of creating accommodations that can enable individuals to exercise their decisionmaking capacity.[188]

Current CST procedures assume that time and treatment can guarantee participation for individuals with mental disabilities. They imply that neurodivergence is only worthy of constitutional recognition if it can

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183. See id.; Amundson, supra note 85, at 48 ("The concept of normality, and not the concept of function, controls current thought about the disadvantages caused by biological atypicality.").

184. Sins Invalid, supra note 83, at 19.

185. See G.A. Res. 61/106, Convention on the Rights of Persons With Disabilities, art. 12 (Dec. 13, 2006) (requiring state parties to take measures to ensure people with disabilities enjoy "[e]qual recognition before the law"); Statement on Article 14 of the Convention on the Rights of Persons With Disabilities, UN Hum. Rts. Off. High Comm'r (Sep. 2014), https://www.ohchr.org/en/2014/10/statement-article-14-convention-rights-persons-disabilities [https://perma.cc/XNQ5-KUNP] ("The committee has established that declarations of unfitness to stand trial and the detention of persons based on that declaration is contrary to article 14 of the convention since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant.").

186. See G.A. Res. 61/106, supra note 185, art. 12(2) ("States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.").

187. Anna Arstein-Kerslake, Piers Gooding, Louis Andrews & Bernadette McSherry, Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons With Disabilities, 17 Hum. Rts. L. Rev. 399, 406 (2017) (citing Piers Gooding & Charles O'Mahony, Laws on Unfitness to Stand Trial and the UN Convention on the Rights of Persons With Disabilities: Comparing Reform in England, Wales, Northern Ireland and Australia, 44 Int'l J.L. Crime & Just. 122, 129 (2016)).

188. See G.A. Res. 61/106, supra note 185, art. 12(3) ("States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."); Michael Bach & Lana Kerzner, A New Paradigm for Protecting Autonomy and the Right to Legal Capacity 58–72 (2010), https://www.lco-cdo.org/wp-content/uploads/2010/11/disabilities-commissioned-paper-bach-kerzner.pdf [https://perma.cc/EG9R-DNFP] (advancing a "new legal paradigm for maximizing autonomy" for individuals with disabilities as they navigate legal decisionmaking).

be treated. Restoration, ostensibly the therapeutic remedy for a person found unfit to stand trial, requires the person be cured before they can participate in court.[189] Medication is a key aspect of treatment during the restoration process, underscoring CST's biomedical orientation.[190] But some psychiatric disabilities are more responsive to medication than others, and some mental disabilities are not curable.[191] Beatrice Adler-Bolton and Artie Vierkant identify sanism in institutional policies that construct and reproduce distinctions between the incurably mad and curably mad.[192] Such categories can diminish compassion for those whose disabilities cannot be treated. These distinctions also can communicate the expectation that differently abled people must assimilate if they want to be included in society.

Once a person is found incompetent, they are, by default, involuntarily hospitalized or jailed awaiting institutionalization.[193] Institutionalization involves forced treatment, from therapy to a pharmaceutical regime.[194] Large, state-run mental health institutions have been

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189. See Fader-Towe & Kelly, supra note 92, at 1 (noting that "restoration services are designed to prepare people to participate in a courtroom process").

190. See Sell v. United States, 539 U.S. 166, 177–83 (2003) (holding that, in certain circumstances, the state may forcibly medicate a defendant found incompetent to stand trial to ensure their restoration); Fader-Towe & Kelly, supra note 92, at 6, 18, 22 (emphasizing the importance of a continued medication regiment to maintain a defendant's competency).

191. Psychiatric medications can help alleviate the symptoms of anxiety, depression, schizophrenia, and bipolar disorder. See Nat'l All. on Mental Illness, Medications Overview, https://www.nami.org/NAMI/media/NAMI-Media/Images/FactSheets/Medications-Overview-FS.pdf [https://perma.cc/7GRY-TY4P] (last updated Mar. 2015). But intellectual disabilities are not curable. Intellectual Disability (Intellectual Developmental Disorder), Psych. Today, https://www.psychologytoday.com/us/conditions/intellectual-disability-intellectual-developmental-disorder [https://perma.cc/VXJ5-QQNW] (last updated Apr. 19, 2022).

192. See Adler-Bolton & Vierkant, supra note 67, at 61 ("[A] distinction between the mad and the not-mad is constructed and reproduced by medical and psychiatric expertise, which differentiates between those who can be returned to a state of perceived normalcy . . . and those considered to be irreparably impaired, different, or otherwise clinically unable to be made normal.").

193. Pol'y Rsch. Assocs., Quick Fixes for Effectively Dealing With Persons Found Incompetent to Stand Trial 2 (2020), https://www.prainc.com/wp-content/uploads/2020/09/ISTRebrand-508.pdf [https://perma.cc/Q2QW-SDUC] ("For individuals found incompetent to stand trial (IST), restoration in almost all instances is provided in psychiatric hospitals . . . ."); see also Jackson v. Indiana, 406 U.S. 715, 738 (1972) (imposing limits on the length of detention for restoration, not to exceed "the reasonable period of time necessary to determine whether there is a substantial probability that [the defendant] will attain that capacity in the foreseeable future"); Fader-Towe & Kelly, supra note 92, at 6 ("Instead of receiving needed behavioral health treatment while awaiting evaluation, restoration, or trial, many people are left in jail, where treatment for their mental illnesses may be disrupted and their risk of symptom recurrence is increased.").

194. See *Sell*, 539 U.S. at 181 (outlining the requirements before a court may authorize a state to involuntarily medicate a defendant under restoration, including that "any

notorious for their abuse and neglect of patients.[195] Indeed, repeated scandals in and exposés about state psychiatric hospitals prompted a critical reexamination of involuntary hospitalization and helped bring about deinstitutionalization—the shuttering of residential institutions and state hospitals that warehoused thousands of people for their neurodivergence.[196] In interpreting the ADA, the Supreme Court has held that "[u]njustified isolation . . . is properly regarded as discrimination based on disability."[197] Yet despite these proclamations, state institutionalization remains the default for individuals found incompetent to stand trial. The conditions in those facilities often remain degrading, and allegations of abuse and neglect are common.[198]

C. *CST in Practice*

Nationally, courts order between twenty-five thousand and fifty thousand CST evaluations each year.[199] They are the most common forensic assessments, with public defenders expressing concerns about their clients' competency—potentially triggering these evaluations—in 10% to 15% of cases.[200] Studies suggest that 20% to 30% of assessments result in a finding of incompetency.[201] In Wisconsin, the number of CST evaluations climbed 32.5% between 2010 and 2015.[202] In Washington, between 2001 and 2012, there was a 76.3% increase.[203] Colorado reported

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alternative, less intrusive treatments," such as therapy, "are unlikely to achieve substantially the same results").

195. See supra note 46 and accompanying text.

196. See supra note 46 and accompanying text.

197. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 597 (1999).

198. See Gene Myers, Lawsuit Alleges Harrowing Conditions, Abuse in New Jersey Psychiatric Hospitals, NorthJersey.com, https://www.northjersey.com/story/news/new-jersey/2024/02/21/nj-psychiatric-hospitals-unsafe-conditions-abuse-lawsuit/72687863007/ [https://perma.cc/LLV3-93MY] (last updated Feb. 21, 2024) (reporting on a lawsuit in New Jersey that alleges that the conditions inside the state's facilities are "'more akin to psychiatric incarceration' than to a setting where patients can get proper care" and detailing sexual, physical, and emotional assaults that have caused permanent damage or death (quoting Complaint at 35, Disability Rts. N.J. v. Adelman, No. 3:24-cv-00949 (D.N.J. filed Feb. 20, 2024))).

199. See Katherine E. McCallum & W. Neil Gowensmith, Tipping the Scales of Justice: The Role of Forensic Evaluations in the Criminalization of Mental Illness, 25 CNS Spectrums 154, 155 (2020) ("Courts order an estimated 25,634–51,500 CST evaluations each year nationally, varying from fewer than 50 to approximately 5,000 per year in individual states.").

200. Melton et al., supra note 42, at 193.

201. Id.; see also Zapf et al., Have the Courts Abdicated?, supra note 34, at 28–29 ("The number of competence evaluations ordered each year in the United States has been estimated at 60,000 . . . . [A]pproximately 20% of those referred for competency evaluation [are deemed] incompetent to proceed with criminal proceedings." (citation omitted)).

202. Gowensmith, supra note 96, at 2 (describing the unprecedented increase in competency evaluations).

203. Id.

a 206% increase between 2005 and 2014.[204] Los Angeles County had a staggering 273% increase from 2010 to 2015.[205]

Lawyers and judges play a passive role when it comes to deciding who is fit to stand trial. Research consistently shows that it is forensic examiners, not judges, who make the ultimate decisions about competency.[206] Judges approve examiners' findings in all but a few cases. A 1991 meta-analysis found that "in the overwhelming majority of studies (26 of 30, or 86.7%), competency status was based entirely on decisions by a psychiatrist, a psychologist, or a team of forensic examiners."[207] In Alabama, a 2004 study found that courts agreed with examiners in 99.7% of cases.[208] Not only are contested hearings rare, but judges rarely scrutinize the information gathered or conclusions reached.[209] Once a report is filed with the court, the parties and judge simply confirm the findings.[210] Although forensic experts are instructed not to weigh in on the ultimate legal issue—whether someone is fit to stand trial—in practice the reports they file in CST proceedings form the entire basis for the court's fitness findings.[211] As a result, CST proceedings are neither adversarial nor adjudicative. Psychologist and scholar Patricia Zapf suggests that judges have abdicated their responsibility.[212] Effectively, the *Dusky–Drope* legal standard is enforced by examiners.[213]

In the absence of judicial or clinical oversight, research from the past forty years has revealed the poor quality of the reports filed with courts.[214] The *Dusky–Drope* inquiry is a predictive test, one that requires examiners to evaluate the degree to which a person will comprehend the proceedings against them and be able to participate. But evidence suggests that

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204. Id.

205. Id.

206. See Zapf et al., Have the Courts Abdicated?, supra note 34, at 39 ("The courts tend to ignore the rule that experts cannot give evidence on the ultimate issue in relation to competency evaluations." (citation omitted)); see also Christopher Slobogin, Psychiatric Evidence in Criminal Trials: To Junk or Not to Junk?, 40 Wm. & Mary L. Rev. 1, 20 (1998) [hereinafter Slobogin, Psychiatric Evidence] (noting "[m]ost forensic mental health professionals have never had their testimony challenged" on evidentiary grounds).

207. Nicholson & Kugler, supra note 76, at 357.

208. Zapf et al., Have the Courts Abdicated?, supra note 34, at 39 (showing the "higher [rate of] agreement" between courts' determinations of defendants' competence and mental health experts' determinations).

209. Id. at 39–40.

210. See id. at 36 (discussing courts' "strong reliance . . . on the report of the certified forensic examiner").

211. Id. at 41 ("[I]t may be that the report is the only piece of evidence upon which to make a determination of a defendant's competency.").

212. Id. at 41–42.

213. Melton et al., supra note 42, at 186 ("Despite the long recognition by both appellate courts and clinicians that the determination is a legal rather than clinical matter, studies have repeatedly shown that judges agree with clinicians' competence opinions in more than 90% of cases." (footnote omitted)).

214. See Zapf et al., Have the Courts Abdicated?, supra note 34, at 31–32.

examiners are not consistently testing the defendant's functioning. One study of 150 reports discovered that nearly all of the examiners omitted any discussion of the accused person's history.[215] Some examiners also failed to share their reasoning for their forensic opinion.[216] In another study, researchers discovered that reports were inconsistent as to which functional abilities they addressed and not a single report documented interactive characteristics—that is, how the defendant's functional deficits would interact with the particular demands of the trial.[217] Similarly, reports reveal that examiners fail to operationalize the competency standard: They do not connect the observed symptoms of psychopathology to legal skills needed for navigating trial.[218] Examiners also do not assess the accused's decisional competence.[219] In Alabama, "mental health examiners appear to put more weight on the defendant's knowledge and ability to participate in the proceedings than on the defendant's ability to appreciate and reason."[220] These superficial and inconsistent assessments may partly, but not entirely, be attributed to the poor quality of the testing instruments available to examiners. Many of the CST instruments are not standardized.[221] And while the first generation of tests often assessed the accused person's attitudes and knowledge rather than skills, researchers have published a second-generation instrument designed to help the expert gauge the accused's decisionmaking abilities.[222]

As trial courts have abdicated their responsibility to adjudicate, forensic examiners conduct their assessments guided by their loose

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215. See Richard Robinson & Marvin W. Acklin, Fitness in Paradise: Quality of Forensic Reports Submitted to the Hawaii Judiciary, 33 Int'l J.L. & Psychiatry 131, 135 (2010).

216. Id at 136 (finding that "66% of reports fail[ed] to document the ethically mandated notice of limits of confidentiality" and observing "a general lack of attention to quality elements" in those reports).

217. See Elisa Robbins, Judith Waters & Patricia Herbert, Competency to Stand Trial Evaluations: A Study of Actual Practice in Two States, 25 J. Am. Acad. Psychiatry & L. 469, 476–77 (1997) (reporting the numerous ways the reports differed from one another or failed to include information).

218. See Jennifer L. Skeem, Stephen L. Golding, Nancy B. Cohn & Gerald Berge, Logic and Reliability of Evaluations of Competence to Stand Trial, 22 Law & Hum. Behav. 519, 521 (1998) (discussing how the reports reflected a basic "operationalization" of the CST construct in which foundational psycho-legal abilities such as defendants' appreciation of their charges are addressed almost to the exclusion of contextually relevant decisionmaking abilities like defendants' appreciation of the benefits of plea bargaining (internal quotation marks omitted)).

219. Id. at 538–40.

220. Zapf et al., Have the Courts Abdicated?, supra note 34, at 40.

221. See Melton et al., supra note 42, at 152–58 (describing the various testing instruments examiners can use to determine competency). But see id. at 198 (noting that more recent instruments are "relatively standardized").

222. See id. at 203–09 (outlining the newer tests and noting their "greater attention to the discrete functional abilities articulated in *Dusky*").

interpretation of the *Dusky–Drope* standard,[223] which is itself already incomplete and problematic. Their reports reveal omissions in the information collected and thinly reasoned conclusions.[224] Because determining fitness to stand trial has been delegated to mental health specialists, understanding their practices is crucial to understanding how the standard is enforced.

II. PERSONALITY DISORDERS

To understand forensic experts' decisionmaking in criminal court, the following Part situates PDs in psychology and psychiatry's orthodox diagnostic typology.

A. *Classification and Presentation According to the* DSM

To diagnose a PD, examiners rely on the *DSM*'s criteria. The *DSM-5-TR* defines a PD as "an enduring pattern of inner experience and behavior that deviates markedly from the norms and expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment."[225] For a diagnosis, that enduring pattern must lead to "clinically significant distress or impairment in social, occupational, or other important areas of functioning," among other criteria.[226]

The previous finalized edition of the *DSM*—the fourth edition, text revision (*DSM-IV-TR*)—distinguished between Axis I and Axis II diagnoses; psychotic disorders fell under Axis I and PDs under Axis II.[227] The fourth edition made clear that this classification was not designed to create a hierarchy of disorders but rather to encourage diagnoses on several distinct dimensions.[228] Nonetheless, relative to psychotic disorders,

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223. See id. at 197, 203 (noting that test designers and examiners tailor their evaluations to *Dusky*).

224. See Zapf et al., Have the Courts Abdicated?, supra note 34, at 40–41 (providing results from an Alabama study that show "mental health examiners did not always address all of the [required] issues" in their assessments).

225. DSM-5-TR, supra note 15, at 733.

226. Id. at 735.

227. See Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 28 (4th ed., text rev. 2000) [hereinafter DSM-IV-TR] (listing the various diagnoses that fall under each axis).

228. See Krueger, supra note 82, at 233 ("[T]he DSM–IV–TR is careful to note that the separation of mental disorders into CDs and PDs need not imply fundamental distinctions in terms of 'pathogenesis or range of appropriate treatment' . . . ." (quoting DSM-IV-TR, supra note 227, at 28)); see also Anthony C. Ruocco, Reevaluating the Distinction Between Axis I and Axis II Disorders: The Case of Borderline Personality Disorder, 61 J. Clinical Psych. 1509, 1517 (2005) ("There is an abundance of evidence refuting the rationale for the distinction between personality disorders and Axis I conditions in terms of phenomenology, cause, and course.").

PDs are perceived as more stable in their presentation over time, less severe, presenting earlier in life, and less treatable.[229]

PD categories have shifted over time and expanded. The *DSM*'s first iteration included a broad category called sociopathic personality disturbances, a label that has since been abandoned.[230] The fourth edition of the *DSM* identified a lack of research into PDs, which undermined the credibility of its classification, and reclassified the disorders to stimulate scholarly investigation.[231] Currently, the *DSM* categorizes PDs into three clusters: A, B, and C.[232]

Cluster B disorders present themselves most frequently in a treatment setting and in the criminal legal system. Cluster B includes antisocial, borderline, histrionic, and narcissistic personality disorders.[233] According to the *DSM-5-TR*, these share common presentations: "Individuals with these disorders often appear dramatic, emotional, or erratic."[234] Antisocial personality disorder (ASPD) is recognized as "[a] pervasive pattern of disregard for and violations of the rights of others."[235] Borderline personality disorder (BPD) is defined as "[a] pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity."[236] Histrionic personality disorder is characterized by "[a] pervasive pattern of excessive emotionality and attention seeking."[237] Narcissistic personality disorder features "grandiosity[,] . . . need for admiration, and lack of empathy."[238] Symptoms of all Cluster B conditions can shape all three dimensions of human behavior relevant to legal decisionmaking: cognition, emotion, and impulse. Most evidently, these disorders can strain relationships, impede trust, and thwart collaboration, all of which are essential for attorney–client relationships.

As Lynn Williams, an individual diagnosed with BPD, explains:

> The best way I have heard borderline personality disorder described is having been born without an emotional skin—with no barrier to ward off real or perceived emotional assaults. What

229. See Krueger, supra note 82, at 234–41 (discussing the various ways PDs have been distinguished from psychotic disorders over time).

230. See Dean A. Haycock, Psychopathic, Sociopathic, or Antisocial Personality?, Psych. Today (July 2, 2019), https://www.psychologytoday.com/us/blog/tyrannical-minds/201907/psychopathic-sociopathic-or-antisocial-personality (on file with the *Columbia Law Review*) (discussing the evolution of the sociopathy diagnosis).

231. See Robert L. Trestman, DSM-5 and Personality Disorders: Where Did Axis II Go?, 42 J. Am. Acad. Psychiatry & L. 141, 141–42 (2014) (discussing the evolution of personality disorder diagnoses).

232. DSM-5-TR, supra note 15, at 734 (describing the differences between Cluster A, B, and C personality disorders).

233. Id.

234. Id.

235. Id. at 748.

236. Id. at 752.

237. Id. at 757.

238. Id. at 760.

> might have been a trivial slight to others was for me an emotional catastrophe . . . . This reaction was spontaneous and not something I chose.[239]

For people with BPD, that "thin skin" can trigger "feelings of suspicion and paranoia about the intentions of people around them."[240] Those interpersonal stresses can cause the person to dissociate and feel as though they were leaving their body.[241] John Gunderson, the foremost researcher of BPD, underscores that, although this form of neurodivergence can manifest as illogical thinking, many people with a BPD diagnosis are still able to maintain the appearance of normalcy.[242]

Professor Mala Chatterjee reminds us that the *DSM*'s checklists of symptoms only roughly approximate the internal experience of neurodivergence. Chatterjee, who has been diagnosed with BPD, explains that the criteria in the *DSM* are mere "shadows" that the disorder casts; they are only "outward reverberations rather than what seethes inside."[243] As for the common portrayal of "borderlines," as she puts it, who "behave in impulsive and destructive ways toward others," she explains that "these behaviors are not cruel, callous, or calculated. Rather, they are desperate and compulsive attempts at alleviating pain."[244] Diagnosis, Chatterjee underscores, should trigger the relief of recognition, but given societal views of BPD, it instead brings a feeling of shame often associated with difference.[245]

The *DSM* did not entirely displace other modes of categorizing different personality traits. In particular, the labels of "sociopathy" and "psychopathy," which became popular in the early to mid-twentieth century, have retained currency, independent of the *DSM*.[246] At times,

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239. Lynn Williams, A "Classic" Case of Borderline Personality Disorder, 49 Psychiatric Servs., 173, 173 (1998).

240. Understanding Borderline Personality Disorder: A Complete Guide, Mass Gen. Brigham McLean (Aug. 7, 2025), https://www.mcleanhospital.org/essential/bpd (on file with the *Columbia Law Review*).

241. Id. ("Dissociation feels like being spaced out, foggy, or as if you exist outside of your own body.").

242. See Diana Kwon, Borderline Personality Disorder May Be Rooted in Trauma, Sci. Am. (Jan. 1, 2022), https://www.scientificamerican.com/article/borderline-personality-disorder-may-be-rooted-in-trauma [https://perma.cc/CK5M-AVV5] ("Gunderson defined six key features [that] people [with a BPD diagnosis] shared . . . [including:] illogical or 'loose' thinking as evident in, for example, bizarre responses in unstructured psychological tests; and an ability to uphold an outward appearance of normalcy.").

243. Mala Chatterjee, Transcendent Luminescence, Ravaging Flames: On Alexander Kriss's "Borderline", L.A. Rev. Books (June 19, 2024), https://lareviewofbooks.org/article/transcendent-luminescence-ravaging-flames-on-alexander-krisss-borderline/ [https://perma.cc/XVJ5-C5UW].

244. Id.

245. Id.

246. See DSM-5-TR, supra note 15, at 885 (discussing a form of ASPD with psychopathic features); Haycock, supra note 230 (discussing the distinctions between sociopathic, psychopathic, and antisocial PDs).

sociopathy, psychopathy, and ASPD have been used interchangeably,[247] but they represent distinct constellations of behaviors and diagnostic approaches.[248] Hervey Cleckley, a forensic psychiatrist from the mid-twentieth century, derisively described a person with psychopathy as "a self-absorbed loner, an egocentric subject who, unable to feel genuine emotions of love and empathy, would carelessly crush other people's feelings to pursue [their] own needs."[249] Psychoanalysts, by contrast, embraced the diagnostic category but argued psychopathy stemmed from trauma, requiring sympathy from treatment providers.[250] Meanwhile, the *DSM-5-TR* no longer recognizes psychopathy as a stand-alone PD but instead categorizes it as a specification to ASPD.[251]

In *Sociopath: A Memoir*, Patric Gagne narrates her discomforting journey with her diagnoses of ASPD, sociopathy, and psychopathy. Gagne opens her text with a provocative confession: "I'm a liar. I'm a thief. I'm emotionally shallow. I'm mostly immune to remorse and guilt. I'm highly manipulative. I don't care what other people think. I'm not interested in morals. I'm not interested, period. Rules do not factor into my decision-making. I'm capable of almost anything."[252] But she also explains that, from a young age, her pattern of causing harm stemmed from irresistible urges:

> Had you asked me back then, I would have described this compulsion as a *pressure*, a sort of tension building in my head. It

247. See DSM-5-TR, supra note 15, at 748 ("The essential feature of antisocial personality disorder is a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood. This pattern has also been referred to as *psychopathy, sociopathy*, or *dyssocial personality disorder*."); Partridge, supra note 82, at 55 (defining sociopathy as a common trait across psychopathic disorders that expresses itself as "anything deviated or pathological in social relations, whether of individuals with one another, or within or towards groups, and also in the relations of groups to one another"); see also id. at 75–81 (noting the absence of any consensus about how to distinguish between sociopathy, psychopathy, and specific disordered personality traits).

248. See Haycock, supra note 230 (noting distinctions between the different terms).

249. Deambrogio, supra note 166, at 119 (citing Hervey Cleckley, The Mask of Sanity: An Attempt to Reinterpret the So-Called Psychopathic Personality 241–42 (1st ed., The C.V. Mosby Co. 1941)); see also Robert D. Hare, David J. Cooke & Stephen D. Hart, Psychopathy and Sadistic Personality Disorder, *in* Oxford Textbook of Psychopathology 555, 555–57 (Theodore Millon, Paul H. Blaney & Roger D. Davis eds., 1999) (building on Cleckley's definition of psychopathy and defining it as "a specific form of personality disorder with a distinctive pattern of interpersonal, affective, and behavioral symptoms").

250. See Deambrogio, supra note 166, at 119–20 ("By aligning themselves with the changed cultural context and by respecting narcissists' emotional needs, psychoanalytic reformers could express sympathy and understanding for those who rejected family life, pursued activities and professions that served no social purpose, and expressed ideas and beliefs that challenged the established order." (citing Eli Zaretsky, Secrets of the Soul: A Social and Cultural History of Psychoanalysis 315 (2004))).

251. See DSM-5-TR, supra note 15, at 885–86 (describing a variance of ASPD termed psychopathy or "'primary' psychopathy").

252. Patric Gagne, Sociopath: A Memoir, at xiii (2024).

> was like mercury slowly rising in an old-fashioned thermometer. At first it was barely noticeable, just a blip on my otherwise peaceful cognitive radar. But over time it would get stronger. The quickest way to relieve the pressure was to do something undeniably wrong, something I knew would absolutely make anyone else feel one of the emotions I couldn't. So that's what I did.[253]

B. *Contested Status*

PDs are a matter of considerable controversy within the mental health community. All psychiatric disorders struggle with credibility because they comport poorly with the biomedical model of disease that predominates in psychology and psychiatry.[254] Many diagnoses listed in the *DSM* have neither a clear biological origin nor a guaranteed course of treatment.[255] Diagnostic testing instruments exist but have been criticized as being insufficiently technical and superficial.[256] The *DSM*, however, clarifies that etiology does not control diagnosis.[257] Instead, it embraces a "purely descriptive approach," captured by the series of checklists of "behavioral symptoms" that are grounded in clinical judgments, rather than neuroscientific testing or experimental results.[258] But these qualifications within

253. Id. at xiv–xv.

254. This was not always the case. Early twentieth-century forensic psychiatrists described both insanity and criminality as the products of savage, uncivilized women and men. Deambrogio, supra note 166, at 30. Discourse shifted toward eugenics and racial inferiority, then into a puritan ethic of idleness. Id. at 31–33. At this time, Freudian psychoanalysis dominated in the United States, alongside eugenic and puritan discourses, but, gradually, scientific discourses about the brain and human behavior came into vogue and explained human behavior through base instincts and biology. Id. at 27, 32. By the 1960s, there was increasing concern amongst clinicians that the Freudian emphasis of psychodynamics had compromised diagnostic precision. Id. at 131–32. The *DSM-III*, published in 1980, marked a definitive departure and the rise of a new biomedical orthodoxy in behavioral health. Id. at 145. It supplanted other methods of studying and treating psychiatric distress. Id. at 132, 145. The *DSM* has since served as the ultimate and final authority on psychopathology and diagnosis, despite the text's own far more modest and schematic ambitions. Andreasen, supra note 171, at 111. It aimed to integrate both biological and psychosocial dimensions of clinical assessment but emphasized the former. Deambrogio, supra note 166, at 132, 146. While it aims to be comprehensive and serve as the standard, it crowds out other modes of treatment, nosology, and modes of conceiving of disease and disability. Andreasen, supra note 171, at 111.

255. See Deambrogio, supra note 166, at 35 (noting psychopathy is "without a clear organic origin").

256. See id. at 35–36 ("[W]hen dealing with mental health conditions without a clear organic origin . . . psychiatrists lacked . . . technical instruments.").

257. See DSM-5-TR, supra note 15, at 29–30 (noting that "a diagnosis does not carry any necessary implications regarding . . . etiology").

258. See Deambrogio, supra note 166, at 35 (noting that examiners often "rely on a purely descriptive approach, based on the observation of behavioral symptoms and physical characteristics" for mental health conditions); see also DSM-5-TR, supra note 15, at xxiii–xxiv (noting that "current diagnostic criteria" rely on "how mental disorders are expressed and can be recognized by trained clinicians").

the *DSM* have not settled the significance imputed to etiology and the biological origins of mental illness. PDs, along with other disorders,[259] have attracted heightened scrutiny because there is a widespread impression that they are less anchored in biology, less severe, and less responsive to treatment than psychotic disorders like schizophrenia.[260] But emerging research debunks these common impressions.[261]

How does one ascertain abnormal personality traits caused by a disorder? PDs tend to be consistent with the individual's sense of self.[262] Because these disorders affect a person's emotional, cognitive, and behavioral patterns—and thus their character—psychologists and philosophers have struggled to distinguish the person from the disorder.[263] Legal scholar Jill Peay remarks that when the "'personality disorder' is central to the individual's make-up, . . . the rational and the irrational, the

259. See Richard J. Bonnie, Compulsive Gambling and the Insanity Defense: *United States v. Torniero* and *United States v. Lewellyn*, 9 Am. Acad. Psychiatry & L. 5, 5–8 (1984) [hereinafter Bonnie, Compulsive Gambling] ("Two federal courts have recently held, as a matter of law, that psychiatric evidence purporting to show that the defendant suffered from 'pathological gambling disorder' cannot be introduced in support of an insanity claim."). Under federal law, since the Insanity Defense Reform Act of 1984 was enacted, the insanity defense has only been available to defendants who substantially lack rational capacity. 18 U.S.C. § 17 (2018). The Federal Sentencing Guidelines, however, permit downward departures for defendants if they can establish a significant impairment of their ability to control behavior that they otherwise know is wrongful. U.S. Sent'g Guidelines Manual § 5K2.13 (U.S. Sent'g Comm'n 2024); see also Transcript of Sentencing at 81–82, United States v. Caspersen, 275 F. Supp. 3d 502 (S.D.N.Y. 2017) (No. 16-cr-00414-JSR) (on file with the *Columbia Law Review*) (granting the defendant a downward departure due to his gambling addiction, among other things).

260. See Kamila Belohradova Minarikova, Jan Prasko, Michaela Holubova, Jakub Vanek, Krystof Kantor, Milos Slepecky, Klara Latalova & Marie Ociskova, Hallucinations and Other Psychotic Symptoms in Patients With Borderline Personality Disorder, 18 Neuropsychiatric Disease & Treatment 787, 788 (2022) (assessing the "evidence against the long-standing concept that psychotic signs in BPD are different and less severe than in psychotic disorders"); Katherine A. Fowler, William O'Donohue & Scott O. Lilienfeld, Introduction: Personality Disorders in Perspective, *in* Personality Disorders: Toward the *DSM-V*, at 1, 10–12 (William O'Donohue, Katherine A. Fowler & Scott O. Lilienfeld eds., 2007) (describing "myriad surrounding controversies" of PDs); John Gunderson, Sara Masland & Lois Choi-Kain, Good Psychiatric Management: A Review, 21 Current Op. Psych. 127, 127 (2018) (explaining how, prior to the 1990s, many psychologists believed that BPD was "untreatable"); Thomas A. Widiger, Alternatives to *DSM-IV*: Axis II, *in* Personality Disorders: Toward the *DSM-V*, supra, at 21, 23 (noting a common perception that there is not quality treatment for PDs).

261. See Marialuisa Cavelti, Katherine Thompson, Andrew M. Chanen & Michael Kaess, Psychotic Symptoms in Borderline Personality Disorder: Developmental Aspects, 37 Current Op. Psych. 26, 26–27 (2021) (explaining how individuals with BPD can exhibit many of the same symptoms as individuals with psychosis).

262. See Kevin Bennett, When You Can't See Your Own Illness, Psych. Today (Dec. 29, 2022), https://www.psychologytoday.com/us/blog/modern-minds/202203/when-you-cant-see-your-own-illness [https://perma.cc/SSX6-A48S] ("Most personality disorders are considered ego-syntonic because they do not conflict with your sense of identity.").

263. See Peay, supra note 25, at 240–41.

capacitous and the incapacitous, are almost impossible to disentangle."[264] Therefore, "there is no clear distinction, other than a moral one judged by others, between the true path and the disordered path."[265]

Furthermore, the traits associated with PDs are present in the general population. As a result, the *DSM-5-TR* advances a categorical approach to PDs, in which "personality disorders are qualitatively distinct clinical syndromes."[266] It also, however, credits the dimensional approach, which sees PDs as "impairments in personality *functioning* and pathological personality *traits*" on a "continuum with other mental disorders."[267]

How are PDs different from other psychiatric disorders? Among clinicians, there is a tendency to assume that PDs do not produce cognitive deficits, but empirical research does not confirm such assertions. Research suggests that both individuals with schizophrenia and individuals with PDs can display cognitive deficits.[268] Studies suggest that having BPD, for example, can undermine executive functioning.[269]

Research also points toward the significant overlap between psychotic disorders and PDs. The term "borderline" comes from a time when the diagnosis was used to describe people who were experiencing symptoms on the border between neurosis and psychosis.[270] The theory, at the time, was that the borderline disorder was "latent schizophrenia."[271] Eventually, the *DSM* moved to distinguish BPD from psychotic disorders. In its current iteration, the *DSM*'s definition recognizes that a person with BPD can experience some of the same symptoms seen in schizophrenia, but it distinguishes those symptoms as transient in BPD, noting the symptoms manifest as either "stress-related paranoid ideation or severe dissociative

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264. Id. at 241.

265. Id. at 240.

266. DSM-5-TR, supra note 15, at 734.

267. Id. at 734, 881 (emphasis added).

268. See Ian Barkataki, Veena Kumari, Mrigendra Das, Mary Hill, Robin Morris, Paul O'Connell, Pamela Taylor & Tonmoy Sharma, A Neuropsychological Investigation Into Violence and Mental Illness, 74 Schizophrenia Rsch. 1, 9 (2005) ("[B]oth violent and nonviolent schizophrenia groups had global deficits involving measures of general intellectual functioning . . . ."); Kinscherff, supra note 23, at 750 ("The functional impairments associated with personality disorders can be severe and similar to the functional impairments associated with mental disorders that would be permitted for consideration of nullification of criminal responsibility." (emphasis omitted)).

269. See Paola Bozzatello, Cecilia Blua, Claudio Brasso, Paola Rocca & Silvio Bellino, The Role of Cognitive Deficits in Borderline Personality Disorder With Early Traumas: A Mediation Analysis, J. Clinical Med., Feb. (I) 2023, at 1, 2 ("Among cognitive deficits, the impairment of executive functions and social cognition is considered a prominent feature of BPD patients . . . . In BPD patients, significant deficits were found in working memory processes, activities of planning and problem solving, set shifting, and decision making.").

270. See Introduction: Personality Disorders, *in* First Person Accounts of Mental Illness and Recovery 197, 198 (Craig Winston LeCroy & Jane Holschuh eds., 2012) ("From the late 1930s into the 1970s, the term *borderline* was used to describe people with symptoms on the borderline between neurosis and psychosis.").

271. Id.

symptoms."[272] The heart of the BPD diagnosis is emotional dysregulation, characterized by bursts of emotions that are hostile or depressive.[273]

PDs can share symptoms with psychotic disorders, and psychotic disorders can also manifest as divergent PDs.[274] Psychotic symptoms—hallucinations, delusions, and confused and disturbed thoughts—are best described as transdiagnostic because they can appear in schizotypal personality disorder, BPD, and schizophrenia.[275] The shared symptomology across PDs and psychotic spectrum disorders has led researchers and clinicians to call for a reevaluation of the current diagnostic approach.[276] Research demonstrates that PDs are best understood as the expressions of

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272. See DSM-5-TR, supra note 15, at 752–53, 757 ("Paranoid ideas or illusions may be present in both borderline personality disorder and schizotypal personality disorder, but these symptoms are more transient, interpersonally reactive, and responsive to external structuring in borderline personality disorder."); accord Kwon, supra note 242 ("For years 'borderline' remained a nebulous concept. It did not become an official diagnosis until the 1970s, when John Gunderson, a psychiatrist at McLean Hospital in Massachusetts, carefully examined and characterized a group of patients he noticed had been misdiagnosed with schizophrenia.").

273. See Introduction: Personality Disorders, supra note 270, at 198 ("Current theory on BPD holds that a central part of the disorder is emotional dysregulation, an inability to regulate intense emotions that become overwhelming.").

274. See Maria Gruber et al., Personality Functioning and Self-Disorders in Individuals at Ultra-High Risk for Psychosis, With First-Episode Psychosis and With Borderline Personality Disorder, Brit. J. Psychiatry Open, Sep. 2023, at 1, 6 ("Our results demonstrate that psychosis spectrum disorders are associated with impaired personality functioning."); Christian G. Huber, Lisa Hochstrasser, Klara Meister, Benno G. Schimmelmann & Martin Lambert, Evidence for an Agitated-Aggressive Syndrome in Early-Onset Psychosis Correlated With Antisocial Personality Disorder, Forensic History, and Substance Use Disorder, 175 Schizophrenia Rsch. 198, 202 (2016) ("These results indicate that a trait component of increased agitation and aggression may exist that is different for early-onset and adult-onset psychosis."); Aurelie Schandrin, Shona Francey, Lucia Nguyen, Dean Whitty, Patrick McGorry, Andrew M. Chanen & Brian O'Donoghue, Co-Occurring First-Episode Psychosis and Borderline Personality Pathology in an Early Intervention for Psychosis Cohort, 17 Early Intervention Psychiatry 588, 595 (2023) ("Borderline personality pathology is a common occurrence in psychotic disorders and is associated with more severe hallucinations and depression with higher risks of self-harm.").

275. See Sivasankaran Balaratnasingam & Aleksandar Janca, Normal Personality, Personality Disorder and Psychosis: Current Views and Future Perspectives, 28 Current Op. Psychiatry 30, 30 (2015) ("This overlap of symptoms [between psychotic disorders and personality disorders] present difficulties for practising clinicians in terms of diagnosis and in turn, treatment."); Joana Henriques-Calado, Rute Pires, Marco Paulino, João Gama Marques & Bruno Gonçalves, Psychotic Spectrum Features in Borderline and Bipolar Disorders Within the Scope of the *DSM-5* Section III Personality Traits: A Case Control Study, Borderline Personality Disorder & Emotion Dysregulation, Jan. 2023, at 1, 2 ("The innermost relationship of the borderline concept and psychosis has been historically intertwined and can be traced back to the twentieth century. Psychotic spectrum features in borderline personality disorder (PD) are a long-standing phenomenon . . . ." (footnote omitted)).

276. See Widiger, supra note 260, at 26–27 (discussing proposals to recategorize PDs as variants of other disorders).

psychotic disorders.[277] Furthermore, the robustly documented relationship between adverse childhood experience and the traits of PDs has led some to conclude that these conditions are expressions of trauma.[278]

What causes PDs? There remains "no consensus on underlying neuropathology or the optimum approach to diagnosis."[279] The disorders' "inadequate scientific base" has led to significant dissatisfaction with the current approach.[280] In psychology and psychiatry, unlike internal medicine, the symptoms and the disease are one and the same. The underlying cause for mental distress is not always discernible or treatable. Importantly, the *DSM-5-TR* is agnostic about etiology; diagnosis does not require establishing a cause.[281]

Psychologists John Gunderson and William Pollack note there is a "tendency to assume divergent etiologic primacy" for psychotic and personality disorders.[282] For example, clinicians and examiners have tended to reserve neuropsychological testing for disorders like psychosis and to favor psychological tests for conditions like PDs.[283] But "convergent research in neurocognitive sciences and behavioral genetics has increasingly rendered meaningless any distinction between those mental disorders with a 'biological' basis and those that are 'merely' a 'psychological' disorder."[284] There is increasing evidence from neurocognitive science "demonstrating the neural substrates of personality disorders."[285] Twin

277. See Kinscherff, supra note 23, at 749 ("[T]he personality disorders are developmental *endpoints*, most typically built upon a series of preceding heritable traits and individual adverse life circumstances combining in ways to fashion underlying neural architectures that often would have precedent Axis I diagnoses before being 'clustered' to yield a personality disorder on Axis II." (footnote omitted)).

278. See Nan Zhao, Dianhong Shi, Juan Huang, Qiuying Chen & Qiang Wang, Comparing the Self-Reported Personality Disorder Traits and Childhood Traumatic Experiences Between Patients With Schizophrenia vs. Major Depressive Disorder, Frontiers Psychiatry, Oct. 2021, at 1, 2 ("Importantly, the relationship between PD traits and [childhood traumatic experience] is extremely close, and they can both affect subsequent psychiatric disorders.").

279. Trestman, supra note 231, at 142.

280. See Fowler et al., supra note 260, at 22–26 (outlining the various issues involved in the current process of diagnosing PDs).

281. See DSM-5-TR, supra note 15, at 30 ("Nonclinical decision-makers should also be cautioned that a diagnosis does not carry any necessary implications regarding the etiology or causes of the individual's mental disorder or the individual's degree of control over behaviors that may be associated with the disorder.").

282. John G. Gunderson & William S. Pollack, Conceptual Risks of the Axis I-II Division, *in* Biological Response Styles: Clinical Implications 82, 86 (Howard Klar & Larry J. Siever eds., 1985); see also Krueger, supra note 82, at 245 ("Historically speaking, there has been a tendency for clinicians to regard [Clinical Disorders] as more genetic in etiology . . . whereas PDs were regarded as more environmental in etiology . . . .").

283. See Gunderson & Pollack, supra note 282, at 85–86.

284. Kinscherff, supra note 23, at 748.

285. Id.; see also Veena Kumari, Mrigen Das, Sheilagh Hodgins, Elizabeth Zachariah, Ian Barkataki, Michael Howlett & Tonmoy Sharma, Association Between Violent Behaviour and Impaired Prepulse Inhibition of the Startle Response in Antisocial Personality Disorder

studies[286] show that personality pathology is inheritable.[287] In fact, one study suggests that the heritability of PDs "approximates or exceeds" the heritability of some psychotic disorders.[288] Studies have also established physiological differences in individuals who meet the criteria for psychopathy.[289]

Do PDs respond to treatment? Because PDs appear in adolescence and become a durable part of a person's makeup, there is a common perception that they are untreatable.[290] PDs have been "defined in such a way as to be ingrained aspects of a person's behavior, affect, and cognition that are fundamentally problematic for the person and/or society, as well as for the essential ingredients of intervention, such as the ability to establish a good working relationship."[291] Yet, notwithstanding this dominant historical conceptualization, there is evidence that effective treat-

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and Schizophrenia, 158 Behav. Brain Rsch. 159, 160 (2005) ("There is also evidence for an association between certain neurotransmitter systems, which are known to influence [prepulse inhibition of the startle response], and violence. . . . A large number of studies have reported impaired [prepulse inhibition of the startle response] in schizophrenia." (footnote omitted)).

286. Twin studies examine twins to "distinguish[] between the effects of tendencies received due to genes at birth and those imposed by the different environments they were exposed to during their lives after birth." Monalisha Sahu & Josyula G Prasuna, Twin Studies: A Unique Epidemiological Tool, 41 Indian J. Cmty. Med. 177, 177 (2016).

287. Krueger, supra note 82, at 246 ("The twin method has been applied to the study of personality pathology, and the results show clearly that personality pathology, like other forms of psychopathology, is significantly heritable." (citations omitted)).

288. See Kinscherff, supra note 23, at 748.

289. These physiological differences manifest in the brain:

> [I]t was possible to find that psychopaths have reduced gray matter in their frontal lobes, increased striatal volume, abnormal asymmetry in the hippocampus, a larger corpus callosum, a lack of structural integrity in the uncinate fasciculus, abnormal activity in the anterior cingulate cortex (ACC), and deformations within the amygdala. . . . [A]ll of these neurological studies have added an immense amount of knowledge to what it means biologically to be a psychopath.

Jack Pemment, Psychopathy Versus Sociopathy: Why the Distinction Has Become Crucial, 18 Aggression & Violent Behav. 458, 459 (2013) (footnote omitted) (citations omitted). But it would be a mistake to say ASPDs are the same as psychopathy. Though often conflated, neuroimaging suggests these are distinct conditions. See Lynch & Perlin, supra note 76, at 455 ("Emerging research using neuroimaging is demonstrating that the brain of a psychopath responds differently to punishment than the brains of other non-psychopathic criminal offenders." (footnote omitted)).

290. See Fleenor v. Farley, 47 F. Supp. 2d 1021, 1066 (S.D. Ind. 1998) (noting the testimony from a defense-hired psychologist who testified that the defendant's personality disorder would be "quite resistant to treatment" (internal quotation marks omitted) (quoting Dr. Paul Campbell)), aff'd sub nom., Fleenor v. Anderson, 171 F.3d 1096 (7th Cir. 1999); Gunderson et al., supra note 260, at 127 (noting the "growing consensus" that BPD is untreatable).

291. Krueger, supra note 82, at 239.

ment for some PDs, including BPD, exists.[292] Dialectical behavior therapy can reduce the likelihood of more intrusive emergency interventions.[293] Pharmacologic interventions, like medications, have been successful in addressing the psychopathological processes shared by PDs and other clinical disorders.[294]

Do the diagnostic categories predictably match distinct psychological profiles? Because there are several criteria that can establish any given personality disorder, two people with the same diagnosis may present very differently. In clinical practice, the same person can be assigned different diagnoses. Such "excessive diagnostic co-occurrence" suggests the criteria distinguishing each unique disorder are not accurate.[295] Clinicians frequently diagnose by impression rather than abide by the *DSM*'s criteria.[296] The instability of diagnostic categories has led scholars to call for a different nosological framework.[297]

Who opposes this category of disorders? Capital defense attorneys have long been skeptical of PDs.[298] There is a perception that in death

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292. See Falk Leichsenring & Eric Leibing, The Effectiveness of Psychodynamic Therapy and Cognitive Behavior Therapy in the Treatment of Personality Disorders: A Meta-Analysis, 160 Am. J. Psychiatry 1223, 1223 (2003) (stating that "psychotherapy . . . is an effective treatment for personality disorders"); J. Christopher Perry, Elisabeth Banon & Floriana Ianni, Effectiveness of Psychotherapy for Personality Disorders, 156 Am. J. Psychiatry 1312, 1318 (1999) (discussing various studies analyzing the effects of treatments on PDs); Adrian Raine, Schizotypal Personality: Neurodevelopmental and Psychosocial Trajectories, 2 Ann. Rev. Clinical Psych. 291, 312 (2006) ("In contrast, multiple intervention studies indicate that neuroleptic medication is an effective treatment for schizotypy.").

293. See Marsha M. Linehan, Hubert E. Armstrong, Alejandra Suarez, Douglas Allmon & Heidi L. Heard, Cognitive-Behavioral Treatment of Chronically Parasuicidal Borderline Patients, 48 Archives Gen. Psychiatry 1060, 1063 (1991) ("[D]ays of inpatient psychiatric hospitalization were fewer for subjects who received DBT than for control subjects."); Paul J. Markovitz, Recent Trends in the Pharmacotherapy of Personality Disorders, 18 J. Personality Disorders 90, 90–101 (2004); see also Anthony Bateman & Peter Fonagy, Effectiveness of Partial Hospitalization in the Treatment of Borderline Personality Disorder: A Randomized Controlled Trial, 156 Am. J. Psychiatry 1563, 1568 (1999) ("Patients treated with partial hospitalization for 18 months showed significant improvement on both symptomatic and clinical measures.").

294. See Krueger, supra note 82, at 239 ("Nevertheless, psychotherapy can be effective in PDs, as can pharmacotherapy." (citations omitted)).

295. Fowler et al., supra note 260, at 10–12, 22–24; Mark D. Cunningham & Thomas J. Reidy, Antisocial Personality Disorder and Psychopathy: Diagnostic Dilemmas in Classifying Patterns of Antisocial Behavior in Sentencing Evaluations, 16 Behav. Scis. & L. 333, 334–36 (1998) (discussing ASPD's diagnostic weaknesses in the *DSM-IV*).

296. Trestman, supra note 231, at 142.

297. See, e.g., Fowler et al., supra note 260, at 6 ("The predictive utility and perhaps even the existence of personality itself have been called into question." (emphasis omitted)); see also Widiger, supra note 260, at 26 ("One proposal for DSM-V is to abandon the concept of a personality disorder. Proposals have been made to redefine personality disorders as early onset, chronic variants of existing Axis I disorders." (citations omitted)).

298. See, e.g., Kathleen Wayland & Sean D. O'Brien, Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels, 42 Hofstra L. Rev. 519, 525 (2013) ("Testimony labeling a capital

penalty cases, a PD diagnosis tends to foreclose opportunities for mitigation and aggravate outcomes.[299] The capital defense community has criticized the use of these disorders as convenient shortcuts taken by unsympathetic examiners.[300] Furthermore, practitioners have suggested that PDs are not discrete disorders but symptoms of deeper, but unexamined, trauma.[301] Capital defense litigation strategy thus involves challenging examiners who reach that diagnosis and hiring experts who identify different symptomology.[302] Neoconservative critics writing in the 1990s, after the passage of the ADA, saw PDs as "the psychiatric profession's success in medicalizing emotional problems."[303] This kind of criticism looked for neat equivalences between physical diseases and mental disorders and, failing to find them, expressed skepticism about the *DSM*'s incorporation of PDs.[304]

More broadly, there is a resilient cultural skepticism toward PDs because they are associated with criminal offending. The empirical connection between PDs and contact with the criminal legal system may mean that "personality disorders have to some degree lost their identity as

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defendant antisocial or psychopathic has one overriding purpose: to obtain and carry out a sentence of death.").

299. See id. ("Judicial decisions discussing ASPD and psychopathy almost uniformly reflect reliance on the dehumanizing stereotype."); see also Lynch & Perlin, supra note 76, at 471–74 (examining the prejudicial impact of a psychopathy diagnosis on defendants of color). But see Deborah W. Denno, The Myth of the Double-Edged Sword: An Empirical Study of Neuroscience Evidence in Criminal Cases, 56 B.C. L. Rev. 493, 503 (2015) [hereinafter Denno, The Myth of the Double-Edged Sword] (finding "neuroscience evidence is usually offered to mitigate punishments in the way that traditional criminal law has always allowed, especially in the penalty phases of death penalty trials," which "controverts the popular image of neuroscience evidence" as something that either "get[s] defendants off the hook" or "unfairly brand[s] them").

300. See Wayland & O'Brien, supra note 298, at 522–31 (criticizing forensic evaluators' misuses of PD diagnoses in capital cases).

301. See, e.g., id. at 540 ("[E]xcessive focus on antisocial behavior without attention to contextual factors such as trauma history, thought or mood disorders, and neuropsychological dysfunction, may lead to failure to identify relevant diagnostic considerations."); Kathleen Wayland, The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations, 36 Hofstra L. Rev. 923, 947 (2008) ("A major problem leading to frequent misdiagnoses of ASPD in the capital setting is that mental health evaluators routinely ignore guidelines of the DSM [III] which suggest the importance of understanding behavior in context in order to properly identify symptoms.").

302. See, e.g., Russell v. State, 849 So.2d 95, 141 (Miss. 2003) (en banc) (relaying that the defense expert's testimony rejected the state's experts' conclusions, calling them "flawed" and noting that an antisocial PD diagnosis can be the product of "racial bias"); State v. Jenkins, 931 N.W.2d 851, 867 (Neb. 2019) (noting the disagreement between state and defense experts in a death penalty case).

303. G.E. Zuriff, Medicalizing Character, 123 Pub. Int. 94, 97 (1996).

304. See id. at 95–98 (noting that the *DSM*'s attempt to include PDs is "disturbing" and contradicts the *DSM*'s own logic).

mental illnesses, and instead are often seen as common population characteristics."[305]

C. *Transinstitutional Hostility*

Across spheres of life, individuals with PDs are regularly denied recognition as disabled.[306] They face hostility as they seek care or accommodation. The signs of these diagnoses tend to prompt negative reactions, in part because they are not unique to disability but commonly disvalued traits.[307]

In employment discrimination suits, courts have denied redress to plaintiffs with PDs.[308] Scholar Adi Goldiner has surveyed cases involving employees with PDs defending themselves against termination for misconduct by attributing their behavior to their disability.[309] Goldiner reveals that "[c]ourts typically hold that employees who engaged in impairment-related misconduct are not disabled, not otherwise qualified for the job, or that the adverse action against such employees was not because of their disability."[310]

In healthcare settings, people with BPD diagnoses report experiencing hostility. For example, while self-mutilation, suicidal behavior, and other behaviors that require attention from health service providers are established features of BPD's clinical profile,[311] people diagnosed with BPD have revealed that their healthcare providers accuse them of engaging in attention-seeking behavior.[312] In an effort to dispel providers' hostility, Lynn Williams wrote: "The first misconception most people have about borderline personality disorder is that its dramatic manifestations

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305. Sally C. Johnson & Eric B. Elbogen, Personality Disorders at the Interface of Psychiatry and the Law: Legal Use and Clinical Classification, 15 Dialogues Clinical Neuroscience 203, 208 (2013).

306. See Young et al., supra note 39, at 714 ("For disability cases, BPD was often introduced by the Social Security Administration (SSA) Commissioner or administrative law judge (ALJ) to rebut the Cluster B litigant's claim of disability."); id. at 718 ("In general, Cluster B personality disorders were treated negatively in case law and were solely used to support the termination of parental rights.").

307. See Coppola, supra note 76, at 27 ("There is consequently a tendency—in criminal law as well as in common understanding—to qualify patients suffering from pathological socioaffective deficits as iconic wrongdoers, as 'evil' individuals who constantly and willingly reject and break the rules of societal coexistence.").

308. See Adi Goldiner, Moral Accommodations: Tolerating Impairment-Related Misconduct Under the Americans With Disabilities Act, 54 Colum. Hum. Rts. L. Rev. 171, 175 (2022) (describing how courts almost exclusively rule against plaintiffs with PDs in employment discrimination cases).

309. See id.

310. Id. at 202.

311. See, e.g., Williams, supra note 239, at 173–74 ("[W]hen I was acutely ill, no other options besides my suicidal behavior existed.").

312. See id. (offering a first-hand account of the experience of BPD and correcting misconceptions).

such as reckless or suicidal behavior are merely deliberate, manipulative attempts to get attention. That is not true. The distress is real."[313] Williams is not alone in noting the suspicion toward BPD and other Cluster B disorders.[314] Researchers have documented how the personality traits associated with PDs can prompt negative and prejudicial responses.[315] Those who are responsible for caring for individuals with BPD report more negative experiences with professional medical care providers than those caring for individuals with psychosis.[316]

The American Law Institute's Model Penal Code specifically excluded ASPD from the definition of mental disease or defect, excluding any "abnormality manifested only by repeated criminal or otherwise anti-social conduct."[317] Federal law denies the insanity defense to defendants whose only diagnosis is a PD.[318] Case law suggests courts often treat ASPD as an aggravating factor at sentencing.[319]

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313. Id. at 173.

314. See, e.g., Goldiner, supra note 308, at 177 ("[P]eople with BPD face negative social stigma and disadvantage on the basis of their diagnosis and related symptoms.").

315. Id.

316. Sue M. Cotton et al., A Comparison of Experiences of Care and Expressed Emotion Among Caregivers of Young People With First-Episode Psychosis or Borderline Personality Disorder Features, 56 Australian & N.Z. J. Psychiatry 1142, 1147 (2022) (describing "caregivers of young people with BPD" as reporting "problems with services," including problems with mental health professionals not taking them seriously).

317. Model Penal Code § 4.01(2) (Am. L. Inst., Proposed Official Draft 1962); see also Young et al., supra note 39, at 717 ("Overall, Cluster B litigants who argued the insanity defense were unsuccessful on their appeals . . . ."). Under section 4.01(1), a "person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." Model Penal Code § 4.01(1) (brackets in original).

318. See, e.g., United States v. Salava, 978 F.2d 320, 323 (7th Cir. 1992) ("The government relies on the legislative history of 18 U.S.C. § 17, which states: 'The concept of severity was added to emphasize that non-psychotic behavior disorders or neuroses such as an "inadequate personality," "immature personality," or a pattern of "antisocial tendencies" do not constitute the defense.'" (quoting S. Rep. No. 98-225, at 229 (1984))). But see United States v. Henley, 8 F. Supp. 2d 503, 505 (E.D.N.C. 1998) ("This is not to say, however, that personality disorders can never rise to the level of a mental disease or defect under [18 U.S.C.] § 4246. Federal case law on the subject has been ambiguous at best.").

319. See, e.g., Evans v. Sec'y, Dep't of Corrs., 703 F.3d 1316, 1327–28, 1332–33 (11th Cir. 2013) (en banc) (upholding the rejection of a defendant's ineffective assistance of counsel claim, which was based on the defense's failure to pursue a "mental health theory of mitigation," because such evidence—especially that of the defendant's PD—could be aggravating rather than mitigating); Suggs v. McNeil, 609 F.3d 1218, 1231 (11th Cir. 2010) (noting that evidence of the defendant's "antisocial personality disorder" would be "potentially aggravating"). But see Brumfield v. Cain, 576 U.S. 305, 319–21 (2015) (finding that, contra the prosecution's arguments, an ASPD diagnosis did not preclude relief under *Atkins v. Virginia*, a prior case that had disallowed capital punishment for individuals with intellectual disabilities); Young et al., supra note 39, at 715–16 (noting that *Brumfield* cut against the trend of using ASPD as an aggravating factor at sentencing). Deborah Denno cautions against giving this trend too much credence because it underestimates jurors' and

PDs' uncertain position in mental health and the common institutional hostility toward individuals who carry this diagnosis shape such individuals' treatment in criminal court.

III. A HIERARCHY OF DIAGNOSES

In this Part, a systematic review of state and federal cases from the last decade reveals a hierarchy of diagnoses embedded in the CST standard. Examiners are most likely to find a person incompetent to stand trial if their symptoms are consistent with psychosis.[320] Examiners and the courts that defer to their judgments consistently approach defendants with PDs with skepticism. Court actors doubt the veracity of their symptoms and that PDs can create veritable disabilities in criminal court.

Studies from the last thirty years confirm a strong association between incompetency and psychosis.[321] A diagnosis of psychosis is assigned when the individual has experienced hallucinations, delusions, disorganized speech, and abnormal psychomotor behavior.[322] The crux of the diagnosis

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judges' capacity to appreciate nuanced arguments about culpability. See Denno, Prosecutors and Defense Attorneys, supra note 146, at 453, 467–68 (explaining that the "double-edged sword" myth erroneously assumes that "reasonable jurists" cannot appreciate when mental illness is an aggravating versus mitigating circumstance).

320. See Melton et al., supra note 42, at 194–96 (describing the characteristics of incompetent defendants); Nicholson & Kugler, supra note 76, at 363 ("[T]he strongest correlates of incompetency are (a) poor performance on psychological tests specifically designed to assess defendants' legally relevant functional abilities, (b) a psychotic diagnosis, and (c) psychiatric symptoms indicative of severe psychopathology."); Janet I. Warren, Preeti Chauhan, Lauren Kois, Ashley Dibble & Jeff Knighton, Factors Influencing 2,260 Opinions of Defendants' Restorability to Adjudicative Competency, 19 Psych. Pub. Pol'y & L. 498, 500 (2013) (noting that psychosis is a common factor that can drive determinations about both competency and insanity).

321. A meta-analysis of thirty studies examined the differences between individuals deemed competent and those deemed incompetent and found that "the correlation between psychosis and incompetency was among the highest obtained in the review." Nicholson & Kugler, supra note 76, at 359. In addition, the same study discovered a strong association between "psychiatric symptoms indicative of severe psychopathology" and incompetency. Id. at 363; see also Pirelli et al., supra note 76, at 6 (discussing Nicholson and Kugler's findings from this study). Individuals found unfit are also more likely to have been hospitalized for their psychiatric needs, suggesting the severity of their symptoms prior to the instant arrest. See Steadman, supra note 76, at 31 (finding that 81% of incompetent defendants had a history of psychiatric hospitalization); Pirelli et al., supra note 76, at 15 ("Most incompetent defendants were diagnosed with a Psychotic Disorder (66.5%) and had a previous psychiatric hospitalization (53.4%) . . . ."); Ronald Roesch, Determining Competency to Stand Trial: An Examination of Evaluation Procedures in an Institutional Setting, 47 J. Consulting & Clinical Psych. 542, 545 (1979) (finding that incompetent defendants had been hospitalized for an average of almost three years); Alex M. Siegel & Amiram Elwork, Treating Incompetence to Stand Trial, 14 Law & Hum. Behav. 57, 59 (1990) ("Thirty eight (93%) of the subjects had been previously hospitalized at a state or city psychiatric facility.").

322. See DSM-5-TR, supra note 15, at 101–03 (enumerating the key features of psychotic disorders).

is the experience of losing touch with reality.[323] With a tenuous grasp of reality, the person may also experience a diminished capacity to express themselves. As one person described: "It felt like I was outside my body and someone else was inside my body. That's the only way I can explain it."[324] Psychiatrist Larry Davidson contends that the experience of psychosis can prevent authentic decisionmaking:

> Being unable to retain a sense of oneself as the source of the direction of one's own awareness may thus deprive the person with schizophrenia of the most fundamental sense of ownership of his or her own experiences. Without this basic self-awareness, people may then lose their secondary sense of themselves as agents active in and affected by the world. The impact of voices and cognitive disruptions in this way reverberates throughout the person's experiences of self[,] leading to the constitution of a sense of personal identity built more on feelings of being controlled by and vulnerable to external influences than of being the agent of one's own thoughts, perceptions, and feelings as well as actions.[325]

The strong connection between incompetency and psychotic disorders may suggest this cluster of disabilities creates the very impairments the CST standard is intended to detect. Alternatively, and as suggested below, the observed association between psychosis and incompetency might imply that forensic examiners equate the CST standard with a particular diagnosis without meticulously assessing the accused person's capacities.[326]

A. *Skepticism Toward Personality Disorders*

A review of state and federal cases[327] reveals a recurring skepticism toward PDs in CST proceedings. Not only symptomology but also diagnostic categories guide forensic examiners and courts reaching competency decisions. Their conclusions articulate and reproduce a hierarchy of disorders, with PDs occupying the lowest rung. These categories of

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323. See Larry Davidson, Living Outside Mental Illness: Qualitative Studies of Recovery in Schizophrenia 139 (2003) ("What appears to be unique about psychosis is the alien, ambiguous, and intangible nature of the onslaught that people experience.").

324. Id. (internal quotation marks omitted) (quoting a study participant).

325. Id. at 141.

326. See Siegel & Elwork, supra note 321, at 58 ("[S]ince courts often simply defer to the expertise of mental health professionals, high rates of agreement between the two cannot be assumed to indicate effective treatment." (citation omitted) (citing Steadman, supra note 76, at 56)).

327. The survey draws from a search of state cases after 2000, using Lexis to search the following query: "personality disorder" /10 (competen! OR incompeten!). For federal cases, the survey used the same search terms and focused on cases between January 1, 2013, and December 31, 2023. Memorandum from Zohra Ahmed to Columbia L. Rev. (July 30, 2025) (on file with the *Columbia Law Review*). Emily Stork's note surveys federal cases before 2013. Stork, supra note 22, at 929.

psychiatric conditions attract disdain and blame rather than empathy and accommodation.

In several cases,[328] courts have found either an explicit or an implicit association between competency and PDs.[329] In addition, many cases follow a similar pattern. Defense counsel or their experts aver that their client's neurodivergence makes it difficult for them to confide in their representative, candidly discuss inculpatory evidence, or reconsider a self-defeating trial strategy.[330] The defense may even concede that the accused person is able to understand the proceedings and the roles of the judge and jury, meeting the first part of the *Dusky–Drope* test.[331] In response, prosecutors allege that the proper diagnosis is a PD, which can result in a categorical denial of the defense's incompetency claim.[332] Or, the state's

328. A few caveats about the data collected. First, because competency issues are so rarely litigated at the trial level, these decisions represent a minority of CST determinations. Nonetheless, their holdings likely inform courts', litigants', and examiners' practices in cases in which the issue of competency is never litigated. Second, this analysis is limited to court decisions. The depth of reasoning varies across cases, and experts' testimonies are only partially excerpted or paraphrased. Third, the nature of clinical knowledge precludes clear causal arguments because there are no controls. That is, while this Essay identifies cases in which the examiners offer some evidence of impairment relevant to competency, we cannot claim that, but for their PD diagnoses, defendants would be found incompetent. This Essay also cannot account for variation in symptoms and the quality of the examiners' reasoning. The survey identifies, at a minimum, cases in which the record establishes some evidence of incompetency, the defendant has a PD diagnosis, and the court declines to find them unfit. Sometimes the court is explicit in ruling that the PD precludes a finding of incompetency. Other times, there is insinuation. Despite such limitations, these qualitative results can help identify lines of inquiry for quantification and correlation.

329. See, e.g., United States v. Rosenheimer, 807 F.2d 107, 112 (7th Cir. 1986) (per curiam) (affirming a finding of competency because "the defendant did not suffer from any mental disease or defect, but rather from a narcissistic personality disorder which is separate and distinct"); United States v. Mitchell, 706 F. Supp. 2d 1148, 1220 (D. Utah 2010) ("[E]xperts agree that Mitchell's personality disorders would not be a basis for a finding of incompetency." (citing Competency Hearing Transcript at 632, 816, 1879)); see also United States v. Van Hoesen, No. 06-CR-394 (GLS-DRH), 2008 WL 4283419, at *2 (N.D.N.Y. Sep. 16, 2008) (holding that a PD is not normally a disease that renders a defendant incompetent), aff'd, 450 F. App'x 57 (2d Cir. 2011). But see United States v. DeShazer, 554 F.3d 1281, 1287 (10th Cir. 2009) ("Whether or not Mr. DeShazer could be diagnosed with an Axis I or Axis II illness is irrelevant . . . ."); United States v. Miller, No. 2:10-cr-136-DBH, 2011 WL 1898251, at *2–6 (D. Me. May 18, 2011) (finding the defendant competent but noting that the Axis II PD did not preclude a finding of incompetency); United States v. Salley, No. 01 CR 0750, 2004 WL 170322, at *1, *5 (N.D. Ill. Jan. 16, 2004) (explaining that narcissistic personality disorder did not preclude incompetency, but finding the defendant competent).

330. See, e.g., People v. Berg, No. B236694, 2013 WL 492553, at *3 (Cal. Ct. App. Feb. 11, 2013) (noting defense counsel's incompetency argument would focus on the defendant's inability to "consult with his attorney with a reasonable degree of rational understanding").

331. See id. ("At the beginning of the competency hearing, counsel for appellant said she would not be contending that appellant was unable to understand the proceedings and the roles of the judge and jury.").

332. See infra section III.B.

experts explain that as a matter of psychology, these disorders are qualitatively different.[333] In both situations, prosecutors tend to prevail.[334] In the process, courts tend to downplay evidence of socioaffective distress and contentious attorney–client relationships.[335] As a consequence, courts have minimized the second part of the *Dusky–Drope* standard, which focuses on the defendant's capacity to assist their attorney.

For example, in *People v. Berg*, counsel for the defense at a competency hearing in California clarified that their arguments would focus solely on whether Ronald Berg, the accused, possessed the "ability to consult with his attorney with a reasonable degree of rational understanding, and was able to assist in his defense."[336] The defense's expert focused on Berg's "longstanding problems with social interactions, e.g. the capacity to read social cues and respond appropriately."[337] Berg struggled to focus and to absorb and filter relevant information.[338] One mental health specialist attributed those difficulties to a mood disorder that fluctuated between depression and hypomania and to a developmental disability.[339] When stressed, Berg showed signs of paranoia, which the defense expert expected to flare at trial.[340] In his forensic interview, Berg revealed deep fears of being attacked by jail guards and even being executed.[341] The defense argued he would be unable to exercise his right to testify because of these overwhelming and irrational fears, but the prosecutor's expert argued that Berg was "logical, coherent, and rational," countering the defense's claims.[342] Berg showed no delusions or other psychotic symptoms, according to the state's expert.[343] Tellingly, however, the defense did not argue that Berg was either delusional or psychotic, so the prosecution's

333. See infra sections III.C–.D.

334. See, e.g., United States v. Heard, 762 F.3d 538, 542 (6th Cir. 2014) (denying the defendant relief on competency grounds because his only diagnosis was a PD); State v. Cooke, No. 0506005981, 2022 WL 17817903, at *17, *29 (Del. Super. Ct. Dec. 15, 2022) (finding no merit to the defendant's claim that he was incompetent in a case in which expert testimony established an ASPD diagnosis), aff'd, 338 A.3d 418 (Del. 2025); State v. Jenkins, 931 N.W.2d 851, 865 (Neb. 2019) (affirming the trial court's ruling on competency that relied on an expert's conclusion that the defendant was properly diagnosed with ASPD); State v. Hundley, 166 N.E.3d 1066, 1087 (Ohio 2020) (affirming the defendant's competency because he only established a diagnosis for a PD). But see People v. Asberry, No. F070000, 2017 WL 2686544, at *31 (Cal. Ct. App. June 22, 2017) (reversing a conviction because the trial court erred in finding the defendant competent).

335. See, e.g., *Berg*, 2013 WL 492553, at *6–7 (affirming the trial court's decision to follow the testimony of a single expert who deemed the defendant competent).

336. Id. at *3.

337. Id.

338. Id.

339. Id. at *2–3.

340. See id. at *3 ("The paranoid symptoms arose when appellant became extremely stressed and unable to understand what was going on around him.").

341. Id.

342. Id. at *4.

343. Id.

focus on these symptoms revealed its preconceptions about which diagnoses trigger incompetency.[344] The prosecution's expert testified that Berg failed to demonstrate "'glaring' symptoms of mental illness."[345] In the end, the court endorsed the prosecution's theory: Berg showed traits of a PD with features of depression and anxiety.[346] The prosecution's expert informed the court that "a personality disorder is not a major mental illness . . . [since it] continu[es] throughout a lifetime[] and there is very little mental health professionals can do for individuals suffering from a personality disorder other than long-term psychotherapy."[347] The expert contrasted Berg's personality disorder with schizophrenia and its tangential thinking.[348] The court rejected the defense's arguments about Berg's developmental disabilities, credited the state's expert for his experience, and found Berg competent to stand trial.[349]

Berg illustrates some common features of the cases discussed in this Essay: Courts and examiners expect defendants to exhibit obviously severe impairments to reach a finding of incompetency. Litigation focuses on the diagnosis as well as observed symptoms. PDs are not compatible with incompetency, whether by law or by fact. *Berg* and the cases that follow are appellate decisions reviewing trial level determinations of competency. Because competency is a question of fact, appellate review is generally deferential to the trial court's credibility determinations.[350] Some cases are post-conviction review cases, in which the defense has raised an ineffective assistance of counsel claim based on trial counsel's failure to raise competency. In those cases, the defense's expert may be testifying to the defendant's competency retrospectively. In some jurisdictions, like California, Texas, and Washington, competency is a question for a jury.[351] Trial courts, as the triers of fact in competency determinations, have the

344. Id.

345. Id. (quoting Dr. Kory Knapke).

346. See id. at *6 ("Dr. Knapke's diagnosis of appellant was found the most accurate by the trial court: long-standing traits of a [PD] with mild depression and anxious features.").

347. Id. at *5 (internal quotation marks omitted) (quoting Dr. Knapke).

348. Id. at *7. The defense challenged the testimony offered by the examiner, Dr. Knapke, which included the following: "I don't believe that [Berg] was so tangential, like a schizophrenic would be where he's off on a tangent and never coming back to the original question." Id. (internal quotation marks omitted) (quoting Dr. Knapke). Similarly, the defense cited Dr. Knapke's testimony that "a defendant need not have a 'Harvard law degree' to be found competent because only a basic understanding of courtroom proceedings is required." Id. (quoting Dr. Knapke).

349. Id. at *6.

350. See United States v. Villegas, 899 F.2d 1324, 1341 (2d Cir. 1990) (holding that the determination of a defendant's competence to stand trial under 18 U.S.C. § 4241 is a question of fact).

351. Cal. Penal Code § 1369 (2025); Tex. Code Crim. Proc. Ann. § 46B.0755 (West 2025); Wash. Rev. Code § 10.77.645 (2025).

authority to consider lay and expert testimony and may accept or reject any evidence.[352]

B. *Categorical Bans*

Federal district courts and the Seventh Circuit have ruled that PDs do not count as diseases or defects for competency purposes.[353] The Sixth

352. That the trier of fact has ultimate authority to sift through the evidence and determine the importance to accord to different pieces of evidence is a well-established norm of trial level practice. See United States v. Bailey, 444 U.S. 394, 414 (1980) ("The Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and in federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses."); 1A Kevin F. O'Malley, Jay E. Grenig, William C. Lee & Nadine Jean Wichern, Federal Jury Practice and Instructions § 15:01, Westlaw (7th ed. 2025) ("You, as jurors, are the sole and exclusive judges of the credibility of each of the witnesses called to testify in this case and only you determine the importance or the weight, if any, that their testimony deserves.").

353. See, e.g., United States v. Clements, 522 F.3d 790, 796 (7th Cir. 2008) ("The mere fact that a criminal defendant has a personality disorder does not prevent the defendant from appreciating the proceedings or assisting in his defense." (internal quotation marks omitted) (quoting United States v. Savage, 505 F.3d 754, 759 (7th Cir. 2007))); *Savage*, 505 F.3d at 758 ("Savage on appeal contends that the district court should have ordered *sua sponte* a competency hearing. . . . Savage argues that the district court had 'reasonable cause' to doubt his competence. During Savage's case, Dr. Rubin testified that Savage suffered from post-traumatic stress disorder and dependent personality disorder."); United States v. Teague, 956 F.2d 1427, 1432 (7th Cir. 1992) (affirming the conviction on the ground that the defendant did not have any diagnoses "that would prevent a defendant from understanding the proceedings against him and interfere with his ability to confer with his attorney on his own behalf"); United States v. Rosenheimer, 807 F.2d 107, 112 (7th Cir. 1986) (per curiam) (affirming the district court's finding of competency and sanity because "the defendant did not suffer from any mental disease or defect, but rather from a narcissistic personality disorder which is separate and distinct from suffering from a mental disease or defect"); United States v. Mitchell, 706 F. Supp. 2d 1148, 1220 (D. Utah 2010) ("[E]xperts agree that Mitchell's personality disorders would not be a basis for a finding of incompetency. Mitchell's personality disorders do not detach him from reality or affect his rational ability to understand the world around him." (citation omitted) (citing Competency Hearing Transcript at 632, 816, 1879)); see also United States v. Prescott, 920 F.2d 139, 146 (2d Cir. 1990) (describing that the sentencing judge found that the defendant "was not suffering from a mental disease or defect that would qualify him for . . . provisional sentencing" and declining to find clear error upon review); Stork, supra note 22, at 957 (arguing against the inclusion of "mental disease or defect" in the CST standard because "it invites unnecessary line-drawing and battles of the experts").

Federal courts have excluded PDs or considered whether PDs are mental diseases or defects for a range of purposes. See, e.g., 18 U.S.C. § 4241 (2018) (discussing incompetency); id. § 4243 (discussing "[h]ospitalization of a person found not guilty only by reason of insanity"); id. § 4244 (discussing "[h]ospitalization of a convicted person suffering from mental disease or defect"); id. § 4246 (discussing "[h]ospitalization of a person due for release but suffering from mental disease or defect"); United States. v. Henley, 8 F. Supp. 2d 503, 505 (E.D.N.C. 1998) ("This is not to say, however, that personality disorders can never rise to the level of a mental disease or defect under [18 U.S.C.] § 4246. Federal case law on the subject has been ambiguous at best.").

Other conditions have been categorically excluded for competency purposes, like amnesia. See, e.g., United States v. No Runner, 590 F.3d 962, 965 & n.2 (9th Cir. 2009)

Circuit has also noted, "[O]ur caselaw repeatedly emphasizes that even a severe personality disorder is not alone sufficient to make one legally incompetent to stand trial."[354]

In the Seventh Circuit, the seminal case *United States v. Rosenheimer* affirmed the district court's competency finding on the grounds that "the defendant did not suffer from any mental disease or defect, but rather from a narcissistic personality disorder which is separate and distinct from suffering from a mental disease or defect."[355] The district court considered James Rosenheimer's competency and sanity together, following a combined hearing.[356] The experts debated whether Rosenheimer experienced delusions consistent with a psychotic disorder or was prone to exaggerations consistent with a PD.[357] The district court issued a joint ruling focusing on the statutory element common to both insanity and competency: whether the accused had a mental disease or defect.[358] But the district court dedicated most of its opinion to the issue of the accused's sanity. Once it decided Rosenheimer was not insane because of his PD, it then quickly dispensed with his incompetency claim.[359] The Seventh Circuit affirmed.[360] The discussion in *Rosenheimer* reveals how the substantive defense of insanity shapes competency, a procedural protection. In *Rosenheimer*, the former subsumed the latter. *Rosenheimer* set a precedent in the Seventh Circuit that PDs do not meet the legal standard for a mental disease or defect under the federal competency standard.[361]

("[Other] courts have uniformly held that amnesia regarding the alleged crime does not constitute incompetence per se but may establish a basis for a finding of incompetence in a particular case.").

354. United States v. Prigmore, 15 F.4th 768, 777 (6th Cir. 2021) (citing United States v. Heard, 762 F.3d 538, 542 (6th Cir. 2014)).

355. 807 F.2d at 112.

356. See id. at 109 ("On November 13, 1985, an evidentiary hearing was held to determine the defendant's competency to stand trial and his sanity at the time the acts were committed.").

357. Id. at 109–10.

358. See id. at 110–11 ("Under this definition, the defendant is first required to present 'some evidence' of a mental disease or defect." (quoting United States v. Sennett, 505 F.2d 774, 775–76 (7th Cir. 1974))).

359. See id. at 112 ("[T]he court found that the defendant . . . suffer[ed] from . . . a narcissistic personality disorder which is separate and distinct from suffering from a mental disease or defect.").

360. Id.

361. See id. at 111 (concluding that PDs are not the same as mental diseases or defects); see also United States v. Clements, 522 F.3d 790, 796 (7th Cir. 2008) ("The district court's decision not to order a competency hearing during trial was correct."); United States v. Savage, 505 F.3d 754, 758–59 (7th Cir. 2007) (rejecting the defendant's argument that he was not competent because he "suffered from post-traumatic stress disorder and dependent personality disorder"); United States v. Riggin, 732 F. Supp. 958, 964 (S.D. Ind. 1990) ("[A]ll of the qualified experts who have examined Mr. Riggin have carefully analyzed this obsession and have found it to be nothing more than a personality disorder as opposed to a mental illness or defect.").

As a result of these clear rejections, the issue of competency can hinge on the presence of a PD.[362] In *United States v. Diehl Armstrong*, a district court in the Third Circuit distilled the extensive litigation about the accused's mental status in the following way:

> [T]he parties dispute whether the Defendant suffers from bipolar disorder or, alternatively, a personality disorder alone. This is a significant issue because there is uncontradicted evidence in this record that, while bipolar disorder is considered a serious "mental disease or defect" for purposes of establishing an individual's mental incompetence, a personality disorder is not.[363]

The court did not fully explain the basis of that exclusion.

Both examiners observed that the defendant, Marjorie Diehl-Armstrong, struggled to collaborate with her attorney. One examiner observed that her speech was "pressured and voluminous," and as a result it was "difficult to get her to stop talking and to focus on questions posed to her."[364] These symptoms were consistent with hypomania, a feature of bipolar disorder.[365] That same examiner also found that she "exhibited paranoid ideation, which was sometimes focused on her attorney."[366] At the competency hearing, this expert relayed his bipolar disorder diagnosis, explaining that "while the Defendant is competent in terms of rationally understanding the nature of her charges[,] . . . her mental illness renders her psychotic to the point that she is incapable of rationally working with her attorney to assist in the defense of her criminal charges."[367] The prosecution's expert challenged the bipolar disorder diagnosis.[368] The state's witness averred that Diehl-Armstrong's "personality disorder may cause her to be incorrectly seen as not competent to stand trial."[369] He attributed Diehl-Armstrong's tumultuous relationships and erratic mood

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362. In other cases, courts have emphasized that the diagnosis is not dispositive and have instead emphasized symptomology. Yet, in those cases, courts have nonetheless denied incompetency claims to defendants with PDs. See, e.g., United States v. DeShazer, 554 F.3d 1281, 1287 (10th Cir. 2009) ("Whether or not [the defendant] could be diagnosed with an Axis I or Axis II illness is irrelevant, and there is no indication the district court relied on such a diagnosis."); United States v. Salley, No. 01 CR 0750, 2004 WL 170322, at *1 (N.D. Ill. Jan. 16, 2004) (asserting that whether the defendant has an Axis I or Axis II diagnosis is not dispositive for competency).

363. No. 1:07cr26, 2008 WL 2963056, at *26 (W.D. Pa. July 29, 2008) (citing Transcript of May 21 Competency Hearing at 30–31, 71, 272, 285–86; Transcript of May 22 Competency Hearing at 88–89).

364. Id. at *15.

365. Id. at *21 ("[The examiners] documented their own personal observations of the Defendant's manic and/or hypomanic episodes." (citing Transcript of May 21 Competency Hearing at 131–33)).

366. Id. at *15 (citing Report of Dr. Robert L. Sadoff at 4).

367. Id. at *20 (citing Transcript of May 21 Competency Hearing at 122, 124–25, 128, 143–46, 156, 202–05, 208, 210–11, 221).

368. Id. at *18–19.

369. Id. at *17 (quoting Exhibit Two at 13).

to BPD.[370] He argued that her grandiosity, "sense of entitlement," and arrogance were characteristics associated with narcissistic personality disorder.[371] Furthermore, he stated that because the defendant continued to struggle to collaborate with her attorney even after being prescribed medication, and, given that personality disorders "are not easily treatable," her real issue was that she had PDs.[372] To support the PD diagnoses, the state's specialist claimed that Diehl-Armstrong was "unscrupulous," "manipulative," and "demanding" and "intrusively advocated for her own needs and desires."[373] Ultimately, the court embraced the plurality of experts who confirmed Diehl-Armstrong's bipolar disorder diagnosis and found her incompetent because, when under stress, her mood disorder frustrated her ability to collaborate with her attorney.[374] The district court's findings reveal the central importance of diagnosis. Even if both experts observed the same interpersonal difficulties, namely collaboration and trusting others, the formal diagnosis mattered to the court. Unlike the Seventh Circuit, the Third Circuit has not excluded PDs from incompetency claims.

The Sixth Circuit's decision in *United States v. Heard* also echoed this hierarchy of diagnoses. In *Heard*, the court considered whether the district court abused its discretion when it accepted the defendant's stipulation to his competency and allowed him to represent himself.[375] The Sixth Circuit affirmed the judgment below by distinguishing between the kinds of disorders that can establish incompetence. The court explained that to argue that a PD can impede competency "seriously misunderstands the nature of" PDs because "[p]ersonality disorders are not psychoses."[376] The court credited an expert who explained that a PD "'is not a condition which interferes significantly with Mr. Heard's routine functioning, substantially impairs his reasoning or reality testing, or prevents him from comprehending or controlling his actions.' Quite the contrary: people with personality disorders are present in all walks of life."[377] The court continued:

> [A]ntisocials fill the nation's prisons: indeed the first criterion of an antisocial personality is a "failure to conform to social norms with respect to [sic] behaviors as indicated by repeatedly performing acts that are grounds for arrest[.]" Thus, to equate

370. Id. at *16.

371. Id. (quoting Exhibit Two at 10–11).

372. Id. at *17 (quoting Exhibit Two at 13).

373. Id. at *18 (quoting Exhibit Two at 14).

374. Id. at *37.

375. United States v. Heard, 762 F.3d 538, 541 (6th Cir. 2014) ("We review for an abuse of discretion the district court's determination not to conduct a competency hearing." (citing United States v. Ross, 703 F.3d 856, 867 (6th Cir. 2012))).

376. Id. at 542.

377. Id. (citation omitted) (quoting Report of Dr. Judith Campbell at 8).

> personality disorders with legal incompetence is simply to misunderstand what those terms mean.[378]

The court seemed keen to preserve the mental disease or defect category for an exceptional group of defendants. Precisely because the traits associated with PDs are so common, they do not trigger accommodations in the Sixth Circuit.

As in federal courts, certain state courts have also excluded PDs as a matter of law. The Missouri Court of Appeals denied relief to a defendant challenging the twin rulings finding him competent and denying a diminished capacity defense.[379] For both, the Missouri court relied on the forensic examiner's conclusions about the defendant, who had a "'borderline personality disorder with antisocial personality traits' rather than a qualifying mental disease or defect."[380] Here, as in other cases, the court did not disentangle the defendant's procedural claim of incompetency from the substantive claim of diminished capacity.[381] The defendant's diminished capacity defense appears to have overshadowed his due process claim at both the trial and appellate level. Once the court had established he did not have a qualifying disability under Missouri's statute for the purpose of diminished capacity, it briefly addressed his competency claim. Because a personality disorder was the defendant's only diagnosis, the appellate court found there was no prejudice when the trial court denied him a diminished capacity jury instruction and his incompetency claim.[382]

Lower courts in other jurisdictions have reached similar conclusions. The Delaware Superior Court, a trial court, found a defendant competent to stand trial even after considering conflicting testimony from experts and conceding that he likely had ASPD.[383] A post-conviction medical evaluation concluded that the defendant was likely incompetent at trial due to brain damage and a delusion disorder.[384] Another expert disputed

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378. Id. (second alteration in original) (citation omitted) (quoting Theodore Millon, Seth Grossman, Carrie Millon, Sarah Meagher & Rowena Ramnath, Personality Disorders in Modern Life 152 (2d ed. 2004)) (misquotation).

379. State v. Walther, 581 S.W.3d 702, 709 (Mo. Ct. App. 2019) ("Viewing the evidence in the light most favorable to Appellant establishes, at best, Appellant suffered from a personality disorder and not from a statutorily cognizable mental disease or defect.").

380. Id. at 706 (quoting Dr. Bridget Graham).

381. Id. ("The trial court denied this motion for the same reason it granted the State's motion to preclude Appellant's diminished-capacity defense.").

382. Id. at 709–10 (denying the defendant a jury instruction for a diminished capacity defense because he failed to establish a requisite mental disability under the statute).

383. State v. Cooke, No. 0506005981, 2022 WL 17817903, at *25 (Del. Super. Ct. Dec. 15, 2022), aff'd, 338 A.3d 418 (Del. 2025). The court's analysis did not hinge on the diagnosis alone, but it also catalogued facts to dispute the defendant's claim that he struggled to assist his attorneys. Id. at *17–18.

384. Id. at *22 ("[T]he persecutory delusions and his impairments in reading social cues and rationally weighing and deliberating options likely would have rendered him

the findings of brain damage and a prior diagnosis for schizoid/schizotypal personality disorder; instead, he used the evidence to support an ASPD diagnosis.[385] The court agreed that the defendant's "misbehavior can best be explained by the diagnosis of ASPD," precluding as a matter of law a finding of incompetency.[386] It noted that "from a legal standpoint, the competency threshold is quite low," assessing average rather than reasonable capacities.[387]

C. *A Different and Voluntary Disorder*

In addition to the courts' exclusions, experts articulate their own legal and psychological grounds for rejecting incompetency claims by defendants with PDs. "[A]ntisocial personality disorder is not the type of disorder that would cause one to be incompetent to stand trial or to lack appreciation for the criminality of his acts," explained one expert in a case that eventually went up to the Arkansas Supreme Court.[388] Similarly, in federal courts, a forensic psychologist frequently hired by the prosecution, Dr. Shawn Channell, explained that "Antisocial Personality Disorder is not generally determined to be a mental disease or defect sufficient to establish incompetence to stand trial."[389]

Examiners have justified their conclusions by arguing that PDs are categorically different from other disorders. These psychologists and psychiatrists assert that individuals maintain the ability to control the expressions of their disordered personality traits.[390] Testimony from one court-appointed psychiatrist led a court to state that unlike psychotic disorders, "personality disorders do not detach [the defendant] from reality or affect [their] rational ability to understand the world around [them]. They are merely maladaptive personality traits that lead to poor decisions. These are not competency limiting because they are voluntary decisions."[391]

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incompetent to stand trial, waive counsel and represent himself at the time of the trial . . . ." (quoting Report of Dr. Busham S. Agharkar)).

385. Id. at *23–24.

386. Id. at *25.

387. Id. (quoting State v. Shields, 593 A.2d 986, 1012–13 (Del. Super. Ct. 1990)).

388. Ward v. State, 455 S.W.3d 303, 306 (Ark. 2015).

389. United States v. Gillispie, No. 1:16-cr-77, 2017 WL 2779698, at *3 (E.D. Tenn. June 27, 2017) (citing the testimony of Dr. Shawn Channell at 47–49). The same examiner also provided similar testimony in two other cases. See United States v. Prigmore, 15 F.4th 768, 772 (6th Cir. 2021) ("Dr. Shawn Channell, a forensic psychologist with the Bureau of Prisons, evaluated Prigmore and concluded that he was competent to stand trial."); United States v. Mashali, 298 F. Supp. 3d 274, 276 (D. Mass. 2018) ("Dr. Channell concluded in January 2018 that defendant is competent." (citing Report of Dr. Channell at 25)).

390. See, e.g., United States v. Heard, 762 F.3d 538, 541–42 (6th Cir. 2014) ("Heard's 'diagnosis is not a condition which interferes significantly with [his] routine functioning, substantially impairs his reasoning or reality testing, or prevents him from comprehending or controlling his actions.'" (quoting Report of Dr. Judith Campbell at 8)).

391. United States v. Mitchell, 706 F. Supp. 2d 1148, 1220 (D. Utah 2010).

Similarly, before the Ohio Supreme Court, a defendant, Lance Hundley, asserted he had been incompetent at his sentencing and thus could not have validly waived counsel. Hundley argued that he was "likely under the duress of a personality disorder" when he asked to represent himself in his sentencing hearing.[392] The Ohio Supreme Court rejected his claim, crediting a psychiatrist who had assessed the defendant before his trial.[393] The psychiatrist explained that "Hundley's antisocial-personality disorder did not affect his competency or decisionmaking abilities."[394] In her testimony, she claimed that "people with personality disorders still have a conscious choice over how they interact."[395] The trial court and Supreme Court of Ohio endorsed this finding, explaining that Hundley could not establish that "a severe mental disorder or illness" affected his decision to waive counsel.[396] Notably, the Ohio statute does not even require the accused to establish a severe disorder or illness.[397]

D. *A Tendency for Procedural Misconduct*

Having made this distinction between PDs and psychotic disorders, and volitional and nonvolitional conditions, many examiners and courts assert that any difficulties defendants with PDs face in navigating their criminal cases are their own fault. These court actors characterize defendants with PDs as intentionally subverting courtroom processes, thereby engaging in procedural misconduct.[398] When a defendant struggles to collaborate with their attorney or withdraws from the process, many court actors interpret this conduct as deliberately obstructionist.[399] Experts and courts have alleged that defendants with PDs will go so far as to feign mental illness and incompetency.[400] Even if a defendant's conduct

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392. State v. Hundley, 166 N.E.3d 1066, 1087 (Ohio 2020) (internal quotation marks omitted) (quoting Appellant's Merit Brief at 20, *Hundley*, 166 N.E.3d 1066 (No. 2018-0901), 2019 WL 2904315).

393. Id.

394. Id.

395. Id. (internal quotation marks omitted) (quoting Dr. Delaney Smith).

396. Id.; see also State v. Halder, No. 87974, 2007 WL 3286904, at *3–4, *6 (Ohio Ct. App. Nov. 8, 2007) (affirming the lower court's finding of competency and relying on a forensic expert's conclusions that the defendant did not "suffer[] from a major mental disorder" but only "a severe personality disorder").

397. See Ohio Rev. Code Ann. § 2945.37(G) (2023) (stating that if the court ascertains "that, because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the court shall find the defendant incompetent to stand trial").

398. See, e.g., State v. Dahl, 783 N.W.2d 41, 46–49 (N.D. 2010) (describing the accused person's vandalism of his jail cell as an attempt to manipulate the judicial system rather than irrational behavior stemming from mental illness).

399. See infra section III.D.2.

400. See, e.g., United States v. Greer, 158 F.3d 228, 237–41 (5th Cir. 1998) (upholding the district court's finding that the defendant, who suffered from personality disorders, feigned incompetency in an attempt to obstruct justice).

is consistent with the symptoms of disorders, examiners and courts are inclined to find that this undermining conduct is not the product of a mental disability. The following two sections underscore the importance courts and experts accord to malingering and to defendants' motivations to disrupt the criminal process.

1. *Malingering*. — Malingering is a common concern in any forensic assessment and is frequently grounds for denying defendants' competency claims.[401] Psychiatrist Ben Bursten explains that "[m]alingering commonly is conceptualized as the voluntary production of symptoms."[402] And it is a real concern for mental health experts in that it can unravel the entire forensic enterprise. Because it is not possible to observe mental processes, experts rely on the patient or defendant to report their own symptoms and experiences.[403] While the fields of psychiatry and psychology have devised ways to check for malingering, none are perfect.[404] Ultimately, in any case involving evidence about a person's mental health, experts and courts face a tradeoff between false positives and false negatives.[405] But something unique occurs in CST proceedings involving defendants who are labelled with PDs: Courts and examiners allege that their diagnoses predispose them to malingering.[406] That is, they claim that defendants will feign a disability to evade legal accountability. One trial court in Florida drew an explicit connection between PDs and misconduct when, relying on the doctors' findings, it stated the defendant had "malingering antisocial personality disorder" and found him competent to stand trial.[407] The *DSM* does not provide for such a diagnosis.[408] Instead, the examiner appears to

401. See Deborah W. Denno, Neuroscience and the Personalization of Criminal Law, 86 U. Chi. L. Rev. 359, 387 (2019) ("[N]ineteen cases noted the possibility of a malingering defendant: strikingly, courts held in more than half of those cases (eleven) that defendants were malingering or feigning an illness.").

402. Bursten, supra note 26, at 84 (citing J.A. Boydston, Malingering, *in* Comprehensive Textbook of Psychology/III (Harold I. Kaplan, Alfred M. Freedman & Benjamin J. Sadock eds., 3d ed. 1980)).

403. See Arthur A. Stone & Jaylan S. Turkkan, Preface to The Science of Self-Report: Implications for Research and Practice, at ix, ix (Arthur A. Stone, Jaylan S. Turkkan, Christine A. Bachrach, Jared B. Jobe, Howard S. Kurtzman & Virgina S. Cain eds., 2000) ("Peoples' reports about what they are feeling, what they are doing, what they recall happening in the past—that is, self-reported data—are essential to the health care profession and underlie many of our research endeavors.").

404. See Bursten, supra note 26, at 86–89 (discussing the various ways that one can check for malingering and clarifying that these methods are "not necessarily definitive").

405. See id. at 84 (stating that "whether the patient meets the criteria" for malingering "depends on [their] inner experiences").

406. See, e.g., Nolasco v. State, 275 So. 3d 795, 797 (Fla. Dist. Ct. App. 2019) (per curiam) (finding the defendant competent and noting that substantial evidence existed to support the trial court's determination of competence, including that the accused was diagnosed with malingering ASPD).

407. Id. (quoting the trial court's May 2, 2018, ruling).

408. DSM-5-TR, supra note 15, at 748–52 (including no references to "malingering antisocial personality disorder").

have improvised, fusing diagnostic and legal categories.[409] A PD diagnosis enables courts and examiners to set aside the defendant's claims of impairments and to recast the assertion of disability as a ploy.

Some prosecutors have used the diagnosis of a PD to argue in favor of competency.[410] For example, in a competency hearing in California, the prosecutor solicited evidence of the accused person's prior bad acts.[411] Before a jury, the defendant's father described when the defendant assaulted him, and the defendant's brother recounted the defendant threatening him with a weapon.[412] Defense counsel objected, arguing that the evidence was designed to be inflammatory in front of a jury charged with the narrow task of determining competency, rather than guilt.[413] But the appellate court did not disturb the trial court's decision to admit this evidence at the competency hearing. The court explained that the harm the accused, George Banda, perpetrated against his family members confirmed the forensic experts' ASPD diagnosis.[414] "The evidence of Banda's prior bad acts . . . was relevant to bolster [the state's expert's] determination that Banda had antisocial personality disorder, but was competent to stand trial. The prosecutor further used the diagnosis of antisocial personality disorder to argue that Banda was lying or pretending to be incompetent."[415] The competency hearing thus operated as a minitrial that ventured into the defendant's criminal history, not to establish liability but ability. The admissibility of prior bad acts at a competency hearing reveals that the issues of liability and disability are sometimes blurred, depending on the asserted diagnosis. This case demonstrates how PDs can be used to make the case for a defendant's ability rather than disability.

In response to prosecutors' claims about PDs, defense experts have exposed prosecutors' common strategy of using PD diagnoses to discredit defendants' claims of disability and incompetency.[416] For example, in a

409. Compare United States v. Porter, 907 F.3d 374, 381, 385 (5th Cir. 2018) (affirming a district court's holding that a defendant was malingering—or falsifying his symptoms—and thus was competent to stand trial), with DSM-5-TR, supra note 15, at 748–52 (discussing the medical diagnostic criteria for "Antisocial Personality Disorder").

410. See, e.g., People v. Banda, No. F066389, 2015 WL 6734767, at *16 (Cal. Ct. App. Nov. 3, 2015) ("The prosecutor further used the diagnosis of antisocial personality disorder to argue that Banda was lying or pretending to be incompetent.").

411. Id. at *16 & n.12.

412. Id. at *8, *16.

413. Id. at *16. In California and Texas, the legislatures have empowered juries to determine competency. See Cal. Penal Code § 1369(c)(4) (2025) ("[A] determination of the defendant's competency to stand trial shall be decided by a jury."); Tex. Code Crim. Proc. Ann. § 46B.0755(d) (West 2025) (stating that when there is disagreement about a defendant's competence to stand trial, "a jury shall make the competency determination").

414. *Banda*, 2015 WL 6734767, at *16.

415. Id.

416. Deborah Denno's work notes a similar tactic prosecutors use at the penalty stage in capital cases. See Denno, The Myth of the Double-Edged Sword, supra note 299, at 533

contested CST proceeding, the California Court of Appeals reversed the trial court's finding of competency for insufficient evidence.[417] A state expert who found the accused fit to stand trial explained that "people with antisocial personality disorder are manipulative, . . . are better at malingering, and more likely to malinger, than people without antisocial personality disorder."[418] In response, a defense expert challenged the state expert's methods and motivations, explaining that forensic experts frequently infer malingering when someone with an ASPD diagnosis is being assessed for competency in a criminal proceeding.[419] Malingering, in his retelling, is an accusation by clinicians to undermine evidence of impaired functioning when the person accused also has been assigned a PD.[420] Ultimately, the appellate court discredited the finding of malingering and credited other experts who concluded that the defendant was not competent because of an intellectual disability.[421]

More commonly, however, courts have credited experts' commentary on malingering. In *Sands v. Commonwealth*, the Kentucky Court of Appeals consulted with an examiner at the Kentucky Correctional Psychiatric Center, who found the defendant, Robert Sands, was malingering and had a PD.[422] The court explained that Sands "was a malingerer with tendencies to be uncooperative by choice."[423] In consulting with the court, the state facility explained that it could not treat PDs.[424] The court thus affirmed the lower court's ruling that Sands was competent.[425]

(explaining that the court in *Fleenor v. Farley* held that "it was not 'unreasonable or unfair' for the prosecution to attempt to rebut expert testimony that [the defendant's] antisocial personality disorder could be controlled, especially because the defense set forth mental health and other mitigating evidence at the penalty phase" (quoting 47 F. Supp. 2d 1021, 1072 (S.D. Ind. 1998), aff'd sub nom., Fleenor v. Anderson, 171 F.3d 1096 (7th Cir. 1999))).

417. People v. Asberry, No. F070000, 2017 WL 2686544, at *31 (Cal. Ct. App. June 22, 2017).

418. Id. at *11. The appellate court ultimately rejected the expert's conclusion as unfounded because she did not establish all the criteria for ASPD. Id. at *26–27.

419. Id. at *12.

420. See id. (noting that "malingering is frequently attributed to criminal defendants" simply because they are a defendant in a criminal proceeding and have a PD).

421. Id. at *18, *31.

422. 358 S.W.3d 9, 11 (Ky. Ct. App. 2011) ("Dr. Russell Williams from [the Kentucky Correctional Psychiatric Center] . . . diagnosed Sands as being a 'blatant' malingerer and as having a personality disorder with narcissistic, dependent, and borderline traits.").

423. Id. at 13 (emphasis omitted); see also State v. Miraglia, No. A-0407-09T2, 2013 WL 1092106, at *11 (N.J. Super. Ct. App. Div. Mar. 18, 2013) (summarizing the opinion of one expert who diagnosed the defendant with "a personality disorder" with "narcissistic and borderline features" and concluded he could cooperate with his attorneys "[i]f he chose to" (alteration in original) (internal quotation marks omitted) (quoting Report of Dr. Timothy J. Michals)).

424. *Sands*, 358 S.W.3d at 12 (noting that the Kentucky Correctional Psychiatric Center was "unable to treat personality disorders").

425. Id. at 15.

In *State v. Jenkins*, the Nebraska Supreme Court affirmed the trial court's findings that the defendant, Nikko Jenkins, was competent after lengthy proceedings that produced multiple examinations and conflicting expert reports.[426] The trial court embraced findings that the defendant presented the symptoms of ASPD.[427] One psychiatrist opined that "there was a 'very slim' likelihood of Jenkins's having any other psychotic illness, and that Jenkins was mostly malingering."[428] The forensic report endorsed by the trial court suggested the defendant was pursuing secondary gain in manipulating his symptoms—specifically, that he was self-harming to get out of solitary confinement.[429] Other experts, however, cast doubt on the finding that Jenkins was malingering and provided a different diagnosis—psychosis—based on Jenkins's history of hearing voices since childhood.[430] Dr. Bruce D. Gutnik testified Jenkins could not survive the stress of trial without a mental breakdown, although Gutnik opined that Jenkins's competence could be restored.[431] But a state expert challenged these findings, arguing that Jenkins's presentation was not typical for schizophrenia, thereby suggesting he was fabricating his distress.[432] Multiple examiners suggested that the defendant was exaggerating his symptoms.[433] Yet they did not stop there and concluded Jenkins was manipulative. They also suggested that he had a PD, attributing his conduct to a psychiatric condition.[434] *Jenkins* reveals the paradoxical position PDs occupy: They are psychiatric conditions that confer capacity and competency.

2. *Breakdown in Attorney–Client Relations.* — The denial of incompetency claims is most troubling when examiners and judges appear to disregard persuasive evidence of a breakdown in the attorney–client relationship. When the person accused has a diagnosis for a PD, courts and examiners have interpreted that person's difficulties in collaborating with their attorney as a reflection of their desire to obstruct, rather than the product of their neurodivergence. These court actors have empha-

426. See 931 N.W.2d 851, 889 (Neb. 2019) ("We cannot say that the district court abused its discretion in finding Jenkins to be competent to waive counsel, to enter no contest pleas, to proceed to sentencing, and to be sentenced to death.").

427. Id. at 863.

428. Id. at 865 (quoting Dr. Y. Scott Moore).

429. Id. at 875.

430. Id. at 865 ("According to [Dr.] Gutnik, hallucinations and delusions are the two primary signs of psychosis and a review of Jenkins' records showed a history of hallucinations dating back to age 8. Thus, Gutnik testified that if Jenkins was malingering, he had been doing so since he was 8."). But see United States v. Gabrion, 719 F.3d 511, 533 (6th Cir. 2013) (en banc) ("To malinger is to manipulate; and persons with Histrionic or Antisocial personalities tend to be highly manipulative.").

431. *Jenkins*, 931 N.W.2d at 871.

432. See id. ("Moore thought that all the symptoms Jenkins reported were fabricated.").

433. Id. at 871–72 ("[M]any of Jenkins' symptoms appeared contrived."); id. ("Jenkins appeared to be attempting to use mental health symptoms for secondary gain.").

434. Id. at 872 ("Hartmann felt that Jenkins had a personality disorder which accounted for his symptoms.").

sized that the defendant was unwilling rather than unable to collaborate. As a Delaware intermediate appellate court concluded, a defendant diagnosed with ASPD was still "able to consult with his attorneys even if he made their jobs difficult."[435]

In *Silverburg v. Commonwealth*, a case on post-conviction review, the defense's expert concluded that Joseph Silverburg, the defendant, experienced a "paranoid mistrust of attorneys" that prevented him "from developing a trusting relationship with counsel."[436] The forensic psychologist noted that Silverburg's mistrust was so severe that he fired several attorneys, lodged disciplinary complaints against them, and filed pro se motions.[437] But these facts did not suffice to establish a due process deprivation. Defense counsel appears to have failed to specifically aver how Silverburg's paranoid mistrust would erode his ability to assist in his defense.[438] The court leaned on Silverburg's sophisticated understanding of the trial process, without probing whether he could draw on that knowledge to strategize in his own case.[439]

In *State v. Tribble*, the Vermont Supreme Court affirmed the trial court's finding that the accused, Dennis Tribble, was competent, despite a defense expert testifying that he was not "able to work with his attorney through the whole process of trial."[440] Psychiatrist Dr. Albert Drukteinis explained that Tribble's "delusional disorder . . . made it impossible for him to cooperate with his lawyers" and further insisted that the accused was not intending to be "obstructionistic."[441] The court, however, sided with the state's expert, who found Tribble was competent and diagnosed him with "paranoid personality disorder."[442] The state's expert stated that Tribble's PD "made it difficult for him to cooperate with his attorneys, but that this challenge was 'not one in [his] view that can't be achieved.'"[443]

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435. State v. Cooke, No. 0506005981, 2022 WL 17817903, at *20 (Del. Super. Ct. Dec. 15, 2022), aff'd, 338 A.3d 418 (Del. 2025).

436. No. 2005-CA-001751-MR, 2007 WL 2994604, at *1 (Ky. Ct. App. Oct. 12, 2007) (internal quotation marks omitted) (quoting a motion for funds for an expert evaluation of the defendant). The examiner's report is not available on the electronic databases, so it is not possible to say with certainty the precise diagnosis the examiner ascribed. Nonetheless, the descriptions suggest that the examiner may have diagnosed Silverberg with paranoid personality disorder. See id. ("Dr. Martha Wetter conducted a psychological evaluation of Silverburg on April 2, 2004, in which she opined that Silverburg has a paranoid mistrust of attorneys.").

437. See id. at *2.

438. Id. ("[H]e has provided little specific explanation of how this behavior harmed his defense.").

439. See id. ("Silverburg displayed a clear and often sophisticated understanding of the trial process.").

440. 892 A.2d 232, 236 (Vt. 2005) (internal quotation marks omitted) (quoting Dr. Albert Drukteinis).

441. Id. (internal quotation marks omitted) (quoting Dr. Drukteinis).

442. Id. at 236–37.

443. Id. at 236 (quoting Dr. Robert Linder).

The court suggested that Tribble's impairment and difficulties in collaborating were not enough for incompetency; although the "defendant had difficulty collaborating with his court-appointed attorneys, the [trial] court found that defendant nonetheless had shown that he could change his position and tactics."[444] In differentiating between a person's lack of ability and lack of will, the Vermont Supreme Court ruled out psychiatric disabilities that act on a person's willpower as evidence of incompetency. That is, the court seemed to exclude conditions that undermine someone's instincts to make choices to their advantage, like collaborating with their attorney.

In a capital case, the Ohio Court of Appeals, the state's intermediary appellate body, affirmed a trial court's finding of competency when the defendant, Biswanath Halder, showed signs of "a severe personality disorder that [made] him unwilling to assist his attorney with his defense."[445] The trial court considered the opinion of three experts.[446]

One expert found Halder competent, although she conceded that Halder's attorneys reported serious concerns about his memory loss.[447] The other two experts found Halder incompetent and diagnosed him with delusional disorder and personality disorders.[448] Relying on one of the defense expert's testimonies, the court noted that "Halder was convinced that his attorneys were conspiring against him."[449] His persecutory beliefs "[made] it almost impossible for him to have any meaningful collaborative relationship with his attorneys."[450] One expert, however, reported that Halder could discuss the events leading up to his arrest, an assertion that

444. Id. at 237.

445. State v. Halder, No. 87974, 2007 WL 3286904, at *8 (Ohio Ct. App. Nov. 8, 2007).

446. See id. at *6 ("Three doctors submitted reports and testified at the competency hearing. Drs. Eisenberg and Fabian found that Halder was not competent to stand trial, while Dr. Bergman found that Halder was competent to stand trial.").

447. Id. at *4.

448. See id. at *3. ("Dr. Fabian testified that he believed that Halder suffered from both delusional and personality disorders."); id. ("Dr. Eisenberg . . . diagnosed Halder with a personality disorder with narcissistic, paranoid, and obsessive qualities.").

449. Id. One expert, Dr. James Eisenberg, although hired by the defense, is responsible for offering racist testimony, suggesting that certain racial groups are more prone to PDs than others. See Court Overturns Ohio Death Sentence After Defense Expert Testifies that One Quarter of Urban Black Men Should Be Locked Up or Thrown Away, Death Penalty Info. Ctr. (Sep. 1, 2022), https://deathpenaltyinfo.org/court-overturns-ohio-death-sentence-after-defense-expert-testifies-that-one-quarter-of-urban-black-men-should-be-locked-up-or-thrown-away [https://perma.cc/JT4P-5ETR] (last updated Mar. 14, 2025) ("Eisenberg . . . offered the jury what the court desribed as a 'racialized' desription of [antisocial personality disorder], falsely stating that while the disorder afflicated 'one to three percent of the general population,' it was present in '15 to 25 percent, maybe even 30 percent' of 'urban African American males.'" (quoting the testimony of Dr. Eisenberg at the trial of Malik Allah-U-Akbar)).

450. *Halder*, 2007 WL 3286904, at *3.

undermined the defense's claim that Halder could not properly consult with his attorneys.[451]

The trial court sided with the expert who found Halder competent.[452] The court did not consider the possibility that the defendant's feelings of mistrust could credibly vary from person to person.[453] The trial court ruled that Halder had "a severe personality disorder[] but showed no evidence of a major mental disorder."[454] The Ohio Court of Appeals concluded that the trial court's decision was supported by competent, credible evidence.[455]

Similarly, one expert credited by the California Court of Appeals stated that PDs can cause impairments that are circumstantial and variable.[456] In *People v. Tooker*, the court endorsed a court-appointed psychiatrist's testimony regarding his relationship with the defendant, Charles Tooker: "Once Mr. Tooker 'felt good' about me he exhibited no 'mental disease or defect' . . . that would substantially interfere with his ability to [proceed with the trial]."[457] The court concluded that because Tooker's symptoms varied, he had the power to control them.[458] It did not consider the fact that the variation was itself a product of a disability.[459] The court did not probe the expert's determination that Tooker had control over his symptoms.[460] The court found that Tooker "might choose not to cooperate if he did not like counsel, but he was cognitively able to do so."[461] He was deemed fit to stand trial, although he clearly struggled to confer with his attorney.[462] In reaching its conclusion, the court deferred to the expert's interpretation of the *Dusky–Drope* standard:

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451. See id. at *6–8 ("In addition, Dr. Fabian acknowledged that Halder also provided detailed answers to questions he posed.").

452. Id. at *4 (explaining that the trial court found Halder competent to stand trial after hearing Dr. Barbara Bergman's testimony that Halder was "capable of assisting his attorneys").

453. See id. (including no discussion that Halder's feelings could legitimately vary depending on the person and situation).

454. Id. at *6.

455. Id.

456. See People v. Tooker, No. A154181, 2019 WL 6726523, at *5 (Cal. Ct. App. Dec. 9, 2019) (noting that an expert "offered an additional diagnosis of antisocial personality disorder, which did not change his 'fundamental conclusions that if [Tooker] so chooses, [he] is entirely competent to go forward with a trial'" (alterations in original) (quoting Supplemental Report of Dr. Martin Blinder)).

457. Id. (first alteration in original) (quoting Dr. Blinder).

458. Id.

459. See id. (including no discussion on whether a PD could be the cause of such variation).

460. See id. (including no critical evaluation of Dr. Blinder's testimony and conclusions).

461. Id. at *7 (emphasis omitted).

462. Id. at *5 (noting that the court was "not persuaded" by Tooker's claims of incompetency, despite Tooker's lawyer eventually withdrawing from the case due to a "disintegrating" relationship with Tooker).

"'[C]ompetence' is less a relationship issue than an objective clinical measure of the degree to which an individual is cognitively able to . . . collaborate with counsel."[463]

By embracing the examiner's reframed legal standard, the California Court of Appeals diminished the relational component of the *Dusky–Drope* standard. It also rejected the court-appointed psychologist's report on the grounds that it was superficial.[464] The expert whose findings the court rejected had diagnosed Tooker with paranoid personality disorder and noted that while the defendant could grasp the proceedings cognitively, he "was not 'able to cooperate in a rational manner with counsel' due to his 'pervasive distrust and suspiciousness of others.'"[465] The expert stressed that Tooker "would not be able to prepare and conduct his own defense in a rational manner with or without counsel. This is something Mr. Tooker admits himself, he does not know how to defend himself."[466]

The Washington Superior Court favorably cited the opinion of an expert tasked with examining a defendant who was diagnosed with an unspecified personality disorder:

> While Mr. Brown may be a difficult client to represent, there is no data that shows his presentation is due to symptoms of a mental illness; but rather appear to represent maladaptive behaviors and attempts to avoid moving forward with his legal case. Therefore, it is my professional opinion that Mr. Brown has the capacity to understand the nature of the proceedings and assist in his own defense should he choose to do so.[467]

The examiner did not explain how they knew that Brown's attitude was a maladaptive choice, rather than the product of illness.[468] The examiner may have ultimately been correct, but the decision about choice was neither contested by the defense nor adjudicated by the court.[469] The expert further reasoned that while Brown's statements were unusual, they were not consistent with cognitive deficits because Brown would have had

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463. Id. (internal quotation marks omitted) (quoting Dr. Blinder).

464. See id. at *6 ("The other report by Ph.D. Kim is uncomfortably superficial, has no real substantive analysis in terms of what mental disorders the defendant would be suffering from that would afflict him here, [and] essentially is unpersuasive in its conclusion . . . ." (internal quotation marks omitted) (quoting the trial court's opinion)).

465. Id. at *5 (quoting Dr. Mary Ann Yaeil Kim).

466. Id. (internal quotation marks omitted) (quoting Dr. Kim).

467. State v. Brown, No. 11-1-121743-3 KNT, 2012 Wash. Super. LEXIS 284, at *12 (Wash. Super. Ct. Oct. 31, 2012) (emphasis omitted) (quoting Dr. Jolene Simpson); see also United States v. Wessel, 2 F.4th 1043, 1049–50 (7th Cir. 2021) (affirming the trial court's reliance on an expert who noted that the "[defendant's] maladaptive personality traits may prevent him from working with his attorney in a manner that is most effective" but "his decision to do so is considered volitional and not related to any mental illness" (internal quotation marks omitted) (quoting Dr. Allison Schenk's April 19, 2018, competency report)).

468. *Brown*, 2012 Wash. Super. LEXIS 284, at *11–12.

469. Id.

to present as more confused than he was.[470] Instead, the examiner maintained that Brown presented normally.[471]

E. *The Construction of Disability in CST Proceedings*

CST proceedings admit only a narrow band of disabilities.[472] Criminal court actors construct disability as a passive, unvarying, and cognitive phenomenon that is untouched by individual agency or larger social forces.

In criminal cases, the disabled defendant is passive. Psychotic disorders, which can distort perceptions of reality, consistently earn examiners' endorsement as authentic impairments that act on the defendant.[473] Meanwhile, examiners believe that defendants retain the capacity to mediate the symptoms of their PDs.[474] Perhaps because mistrust and deceit are universal experiences, examiners conclude that when defendants describe their symptoms or appear to sabotage their relationships with their attorneys, they do so willfully. And yet, examiners emphasize that deceit, manipulation, and lack of empathy are also common symptoms of PDs.[475] In framing the signs and symptoms of PDs as the product of volition while also embracing the diagnostic frame of a mental disorder, they find themselves in a paradox. Why even classify these personality traits as signs of illness?

Once examiners posit that the accused has the capacity to control their PD symptoms, they worry that defendants may manipulate the process to their advantage.[476] That suspicion of manipulation is a hallmark of sanism.[477] As Professor Doron Dorfman notes, "Disability's fluid nature,

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470. See id. at *10 ("[Defendant's] pattern of incorrect responses to questions assessing for cognitive deficits, if genuine, would be indicative of a severely demented and confused individual, which again were not evident in his general conduct."(quoting Report of Dr. Daisuke Nakashima)).

471. See id. at *9–11 ("[Defendant] possess[es] the normal range of mental capabilities without being compromised by any symptoms of a major psychiatric illness." (quoting Report of Dr. Nakashima)).

472. See Stork, supra note 22, at 931 (discussing the circuit split over whether Axis II personality disorders count as mental diseases under the statutory test for incompetency).

473. See Loren E. Mallory & Michelle R. Guyton, Competency to Stand Trial and Criminal Responsibility in Forensic Neuropsychology Practice, *in* APA Handbook of Forensic Neuropsychology 341, 346 (Shane S. Bush, George J. Demakis & Martin L. Rohling ed., 2017) ("[T]he presence of psychotic symptoms is one of the strongest predictors of incompetence." (citing Pirelli et al., supra note 76)).

474. See Johnson & Elbogen, supra note 305, at 209 ("The characteristic dysfunction of personality disorders often appears to be under volitional control.").

475. See Peay, supra note 25, at 234 (noting psychopaths' "capacity to be . . . manipulative" and the potential "absence" of empathy).

476. See supra section III.D.1.

477. See Doron Dorfman, Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse, 53 Law & Soc'y Rev. 1051, 1054–62 (2019) ("[T]he suspicion of fakery has been engrained in the legal treatment of disability and how disability rights are often viewed as 'special rights.'"); see also Katherine A. Macfarlane, Disability Without Documentation,

which takes on visible and invisible forms, is the basis for the perpetual connection made between disability and fakery."[478] Dorfman suggests this skepticism persistently obstructs efforts for legal recogni-tion.[479] The sanist suspicion reinforces criminal court's institutional skepticism toward defendants, who are perceived by court actors to be dishonest.[480] As a result, CST proceedings articulate an exclusive prototype for disability in criminal courts: It is an impermanent state. Criminal court's vision of disability rests on a binary distinction between illness and choice. Any conduct that appears volitional is denied recognition. Disability is reduced to an externally verifiable condition that overwhelms the true self.[481]

The parameters set by examiners also limit disability to those overwhelming conditions that interfere with cognition, like difficulty tracking and exchanging information, or challenges in approaching a problem in a goal-directed, logical, and reality-based way.[482] Psychotic disorders with delusions as their key feature are the most frequent grounds for incompetency. The courts remain primarily concerned with a defendant's understanding of proceedings, not their actual ability to participate.[483] Although courts and experts recognize that PDs may impede a defendant from assisting their attorney—a capacity explicitly mentioned in *Dusky v. United States*[484]—this is of secondary concern.[485] By excluding PDs, courts do not consider a group of psychiatric disabilities that can shape attorney–client relationships.

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90 Fordham L. Rev. 59, 70 (2021) (discussing how the documentation procedures for disability claims reveal a prevalent fear of fraud).

478. Dorfman, supra note 477, at 1056.

479. Id. at 1051.

480. See Nicole Gonzalez Van Cleve, Crook County: Racism and Injustice in America's Largest Criminal Court 69–70 (2016) (discussing how prosecutors and court staff characterize criminal defendants as either "monsters" or "mopes").

481. See Perlin, Hidden Prejudice, supra note 29, at 45 (explaining that one tenet of sanism is the belief that "[m]ental illness can easily be identified by lay persons" simply through observation and common sense).

482. See State v. Dahl, 783 N.W.2d 41, 45 (N.D. 2010) ("The doctors testified Dahl remembered the facts of his case, had moments of clarity, had a good understanding of the legal proceedings, knew where he was and understood the harm caused by his actions."); supra note 335 and accompanying text (discussing *Berg*).

483. See, e.g., Commonwealth v. Puksar, 951 A.2d 267, 285–89 (Pa. 2008) ("[A]ppellant's experts never opined that appellant lacked the capacity to understand the proceedings and what he was waiving. In fact, the defense experts opined to the contrary—that appellant clearly understood the nature of the proceedings, but had given up on the system."). The post-conviction review court also relied on the attorneys' contemporaneous observations confirming competency. Id. at 285.

484. See 362 U.S. 402, 402 (1960) (per curiam) (noting that part of the test for incompetency is whether the defendant can assist their attorney).

485. See State v. Gutierrez, No. 11-C-06119-8 KNT, 2011 Wash. Super. LEXIS 296, at *18–19 (Wash. Super. Ct. Oct. 5, 2011) ("As a result of his personality functioning, [the defendant] may be a difficult client to work with; however[,] he has the capacity to provide relevant information and to communicate rationally with his defense counsel, if he so chooses.").

Effectively, courts and examiners are affording greater importance to the first prong of the *Dusky–Drope* standard than to the second. That is, attorney–client collaboration appears to be less important than whether the accused understands the nature and object of the proceedings against them.[486] When there is evidence of mistrust between the accused and their lawyer or a breakdown in their relationship, courts are reluctant to attribute it to neurodivergence.[487] Courts can disregard this prong by relying on the Supreme Court's own gradual divestment in the right to counsel. Over the course of the twentieth century, the Supreme Court has retreated from maintaining the right to counsel it enunciated.[488] It has gone so far as to declare that defendants have no right to a "meaningful" relationship with their attorney.[489] That disinvestment has material consequences: It produces the conditions for chronic mistrust between people accused of crimes and their attorneys.

A criminal court's reluctance to impute attorney mistrust to psychological distress is thus not per se unreasonable. That is, there are structural conditions that produce mistrust, and that mistrust can be rational, rather than psychologically idiosyncratic.[490] Ethnographies of criminalization illuminate how a predatory carceral state and neoliberal divestment can cause those most likely to be policed, prosecuted, and incarcerated to withdraw and feel estranged from the trial process. Sociologist Matthew Clair has revealed that defendants' class positions can shape their attitudes toward their attorneys and the criminal process.[491] Working-class defendants are more likely to mistrust the process unfolding

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486. See Drope v. Missouri, 420 U.S. 162, 171–72 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him . . . may not be subjected to a trial."); Perlin, Hidden Prejudice, supra note 29, at 60 ("Pretextuality, in combination with the impact of sanism on expert testimony and judicial decisions, often helps create a system that . . . regularly subverts statutory and case law standards; and . . . raises insurmountable barriers that ensure the allegedly 'therapeutically correct' social outcome and avoidance of the worst-case-disaster-fantasy, the false negative." (footnote omitted)).

487. See supra section III.D.1.

488. See Zohra Ahmed, The Right to Counsel in a Neoliberal Age, 69 UCLA L. Rev. 442, 446–48 (2022) (discussing the "evolution of the right to counsel" and shift from equality to autonomy as the "central value").

489. Morris v. Slappy, 461 U.S. 1, 14 (1983).

490. Sociologist Matthew Clair's careful ethnographic work documents factors contributing to this mistrust and shows how this mistrust is often expressed through conduct that defies the norms of criminal court. Matthew Clair, Privilege and Punishment: How Race and Class Matter in Criminal Court 3, 20, 28 (2020). This mistrust can express itself as defendants rejecting their attorneys' advice, even if it is to their strategic disadvantage. Id. at 1–3. Clair's findings corroborate similar research on the experiences of people from disadvantaged backgrounds forced to navigate criminal court. See Jonathan D. Casper, Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender., 1 Yale Rev. L. & Soc. Action 4, 4–7 (1971) (exploring how seventy-two interviewees charged with felonies navigated the criminal system).

491. See Clair, supra note 490, at 7 ("The attorney-client relationship *reproduces* race and class inequalities.").

before them, precisely because of their more intimate experience of state repression and abandonment.[492] Clair's findings corroborate decades of sociological research on the experiences of people from disadvantaged backgrounds forced to navigate criminal court that shows that their alienation from the process worsens their case outcomes and reproduces their precarious class position.[493] Similarly, legal scholar and sociologist Monica Bell developed the concept of legal estrangement to move away from psychologizing those on the receiving end of state supervision.[494] Legal estrangement "implicate[s] a particular set of structural conditions that produced that subjective feeling."[495]

This body of literature exposes the structural conditions of mistrust. One function of the PD exclusion is that it does not require examiners to disentangle mistrust rooted in state abandonment from mistrust rooted in psychological distress. The line court actors draw excludes disabilities that express themselves in relationships, especially those involving state institutions. Thus, courts firmly shut the door to claims of disability anchored in a social model. In other words, court actors reject a view of disability that is produced through a complex set of interactions between social conditions and human bodies. Instead, they erect a firm boundary to exclude claims of difference that express most apparently in institutional settings. One consequence of this exclusion is that CST proceedings may deny recognition to the debilitating force of state repression. Mistrust is construed in these proceedings as an affective choice, never as the sign of a disability, whether it is produced by structural conditions or emerges spontaneously from a psychological condition. Disabilities that reflect the debilitating force of criminalization are categorically excluded.

IV. MORAL JUDGMENTS

This Part explores the function that the PD exclusion plays in criminal court. Chiefly, the exclusion preserves criminal law's commitment to imputing responsibility.[496] Indeed, a preoccupation with personal respon-

492. Id.

493. See, e.g., Victor M. Rios, Punished**:** Policing the Lives of Black and Latino Boys 8 (2011) ("Delinquent inner-city youths . . . spoke directly to the impact of punitive policies and practices prevalent in welfare and criminal justice institutions."); Paul E. Willis, Learning to Labour: How Working Class Kids Get Working Class Jobs 176–79 (Routledge 2016) (1978) ("[S]ince social reproduction of the class society in general continues despite the intervention of the liberal state and its institutions, it may be suggested that some of the real functions of institutions work counter to their stated aims."); see also Casper, supra note 490, at 4–7 (interviewing seventy-two subjects charged with felonies to explore how individuals navigate and perceive the criminal legal system).

494. See Monica C. Bell, Police Reform and the Dismantling of Legal Estrangement, 126 Yale L.J. 2054, 2066–67 (2017) (reframing the breakdown in police–civilian relationships as one rooted in legal estrangement rather than a crisis of legitimacy).

495. Id. at 2085.

496. For further discussion of the role of responsibility in criminal proceedings, see generally H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law (2d

sibility undergirds examiners' and courts' conclusions that defendants with PDs are competent to stand trial.[497] Such an abiding preoccupation is arguably inappropriate because the *Dusky–Drope* standard directs trial courts to focus on the accused's participation, rather than their responsibility.[498]

A. *Assigning Responsibility*

State examiners often make one key allegation about defendants with PDs: They are in control, unlike defendants who are diagnosed with psychosis.[499] But when examiners claim that defendants are responsible for modulating the expressions of their PDs, they make normative rather than clinical judgments about responsibility. This section illuminates the logical leaps and assumptions examiners make to reach their conclusions.

In CST proceedings, examiners confront individuals who engage in ordinary, if maligned, conduct. They are tasked with assessing defendants' ability according to the legal standard.[500] Examiners' decisions suggest they put significant emphasis on one part of the analysis: whether impairments in cognition, affective response, and impulse control are the product of a mental illness or defect.[501] It is not unreasonable for them to interpret symptoms as they present—that is, to interpret conduct that appears manipulative, deceitful, and obstructionist as those very behaviors. Examiners conclude that because individuals with PDs act in ways that could be intentional and even calculating, they are being their true selves,

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ed. 2008) (centering questions concerning the legal criteria for attributing responsibility in the study of criminal offenses); James Edwards, Theories of Criminal Law, Stan. Encyc. of Phil. (Aug. 6, 2018), https://plato.stanford.edu/entries/criminal-law/#CrimResp [https://perma.cc/QE64-EDV3] (surveying the dominant theories of criminal respon-sibility along with the required elements and defenses implicated in proving responsibility).

497. See, e.g., United States v. Heth, 338 F. App'x 489, 496 (6th Cir. 2009) ("[B]oth psychologists concluded that [the defendant's] difficult nature was caused by a personality disorder, which both agreed was under his control and did not qualify as a mental disease or defect."); People v. Tooker, No. A154181, 2019 WL 6726523, at *7 (Cal. Ct. App. Dec. 9, 2019) ("In other words, Dr. Blinder opined that Tooker might *choose* not to cooperate if he did not like counsel, but he was cognitively able to do so.").

498. See supra section I.A.

499. See, e.g., *Tooker*, 2019 WL 6726523, at *6 ("As Tooker recognizes, one of the experts concluded that he could assist counsel in his own defense, which would normally constitute sufficient evidence of competency in this respect.").

500. See United States v. Brown, 669 F.3d 10, 17 (1st Cir. 2012) ("To challenge the district court's finding of competency, Edward 'must present facts sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to [his] mental competence.'" (alteration in original) (quoting United States v. Collins, 949 F.2d 921, 927 (7th Cir. 1991))).

501. See *Tooker*, 2019 WL 6726523, at *5 ("Once Mr. Tooker 'felt good' about me he exhibited no 'mental disease or defect' . . . that would substantially interfere with his ability to do any of these things . . . ." (alterations in original) (internal quotation marks omitted) (quoting Dr. Blinder)).

rather than expressing their psychiatric disability.[502] But in doing so, experts, judges, and attorneys sidestep genuine moral questions. They do not consider whether apparently intentional conduct could reflect internal distress and neurocognitive difference. Courts and examiners seem to assume that such conduct cannot be the product of disability.[503] But these are precisely the foundational questions about responsibility that PDs pose.[504]

It is not possible to empirically ascertain whether a particular trait is within a person's control.[505] As discussed, there is no consensus on the etiology of PDs.[506] There are some indications that PDs have neurological origins, just like other psychiatric disorders, suggesting that an individual with a PD does not have complete control over their behavior.[507] But as scholar Federica Coppola stresses, "Brain mechanisms do not alone account for an individual's (lack of) culpability."[508] And yet, PDs can cause impairments as severe as those resulting from other psychiatric conditions,

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502. See State v. Brown, No. 11-1-121743-3 KNT, 2012 Wash. Super. LEXIS 284, at *12 (Wash. Super. Ct. Oct. 31, 2012) (stating that the challenges associated with the client's presentation were not related to "symptoms of a mental illness" but rather an attempt by the client to halt the legal proceedings against him); see also Perlin, Hidden Prejudice, supra note 29, at 16 (describing how certain jurists throughout time have based determinations about mental disabilities on whether a "defendant bears a 'normal appearance'" (quoting Michael L. Perlin, The Supreme Court, the Mentally Disabled Criminal Defendant and Symbolic Values: Random Decisions, Hidden Rationales, or "Doctrinal Abyss?", 29 Ariz. L. Rev. 1, 83 n.811 (1987))).

503. See supra Part III.

504. PDs, psychopathy, and ASPD were each once known as moral imbecility or moral insanity. See Partridge, supra note 82, at 65–67; Lucy Ozarin, Moral Insanity: A Brief History, Psychiatric News, May 18, 2001, at 21, 21 ("The 1968 revision [of the *DSM*] uses 'antisocial personality,' and *DSM-III* and *-IV* retain this rubric.").

505. See, e.g., United States v. Lyons, 731 F.2d 243, 248 (5th Cir. 1984) (en banc). In *Lyons*, the Fifth Circuit refused to extend the federal insanity defense to circumstances in which the defendant lacked the capacity to conform their conduct to the requirements of the law. Id. The court cited two reasons for its decision: First, it relied on a new consensus in which "a majority of psychiatrists now believe that they do not possess sufficient accurate scientific bases for measuring a person's capacity for self-control or for calibrating the impairment of that capacity." Id. (citing Richard J. Bonnie, The Moral Basis of the Insanity Defense, 69 A.B.A. J. 194, 196 (1983)). And second: a concern of malingering, explaining that "the risks of fabrication and 'moral mistakes' in administering the insanity defense are greatest 'when the experts and the jury are asked to speculate whether the defendant had the capacity to "control" himself or whether he could have "resisted" the criminal impulse.'" Id. at 249 (quoting Richard J. Bonnie, The Moral Basis of the Insanity Defense, 69 A.B.A. J. 194, 196 (1983)).

506. See supra note 82 and accompanying text.

507. See Robert O. Friedel, Christian Schmahl & Marijn Distel, The Neurobiological Basis of Borderline Personality Disorder, *in* Neurobiology of Personality Disorders 279, 280 (Christian Schmahl, K. Luan Phan, Robert O. Friedel & Larry J. Siever eds., 2018) (noting "that BPD has a strong neurobiological basis and that it is important to understand the biological underpinnings of the disorder").

508. Coppola, supra note 76, at 3.

including in ways relevant to establishing legal responsibility.[509] As a result, bioethicists Dominic Sisti and Arthur Caplan argue against attributing responsibility to individuals with BPD: "BPD is an impairment in a person's ability to control their first-order desires. Persons suffering from BPD, by definition, also lack a stable deeper self and a strong set of volitions."[510] Nonetheless, those very individuals also "possess desires, and sufficient volition to give some insight and empathic capability, [so] there should be a prima facie assumption they are responsible for their actions."[511] In other words, the issue of control is contested within the fields of psychology and psychiatry. Jonas Robitscher, lawyer and psychiatrist, explains:

> A psychiatrist for example can give details of previous mental troubles, trace the course of a developing illness, demonstrate ego deficiencies—all of which may indicate a defendant might have found an impulse more irresistible than might a man with a stronger ego. But the point at which an impulse crosses the borderline from resistibility to irresistibility is not a determination for a psychiatrist; it can only be made in the abstract by a meta-physician and in the concrete by a judge and jury.[512]

In the absence of empirical certainty and in the context of disciplinary debates, the CST examiner is typically tasked with reaching findings about competency and ascertaining attribution: That is, are the difficulties the accused person is experiencing in their case attributable to their bad choices or to a psychiatric disorder? Even the way prosecutors, their experts, and courts frame the question assumes that choices cannot be shaped by disability.[513] To answer this loaded question, the examiner moves from a descriptive account to a normative account, from what is attributable to disability to what ought to be attributed to disability. Put more simply, the examiner is deciding what the law of competency ought to accommodate and what it ought to ignore.[514] The examiners deliver a moral judgment because they are implicitly applying a code of conduct

509. Kinscherff, supra note 23, at 750–51 (noting that neither clinical nor scientific grounds can support categorical bans on insanity defenses for individuals with PDs because the "functional impairments associated with personality disorders can be severe and similar to . . . mental disorders that would be permitted for consideration of nullification of criminal responsibility" (emphasis omitted)).

510. Dominic A. Sisti & Arthur L. Caplan, Accommodation Without Exculpation? The Ethical and Legal Paradoxes of Borderline Personality Disorder, 40 J. Psychiatry & L. 75, 78 (2012).

511. Id.

512. Robitscher, supra note 26, at 170.

513. See supra section III.D; see also supra note 467 and accompanying text.

514. See Stephen J. Morse, Culpability and Control, 142 U. Pa. L. Rev. 1587, 1657–58 (1994) [hereinafter Morse, Culpability and Control] ("[P]sychology does not know, whether and to what degree people are *unable* to refrain from acting. . . . [W]e do not know how mental disorder affects self-control in general, apart from its more clear role in affecting perception and belief, which are variables central to rationality.").

that identifies those behaviors that justify accountability.[515] But the cloak of clinical expertise shrouds what are ultimately moral pronouncements.

Critics of psychology and bioethics have noted the essential moral character of diagnosing disease and disability.[516] The moral interventions occur in two ways. First, the fields of psychology and psychiatry make moral judgments when they define diagnostic categories in the *DSM* and pronounce when a cluster of characteristics "deviate[] markedly from the norms and expectations of the individual's culture."[517] Human diversity occurs naturally, but psychologists and psychiatrists determine which forms of difference ought to be recognized as medical abnormalities.[518] Not all differences are deemed disabilities or diseases. Some are deemed innocuous, while others are met with disdain rather than support. Diagnostic categories are thus not only scientific categories but also value-laden judgments about who deserves autonomy, dignity, and care and who can be rightfully denied those rights.[519]

Second, forensic examiners and other practitioners interpret the *DSM* in CST proceedings and make judgments about responsibility.[520] In CST proceedings, some examiners and courts advance a specific moral claim about individuals with PDs: that even individuals who lack normative

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515. See The Definition of Morality, Stan. Encyc. Phil. (Apr. 17, 2002), https://plato.stanford.edu/entries/morality-definition/ [https://perma.cc/XRQ4-XRVD] (last updated Jan. 28, 2025) ("[T]he term 'morality' can be used . . . descriptively to refer to certain codes of conduct endorsed by a society or a group (such as a religion), or accepted by an individual for [their] own behavior . . . .").

516. See, e.g., Foucault, Jan. 15 Lecture, supra note 31, at 39–41 (narrating the historical evolution of the relationship between psychiatry and law from an antagonistic one to a complimentary one, culminating in a consolidated medico-judicial power in which "both justice and psychiatry are adulterated" in the expert opinion commissioned to describe abnormal individuals).

517. See DSM-5-TR, supra note 15, at 733.

518. Amundson, supra note 85, at 51 (arguing that while philosophers and medical practitioners have attributed disabled people's disadvantages to their own abnormality, this may reflect professionals' "preference for 'ways of doing things that are preferred by the dominant classes and to which we have therefore become accustomed'" (quoting Anita Silvers, A Fatal Attraction to Normalizing: Treating Disabilities as Deviations From "Species-Typical" Functioning, *in* Enhancing Human Traits: Ethical and Social Implications 95, 108 (Erik Parens ed., 1998))).

519. Perlin states:

> "Morality" issues affect the incompetency to stand trial process in several critical ways. First, the process is subject to significant political bias. Second, the power imbalance issues that taint the entire forensic process are especially potent. Third, . . . the inadequacy of pre-trial evaluations, cursory testimony, the misuse and misapplication of substantive standards, and the non-implementation of Supreme Court constitutional directives receive little judicial or scholarly attention . . . .

Perlin, Pretexts and Mental Disability Law, supra note 101, at 653.

520. See supra Part III.

capacity are responsible for their conduct in criminal proceedings.[521] A person who lacks normative capacity struggles to recognize that other people have justifiable claims over their conduct.[522] And, indeed, one of the common traits across several PD diagnoses is a lack of empathy, "the action of understanding, being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experience of another."[523] The *DSM* states that "[i]ndividuals with antisocial personality disorder frequently lack empathy and tend to be callous, cynical, and contemptuous of the feelings, rights, and sufferings of others."[524]

Policymakers have wrestled with whether normative incapacity undermines claims for moral capacity and responsibility. For the most part, jurisdictions embrace a rule that attributes criminal responsibility for apparently volitional conduct.[525] In the absence of delusion or coercion, a person is responsible for their criminal conduct, even if they lack normative capacity.[526] The insanity doctrine does not accommodate defendants who experience socioaffective distress, like defendants who experience PDs.[527] The law has "limited regard of emotional faculties within the evaluation of the capacity for moral rationality."[528] As noted earlier, jurisdictions have imposed a categorical ban on claims of insanity that rely exclusively on a PD diagnosis.[529]

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521. See supra sections III.C–.D; see also Note, Bias Baked In: How Antisocial Personality Disorder Diagnoses Trigger Legal Failures, 138 Harv. L. Rev. 1101, 1118 (2025) ("Judgments about the culpability and moral worth of a person diagnosed with ASPD can prematurely end investigations into mitigating circumstances and foreclose empathy.").

522. Gary Watson, The Trouble With Psychopaths, *in* Reasons and Recognition: Essays on the Philosophy of T.M. Scanlon 307, 307–08 (R. Jay Wallace, Rahul Kumar & Samuel Freeman eds., 2011) ("[P]sychopathy . . . precisely involves an incapacity to recognize the interests of others as making any valid claims on them.").

523. Empathy, Merriam-Webster, https://www.merriam-webster.com/dictionary/empathy [https://perma.cc/5AUH-8SHP] (last visited Feb. 10, 2025); supra note 39 and accompanying text.

524. DSM-5-TR, supra note 15, at 749.

525. See, e.g., United States v. Lyons, 731 F.2d 243, 249 (5th Cir. 1984) (en banc) ("[T]he risks of fabrication and 'moral mistakes' in administering the insanity defense are greatest 'when the experts and the jury are asked to speculate whether the defendant had the capacity to "control" himself or whether he could have "resisted" the criminal impulse.'" (quoting Richard J. Bonnie, The Moral Basis of the Insanity Defense, 69 A.B.A. J. 194, 196 (1983))).

526. See Watson, supra note 522, at 307 ("Those who (without psychosis or coercion) deliberately and callously harm, defraud, and manipulate others, as psychopaths frequently do, seem appropriately subject to blame and to applicable penal sanction.").

527. See Model Penal Code § 4.01(2) (Am. L. Inst., Proposed Official Draft 1962) (excluding "an abnormality manifested only by repeated criminal or otherwise anti-social conduct").

528. Coppola, supra note 76, at 26.

529. See Richard J. Bonnie, Should a Personality Disorder Qualify as a Mental Disease in Insanity Adjudication?, 38 J.L. Med. & Ethics 760, 761 (2010) (noting that "[i]n a few jurisdictions . . . the insanity statutes specifically exclude all personality disorders from the definition of mental disease"); Johnson & Elbogen, supra note 305, at 207–08 (surveying

From another perspective, philosophers have theorized about individuals who lack normative incapacity. Philosopher Gary Watson has argued that normative incapacity prohibits accountability.[530] Watson argues that although a person can cause harm, they are not necessarily accountable.[531] He identifies a group of people who "are disabled from standing in the reciprocal relations or . . . from engaging in the mutual recognition that lie at the core of moral life."[532] A person's normative incapacity may cause them to harm others and invite reproach. But their normative incapacity also means they lack moral agency.[533] While it might feel intuitively correct to blame someone who "willingly or callously" harms others "without coercion or psychosis," Watson suggests the person cannot be held morally accountable if they cannot recognize that others have standing to make legitimate claims on their behavior.[534] In other words, under Watson's account, a person cannot be held responsible if they do not have the capacity—emotionally, cognitively, and volitionally—to grasp the basis for interpersonal accountability and act accordingly.[535]

In CST proceedings, examiners navigate similar terrain. Examiners confront individuals who appear to manipulate CST proceedings and refuse to speak with their attorneys.[536] These defendants tend to cause irritation, even if they do not draw outright condemnation.[537] The examiners must decide whether apparently subversive activity ought to

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federal and state cases and statutes that have excluded certain PDs, including ASPD, as a basis for diminished capacity defenses). But New Jersey has recognized diminished capacity defenses when the defendant presented evidence of a PD. See State v. Galloway, 628 A.2d 735, 740 (N.J. 1993) ("[T]he statutory defense of diminished capacity contemplates a broad range of mental conditions that can be a basis for the defense . . . .").

530. Watson, supra note 522, at 307–08 (exposing the moral dilemma in holding individuals who lack normative capacity accountable for their actions). Watson set forth four propositions that have served as an anchor in philosophical literature and capture this key dilemma. The grounds are as follow: (1) "[N]ormative incapacity undermines moral agency," (2) "moral[] responsibility requires moral agency," (3) "being properly open to moral blame and penal sanctions entails the possession of moral agency," and (4) "to willingly and callously harm or manipulate others, without coercion or psychosis, is to make oneself a proper object of moral blame and punishment." Id. Upon first glance, these four claims may seem uncontroversially true. But in considering the special case of individuals who are unable to cultivate empathy, a tension emerges. Id. Watson suggests that there is a group of people who meet proposition four by causing harm without apparent external excuse but who also lack normative capacity, thus undermining proposition one. Id. "[W]hat appears to explain a good bit of the conduct for which we naturally want to blame these individuals is the very incapacity that disqualifies them as moral agents." Id.

531. See id.

532. Id.

533. Id.

534. Id.

535. Id.

536. See supra section III.D.

537. See supra sections III.D.1–.2; see also supra notes 445–455 and accompanying text (discussing *Halder*, a case in which the court found the defendant competent despite his inability and unwillingness to assist his defense counsel).

trigger a procedural type of legal responsibility. That is, they decide not on the ultimate substantive question of whether the person should be blamed and punished but on whether they should be compelled to undergo the process for blame and punishment. State examiners hold defendants with PDs accountable for their procedural misconduct as if they were morally capable actors, but they fail to consider whether the defendant has the capacity to appreciate the legitimacy of the proceedings brought against them.[538] But what if, instead, the defendants in the cases profiled in this Essay struggled to collaborate and potentially exaggerated their symptoms not just because they made bad choices but because they experience such profound mistrust rooted in psychological distress? While a person who shows symptoms of a cluster B personality disorder may be more likely to engage in behavior that causes interpersonal harm, they may also fail to grasp the very basis for interpersonal accountability.[539] More precisely, they may be unable to recognize the criminal proceedings as justifiable or their legal representatives as faithful. Their socioaffective difference may frustrate cooperation, which the law of criminal procedure otherwise expects.[540] While the examiners do not seem to embrace this possibility, the cases surveyed suggest an alternative interpretation that would credit PDs as genuine psychiatric disabilities, just as genuine as psychosis, and recognize the importance of interpersonal collaboration for trial competency.[541]

The controversy PDs pose is mostly buried.[542] Furthermore, court testimony does not reveal a principled basis for attributing procedural misconduct to defendants with PDs.[543] At worst, it seems that examiners' moral judgments are grounded in the negative reactions that the manifestations of PDs evoke. Or perhaps they are suggesting that legal competence does not require normative competence. In other words, they may be suggesting that defendants with PDs need not have a robust capacity to appreciate the legitimacy of criminal processes, their attorneys, and the examiners. But we are left guessing. Examiners do not explain how they set the threshold for responsibility that underlies their legal determinations. While we cannot expect examiners to offer philosophical proof, we can expect them to offer insight into how they reconcile the dilemma that PDs pose: a category of disorders in which the person is predisposed to display morally disvalued traits that confer the impression of agency.

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538. See supra sections III.C–.D.

539. See Watson, supra note 522, at 308 (noting psychopaths often experience "callous interpersonal relations" and "refus[e] to take responsibility for the troubles caused to others").

540. See supra section III.D.2; see also Drope v. Missouri, 420 U.S. 162, 172 (1975).

541. See supra sections III.D.1–.2.

542. See supra Part III.

543. See supra section III.D.

B. *The Disability–Criminality Binary*

In CST proceedings, the essential moral character of psychology and psychiatry becomes apparent. Examiners define mental disability for competency purposes narrowly. Conduct that is consistent with criminal liability cannot support a defense of competency.[544] In this way, competency decisions mirror substantive criminal outcomes. CST, a procedural safeguard, absorbs criminal court's substantive agenda.

As this Essay has shown, the steps for determining whether someone is responsible for their conduct in both the competency and insanity context are the same.[545] PDs pose the same controversy across these two areas of law. The uniformity is remarkable because the two bodies of law advance distinct purposes. Procedural accommodations for disability advance the Sixth Amendment's guarantee of a fair trial and effective representation.[546] Insanity is not a constitutional doctrine but is a widely embraced defense in the United States that advances the goals of positive retribution.[547] When courts adjudicate competency, they take the same approach to differentiating between disability and deviance that is used in the insanity context and thus potentially ignore the unique values animating the CST standard: It is a protection aimed at recalibrating the imbalance between the defense and the prosecution and between able-minded and disabled defendants.[548] Furthermore, the exclusion of PDs in the insanity doctrine is more firmly established in law.[549] The insanity doctrine has received more thorough scholarly attention than competency.[550] Judges first dispense with insanity before addressing

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544. See Michel Foucault, Lecture of 22 January 1975, *in* Abnormal: Lectures at the Collège de France 1974–1975, supra note 31, at 55, 64 (stating that, despite the possibility that disability "upsets the natural order, . . . it has a place in civil or canon law," unlike "monstrosity," which is an "irregularity that calls law into question and disables it").

545. See supra notes 358–361 and accompanying text (discussing a federal case in which discussion of the insanity defense subsumed discussion of incompetency claims); supra notes 379–382 (discussing a state case in which a diminished capacity defense subsumed discussion of incompetency claims).

546. See Drope v. Missouri, 420 U.S. 162, 171–72 (1975) ("[W]e held that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial.").

547. See Kahler v. Kansas, 140 S. Ct. 1021, 1037 (2020) (declining to hold that the Constitution required Kansas to adopt an insanity defense when the defendant could not appreciate his acts as immoral); id. at 1030 ("Kahler is right that for hundreds of years jurists and judges have recognized insanity (however defined) as relieving responsibility for a crime.").

548. See Bonnie, A Theoretical Reformulation, supra note 4, at 295 ("To proceed against a defendant who lacks the capacity to recognize and communicate relevant information to his or her attorney and to the court would be unfair to the defendant and would undermine society's independent interest in the *reliability* of its criminal process.").

549. The Model Penal Code's exclusion of ASPD is one example of this firm tendency. See Model Penal Code § 4.01(2) (Am. L. Inst. Proposed Official Draft 1962).

550. See supra note 76 and accompanying text.

competency.[551] These trends reveal the force of the insanity doctrine as it permeates competency decisions. Ultimately, concerns about moral and legal responsibility shape a procedural protection.

To put it in other terms, CST proceedings are not merely procedural but substantive. When it comes to PDs, CST proceedings, in their most dramatic form, become miniature trials about the accused's moral and criminal responsibility.[552] Procedural and substantive criminal law are not always so easy to disentangle. But criminal procedure derives its legitimacy from erecting firewalls around substantive criminal law. In theory, the rules of process are the same regardless of guilt or innocence to ensure accurate case outcomes.[553] But courts have frequently allowed substantive concerns to overshadow procedural ones.[554] In other words, courts have been willing to undermine defendants' criminal process rights precisely because defendants are factually culpable, legally guilty, or—in some eyes—worthy of contempt.

In the CST context, substance and process converge, but in a unique way: A rule of procedure, modeled after a rule of substance, has also absorbed its normative content. It is not simply that the background context of guilt and innocence shapes the rule. The procedural rule, CST, replicates the substantive one regarding legal responsibility. That is, even if examiners are not opining on defendants' ultimate criminal responsibility, they reach a finding of moral responsibility that mimics a finding of guilt.

The shadow of substantive concerns helps explain examiners' narrow framing of disability in CST proceedings, discussed in Part II. Competency

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551. See supra notes 358–361 and accompanying text (discussing *Rosenheimer*, a case in which discussion of the insanity defense subsumed discussion of incompetency claims).

552. See supra notes 410–415 and accompanying text (discussing *Banda*, a case in which the defendant's competency proceeding veered into questions about prior criminal history and culpability).

553. See Martinez, supra note 33, at 1019 ("We presume innocence in criminal trials not because we think most defendants are in fact innocent, but because of concerns about limiting government power and a preference for avoiding erroneous convictions even at the cost of erroneous acquittals.").

554. Courts have narrowed Fourth and Fifth Amendment protections for criminal defendants in the face of gory and disturbing facts about their crimes. See, e.g., Brewer v. Williams, 430 U.S. 387, 393–94 (1977) (stating that the defendant waived his right to an attorney when he provided critical information to police officers during the investigation of the abduction and murder of a ten-year-old girl). The sustained backlash to *Mapp v. Ohio* and the exclusionary rule is grounded in a view that guilty defendants deserve fewer protections than the innocent. See, e.g., Stone v. Powell, 428 U.S. 465, 490 (1976) ("The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice."); Louis Michael Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 Colum. L. Rev. 436, 449 (1980) ("When a guilty [defendant] is released because of a fourth amendment violation, the result is not only truth-denying; it denies the truth in order to mold police conduct in a way that itself impedes our ability to secure the truth.").

assessments complement other moves in criminal law to exclude forms of disability that would absolve antisocial behaviors of responsibility. In both insanity and competency contexts, there are categories of disabilities that carceral actors do not recognize as such[555]—perhaps because doing so would undermine the foundational institutional logic that misconduct is prima facie evidence of volition. Apparently, volitional conduct is sufficient for responsibility. As such, in criminal court, disability operates as an exclusive category that is reserved for those whose neurodivergence does not invite blame and whose conduct does not appear voluntary.[556] Disability is a residual category for those ways of being that do not disrupt a robust conception of criminal responsibility.

The knowledge examiners produce is anchored in distinct institutional motivations—namely the administration of criminal law. Disability emerges as a relational concept, defined by the "oriented act of perception, intimately tied to [the] evaluation that guides interaction."[557] In an employment context, as Professor Jasmine Harris points out, disability tends to be construed as the "markers of corporeal deviation" that single out people whose bodies "disrupt a constructed ideal of an optimal 'docile body' and its celebrated set of functional capacities that position the ideal market actor."[558] Criminal court defines disability in contradistinction to criminality and its close cousin: moral culpability.[559] The person who is disabled and incompetent is one who does not attract blame.

The treatment of PDs in CST proceedings exposes the limits of even the modest agenda of disability rights in the carceral state. The demands and underlying logic of criminalization place ideological limits on criminal courts' accommodations. CST proceedings may always fail to accomplish their professed function of equalizing the playing field.

V. IMPLICATIONS FOR REFORM

This Part teases out the practical implications of these findings for court reform. First, when it advances their clients' interests, defense attorneys can litigate the *Dusky–Drope* standard to enforce the second prong that relates to the attorney–client relationship, and they can push examiners and courts to make more transparent and principled decisions

555. See supra section III.B.

556. See Slobogin, Psychiatric Evidence, supra note 206, at 25–26 (reporting on the exclusion of novel psychiatric testimony that "pushes the doctrinal envelope" because it would "open the floodgates to traditionally disfavored volitional impairment claims"); see also Bonnie, Compulsive Gambling, supra note 259, at 7 (stating that "the link between a compulsion to gamble and the offense of theft is too tenuous to permit a jury to find that the defendant, as a result of his compulsive gambling disorder, lacked substantial capacity to conform his behavior to the requirements of the laws").

557. Titchkosky, supra note 10, at 5.

558. Jasmine E. Harris, The Aesthetics of Disability, 119 Colum. L. Rev. 895, 952 (2019).

559. See supra section IV.A.

about PDs. Second, the exclusion of defendants with PDs reveals some of the inherent limitations of disability inclusion in criminal court. Third, the underappreciated moral and substantive valence of examiners' decisions should temper our enthusiasm for therapeutic interventions in criminal court that rely on behavioral health expertise, as these may always exclude an important group of neurodivergent defendants.

A. *Courtroom Correctives*

Examiners and courts make two critical errors in their CST assessments and findings. One is a category error. Courts have deferred entirely to examiners to make normative decisions about responsibility in addition to clinical assessments about capacities.[560] But responsibility, even in a procedural context, is a question of law, policy, and institutional prerogatives. Whether to treat defendants with PDs as responsible or incompetent is a legal question to be litigated and adjudicated. The other type of error is an interpretive error. Courts have ignored the second, relational element of the *Dusky–Drope* standard and have failed to engage with the competency standard's core purpose.[561]

To rectify the category error, examiners and courts should surface several embedded legal issues that emerge in CST proceedings involving PDs. These distinct issues deserve more rigorous engagement by litigants and explicit treatment by courts.

First, courts must decide as a matter of policy if PDs can form the basis of incompetency. If not, what are the principled grounds for excluding these diagnoses and behaviors? If malingering and misconduct are the primary motivations for excluding PDs, then courts must be willing to conclude that, as a matter of law, individuals with these diagnoses are responsible for their conduct. It must be a legal, rather than an empirical, conclusion because courts cannot accurately claim that a person's emotional fragility and deep-seated mistrust rooted in psychopathology does not undermine the capacities the competency standard measures. Courts should be forced to justify their decisions on legal grounds—that is, by actually holding that the competency standard does not recognize certain categories of impairments. And defense attorneys will need to remind courts that the *Dusky–Drope* standard contemplates a range of disabilities that shape interpersonal relations.

Second, if courts do not categorically exclude PDs, under what circumstances can PDs sustain a finding of incompetency, if not in the case before the court? As a litigation position, defense attorneys should urge courts to separate facts from law, even if ontologically those are unstable categories. Courts should be explicit when they determine whether the

560. See supra Part III.

561. See supra note 103 and accompanying text.

defendant can control their symptoms and explain why their competency finding hinges on the defendant's apparent control.

Control, and whether conduct stems from a disorder or from the person, cannot be definitely ascertained empirically.[562] Furthermore, the capacity for self-control might militate in favor of incompetency because it suggests the defendant may be amenable to treatment.[563] As a matter of psychology, the exercise of control over a disorder is not necessarily incompatible with a psychiatric disability.[564] Similarly, that a person's symptoms vary does not necessarily show control; it may instead underscore the fluid nature of disability.[565] Judges should reach these determinations by drawing on law, policy, and clinical expertise.

To rectify the interpretive error, as courts address this issue, defense attorneys should press upon the distinct policy motivations for the competency safeguard. Seeking consistency with the insanity doctrine's exclusions is not a satisfactory explanation because the competency doctrine serves different purposes. The singular focus on responsibility may be more appropriate for the insanity doctrine. But that concern is diminished if fashioning a procedural protection. One could imagine an examiner willing to recognize PDs at the competency stage and not the insanity stage, when the key consideration is the fairness and accuracy of the process rather than culpability. Furthermore, to find that the attorney–client element of the competency standard is secondary in importance creates new law. Neither *Dusky*, *Drope*, nor subsequent Supreme Court cases permit courts to prioritize one part over the other.[566]

These arguments are only possible when defense attorneys document and present the specific behaviors that meet the *Dusky–Drope* standard. If the accused's only diagnosis is a PD, the attorney should establish how conduct consistent with that label can impede trust, communication, and

562. Morse, Culpability and Control, supra note 514, at 1657 ("[T]he studies do not address, and folk psychology does not know, whether and to what degree people are *unable* to refrain from acting. Neither in psychology, philosophy, nor folk psychology is there a reasonably uncontroversial understanding of these matters." (footnote omitted)).

563. The capacity for control is one of the reasons why dialectical behavior therapy (DBT) has proven to be an effective treatment for BPD. DBT asks patients to "balance two seemingly opposing forces: acceptance and change," and in turn to embrace their reality as such while also appreciating their capacity to transform their current conditions. See Dialectical Behavior Therapy to Treat Borderline Personality Disorder, Mass Gen. Brigham McLean, https://www.mcleanhospital.org/treatment/bpd-dbt (on file with the *Columbia Law Review*) (last visited Aug. 20, 2025); see also Jennifer M. May, Toni M. Richardi & Kelly S. Barth, Dialectical Behavior Therapy as Treatment for Borderline Personality Disorder, 6 Mental Health Clinician 62, 63–66 (2016) (discussing the effectivity of DBT for individuals with BPD).

564. The *DSM*'s recognition of ASPD suggests that even intentional conduct characterized by "[a] pervasive pattern of disregard for and violation of the rights of others" can establish a psychiatric condition. See DSM-5-TR, supra note 15, at 748.

565. See supra note 10 and accompanying text; supra notes 453–459 and accompanying text.

566. See supra section I.A (discussing the multiple prongs of the *Dusky–Drope* test).

collaboration. Ideally, the defense should address the impairments as they shape all dimensions of legal decisionmaking: cognition, affect, and impulse control. To anticipate arguments that diminish such evidence because it stems from a PD rather than a psychotic disorder, defense counsel can draw on emerging research that debunks the categorical distinctions between PDs and psychotic disorders.[567] PDs are also responsive to treatment and have neurological underpinnings.[568] Furthermore, the symptoms observed may indicate other unaddressed psychiatric conditions.[569] Finally, defense counsel should underscore that courts retain the ultimate authority to determine whether the defendant's procedural difficulties are a product of a psychiatric disability. Determining which, if any, conduct is a product of a disability is a question of responsibility that implicates ethical, not merely clinical, considerations. Currently, the examiners' conclusions conflate the clinical and moral dimensions of their decisions,[570] preventing clearheaded analysis. Defense attorneys should surface the veritable dilemma.

While rules of evidence empower experts to address each of the elements of the *Dusky–Drope* analysis,[571] experts are no more qualified to determine control and volition than a judge. The fact that an expert has concluded that the defendant has a disorder should weigh in favor of incompetency, not against it. Defense counsel should argue that although there is always a risk of malingering, eliminating the risk of fabrication would also eliminate accommodations.[572]

Defense attorneys should carefully consider when to advance such arguments. There may be occasions when a finding of incompetency, a pause in the proceedings, and mandatory treatment could be the lesser of two evils.[573] The risks of institutionalization, however, should not be underestimated.

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567. See, e.g., Kinscherff, supra note 23, at 748 (suggesting mental disorders are better understood as dimensional rather than categorical diagnostic constructs); supra notes 269–294 and accompanying text.

568. See supra notes 282–292 and accompanying text.

569. See Wayland & O'Brien, supra note 298, at 540 (discussing that the diagnosis process for ASPD relies on an "over-inclusion of symptoms," which can lead to inaccuracy and a failure to recognize other diagnoses or conditions).

570. See supra section IV.A.

571. See Fed. R. Evid. 702–704.

572. See Bursten, supra note 26, at 93 (arguing that "exclud[ing] all circumstances where lying is possible would deprive society of the compassion it requires as part of the emotional glue that holds it together").

573. For a critique of the lesser-evil calculus in social reform, see Eyal Weizman, The Least of All Possible Evils: Humanitarian Violence From Arendt to Gaza 6 (2011). Scholar Eyal Weizman stated,

> The principle of the lesser evil is often presented as a dilemma between two or more bad choices in situations where available options are, or seem to be, limited. . . . Both aspects of the principle are understood as taking place within a closed system in which those posing

Advancing this kind of strategic litigation requires funds.[574] Defense attorneys and public defender offices would benefit from more resources to rigorously contest examiners' and courts' findings that PDs are not cognizable disabilities. Defense attorneys need funds to hire forensic experts, time to work with them to prepare for hearings, time to build trust with their clients, and time to educate themselves about developments in mental health. Additional funding could also help prevent unnecessary competency litigation and the risk of prolonged civil commitment because it would grant public defender offices the resources to devise ways to support their neurodivergent clients.

B. *Beyond Competency*

Advocates asking courts to recognize their clients as incompetent may face an epistemic barrier. Examiners produce a view of disability skewed by institutional demands.[575] Unless those institutional constraints shift, advocates' pleas will go unanswered. To ask examiners and courts to accept PDs as grounds for incompetency troubles substantive criminal law's default commitment to ascribing blame. Exemptions from competency could bleed into exemptions from criminal responsibility. This context cautions against efforts to compel courts and examiners to

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> the dilemma, the options available for choice, the factors to be calculated and the very parameters of calculation are unchallenged. Each calculation is undertaken anew, as if the previous accumulation of events has not taken place, and the future implications are out of bounds.

Id.

574. Increasing funding for public defenders and indigent defense providers is not a new demand, but a plea as old as the right to counsel itself. See Sara Mayeux, Free Justice: A History of the Public Defender in Twentieth-Century America 144–45 (2020) (discussing the indigent defense crisis, including crushing caseloads in Boston, once a leader in public representation); Sara Mayeux, What *Gideon* Did, 116 Colum. L. Rev. 15, 54–55 (2016) (discussing the absence of federal support for public defense in the 1960s through the 1970s). For an assessment of the crisis today, see Bryan Furst, Brennan Ctr. for Just., A Fair Fight: Achieving Indigent Defense Resource Parity (2019), https://www.brennancenter.org/media/4438/download/Report_A%20Fair%20Fight.pdf?inline=1 [https://perma.cc/36TP-CQK8] (finding unsustainable workloads, disparities between public defenders' and prosecutors' salaries, insufficient support staff, and disparate federal funding as compared to law enforcement and recommending, inter alia, increased state and federal funding for indigent defense systems); see also Miriam S. Gohara, James S. Hardy & Damon Todd Hewitt, The Disparate Impact of an Under-Funded, Patchwork Indigent Defense System on Mississippi's African Americans: The Civil Rights Case for Establishing a Statewide, Fully Funded Public Defender System, 49 How. L.J. 81, 82–84 (2005) (noting the "lack of adequate defense" for accused individuals in Mississippi given the state's failure to fund counsel). See generally Evaluations, Sixth Amend. Ctr., https://6ac.org/what-we-do/evaluations/ [https://perma.cc/WE7Y-85TN] (last visited Feb. 21, 2025) (evaluating the state of compliance with the Sixth Amendment right to counsel nationally).

575. See supra Part III; see also Perlin, Hidden Prejudice, supra note 29, at 62 (arguing that the legal system selectively accepts social science evidence).

recognize how the symptoms of PDs can undermine *Dusky–Drope* capacities.[576] Such efforts may be bound for failure.

Even if it were possible to expand criminal court's conception of disability, more findings of incompetence is not a desirable outcome. Institutionalization has proven harmful for many and thus cannot be considered an accommodation.[577] Given these limitations and the finite energy for reform, the solutions might not lie in redefining the *Dusky–Drope* standard or retraining forensic experts on the importance of attorney–client collaboration. Instead, those troubled by forensic examiners' attitudes toward PDs may want to turn their attention to scrutinizing the overrepresentation of individuals with PDs in the criminal legal system.[578] That is, instead of making criminal court processes more accommodating to individuals with PDs, it may be more impactful to try to prevent the criminalization of individuals diagnosed with PDs.[579] Such an approach promotes disability justice by interrupting one important debilitating process—criminalization. It is also compatible with disability rights because even if the goal is formal legal equality, preventing criminalization in the first instance eliminates the need for accommodations. Robust investment in mental health services, education, and the catalysts for economic prosperity can help fortify communities most at risk for criminalization.[580]

The case survey contained in this Essay also illuminates the ambivalent role of mental health expertise in advancing the interests of individuals with disabilities. Mental health specialists typically embedded in criminal courts play an enabling role, producing knowledge about disabilities that facilitates, rather than moderates, the state's capacity for criminalization.

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576. See, e.g., Stork, supra note 22, at 968 (explaining that because "clients with personality disorders may . . . have more difficulty working with their attorneys," they may "have a low likelihood of meeting the second prong of the *Dusky* competency standard (ability to assist counsel)").

577. See supra note 46 and accompanying text.

578. See William H. Reid, Borderline Personality Disorder and Related Traits in Forensic Psychiatry, 15 J. Psychiatric Prac. 216, 216 (2009) (explaining that "individuals with borderline pathology" are "overrepresented in" criminal punishment due to their clinical characteristics and involvement in society); Robert L. Trestman, Julian Ford, Wanli Zhang & Valerie Wiesbrock, Current and Lifetime Psychiatric Illness Among Inmates Not Identified as Acutely Mentally Ill at Intake in Connecticut's Jails, 35 J. Am. Acad. Psychiatry & L. 490, 490 (2007) (demonstrating the high volume of PDs among incarcerated people in Connecticut's jails).

579. See Elyn R. Saks, The Status of Status Offenses: Helping Reverse the Criminalization of Mental Illness, 23 S. Cal. Rev. L. & Soc. Just. 367, 382 (2014) (arguing "against the status quo that criminalizes mental illness" in favor of "alternative responses").

580. Elise Jácome, Stan. Inst. for Econ. Pol'y Rsch., How Better Access to Mental Health Care Can Reduce Crime 2 (2021), https://drive.google.com/file/d/1j9JOhi3v-gE9cPNMBNh9BBEu9APuX14S/view (on file with the *Columbia Law Review*); John Jay Coll. Rsch. Advisory Grp. on Preventing & Reducing Cmty. Violence, Reducing Violence Without Police: A Review of Research Evidence (2020), https://johnjayrec.nyc/wp-content/uploads/2020/11/AV20201109_rev.pdf [https://perma.cc/KT34-NQU6].

More empirical work is needed to investigate how court examiners' professional formation and work culture produce these outcomes. But if CST experts are not exceptional but instead reflect attitudes and approaches pervasive in psychology and psychiatry, their practices in CST proceedings hold a cautionary lesson for carceral reforms that rely on mental health specialists. Indeed, across jurisdictions, criminal court actors have embraced alternatives to incarceration, particularly for those with psychiatric needs.[581] In such cases, people accused of crimes can undergo treatment, broadly defined, as their sentence. To implement these alternatives, courts have assembled teams of interdisciplinary experts to identify those who stand to benefit from softer penal interventions.[582] Mental health specialists play a critical role in these efforts, drawing on their diagnostic expertise to educate judges, prosecutors, and defense attorneys about neurodivergence and appropriate interventions.[583] Their integration into the criminal courts has been hailed as a humanizing countervailing force to the sharpest edges of sentencing.[584] But CST proceedings suggest that the diagnostic framework mental health experts deploy is not distinct from criminal law's deontological framework. Embedding more psychologists, psychiatrists, and social workers into criminal legal processes is not necessarily an alternative to criminalization.[585] Individuals with PDs may be locked out, once again. If mental health experts, who play an important role in designing more therapeutic processes, have difficulty accepting certain categories of disabilities, therapeutic reforms may be inherently exclusionary.

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581. See Lowry & Kerodal, supra note 54, at 6, 11 (reporting a study that found 55% of the 220 responding prosecutors' offices offered some type of diversion program, including mental health treatment); Collins, Problem of Problem-Solving, supra note 54, at 1575 ("There are now more than 4,000 specialized courts throughout the country dedicated to an ever-expanding roster of issues, which currently includes mental health courts . . . .").

582. See All Rise, Adult Treatment Court Best Practice Standards 26 (2025), https://allrise.org/wp-content/uploads/2025/03/Adult-Treatment-Court-Best-Practice-Standards_07.28.2025.pdf [https://perma.cc/76TF-W32M] ("Studies indicate that treatment professionals, such as licensed addiction or mental health counselors, social workers, and psychologists, serve a crucial role as core members of the treatment court team.").

583. See id. at 16 (discussing the importance of multidisciplinary teams operating treatment courts as alternatives to incarceration).

584. See Johnson & Ali-Smith, supra note 57, at 2–3 (arguing that diversion programs are overall beneficial because they help to minimize contact with the criminal legal system and focus on addressing root problems, including homelessness, job and food insecurity, substance use disorders, and unmet mental health needs).

585. See Drug Pol'y All., Drug Courts Are Not the Answer: Toward a Health-Centered Approach to Drug Use 2 (2011), https://drugpolicy.org/wp-content/uploads/2023/09/Drug-Courts-Are-Not-the-Answer_Final2.pdf [https://perma.cc/S9KA-M45X] ("Drug courts have made the criminal justice system more punitive toward addiction—not less." (emphasis omitted)).

CONCLUSION

Even procedural rights granted to disabled defendants, shorn of dignity as they may be, are constrained by substantive criminal law's irresistible urge to blame defendants for all manner of perceived misconduct. While popular fascination with the insanity defense overstates its doctrinal importance and statistical significance, this Essay shows how the defense infuses CST proceedings to produce only the most limited exception to the norm of accountability. Background conditions—for instance, unsettled issues in the field of psychology and psychiatry, a cultural antipathy toward PDs, PDs' exclusion from insanity defenses, and generalized mistrust toward defendants in the criminal legal system—may empower clinical experts to pass judgments about defendants with these diagnoses. More research is needed to understand examiners' motivations and why their opinions reinforce criminal law's deontological framework. This Essay also provides some evidence that mental health expertise is not the hoped for antidote to criminalization, nor is it sufficient for disability justice.

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