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ARTICLE

THE NEW ABORTION BATTLEGROUND — *David S. Cohen, Greer Donley & Rachel Rebouché*

NOTES

DOUBLING DOWN ON DUE PROCESS: TOWARD A GUARANTEED RIGHT TO LEGAL COUNSEL IN JAIL DISCIPLINARY PROCEEDINGS — *Nkechi N. Erondu*

INVESTORS TAKE NOTE: COMPLEXITY AND DISCLOSURE EFFICACY CONCERNS AMID A STRUCTURED NOTES RENAISSANCE — *Jacob Freund*

ESSAY

FLEEING THE LAND OF THE FREE — *Jayesh Rathod*

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COLUMBIA LAW REVIEW

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CONTENTS

ARTICLE

THE NEW ABORTION BATTLEGROUND — *David S. Cohen, Greer Donley & Rachel Rebouché* — 1

NOTES

DOUBLING DOWN ON DUE PROCESS: TOWARD A GUARANTEED RIGHT TO LEGAL COUNSEL IN JAIL DISCIPLINARY PROCEEDINGS — *Nkechi N. Erondu* — 101

INVESTORS TAKE NOTE: COMPLEXITY AND DISCLOSURE EFFICACY CONCERNS AMID A STRUCTURED NOTES RENAISSANCE — *Jacob Freund* — 139

ESSAY

FLEEING THE LAND OF THE FREE — *Jayesh Rathod* — 183

COLUMBIA LAW REVIEW

VOL. 123 | **JANUARY 2023** | **NO. 1**

ABSTRACTS

ARTICLE

THE NEW ABORTION BATTLEGROUND *David S. Cohen, Greer Donley & Rachel Rebouché* 1

This Article examines the paradigm shift that is occurring now that the Supreme Court has overturned Roe v. Wade. *Returning abortion law to the states will spawn perplexing legal conflicts across state borders and between states and the federal government. This Article emphasizes how these issues intersect with innovations in the delivery of abortion, which can now occur entirely online and transcend state boundaries. The interjurisdictional abortion wars are coming, and this Article is the first to provide the roadmap for this aspect of the aftermath of* Roe*'s reversal.*

Judges and scholars, and most recently the Supreme Court, have long claimed that abortion law will become simpler if Roe *is overturned, but that is woefully naïve. In reality, overturning* Roe *will create a novel world of complex, interjurisdictional legal conflicts over abortion. Some states will pass laws creating civil or criminal liability for out-of-state abortion travel while others will pass laws insulating their providers from out-of-state prosecutions. The federal government will also intervene, attempting to use federal laws to preempt state bans and possibly to use federal land to shelter abortion services. Ultimately, once the constitutional protection for previability abortion disappears, the impending battles over abortion access will transport the half-century war over* Roe *into a new arena, one that will make abortion jurisprudence more complex than ever before.*

This Article is the first to offer insights into this fast-approaching transformation of abortion rights, law, and access, while also looking ahead to creative strategies to promote abortion access in a country without a constitutional abortion right.

NOTES

DOUBLING DOWN ON DUE PROCESS: TOWARD A GUARANTEED RIGHT TO LEGAL COUNSEL IN JAIL DISCIPLINARY PROCEEDINGS *Nkechi N. Erondu* 101

Wolff v. McDonnell *is the seminal case outlining the due process rights due to incarcerated people in disciplinary hearings. The Court held that incarcerated people are entitled to the minimum procedures*

appropriate under the circumstances and required by the Due Process Clause but stopped short of adopting the full panoply of procedural safeguards. Namely, the Court found that incarcerated people have no due process right to confront and cross-examine adverse witnesses or to appointed or retained counsel, believing that extending such rights would undermine institutional safety and correctional goals.

This Note advocates for a reexamination of the due process protections afforded to pretrial jail populations—specifically the right to counsel in jail disciplinary proceedings. It demonstrates that the Wolff *Court failed to adequately consider all the interests of an incarcerated person by refusing to impose the requirement of counsel in disciplinary hearings. Even further, this Note contends that in the era of COVID-19, where the harms of pretrial detention generally, and solitary confinement more specifically, are well-documented, an unlimited right to counsel is needed now more than ever in jail disciplinary hearings.*

INVESTORS TAKE NOTE:
COMPLEXITY AND DISCLOSURE EFFICACY
CONCERNS AMID A STRUCTURED NOTES
RENAISSANCE *Jacob Freund* 139

This Note examines how increasing complexity fueled by financial innovations can impair mandatory disclosure as an investor-protection mechanism. It focuses on structured notes, a type of debt security that has transformed significantly since the global financial crisis. This Note highlights several financial innovations that have fueled an unprecedented increase in structured note issuance volume by expanding access and catering to more idiosyncratic investor preferences, such as the proliferation of digital platforms and proprietary indexes. It considers how these innovations have made structured notes more complex and how increased complexity might make crucial information more expensive and more difficult for issuers to express and for investors and regulators to understand through disclosure documents. In addition to discussing the potential effects of increasing complexity, this Note conducts a brief analysis of the readability of a novel data set of structured note prospectuses filed with the Securities and Exchange Commission and shows that structured note disclosure has become more difficult to read over time. This Note argues that mandatory disclosure rules may not be enough to protect investors as structured notes continue to grow in popularity and evolve in substance, and it suggests several improvements to the current disclosure regime, such as interactive digital calculators, to combat informational hurdles that investors in increasingly complex structured notes might face in the years ahead.

ESSAY

FLEEING THE LAND OF THE FREE *Jayesh Rathod* 183

This Essay is the first scholarly intervention, from any discipline, to examine the number and nature of asylum claims made by U.S. citizens, and to explore the broader implications of this phenomenon. While the United States continues to be a preeminent destination for persons seeking humanitarian protection, U.S. citizens have fled the country in significant numbers, filing approximately 14,000 asylum claims since 2000. By formally seeking refuge elsewhere, these applicants have calculated that the risks of remaining in the United States outweigh the bundle of rights that accompany U.S. citizenship. Given the United States' recent flirtation with authoritarianism, and the widening fissures in the nation's social fabric, a closer study of asylum seeking is warranted—and indeed, prudent—should future political conditions generate a larger exodus of U.S. citizens.

This Essay opens with a quantitative overview of claims, drawing on data from the United Nations High Commissioner for Refugees and from countries that are the U.S. citizen asylum seekers' destinations. Following that statistical summary, this Essay presents a typology of claims that U.S. citizens have lodged, extracting from public sources the applicants' motivations for seeking asylum and how foreign government authorities have received those claims. Among the classes of U.S. citizens who have sought protection overseas are war resisters, political dissidents, whistleblowers, fugitives, members of minority groups, domestic violence survivors, and the U.S. citizen children of noncitizen parents. This Essay concludes by exploring the relevance of this trend to scholarly debates about asylum adjudication, international relations, forced migration, and citizenship.

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ARTICLE

THE NEW ABORTION BATTLEGROUND

David S. Cohen, Greer Donley** & Rachel Rebouché****

This Article examines the paradigm shift that is occurring now that the Supreme Court has overturned Roe v. Wade. *Returning abortion law to the states will spawn perplexing legal conflicts across state borders and between states and the federal government. This Article emphasizes how these issues intersect with innovations in the delivery of abortion, which can now occur entirely online and transcend state boundaries. The interjurisdictional abortion wars are coming, and this Article is the first to provide the roadmap for this aspect of the aftermath of* Roe*'s reversal.*

Judges and scholars, and most recently the Supreme Court, have long claimed that abortion law will become simpler if Roe *is overturned, but that is woefully naïve. In reality, overturning* Roe *will create a novel world of complex, interjurisdictional legal conflicts over abortion. Some states will pass laws creating civil or criminal liability for out-of-state abortion travel while others will pass laws insulating their providers from out-of-state prosecutions. The federal government will also intervene, attempting to use federal laws to preempt state bans and possibly to use federal land to shelter abortion services. Ultimately, once the constitutional protection for previability abortion disappears, the impending battles over abortion access will transport the half-century war over* Roe *into a new arena, one that will make abortion jurisprudence more complex than ever before.*

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*** Dean and James E. Beasley Professor of Law, Temple University Beasley School of Law. The authors have developed and refined the ideas in this Article based on countless conversations with advocates, providers, legislators, and scholars—too many to name here. We are grateful to each and every one of them for engaging with these ideas and helping us hone these arguments. We are especially grateful for the support Lauren Kelley has shown to this Article and to the importance of spreading its ideas to the general public as well as for the editorial work of Jacob Rosenberg and the staff of the *Columbia Law Review*. Finally, we also greatly appreciate the research assistance from Isabelle Aubrun, Charnique Johnson, Emily Lawson, Nicole Scott, and Josephine Wenson.

This Article is the first to offer insights into this fast-approaching transformation of abortion rights, law, and access, while also looking ahead to creative strategies to promote abortion access in a country without a constitutional abortion right.

INTRODUCTION 2
I. POST-*ROE* ABORTION RIGHTS AND ACCESS 8
A. The Post-*Dobbs* Interjurisdictional Legal Landscape 9
B. Beyond Legality: Avenues for Accessing Abortion After *Dobbs* 14
II. INTERSTATE BATTLES OVER CROSS-BORDER ABORTION 22
A. Extraterritoriality in Abortion Law Precedent 27
B. Extraterritorial Criminal Law 30
C. Extraterritoriality and the Constitution 34
D. Shield Laws 42
III. PREEMPTION, FEDERAL LAND, AND HEALTH POLICY 52
A. Federal Preemption 53
1. The FDA's Power Over Medication Abortion 53
2. HHS's Role in Other Healthcare Matters 71
B. Federal Land 80
C. Expanding Access to Medication Abortion 88
CONCLUSION 99

INTRODUCTION

The Supreme Court's decision to overturn *Roe v. Wade* will usher in a new era of abortion law and access.[1] Borders and jurisdiction will become the central focus of the abortion battle. What had been, until now, a uniform national right has become a state-by-state patchwork.[2] In a post-*Roe* country, states will attempt to impose their local abortion policies as

1. In *Roe v. Wade*, the Supreme Court held that criminal laws banning abortion were an infringement of a constitutional right to privacy under the Fourteenth Amendment's Due Process Clause. 410 U.S. 113, 164 (1973). In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court preserved constitutional protection for abortion but gave states greater discretion to restrict access to abortion. 505 U.S. 833, 873 (1992) (plurality opinion). One of *Casey*'s central holdings is that a state cannot ban previability abortions. Id. at 872. On June 24, 2022, the Court overturned both of these precedents. Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 5 (U.S. June 24, 2022).

2. See generally David S. Cohen & Carole Joffe, Obstacle Course: The Everyday Struggle to Get an Abortion in America (2020) (exploring the various state laws restricting abortion and their impact on patients and providers). It is important to contrast what had been a national right to the national reality of access, which has always been marked by significant race and class disparities. See id. at 88.

widely as possible, even across state lines, and will battle one another over these choices;[3] at the same time, the federal government may intervene to thwart state attempts to control abortion law.[4] In other words, the interjurisdictional abortion wars are coming. This Article is the first to offer insights into this fast-approaching transformation of abortion rights, law, and access.

Though access to abortion was already scarce in many regions, for the past fifty years the Supreme Court had held steadfast to the principle that the Constitution protected the right to previability abortion everywhere in the country. The Court upended that long-standing precedent in *Dobbs v. Jackson Women's Health Organization*, holding that the U.S. Constitution lacks any abortion right.[5] As of November 2022,[6] twenty-one states—mostly in the Midwest and South—have banned or tried to ban abortion in almost all circumstances. Seven state bans, however, have been stymied by courts.[7] The remaining states—mostly along the coasts—continue to offer legal abortion, regulated to varying degrees, with some states codifying abortion rights and expanding access.[8]

Antiabortion jurists and advocates have long forecasted that abortion law will become simpler if *Roe* is overturned. This claim has been a central part of their efforts to overturn *Roe* and *Planned Parenthood v. Casey*—the case that upheld *Roe*'s protection of previability abortion. According to this argument, these cases created an unworkably complex legal framework. In *Casey*, for instance, Justice Antonin Scalia wrote in dissent that the undue burden test for evaluating the constitutionality of

3. See infra Part II.

4. See infra Part III.

5. See *Dobbs*, slip op. at 14–15. The Supreme Court ruled that neither the history and tradition of abortion regulation nor the text of the Constitution supports the "egregiously wrong" judgment in *Roe*, reiterated in *Casey*, that the Fourteenth Amendment protects previable abortion decisions. Id. at 5–6. States are free to regulate, even ban, abortion so long as there is "a rational basis on which the legislature could have thought that it would serve legitimate state interests." Id. at 77.

6. The state of the law and events described by this Article has developed at a rapid pace since the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization and continues to do so. This Article reflects developments through November 5, 2022.

7. Caroline Kitchener, Kevin Schaul, N. Kirkpatrick, Daniela Santamariña & Lauren Tierney, Abortion Is Now Banned in These States. See Where Laws Have Changed., Wash. Post (June 24, 2022), https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe/ (on file with the *Columbia Law Review*) (last updated Oct. 10, 2022) (reporting that Alabama, Arkansas, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin ban most or all abortions but that the bans in Arizona, Indiana, North Dakota, Ohio, South Carolina, Utah, and Wyoming are currently enjoined).

8. Abortion Policy in the Absence of *Roe*, Guttmacher Inst., https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe [https://perma.cc/N226-J2EF] [hereinafter Guttmacher Inst., Abortion Policy] (last updated Oct. 1, 2022).

previability abortion restrictions was "inherently manipulable and will prove hopelessly unworkable in practice."[9] Abortion law will become simpler, the argument continues, because states will be able to craft laws without the threat of constitutional litigation.[10] Justice Samuel Alito adopted this argument in the *Dobbs* opinion, noting that *Casey* saddled judges with "an unwieldy and inappropriate task."[11]

As this Article makes clear, the opposite is true: Overturning *Roe* and *Casey* will create a complicated world of novel interjurisdictional legal conflicts over abortion. Instead of creating stability and certainty, it will lead to profound confusion because advocates on both sides of the abortion controversy will not stop at state borders in their efforts to apply their policies as broadly as possible. Antiabortion activists have made clear that overturning *Roe* is the first step toward their goal of making abortion illegal nationwide.[12] Right now, there are not enough votes in Congress nor is there a supportive White House to achieve that goal. That will leave the effort to antiabortion states who will, with *Roe* overturned, not only pass laws that criminalize in-state abortion but also attempt to impose civil or criminal liability on those who travel out of state for abortion care or on those who provide such care or facilitate its access.[13] In a post-*Roe* country, abortion-supportive states will seek the opposite and, in an effort to expand abortion access as broadly as possible, pass laws that protect their providers from legal sanctions after helping out-of-state residents obtain care.[14]

The country is seeing the start of these battles. A model law authored by the National Right to Life Committee bans assisting a minor across state

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9. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 986 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

10. Stenberg v. Carhart, 530 U.S. 914, 956 (2000) (Scalia, J., dissenting) (arguing that overturning *Roe* and *Casey* will remove the Court from the "abortion-umpiring business" and "return this matter to the people" (quoting *Casey*, 505 U.S. at 995–96 (Scalia, J., concurring in the judgment in part and dissenting in part))).

11. *Dobbs*, slip op. at 62 (citing Lehnert v. Ferris Fac. Ass'n, 500 U.S. 507, 551 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part)); see also id. at 59–62 (discussing the difficulty of applying *Casey*'s rules in prior cases).

12. See Caroline Kitchener, The Next Frontier for the Antiabortion Movement: A Nationwide Ban, Wash. Post (May 2, 2022), https://www.washingtonpost.com/nation/2022/05/02/abortion-ban-roe-supreme-court-mississippi/ (on file with the *Columbia Law Review*) ("Leading antiabortion groups and their allies in Congress have been meeting behind the scenes to plan a national strategy that would kick in . . . [post-*Roe*], including a push for a strict nationwide ban on the procedure . . . ."); Caroline Kitchener, *Roe*'s Gone. Now Antiabortion Lawmakers Want More., Wash. Post (June 25, 2022), https://www.washingtonpost.com/politics/2022/06/25/roe-antiabortion-lawmakers-restrictions-state-legislatures/ (on file with the *Columbia Law Review*) [hereinafter Kitchener, *Roe*'s Gone] ("On the heels of their greatest victory, antiabortion activists are eager to capitalize on their momentum by enshrining constitutional abortion bans[] [and] pushing Congress to pass a national prohibition . . . .").

13. See infra sections II.A–.B.

14. See infra section II.D.

lines to get an abortion without parental consent, "[r]egardless of where [the] illegal abortion occurs."[15] At least one "sanctuary city" in Texas has likewise included such language, banning abortion for city residents "regardless of where the abortion is or will be performed."[16] Missouri has now twice considered passing a statewide law to this effect: with a 2021 bill that would have applied the state's abortion restrictions to out-of-state abortions performed on Missouri citizens[17] and a 2022 bill that imposed civil liability on those helping Missouri citizens travel out of state to obtain an abortion.[18] From the abortion-supportive side of the ledger, a Connecticut law adopted in April 2022 became the first in the nation to offer protection for those who provide and assist in the provision of abortions to out-of-state patients, and four other states have since followed suit.[19] In the wake of *Dobbs*, twelve governors from abortion-supportive states have issued executive orders indicating they will not extradite abortion providers and limiting state employees from participating in out-of-state investigations of abortions legally occurring within those states. These examples are the first of many to come.[20]

Roe's demise is just one part of the story behind the seismic shift in abortion law; the other is that abortion practice has changed in ways that make borders less relevant. The rise of telehealth for medication abortion—abortion completed solely with pills—allows abortion provision to occur across state and country lines.[21] Virtual clinics, offering remote

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15. Memorandum from James Bopp, Jr., Gen. Couns., Nat'l Right to Life Comm., Courtney Turner Milbank & Joseph D. Maughon, to Nat'l Right to Life Comm. 14 (June 15, 2022), https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf [https://perma.cc/G46B-KZF7] [hereinafter NRLC Model Law].

16. See, e.g., Slaton, Tex., Ordinance 816, at 7 (Dec. 13, 2021) (on file with the *Columbia Law Review*); see also Cisco, Tex., Ordinance 0-2021-17, at 5 (Oct. 12, 2021) (on file with the *Columbia Law Review*) (declaring it illegal to "procure . . . an abortion in the City of Cisco, Texas," without limiting the geographical range of such procurement); cf. Isaiah Mitchell, From Waskom to Abilene: Behind the Movement of Sanctuary Cities for the Unborn, Texan (Apr. 13, 2022), https://thetexan.news/from-waskom-to-abilene-behind-the-movement-of-sanctuary-cities-for-the-unborn/ [https://perma.cc/QC9Y-AFK2] (reporting inaccurately that Cisco's ordinance contained the same language as Slaton's, whereas the version included in the reporting was not the one ultimately promulgated).

17. S.B. 603, 101st Gen. Assemb., Reg. Sess. (Mo. 2021).

18. H.B. 2012, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

19. See infra section II.D.

20. See infra section II.D.

21. The pandemic catapulted the idea of virtual abortion care from a distant dream to a new reality, revolutionizing how abortion care is offered. See Rachel Rebouché, Greer Donley & David S. Cohen, Opinion, The FDA's Telehealth Safety Net for Abortion Only Stretches So Far, Hill (Dec. 18, 2021), https://thehill.com/opinion/healthcare/586329-the-fdas-telehealth-safety-net-for-abortion-only-stretches-so-far/ [https://perma.cc/DB5S-6PCK] [hereinafter Rebouché et al., Safety Net] (noting that, during the COVID-19 pandemic, a federal district court enjoined the in-person dispensation requirement and the Biden Administration suspended enforcing it).

medication abortion through telehealth, have begun to operate in greater numbers, and brick-and-mortar clinics have expanded their practice into virtual care as well.[22] Early abortion care has, as a result, become more portable in the states that permit telehealth for abortion.[23]

The portability of medication abortion will impact abortion access even in states that prohibit telehealth or ban abortion after *Roe*. In those jurisdictions, people[24] already obtain this medication through the mail, often through international physicians, pharmacies, and advocates, allowing patients to have an abortion at home in an antiabortion state.[25] Even for patients who travel to abortion-supportive states to obtain medication abortion legally, if they consume one or both sets of medications in the antiabortion state, it raises novel questions about where an abortion occurred. Out-of-state and out-of-country providers could be guilty of state crimes if they knowingly send pills into antiabortion states; but antiabortion states will struggle to establish jurisdiction over these providers, while abortion-protective states will attempt to protect their providers from out-of-state prosecutions. The legal uncertainty in this newly developing world of remote abortion will shape the actions of patients, providers, and the networks that support them in the years to come.

Additional interjurisdictional conflicts will arise because the federal government could play a more pronounced role in abortion regulation, whether deploying strategies to protect or limit abortion nationally. Whatever the political agenda, federal action in this area could create jurisdictional conflict with state regulation of abortion. The Biden Administration has already taken some executive action in the immediate

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22. Id.

23. Cf. Medication Abortion, Guttmacher Inst., https://www.guttmacher.org/state-policy/explore/medication-abortion/ [https://perma.cc/QC5W-Y872] [hereinafter Guttmacher Inst., Medication Abortion] (last updated Oct. 1, 2022) (noting restrictions placed by antiabortion states on provision of medication abortion, preventing portability in those states).

24. Not every person capable of becoming pregnant is a woman; trans men, girls, and gender nonbinary patients also need access to abortion and reproductive healthcare. There are also times, however, when gender's intersection with abortion is important and relevant. This Article does its best to thread that needle by using a variety of terms in its discussion. For more context, see Jessica A. Clarke, They, Them, and Theirs, 132 Harv. L. Rev. 894, 954–57 (2019); see also Loretta J. Ross & Rickie Solinger, Reproductive Justice: An Introduction 6–8 (2017).

25. See infra section I.B; see also Caroline Kitchener, Covert Network Provides Pills for Thousands of Abortions in U.S. Post *Roe*, Wash. Post (Oct. 18, 2022), https://www.washingtonpost.com/politics/2022/10/18/illegal-abortion-pill-network/ (on file with the *Columbia Law Review*) (describing efforts to provide covert access to medication abortion).

aftermath of *Dobbs* that creates this federal–state conflict, and members of Congress have advocated for more aggressive ideas.[26]

This Article tackles these tricky interjurisdictional issues while considering strategies to protect abortion access in a country without a constitutional right to abortion. Part I starts by describing what a post-*Roe* country looks like when each state is free to ban abortion at any point in pregnancy. It highlights both the legal heterogeneity across states and notes how the law will alter the practice of abortion on the ground, paying attention to the growth of self-managed abortion and remote abortion access across state and country lines.

Next, Part II focuses on the next generation of interstate abortion conflicts. It first explores the legal complexity that will result when antiabortion states attempt to punish extraterritorial abortion through general criminal laws like conspiracy or through laws specifically targeting abortion providers, helpers, and even patients. The Constitution's general prohibition of state restrictions on interstate travel, burdens on interstate commerce, or application of a state's law outside its borders should make it difficult for antiabortion states to enforce these laws. Yet, these constitutional defenses are underdeveloped and subject to debate, leaving courts as the ultimate arbiters of these interstate battles. It then explores how states in which abortion remains legal might prevent antiabortion states from enforcing their laws in other jurisdictions. These dueling strategies, however, come at a cost by undermining key tenets of federalism and comity.

Finally, Part III highlights how the federal government, given the Biden Administration's commitments to reproductive rights, might protect abortion access in states that ban it. It argues that the supremacy of federal law provides a novel and untested argument for chipping away at state abortion bans. The FDA's exercise of authority over medication abortion since it was approved in 2000 suggests that FDA regulation preempts contradictory state laws, potentially granting a right to medication abortion in all fifty states. Other federal laws governing health privacy and emergency medical treatment could also poke holes in state abortion bans. Moreover, because state law does not always apply on

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26. See Letter from Elizabeth Warren, U.S. Sen., et al., to Joseph R. Biden, President of the United States (June 7, 2022), https://www.warren.senate.gov/download/20220607-letter-to-potus-on-abortion-eo/ [https://perma.cc/CG37-C64R] [hereinafter Senate Letter] (encouraging presidential action to increase access to medication abortion, establish a reproductive health ombudsman at the Department of Health and Human Services, enforce "Free Choice of Provider" requirements, and use federal property and resources to increase access to abortion); Fact Sheet: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services, The White House (July 8, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/08/fact-sheet-president-biden-to-sign-executive-order-protecting-access-to-reproductive-health-care-services/ [https://perma.cc/ERE2-X5BP] [hereinafter White House, Protecting Access] (outlining the contents of President Joseph Biden's executive order, "Protecting Access to Reproductive Health Care Services").

federal land, some abortions provided on federal land within antiabortion states might not be subject to state abortion bans. Federal policy decisions could also promote access to medication abortion through telehealth and multi-state physician licensing.

Ultimately, without a constitutional right to abortion, the coming battles over abortion access will move the half-century war over *Roe* into a new interjurisdictional arena. These conflicts will make abortion jurisprudence much more complex than before, in ways that test the principles underpinning the country's federalist system of government. But these conflicts also open the door to unexamined possibilities in a new era of abortion access—a future that will no longer be tethered to constitutional rights. This Article concludes by highlighting how an abortion rights movement might pivot from defense to offense, from short game to long game, and capitalize on the same strategies that led to the antiabortion movement's success.

I. POST-*ROE* ABORTION RIGHTS AND ACCESS

Among the various arguments to overturn *Roe*, conservatives long argued that *Roe* and its progeny created unworkable standards that vexed lower courts. Their list of concerns included that the undue burden standard—*Casey*'s constitutional test for vetting state abortion restrictions—was vague and difficult to apply,[27] that viability was a moving target,[28] and that a health-or-life exception[29] was malleable.[30] Abortion precedents should be overturned, in this vein of thinking, because the values underlying stare decisis failed in the face of unworkability.[31] The simpler, more workable alternative, they claimed, would be to allow each state to decide its own abortion laws. Justice Alito adopted this reasoning in full in *Dobbs*.[32] But he and those who came before him are wrong.

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27. *Casey* held that states could regulate previability abortions so long as the regulation did not create an undue burden. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (plurality opinion). Courts applied this standard differently. See Dobbs v. Jackson Women's Health Org., No. 19–1392, slip op. at 60–62 (U.S. June 24, 2022) (discussing lower courts' inconsistent applications of the undue burden standard).

28. The Court had determined that viability starts when a fetus has a "realistic possibility of maintaining and nourishing a life outside the womb." *Casey*, 505 U.S. at 870. This point had changed over time. See id. at 860 ("[A]dvances in neonatal care have advanced viability to a point somewhat earlier [than had been recognized in *Roe*].").

29. The Court had always required that abortion bans include an exception for the life or health of the mother, unless a court determined that the law did not harm the health or life of the mother. See *Casey*, 505 U.S. at 846.

30. See Mary Ziegler, Taming Unworkability Doctrine: Rethinking Stare Decisis, 50 Ariz. St. L.J. 1215, 1218–20 (2018) (discussing how antiabortion attorneys exploited weaknesses in *Roe* and its progeny to further their strategies).

31. Id. at 1218.

32. *Dobbs*, slip op. at 56–59.

This Part explores a United States without any constitutional floor for abortion rights. Though before *Dobbs*, states restricted abortion to varying degrees, straining abortion access and making services all but absent in a few places, *Roe* and *Casey* ensured that no state could ban previability abortion.[33] Without those precedents, the legality of obtaining abortion care hinges on where you live.

The heterogeneity that characterized abortion regulation for the past half century will be nothing like the complexity of what is unfolding now and what is to come. This Part outlines the myriad ways in which states will ban (or protect) in-state and cross-border services with *Roe* now overturned. It then explores how the now-varying legality of abortion will affect access to abortion. Such access for those who live in states that ban abortion comprises both traditional in-person services, accessed through interstate travel, and medication abortion mailed into antiabortion states. Abortion access will not necessarily be tied to local abortion legality: People can and already do obtain abortion-inducing drugs online and will continue to do so through telemedicine or other means.[34] Thus, post-*Roe* America looks very different than much of the *Roe* and pre-*Roe* era.

A. *The Post-*Dobbs *Interjurisdictional Legal Landscape*

Without *Roe*, roughly half the country is expected to eventually make almost all abortion services illegal.[35] At the time of writing, fourteen states have done just that, while another seven states have had their bans blocked by courts.[36] Overturning *Roe* will not only result in states criminalizing abortion; according to the *Dobbs* majority, states can decree that life begins at conception, which could treat abortion as murder.[37] Alabama, Arizona, and Georgia passed such laws before *Dobbs* but they were ultimately enjoined while *Roe* and *Casey* stood.[38] And the Louisiana legislature

33. *Casey*, 505 U.S. at 874.

34. See Rachel Rebouché, Remote Reproductive Rights, 48 Am. J.L. & Med. (forthcoming 2022) (manuscript at 1–3) (on file with the *Columbia Law Review*) [hereinafter Rebouché, Remote Reproductive Rights] (describing the wider scale emergence of telehealth for abortion).

35. Guttmacher Inst., Abortion Policy, supra note 8.

36. See Kitchener et al., supra note 7.

37. *Dobbs*, slip op. at 37–39.

38. See SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga., 40 F.4th 1320, 1324–25 (11th Cir. 2022) (describing Georgia's law and a pre-*Dobbs* permanent injunction against it); Isaacson v. Brnovich, No. CV-21-01417-PHX-DLR, 2022 WL 2665932, at *1, *10 (D. Ariz. July 11, 2022) (describing Arizona's law and a pre-*Dobbs* preliminary injunction against it); Robinson v. Marshall, No. 2:19cv365-MHT (WO), 2022 WL 2314402, at *1 (M.D. Ala. June 24, 2022) (lifting a preliminary injunction against Alabama's law); see also Kitchener et al., supra note 7 (discussing these developments). Litigation over Arizona's laws has continued, but as of October 2022 an injunction remains in place. See Order, Planned Parenthood of Ariz., Inc. v. Brnovich, No. C127867 (Ariz. Ct. App. Oct. 7, 2022) ("The court . . . concludes the balance of hardships weigh strongly in favor of granting the

considered, but ultimately shelved, such a bill in May 2022.[39] Georgia's and Alabama's injunctions were lifted after *Dobbs*.[40]

Abortion-supportive states will comprise the other half of the country post-*Roe*. At present, sixteen states and the District of Columbia have passed laws—and some are considering amendments to their state constitutions[41]—to protect abortion rights on their own regardless of a federal constitutional right.[42] These state provisions guarantee mostly unencumbered access to previability abortion and access to postviability abortion when necessary to protect the health or life of the pregnant person.[43] The remaining states will operate in a middle ground, keeping abortion legal but regulating it to varying degrees of strictness.[44] Providers in all of the states where abortion remains legal will begin providing services to those traveling from states where abortion is banned, putting immense strain on their capacity to deliver services.[45]

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stay [of the lower court's decision vacating the injunction], given the acute need of healthcare providers, prosecuting agencies, and the public for legal clarity as to the application of our criminal laws.").

39. Rick Rojas & Tariro Mzezewa, After Tense Debate, Louisiana Scraps Plan to Classify Abortion as Homicide, N.Y. Times (May 12, 2022), https://www.nytimes.com/2022/05/12/us/louisiana-abortion-bill.html (on file with the *Columbia Law Review*).

40. *SisterSong*, 40 F.4th at 1324 (lifting injunction against Georgia law); *Robinson*, 2022 WL 2314402, at *1 (lifting injunction against Alabama law).

41. For example, Vermont residents will vote on a legislatively referred constitutional amendment in November 2022, which reads: "That an individual's right to personal reproductive autonomy is central to the liberty and dignity to determine one's own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means." Prop. 5, 76th Sess. (Vt. 2021). On August 2, 2022, voters in Kansas rejected a proposed constitutional amendment that would have eliminated the right to abortion in the state. See Dylan Lysen, Laura Ziegler & Blaise Mesa, Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment, NPR (Aug. 2, 2022), https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment/ [https://perma.cc/48BD-RV2A] (last updated Aug. 3, 2022).

42. Guttmacher Inst., Abortion Policy, supra note 8.

43. Id. (noting that jurisdictions like the District of Columbia have legalized abortion throughout pregnancy and others have protected abortion care providers from out-of-state abortion bans); see also After *Roe* Fell: Abortion Laws by State, Ctr. for Reprod. Rts., https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/9Q55-D4ZW] (last visited Sept. 23, 2022) (explaining that some states have made abortions more accessible by funding medically necessary abortions, requiring private insurers to cover abortions, and ensuring that abortion clinics are not physically obstructed by antiabortion protest).

44. Ctr. for Reprod. Rts., supra note 43 (identifying states in which abortion is "not protected" or is subject to "hostile" treatment).

45. See Rachel K. Jones, Jesse Philbin, Marielle Kirstein & Elizabeth Nash, New Evidence: Texas Residents Have Obtained Abortions in at Least 12 States that Do Not Border Texas, Guttmacher Inst. (Nov. 9, 2021), https://www.guttmacher.org/article/2021/11/new-evidence-texas-residents-have-obtained-abortions-least-12-states-do-not-border [https://perma.cc/WD8J-P79S]; Mary Tuma, Texas' Abortion Ban Is Having a "Domino Effect" on Clinics Across the U.S., Tex. Observer (Nov. 18, 2021), https://www.texasobserver.org/texas-abortion-ban-is-

The effects of this new reality will have devastating consequences for all abortion seekers. A 2019 study mapped what abortion provision would look like if *Roe* were overturned.[46] It found that "the average resident is expected to experience a 249-mile increase in travel distance, and the abortion rate is predicted to fall by 32.8%."[47] Indeed, regional gaps in abortion access have been stark for a while. Leading up to *Dobbs*, six states had only one abortion clinic.[48] Providers throughout the country were increasingly concentrated in urban areas, creating "abortion deserts," mostly in the Midwest and South, in which there were no providers within one hundred miles of many of a state's residents.[49] Now that states can ban almost all abortions at any point in pregnancy, the size of the already-existing abortion deserts will increase. In the first 100 days after *Dobbs*, sixty-six clinics closed across fifteen states;[50] as a result, in the two months after *Dobbs*, an estimated 10,000 people were unable to travel to obtain legal abortions who otherwise would have.[51]

The impact of these abortion deserts is stark. Three quarters of abortion patients are poor or low income,[52] and the costs associated with travel, time off work, and childcare already had significant impacts on their ability to obtain abortion care in the *Roe* era.[53] With the costs and logistical

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having-a-domino-effect-on-clinics-across-the-u-s/ [https://perma.cc/LZ6U-XLK4] (noting that wait times in neighboring states have become much longer and that the states accommodating the influx of patients severely lack capacity).

46. Caitlin Myers, Rachel Jones & Ushma Upadhyay, Predicted Changes in Abortion Access and Incidence in a Post-*Roe* World, 100 Contraception 367, 369 (2019).

47. Id. at 367.

48. Abortion Care Network, Communities Need Clinics 2021, at 5 (2021), https://abortioncarenetwork.org/wp-content/uploads/2021/11/CommunitiesNeed Clinics2021-1.pdf [https://perma.cc/8NGL-DZG9].

49. See Lisa R. Pruitt & Marta R. Vanegas, Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law, 30 Berkeley J. Gender L. & Just. 76, 79–80 (2015) (discussing the unique impacts antiabortion laws have on women living in rural areas and noting that such women must "traverse . . . very substantial distances—sometimes hundreds of miles—to reach an abortion provider").

50. Marielle Kirstein, Joerg Dreweke, Rachel K. Jones & Jesse Philbin, 100 Days Post-*Roe*: At Least 66 Clinics Across 15 U.S. States Have Stopped Offering Abortion Care, Guttmacher Inst. (Oct. 6, 2022), https://www.guttmacher.org/2022/10/100-days-post-roe-least-66-clinics-across-15-us-states-have-stopped-offering-abortion-care/ [https://perma.cc/97PW-TAXZ].

51. See Maggie Koerth & Amelia Thomson-DeVeaux, Overturning *Roe* Has Meant at Least 10,000 Fewer Legal Abortions, FiveThirtyEight (Oct. 30, 2022), https://fivethirtyeight.com/features/overturning-roe-has-meant-at-least-10000-fewer-legal-abortions/ [https://perma.cc/ZX8X-SCPG] (calculating this figure).

52. Abortion Patients Are Disproportionately Poor and Low Income, Guttmacher Inst. (May 9, 2016), https://www.guttmacher.org/infographic/2016/abortion-patients-are-disproportionately-poor-and-low-income [https://perma.cc/WV62-8D9A] [hereinafter Guttmacher Inst., Abortion Patients].

53. Jenna Jerman, Lori Frohwirth, Meghan L. Kavanaugh & Nakeisha Blades, Barriers to Abortion Care and Their Consequences for Patients Traveling for Services: Qualitative

burdens of travel increasing as distances double, triple, or quadruple, many abortion seekers will not be able to afford the costs. Abortion funds seek to help these patients, but it is unclear if they can help on the scale necessary, especially as states like Texas work to shut them down.[54] Without funding, poor people and women of color are more likely to be left with the options of continuing an unwanted pregnancy or self-managing an abortion in a hostile state with the corresponding legal risks. Moreover, there are some people who will struggle to leave the state for other reasons—those who are institutionalized or hospitalized, those on parole, those who are undocumented, and those with disabilities that make travel challenging.[55] As countless news stories have highlighted, many people with medical emergencies related to their pregnancies may also be denied a health- or life-saving abortion, and they too may be unable to travel.[56] Abortion costs with travel can add up to thousands of dollars.[57]

Clinics that remain open in this new era will be inundated with out-of-state patients, delaying care for in- and out-of-state patients alike.[58] Already, clinics in certain areas are booking over three weeks out or are not scheduling new patients due to the surge in demand.[59] Before *Dobbs*, California abortion providers served about 14,000 patients per year from other states;[60] with *Roe* overturned, one study estimates that an additional

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Findings From Two States, 49 Persps. on Sexual & Reprod. Health 95, 96 (2017) (noting that "barriers to abortion care—including travel and its associated costs, such as lost wages and expenses for child care, transportation and accommodations—may be significant for many women"); Ushma D. Upadhyay, Tracy A. Weitz, Rachel K. Jones, Rana E. Barar & Diana Greene Foster, Denial of Abortion Because of Provider Gestational Age Limits in the United States, 104 Am. J. Pub. Health 1687, 1689–91 (2014) ("[T]he most commonly reported reason for not obtaining an abortion after being denied one were procedure and travel costs . . . .").

54. See Jolie McCullough & Neelam Bohra, As Texans Fill Up Abortion Clinics in Other States, Low-Income People Get Left Behind, Tex. Trib. (Sept. 3, 2021), https://www.texastribune.org/2021/09/02/texas-abortion-out-of-state-people-of-color/ [https://perma.cc/S53S-V9SR].

55. See Cohen & Joffe, supra note 2, at 72–83 (describing the pre-*Roe* challenge of getting to a clinic).

56. See, e.g., Jack Healy, With *Roe* Set to End, Many Women Worry About High-Risk Pregnancies, N.Y. Times (June 20, 2022), https://www.nytimes.com/2022/06/20/us/abortion-high-risk-pregnancy.html (on file with the *Columbia Law Review*) (last updated June 26, 2022).

57. Allison McCann, What It Costs to Get an Abortion Now, N.Y. Times (Sept. 28, 2022), https://www.nytimes.com/interactive/2022/09/28/us/abortion-costs-funds.html?smid=nytcore-ios-share&referringSource=articleShare&blm_aid=397749857/ (on file with the *Columbia Law Review*).

58. Margot Sanger-Katz, Claire Cain Miller & Josh Katz, Interstate Abortion Travel Is Already Straining Parts of the System, N.Y. Times: The Upshot (July 23, 2022), https://www.nytimes.com/2022/07/23/upshot/abortion-interstate-travel-appointments.html (on file with the *Columbia Law Review*).

59. Id.

60. See Adam Beam, California Plans to Be Abortion Sanctuary if *Roe* Overturned, AP News (Dec. 8, 2021), https://apnews.com/article/abortion-california-sanctuary-625a11

8,000 to 16,000 people will be traveling to the state for care.[61] A coalition of California officials and medical care professionals has scaled up efforts to provide financial and logistical support to abortion travelers, but it is unclear if these efforts can meet the needs of out-of-state patients.[62]

As the next Part illustrates, abortion travel will become an essential part of the post-*Roe* reality, but there will be attempts to outlaw it. Some state legislators are now focused on both regulating abortion outside their borders and stopping their citizens from traveling for abortion care.[63] Abortion-supportive states likewise have crafted legislation in anticipation of increased demand for services and the need to protect providers who offer care to patients who live out of state.[64]

Though the focus in the coming years will be on state efforts to outlaw or to protect abortion access, the federal government will also enter the fray in this new landscape. The Biden Administration has preliminarily indicated that it wants to protect interstate travel and access to medication abortion in the aftermath of *Dobbs*,[65] and multiple members of Congress have encouraged President Joseph Biden to explore leasing federal land

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8108bcda253196697c83548d5b [https://perma.cc/B85Y-XJ8Y] (noting that Planned Parenthood in California annually performs 7,000 abortions on out-of-state residents and represents about half of such abortions performed in California every year).

61. See Brad Sears, Cathren Cohen & Lara Stemple, People Traveling to California and Los Angeles for Abortion Care if *Roe v. Wade* Is Overturned 1 (2022), https://law.ucla.edu/sites/default/files/PDFs/Center_on_Reproductive_Health/California_Abortion_Estimates.pdf [https://perma.cc/RVS7-CXTS].

62. Id. at 1–2, 10.

63. See infra sections II.A–.C.

64. See infra section II.D. This Article has played an interesting role in the passage of these laws. For example, before the Article's appearance online in draft form, the authors had the privilege of advising legislators in Connecticut about options for protecting abortion providers. These legislators adopted many of the ideas appearing in this Article and molded them into a bill that the authors advised on and testified in support of. See generally Letter from David S. Cohen, Greer Donley & Rachel Rebouché, Law Professors, to Joint Comm. on the Judiciary, Conn. Gen. Assembly (Mar. 21, 2022), https://www.cga.ct.gov/2022/juddata/tmy/2022HB-05414-R000321-Cohen,%20David%20S.,%20Professor%20of%20Law-Drexel%20Kline%20School%20of%20Law-TMY.PDF [https://perma.cc/GP7V-RNLH]; CGA – Judiciary Committee, 3/21/22 JUD DV, Family, Victims Public Hearing, YouTube, at 04:12:10 (Mar. 21, 2022), https://youtu.be/10NDU433YFk?t=15131 (on file with the *Columbia Law Review*) (featuring the oral testimony of Professor David S. Cohen). This bill ultimately passed. See Pub. Act No. 22-19 (Conn. May 5, 2022) (codified as amended at Conn. Gen. Stat. Ann. §§ 54-82i(b), 54-162, 19a-602 (West 2022)).

65. See Fact Sheet: President Biden Announces Actions in Light of Today's Supreme Court Decision on *Dobbs v. Jackson Women's Health Organization*, The White House (June 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/24/fact-sheet-president-biden-announces-actions-in-light-of-todays-supreme-court-decision-on-dobbs-v-jackson-womens-health-organization/ [https://perma.cc/S9FM-25S4] [hereinafter White House, Actions in Light of *Dobbs*].

to abortion providers.[66] Part III discusses the legal complexities of these actions.

B. *Beyond Legality: Avenues for Accessing Abortion After* Dobbs

Abortion made illegal in half of the country will be devastating for people seeking abortion generally and, as noted above, disproportionally so for poor people and women of color.[67] But legal scholarship has not yet explored or developed how abortion care will be different after *Roe*'s reversal, compared to a pre-*Roe* era.[68] The United States's pre-*Roe* history coupled with the comparative experience of other countries points to one thing, however: Abortions will not stop occurring just because they are illegal.[69]

One important difference between illegal abortion in the future and illegal abortion decades ago is that some people will be able to safely terminate a pregnancy without leaving their homes. With the uptake of mailed medication abortion, abortion travel will not be the only way to find a safe and effective abortion. Unlike the pre-*Roe* era, people can end their pregnancies without traveling to find a provider.

In 2000, the FDA approved the first drug to end a pregnancy: mifepristone (previously known as RU-486).[70] Today, medication abortion in the United States is accomplished with two drugs. The first, mifepristone, blocks the hormone progesterone, which is necessary for a pregnancy to continue.[71] The second drug, misoprostol, is typically taken

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66. See, e.g., Emma Platoff, Senator Elizabeth Warren Calls on Biden to Use Federal Lands to Protect Abortion Access, Bos. Globe, https://www.bostonglobe.com/2022/06/24/metro/senator-elizabeth-warren-calls-biden-use-federal-lands-protect-abortion-access/ (on file with the *Columbia Law Review*) (last updated June 24, 2022).

67. Khaleda Rahman, *Roe v. Wade* Being Overturned Will Harm Black Women the Most, Newsweek (Nov. 29, 2021), https://www.newsweek.com/overturning-roe-harm-black-women-most-1653082 [https://perma.cc/D8FR-DW2R].

68. But see Rachel Rebouché, The Public Health Turn in Reproductive Rights, 78 Wash. & Lee L. Rev. 1355, 1416–28 (2021) (describing abortion access in the United States "without *Roe*").

69. See Yvonne (Yvette) Lindgren, When Patients Are Their Own Doctors: *Roe v. Wade* in an Era of Self-Managed Care, 107 Cornell L. Rev. 151, 169 (2021) ("The rate of abortion has remained relatively constant over time despite its illegality . . . ."); Michelle Oberman, What Will and Won't Happen When Abortion Is Banned, 9 J.L. & Biosciences 1, 3–4 (2022) (noting countries that ban abortion and still have relatively high abortion rates).

70. Greer Donley, Medication Abortion Exceptionalism, 107 Cornell L. Rev. 627, 638 (2022).

71. See id. at 633; see also Mifeprex (Mifepristone) Information, FDA, https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information [https://perma.cc/8E9Y-628C] [hereinafter FDA, Mifepristone Information] (last updated Dec. 16, 2021); Questions and Answers on Mifeprex, FDA, https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-

twenty-four-to-forty-eight hours after mifepristone and causes uterine contractions that expel the pregnancy from the uterus.[72] Misoprostol is not FDA-approved to terminate a pregnancy but is used off-label for this and a variety of other obstetric purposes.[73]

As discussed further in Part III, the FDA has historically prevented mifepristone from being prescribed in the same manner as most other drugs. Until recently, the agency required patients to pick up the drug in person from a "certified provider," which was almost always an abortion provider working at an abortion clinic.[74] In December 2021, based on years of evidence showing the drug can be prescribed and used safely without such strict controls, the FDA removed the requirement that patients pick up the drug in person.[75] It nevertheless maintained other restrictions on medication abortion that, based on evidence of the drug's safety and efficacy, are unnecessary and not applied to comparably safe drugs.[76]

The removal of the in-person dispensing requirement opened the door for what will become a key part of abortion's future: abortion untethered to a clinical space. Patients now can obtain a legal abortion after meeting via telehealth with an abortion provider who prescribes abortion medication that they then take at the location of their choice.[77] The new ease of access, facilitated by mailed delivery, will likely increase the number of persons utilizing these services moving forward.[78] For example, the first large-scale telehealth abortion service run by a U.S.-based provider, Abortion on Demand (AOD), launched in April 2021 and

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and-providers/questions-and-answers-mifeprex/ [https://perma.cc/497Y-KDKC] [hereinafter FDA, Questions and Answers] (last updated Dec. 16, 2021).

72. See Donley, supra note 70, at 633; see also Rebecca Allen & Barbara M. O'Brien, Uses of Misoprostol in Obstetrics and Gynecology, 2 Revs. Obstetrics & Gynecology 159, 159–60 (2009).

73. Allen & O'Brien, supra note 72, at 161–62.

74. Donley, supra note 70, at 642.

75. FDA, Mifepristone Information, supra note 71.

76. See Letter from Patrizia A. Cavazzoni, Dir., Ctr. for Drug Evaluation & Rsch., FDA, to Donna J. Harrison, Exec. Dir., Am. Ass'n Pro-Life Obstetricians & Gynecologists & Quentin L. Van Meter, President, Am. Coll. of Pediatricians 6 (Dec. 16, 2021), https://www.regulations.gov/document/FDA-2019-P-1534-0016 [https://perma.cc/JWH9-XJN6] [hereinafter FDA, Cavazzoni Letter] (explaining that "healthcare provider certification and dispensing of mifepristone to patients with evidence or other documentation of safe use conditions continue to be necessary"); cf. Donley, supra note 70, at 651–67 (critiquing these remaining requirements as unnecessary and inappropriate).

77. Carrie N. Baker, How Telemedicine Startups Are Revolutionizing Abortion Health Care in the U.S., Ms. Mag. (Nov. 16, 2020), https://msmagazine.com/2020/11/16/just-the-pill-choix-carafem-honeybee-health-how-telemedicine-startups-are-revolutionizing-abortion-health-care-in-the-u-s [https://perma.cc/5G2L-Q64J] [hereinafter Baker, Telemedicine Startups] (last updated Dec. 15, 2020); Rebouché et al., Safety Net, supra note 21.

78. See The Availability and Use of Medication Abortion, Kaiser Fam. Found. (Apr. 6, 2022), https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/ [https://perma.cc/8TZS-S65N].

operates in twenty-two states.[79] The AOD founder, who writes patients' prescriptions, is a physician licensed in each of those twenty-two states. AOD initially prescribed medication abortion through eight weeks of pregnancy, rather than the ten weeks allowed by the FDA, and only for those over eighteen to ensure compliance with parental involvement restrictions.[80] According to its founder, AOD is built for scale over scope, delivering medication abortion to patients who do not present complicated cases and adopting a patient protective strategy through a rigorous screening process.[81]

AOD built the platform it uses with telehealth regulations in mind: The process is designed to protect patient privacy and to comply with the privacy protections of the Health Insurance Portability and Accountability Act.[82] It is the same for every state in which AOD operates, even in states with twenty-four hour waiting periods.[83] The intake is asynchronous, with informed consent delivered by a pre-recorded video; a video appointment with the physician follows. AOD works with an online pharmacy that then ships the medication directly to the patient with an option for express overnight shipping. The entire process—from counseling to receipt of abortion pills—typically takes between two to five days, depending on the state. AOD charges $289 (and $239 for patients self-reporting financial need), which is around two to three hundred dollars less than abortions offered by a clinic.[84]

Before *Dobbs* and even with the in-person restriction jettisoned, remote abortion care was not available everywhere. Virtual providers could not operate in the nineteen states that had banned telemedicine for abortion or required in-person dispensation of abortion medication.[85]

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79. Where Is AOD Available?, Abortion on Demand, https://abortionondemand.org/ [https://perma.cc/JH6L-2JZ3] [hereinafter AOD, Where Is AOD Available?] (last visited Sept. 26, 2022). Remote medication abortion first became more broadly available two years ago after a federal district court issued an injunction that temporarily suspended in-person collection during the COVID-19 pandemic. See Am. Coll. of Obstetricians & Gynecologists v. U.S. Food & Drug Admin., 472 F. Supp. 3d 183, 233 (D. Md. 2020) (issuing "a preliminary injunction enjoining" the application of "In-Person Requirements contained in the mifepristone REMS as to medication abortion patients"), clarified by 2020 WL 8167535 (2020).

80. AOD, Where Is AOD Available?, supra note 79. Other virtual clinics, such as Choix and Hey Jane, provide medication abortion through ten weeks of pregnancy. Baker, Telemedicine Startups, supra note 77.

81. Telephone Interview with Jamie Phifer, Founder, Abortion on Demand (Aug. 3, 2021) (on file with the *Columbia Law Review*) [hereinafter AOD Interview].

82. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 264, 110 Stat. 1936, 2033–34 (codified as amended at 42 U.S.C. § 1320d-2).

83. Online counseling is time stamped and shipment of medication abortion does not mail until twenty-four hours have passed. Patients' digital signatures have an audit trail with an email only the patient has access to. AOD Interview, supra note 81.

84. Frequently Asked Questions, Abortion on Demand, https://abortionon demand.org/faq/ [https://perma.cc/N2J7-CL97] (last visited Sept. 2, 2022).

85. Guttmacher Inst., Medication Abortion, supra note 23.

Beyond the fourteen states that ban all abortion before ten weeks of pregnancy, an additional eight states require physician presence when medication abortion is dispensed.[86] AOD verifies that the patient is in a state permitting remote provision by tracking IP addresses to confirm location at patient intake.[87] If the IP address indicates a location different than the location claimed by the patient, the patient is asked to provide an in-state identification.[88]

Nevertheless, there are three ways in which remote care can assist people in states that ban abortion. First, patients traveling to a state that allows remote abortion care could travel across the border to have their telehealth appointment, rather than travel further into the state to a brick-and-mortar clinic. This can mean the difference of hundreds of miles—and the extra cost of gas and time that come with it. Indeed, some providers have built satellite sites or placed mobile clinics at antiabortion state borders to make telehealth visits easier.[89]

Second, some providers do not rely on IP addresses to assess a person's location but, as is the standard of care for most health services, ask patients to provide their address.[90] Providers would thus have difficulty knowing if a person is using the mailing address of a friend or family member or renting a post office box in a state where telabortion is legal.[91] Some virtual providers warn against trying to circumvent state law through, for example, VPNs or mail forwarding.[92] Extralegal strategies can have costs, particularly for those already vulnerable to state surveillance and punishment.[93] Though it is unclear how these extralegal strategies will be policed, the ability to receive abortion pills by mail in ways that defy detection is sure to encumber efforts to eliminate abortion in this country.[94]

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86. Rebouché, Remote Reproductive Rights, supra note 34, at 12.

87. AOD Interview, supra note 81.

88. This can happen when a patient is close to a border of a state with a law prohibiting telehealth for abortion. Id.

89. Rebecca Pifer, Abortion Clinics Go Mobile, Seeking Flexibility Amid Patchwork State Restrictions, Healthcare Dive (Aug. 1, 2022), https://www.healthcaredive.com/news/abortion-mobile-state-law-roe-v-wade-dobbs/627178/ [https://perma.cc/YN7A-EUPY].

90. Baker, Telemedicine Startups, supra note 77.

91. How to Get Abortion Pill Access by Mail in Texas, Plan C, https://www.plancpills.org/states/texas#results-anchor/ [https://perma.cc/68PZ-VHDH] (last visited Sept. 7, 2022).

92. See AOD Interview, supra note 81. But see Donley, supra note 70, at 696 (noting that Plan C offers "detailed instructions" for mail-forwarding strategies).

93. See Donley, supra note 70, at 699 (noting the "serious legal risks associated with self-management").

94. See Greer Donley, Rachel Rebouché & David S. Cohen, Opinion, Abortion Pills Will Change a Post-*Roe* World, N.Y. Times (June 23, 2022), https://www.nytimes.com/2022/06/23/opinion/abortion-pills-online-roe-v-wade.html (on file with the *Columbia Law Review*) [hereinafter Donley et al., Post-*Roe* World] ("Medication

Third, people can (and do) circumvent legal requirements by ordering medication abortion online and having it delivered directly to their residence in the antiabortion state. Even when *Roe* was in place, gaining access to abortion was a struggle for many people, particularly those who lived in rural areas or below the poverty level.[95] Aid Access is an international nonprofit that offers medication abortion to people across the United States—including those who live in states that ban abortion—for $105.[96] For states where either abortion or telehealth for abortion is banned, European-based physicians review the patients' consultation forms and prescribe them the medications, which are delivered by an India-based pharmacy within one-to-three weeks.[97] The organization saw a dramatic increase in requests from Texans after SB 8, the law that bans abortion after detection of a fetal heartbeat or around six weeks, went into effect in September 2021.[98] Asserting jurisdiction over international actors is difficult for any state, so even though a state may view this conduct to be illegal, state and federal actors have so far been unable to stop it.[99]

People seeking abortion also can self-manage their abortions—that is, buy the medication online from an international pharmacy—without any involvement from a healthcare provider or organization like AOD or Aid Access. Plan C is a website that informs pregnant people how they can order abortion medication from foreign suppliers, even in states that view

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abortion delivered through the mail opens up possibilities for cross-border care, even if that care is outlawed in the patient's state.").

95. Pruitt & Vanegas, supra note 49, at 81–83.

96. Consultation, Aid Access, https://aidaccess.org/en/i-need-an-abortion/ [https://perma.cc/M6G9-Z5HN] (last visited Sept. 7, 2022).

97. Id.

98. Abigail R.A. Aiken, Jennifer E. Starling, James G. Scott & Rebecca Gomperts, Association of Texas Senate Bill 8 With Requests for Self-Managed Medication Abortion, JAMA Network Open, Feb. 2022, at 1, 1; see also Tanya Basu, Activists Are Helping Texans Get Access to Abortion Pills Online, MIT Tech. Rev. (Sept. 15, 2021), https://www.technologyreview.com/2021/09/15/1035790/abortion-pills-online-texas-sb8/ [https://perma.cc/9ALT-6JJZ] (describing efforts to assist Texans seeking abortions after SB 8's passage).

99. Even under the Trump Administration, the federal government was unable to stop the organization. See Kimberly Kindy, Most Abortions Are Done at Home. Antiabortion Groups Are Taking Aim., Wash. Post (Aug. 14, 2022), https://www.washingtonpost.com/politics/2022/08/14/medicated-abortions-drugs-students-for-life/ (on file with the *Columbia Law Review*) (noting that "[t]he Trump administration unsuccessfully attempted in 2019 to shut down Aid Access's work in the United States"); Letter from Thomas Christi, Dir., Off. of Drug Sec., Integrity & Response, Ctr. for Drug Evaluation & Rsch., Food & Drug Admin., to Aidacess.org (Mar. 8, 2019), https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/aidaccessorg-575658-03082019/ [https://perma.cc/B9VM-HQJE] (threatening that if Aid Access continues to distribute abortion medication, the FDA may take "regulatory action, including seizure or injunction, without further notice").

this action as illegal.[100] Although Plan C offers detailed instructions about how to use the medication, some worry that the lack of a provider's involvement may increase the abortion's risks.[101] However, studies conducted in both this country and others demonstrate that people can safely and effectively end their own pregnancies without the involvement of a provider.[102] Unlike the "back-alley abortions" of generations ago, self-managed medication abortion early in pregnancy opens the door for safe abortions even without legal permission. Thus, with *Roe* overturned, people in the states that ban abortion can have access to safe and effective remote abortion care.

There are important limitations.[103] Even if medication abortion can be prescribed remotely in a safe way, there remain legal risks.[104] Historically, abortion bans have targeted providers, but the rise of telehealth and self-management, where the provider might be beyond the state's reach or nonexistent, suggests that enforcement of state abortion laws will target the people who seek abortion or those who assist them.[105] Poor people and people of color will be prosecuted disproportionately and face greater legal

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100. See Plan C, https://www.plancpills.org/ [https://perma.cc/L5P7-RJD5] (last visited Sept. 26, 2022); see also Patrick Adams, Opinion, Amid Covid-19, a Call for M.D.s to Mail the Abortion Pill, N.Y. Times (May 12, 2020), https://www.nytimes.com/2020/05/12/opinion/covid-abortion-pill.html (on file with the *Columbia Law Review*) (describing Plan C's background and organizing efforts to expand access to medication abortion).

101. In Tennessee, a physician is required to examine a patient before providing an abortion-inducing drug because—the statute claims—pregnant patients risk complications from the procedure if not monitored. H.B. 2416, 112th Gen. Assemb., 2d Sess. § 2 (Tenn. 2022) (codified as amended at Tenn. Code Ann. § 63-6-1104(a) (2022)). The statute takes effect on January 1, 2023. Id.

102. Abigail R.A. Aiken, Jennifer E. Starling, Alexandra van der Wal, Sascha van der Vliet, Kathleen Broussard, Dana M. Johnson, Elisa Padron, Rebecca Gomperts & James Scott, Demand for Self-Managed Medication Abortion Through an Online Telemedicine Service in the United States, 110 Am. J. Pub. Health 90, 95 (2020).

103. There may be new legal battles on the way as well, including the possibility that the FDA will face pressure to add or remove barriers to accessing medication abortion and whether the use of abortion-inducing drugs to start a period, rather than knowingly induce an abortion, will run afoul of bans. Rachel Rebouché, David S. Cohen & Greer Donley, The Coming Legal Battles Over Abortion Pills, Politico (May 24, 2022), https://www.politico.com/news/magazine/2022/05/24/coming-legal-battles-abortion-pills-00034558/ [https://perma.cc/E2C4-MW7Z]; see also Donley et al., Post-*Roe* World, supra note 94.

104. Donley, supra note 70, at 661–62.

105. See Andrea Rowan, Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion, 18 Guttmacher Pol'y Rev. 70, 71 (2015) ("The advent of medication abortion has further allowed some women to take matters into their own hands; however, doing so has exposed them to the risk of criminal prosecution."); see also Greer Donley & Jill Wieber Lens, Abortion, Pregnancy Loss, & Subjective Fetal Personhood, 75 Vand. L. Rev. 1649, 1705–06 (2022).

risks compared to those who are white or have wealth.[106] The story of Lizelle Herrera offers a stark warning: In April 2022, Herrera was charged with murder for self-inducing an abortion. The charges were quickly dropped,[107] but allowing criminal charges against the people seeking abortion could be next in antiabortion states. Even if states do not target patients with laws or policies, prosecutors could use unlawful arrests such as Herrera's as a way to scare and chill those seeking to terminate pregnancies.

Another limitation is that the FDA has approved use of abortion pills only through the first ten weeks even though research suggests they can be safely used weeks beyond that and some providers prescribe it off-label through twelve weeks.[108] Though some people will use medication abortion past the ten-week limit, second- or third-trimester abortion patients will typically need clinics for procedural abortions.[109] However, as medication abortion becomes more prevalent at lower cost, the financial sustainability of brick-and-mortar clinics will be put to the test, even when facilities in abortion-supportive states see more patients.[110] Many facilities already operate at a loss, due in no small part to the costs of complying with state restrictions.[111] If more people access early abortion without clinic involvement, new issues of sustainability will arise for some clinics.

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106. Michele Goodwin, Policing the Womb: Invisible Women and the Criminalization of Motherhood 41–43 (2020) (illuminating the extent to which women of color and low-income people are disproportionately punished by increased surveillance and criminalization of pregnancy in the United States).

107. Giulia Heyward & Sophie Kasakove, Texas Will Dismiss Murder Charge Against Woman Connected to 'Self-Induced Abortion', N.Y. Times (Apr. 10, 2022), https://www.nytimes.com/2022/04/10/us/texas-self-induced-abortion-charge-dismissed.html (on file with the *Columbia Law Review*).

108. Donley, supra note 70, at 628–29 (describing the FDA's restrictions); Laurie McGinley & Katie Shepherd, FDA Eliminates Key Restriction on Abortion Pill as Supreme Court Weighs Case that Challenges *Roe v. Wade*, Wash. Post (Dec. 16, 2021), https://www.washingtonpost.com/health/2021/12/16/abortion-pill-fda/ (on file with the *Columbia Law Review*) (reporting that the drug's off-label use is safe).

109. Second trimester abortion is rare—only 6.2% of abortions occur in the second trimester. Third trimester abortions are extremely rare, accounting for less than 1% of abortions. But as abortion becomes more difficult to access, it is possible that the number of later abortions increase and that some of these abortion seekers will self-manage with pills. There are protocols online where one can find a more accurate dose for a later pregnancy that is still reasonably safe and effective, although less so than a procedural abortion. CDCs Abortion Surveillance System FAQs, CDC, https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm [https://perma.cc/2HF6-XEJT] (last updated Nov. 22, 2021).

110. Cf. About Us, Abortion on Demand, https://abortionondemand.org/about/ [https://perma.cc/26DH-YNAK] (last visited Oct. 20, 2022) ("In order to ensure that pregnant people will always have a place to go when they need or want in-clinic care, AOD donates to Keep Our Clinics.").

111. Cf. Michelle L. McGowan, Alison H. Norris & Danielle Bessett, Care Churn: Why Keeping Clinic Doors Open Isn't Enough to Ensure Access to Abortion, 383 New Eng. J. Med. 508, 509 (2020) (noting that compliance costs contribute to "care churn"—"clinic-

As smaller clinics are driven out of business, large clinical centers will concentrate in the urban areas of states with supportive abortion laws.[112] Patients requiring abortions after the first trimester or who are not candidates for medication abortion—because of preexisting conditions, for example—will have fewer options outside of the most populous areas of certain states.[113]

Further, while online medication abortion may be increasingly available, it is an option that is only now becoming more widely understood or embraced. A study from 2021 found that 28% of people using Google to search for abortion care attempt self-managed abortion, and the vast majority of them use an ineffective and potentially dangerous method: 52% use supplements, herbs, or vitamins; 19% use many contraceptive pills; and 18% use physical trauma.[114] In the same study, only 18% used medication abortion.[115] The response to SB 8 in Texas provides another illustration. Although Aid Access received a large increase in requests from Texans after SB 8,[116] clinics across the country were also

level instability of abortion care services and chronic uncertainty about potential closure or changes in service"); Max Zahn, Abortion Clinics in Embattled States Face Another Challenge: Money, ABC News (Aug. 15, 2022), https://abcnews.go.com/Business/abortion-clinics-embattled-states-face-challenge-money/story?id=87945089 [https://perma.cc/5UKT-2272] ("The budgets at many clinics strain under the weight of compliance with onerous regulations . . . [and] significant legal costs navigating a maze of measures at the federal, state and local level . . . .").

112. For instance, thinking ahead to the possibility of *Roe* being overturned, in 2019 Planned Parenthood opened a facility in Illinois designed as a regional hub. Grace Hauck, Planned Parenthood to Open Major Clinic in Illinois as 'Regional Haven' for Abortion Access, USA Today (Oct. 2, 2019), https://www.usatoday.com/story/news/nation/2019/10/02/illinois-planned-parenthood-mega-clinic-haven-abortion-access/3840714002/ [https://perma.cc/WU26-93NA] (last updated Oct. 3, 2019).

113. People taking certain kinds of blood thinners, for instance, are not good candidates for medication abortion. See GenBioPro, Mifepristone Prescribing Information 5 (2019), https://genbiopro.com/wp-content/uploads/2019/05/genbiopro-prescribing-information.pdf [https://perma.cc/2Q8L-ZDPC] (noting that a patient's anticoagulant therapy, or treatment with blood thinners, is a contraindication, grounds for not prescribing medication abortion). Particularly concerning is that people of color and low-income people are more likely to have preexisting conditions generally, conditions which render use of medication abortion ill-advised. See Ruqaiijah Yearby, Breaking the Cycle of "Unequal Treatment" With Health Care Reform: Acknowledging and Addressing the Continuation of Racial Bias, 44 Conn. L. Rev. 1281, 1305–06 (2012) (explaining key distinctions in medical treatment based on class and race).

114. Ushma D. Upadhyay, Alice F. Cartwright & Daniel Grossman, Barriers to Abortion Care and Incidence of Attempted Self-Managed Abortion Among Individuals Searching Google for Abortion Care: A National Prospective Study, 106 Contraception 49, 49 (2021). Respondents were permitted to identify multiple methods of self-managed abortion attempted; methods were not mutually exclusive. Id.

115. Id.

116. Basu, supra note 98.

inundated with demand from Texans.[117] While Aid Access may be significantly cheaper and more convenient than traveling for a legal abortion, prior to *Dobbs*, it had not become mainstream. Barriers to telehealth, described below, and fears about violating the law also likely impacted uptake.[118] In other words, given the legal risks, the need for abortion beyond the first trimester, and a lack of familiarity with abortion pills, abortion access will continue to depend on travel. And as noted, whether providers in abortion-supportive states can handle the influx of demand remains to be seen.[119]

A post-*Roe* country is a fractured legal landscape that necessitates time, resources, and tenacity to navigate. In the following two Parts, the Article sets out the jurisdictional complications that will arise. The picture that emerges is labyrinthine, and the ground covered is largely unexplored: Some states will assume roles as interstate abortion police, others will attempt to protect all abortion provision however they can, while the current federal government might create new spaces, within and outside of hostile states, for abortion access.

II. INTERSTATE BATTLES OVER CROSS-BORDER ABORTION

After *Roe*, state prosecutors and legislators will likely try to impose civil or criminal liability on their citizens who travel out of state to obtain an abortion, those who help them, and the providers who care for them. Though targeting cross-border abortion provision has been almost nonexistent until this point,[120] antiabortion states are likely to attempt it

117. See Tuma, supra note 45 ("Texas patients are traveling hundreds and even thousands of miles from their homes to receive abortion procedures in places including Illinois, Washington, Ohio, California, Indiana, Tennessee, and Maryland."). The Guttmacher Institute reported that Texas patients were traveling to at least twelve other states. See Jones et al., supra note 45; see also Shefali Luthra, Abortion Clinics North of Texas Are Seeing Double the Number of Patients Than Before State Abortion Ban, 19th (Sept. 17, 2021), https://19thnews.org/2021/09/abortion-clinics-bordering-texas-are-seeing-double-the-number-of-patients/ [https://perma.cc/8CL2-HZ28].

118. See infra notes 505–537 and accompanying text for a discussion of such barriers.

119. See supra note 62 and accompanying text.

120. In 1996, a Pennsylvania woman was convicted for taking a minor to New York for an abortion (with the minor's consent). Woman Faces Trial for Taking 13-Year-Old to Outstate Abortion Clinic, AP News (Oct. 27, 1996), https://apnews.com/article/9d6313302114d7881dd2ecaa083f9b91 [https://perma.cc/AQ4V-JXSJ]; see also David Stout, Woman Who Took Girl for Abortion Is Guilty in Custody Case, N.Y. Times (Oct. 31, 1996), https://www.nytimes.com/1996/10/31/us/woman-who-took-girl-for-abortion-is-guilty-in-custody-case.html (on file with the *Columbia Law Review*) (reporting that the woman was ultimately convicted for violating a Pennsylvania parental-custody law facially unrelated to the abortion). Beyond that, there have been no publicized prosecutions for cross-border abortions. In theory, they could have happened even with *Roe* in place. Before *Dobbs*, forty-three states banned abortion after a particular point in pregnancy, yet patients who needed care later in pregnancy regularly traveled to states where later abortion care was legal. See Anne Godlasky, Nicquel Terry Ellis & Jim Sergent, Where Is Abortion Legal? Everywhere.

in the post-*Roe* future. This is hardly far-fetched: The antiabortion movement has been clear that the endgame is outlawing abortion nationwide.[121] Since *Dobbs*, some in the movement have been explicit about their goal of ending abortion travel, such as the president of Students for Life who advocated as part of national post-*Roe* plans that "if you travel out of state for an abortion, that abortionist can be held liable."[122] Until there is a national ban, the movement will use state powers to stop as many abortions as possible, including outside state borders.

Missouri, which had almost no in-state abortions before *Dobbs* and roughly 10,000 of its residents traveling out of state to receive care each year,[123] has shown us the early phases of this strategy. In March 2021, a

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But . . . , USA Today (May 15, 2019), https://www.usatoday.com/in-depth/news/nation/2019/05/15/abortion-law-map-interactive-roe-v-wade-heartbeat-bills-pro-life-pro-choice-alabama-ohio-georgia/3678225002/ [https://perma.cc/H7WR-E3TE] (last updated Apr. 23, 2020); see also Rachel K. Jones & Jenna Jerman, Guttmacher Inst., Time to Appointment and Delays in Accessing Care Among U.S. Abortion Patients 8–9 & tbl.1 (2016), https://www.guttmacher.org/report/delays-in-accessing-care-among-us-abortion-patients [https://perma.cc/U95V-CACL] (finding that 7% of persons who obtained an in-clinic abortion did so "in a state other than the one they lived in"). To the best of available knowledge, none of these patients were prosecuted for doing so.

121. See Ximena Bustillo, Who and What Is Behind Abortion Ban Trigger Law Bills? Two Groups Laid the Groundwork, NPR (July 8, 2022), https://www.npr.org/2022/07/08/1110299496/trigger-laws-13-states-two-groups-laid-groundwork [https://perma.cc/HL2S-RPBQ] (describing the efforts of the National Right to Life Committee and Americans United for Life to enact a nationwide abortion ban). Amici in *Dobbs* argued as well that the Court should overturn *Roe* by finding that fetuses are protected persons under the Fourteenth Amendment; doing so could have the effect of outlawing abortion everywhere. Brief of Amici Curiae Scholars of Jurisprudence John M. Finnis and Robert P. George in Support of Petitioners at 4–27, Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. June 24, 2022), 2021 WL 3374325 (arguing that unborn children are constitutional persons entitled to equal protection of the laws).

122. Kitchener, *Roe*'s Gone, supra note 12 (internal quotation marks omitted) (quoting Kristan Hawkins, President of Students for Life).

123. See Kan. Dep't of Health & Env't, Abortions in Kansas, 2020: Preliminary Report 7 (2021), https://www.kdhe.ks.gov/DocumentCenter/View/10433/Abortions-in-Kansas-2020-PDF [https://perma.cc/NT2R-TAUS] (reporting that 3,201 Missourians obtained abortions in Kansas in 2020); Abortion Statistics, Ill. Dep't of Pub. Health, https://dph.illinois.gov/data-statistics/vital-statistics/abortion-statistics.html [https://perma.cc/QT4L-73EV] (last visited Sept. 2, 2022) (reporting that 6,578 Missourians obtained abortions in Illinois in 2020). These numbers are more than three times as large as the preliminary estimates from the Missouri Department of Health and Senior Services. See Josh Merchant, Nearly Half of Abortions in Kansas Are for Missouri Residents, but Voters Could End That, KCUR (Nov. 20, 2021), https://www.kcur.org/news/2021-11-20/nearly-half-of-abortions-in-kansas-are-for-missouri-residents-but-voters-could-end-that [https://perma.cc/N2QF-RUHU] (presenting estimates from the Missouri Department of Health and Senior Services that 3,391 Missourians traveled outside the state for abortion services, information accessible by hovering over the last yellow bar in the graph titled "In-state and out-of-state abortions for Missouri residents, 2007–2020"). According to state records, only 167 abortions occurred in Missouri in 2020, a decrease of 97% from a decade earlier. Id.

legislator introduced SB 603, which would apply all Missouri abortion restrictions to conduct occurring "[p]artially within and partially outside this state" as well as conduct wholly outside the state when any one of the following conditions is met: The pregnant person resides in Missouri; there is a substantial connection between the pregnant person and Missouri; the "unborn child" is a resident of Missouri at the time of conception; the pregnant person intends to give birth in Missouri if the pregnancy is carried to term; the individual had sex in Missouri that "may have" conceived this pregnancy; or the patient sought prenatal care in Missouri during the pregnancy.[124]

Then, in March 2022, a different legislator introduced an amendment to another antiabortion bill that would have created civil liability for anyone who performs an abortion on a resident of Missouri, no matter where the abortion occurred, or helps someone from Missouri leave the state to get an abortion.[125] In the manner of Texas's SB 8, these provisions would have been enforced through civil suits rather than the criminal law, making it harder for courts to strike them down as unconstitutional.[126] After receiving national attention, this amendment failed to be included in the final bill,[127] though after *Dobbs* the legislator who drafted the bill vowed to continue this effort; reports indicate antiabortion legislators in other parts of the country are considering similar measures.[128]

Not to be outdone by Missouri, Texas politicians have sought to restrict out-of-state abortions. The Texas Freedom Caucus, a group of antiabortion state legislators, issued cease and desist letters announcing the group's intention to target anyone who helps pay for an abortion "regardless of where the abortion occurs."[129] The state's attorney general is being sued in federal court over statements he has made indicating that abortion funds that assist Texans traveling out of state could be

124. S.B. 603, 101st Gen. Assemb., 1st Reg. Sess. § 188.550.1(2), (3)(a), (3)(c) (Mo. 2021).

125. H.R. Journal, 101st Gen. Assemb., 2d Reg. Sess., at 1623–1630 (Mo. 2022), https://www.house.mo.gov/billtracking/bills221/jrnpdf/jrn042.pdf [https://perma.cc/2PTM-8MTX].

126. See id. at 1625; see also infra notes 259–263 and accompanying text discussing SB 8.

127. Tessa Weinberg, Missouri House Blocks Effort to Limit Access to Out-of-State Abortions, Mo. Indep. (Mar. 29, 2022), https://missouriindependent.com/2022/03/29/missouri-house-blocks-effort-to-limit-access-to-out-of-state-abortions/ [https://perma.cc/M7WT-5NKS].

128. Kitchener, *Roe*'s Gone, supra note 12 (describing Representative Elizabeth Mary Coleman as "eager to restrict abortion across state lines" and other legislative priorities of antiabortion legislators following *Dobbs*).

129. See, e.g., Letter from Mayes Middleton, Rep., Tex. H.R., to Yvette Ostolaza, Chair of the Mgmt. Comm., Sidley Austin LLP 1–3 (July 7, 2022), https://www.freedomfortexas.com/uploads/blog/3b118c262155759454e423f6600e2196709787a8.pdf [https://perma.cc/Y2KS-XJ27] (describing proposed legislation including this language and threatening law firm Sidley Austin with criminal prosecution for providing financial assistance to employees who seek abortions out of state).

prosecuted.[130] Moreover, within the state, several cities have passed ordinances declaring themselves "sanctuary cities for the unborn."[131] At least one of them has included in its ordinance a provision that bans city residents from getting abortions "regardless of where the abortion is or will be performed."[132]

Warnings about cross-border abortion restrictions are far from the "'ridiculous' scaremongering" the general counsel for the National Right to Life Committee has claimed they are.[133] In fact, that organization's model post-*Roe* law—a document drafted by the general counsel—includes a provision that prohibits assisting minors "[r]egardless of where an illegal abortion occurs."[134] Bills like those discussed here could become a reality in coming legislative sessions.

To many people, the immediate response to these possibilities is that various parts of the federal Constitution protect the right to travel and to engage in interstate commerce. After all, most people trust that as long as they follow the laws of the state where they are physically located, they are acting lawfully. Take fireworks or casino gambling as examples: The person who travels from a state that bans fireworks sales or casino gambling to purchase fireworks in another state or to gamble in Las Vegas would not expect her home state to punish her for evading its laws.

This sense of how law works across state borders finds some support in various constitutional doctrines. The Fifth and Fourteenth Amendments' Due Process Clauses have long protected a right to travel as part of their protections for liberty.[135] The Fourteenth Amendment's Privileges or Immunities Clause, in conjunction with the Citizenship Clause, has also protected a right to travel rooted in the notion of national

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130. Karen Brooks Harper, Abortion-Rights Groups Sue Texas AG, Prosecutors to Protect Ability to Help Pregnant Texans Seek Legal Abortions in Other States, Tex. Trib. (Aug. 23, 2022), https://www.texastribune.org/2022/08/23/abortion-funds-lawsuit-texas-travel/ [https://perma.cc/5HJS-79T8]; Eleanor Klibanoff, Attorney General Ken Paxton Ordered to Testify in Abortion Lawsuit After Evading Subpoena, Tex. Trib. (Oct. 4, 2022), https://www.texastribune.org/2022/10/04/ken-paxton-abortion-lawsuit-subpoena/ [https://perma.cc/2VMA-CAP4].

131. Sanctuary Cities for the Unborn, Tex. Right to Life, https://texasrighttolife.com/sanctuary-cities-for-the-unborn/ [https://perma.cc/BF8Q-LEK8] (last visited Sept. 27, 2022).

132. Slaton, Tex., Ordinance 816, at 7 (2021) (on file with the *Columbia Law Review*).

133. Nina Shapiro, Could Idaho Accuse a Washington Abortion Clinic of Murder? Some Are Worried, Chronicle (June 22, 2022), https://www.chronline.com/stories/could-idaho-accuse-a-washington-abortion-clinic-of-murder-some-are-worried,295760 [https://perma.cc/E8XH-H7KM] (quoting James Bopp, Jr., Gen. Couns., Nat'l Right to Life Comm.).

134. NRLC Model Law, supra note 15, at 14.

135. See, e.g., Jones v. Helms, 452 U.S. 412, 418–19 (1981) ("The right to travel has been described as a privilege of national citizenship, and as an aspect of liberty that is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments."); Kent v. Dulles, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment.").

citizenship.[136] And the Dormant Commerce Clause prohibits certain state burdens on interstate commerce, including some that have extraterritorial effect.[137] As explained in detail below, however, these parts of the Constitution and the doctrines they have inspired do not so clearly apply to the situations addressed here.

This Part addresses the complex array of interjurisdictional issues that arise from the possible extraterritorial application of state laws. First, section II.A sets forth the thin body of precedent regarding extraterritoriality in abortion law. Then, section II.B considers whether a state can apply its general abortion laws, by themselves or in conjunction with other non-abortion criminal laws, to out-of-state abortions even though these laws do not explicitly cover them. Section II.C then analyzes whether there are constitutional impediments to states passing and enforcing new laws that specifically target out-of-state abortion.[138] Finally, section II.D explores how abortion-supportive states are legislating to protect their providers, as well as traveling patients and those who help them, from application of another state's abortion law.

One further note: Even if courts permit these interjurisdictional prosecutions and lawsuits to proceed, states may struggle to enforce their laws extraterritorially against providers who refuse to appear at a summons or participate in a lawsuit. There will be difficulties related to personal jurisdiction,[139] vicinage,[140] and problems of proof particular to interstate investigations.[141] It is for these reasons that antiabortion states, and even

136. See, e.g., Saenz v. Roe, 526 U.S. 489, 511 n.27 (1999) ("[I]t is a privilege of citizenship of the United States . . . to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof." (first alteration in original) (internal quotation marks omitted) (quoting Edwards v. California, 314 U.S. 160, 183 (1941) (Jackson, J., concurring))).

137. See, e.g., Healy v. Beer, Inst., 491 U.S. 324, 337 n.14 (1989) ("[T]he critical consideration in determining whether the extraterritorial reach of a statute violates the [Dormant] Commerce Clause is the overall effect of the statute on both local and interstate commerce." (citing Brown-Forman v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986))).

138. These constitutional considerations would also apply to a state using already-existing laws to prosecute abortion travel. See infra sections II.B–.C for a discussion of these topics.

139. See Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (requiring "minimum contacts" with the forum state to have personal jurisdiction that comports with due process); Bullion v. Gillespie, 895 F.2d 213, 216–17 (5th Cir. 1990) (finding personal jurisdiction proper in Texas when a California doctor mailed medication to a patient in Texas).

140. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."); see also Seth F. Kreimer, Lines in the Sand: The Importance of Borders in American Federalism, 150 U. Pa. L. Rev. 973, 1018 (2002) (listing "[t]hirty-three states [that] have constitutional provisions that require juries in criminal trials to be drawn from the geographical district in which the crime occurred").

141. Susan Frelich Appleton, Gender, Abortion, and Travel After *Roe*'s End, 51 St. Louis U. L.J. 655, 657–59 (2007) (discussing problems of proof in extraterritorial application of abortion laws).

the federal government under the Trump Administration, have not been able to stop Aid Access from delivering abortion pills in their states.[142] Though this Article does not plumb these practical issues, they will certainly add to the interjurisdictional complexities explored throughout.

A. *Extraterritoriality in Abortion Law Precedent*

Only two cases decided after *Roe*—one by the U.S. Supreme Court and the other by the Missouri Supreme Court—have addressed whether states can penalize out-of-state abortion conduct, and the modern application of those cases is unclear at best.[143] The first is a lesser-known U.S. Supreme Court case, *Bigelow v. Virginia*.[144] That case concerned a Virginia statute prohibiting any publication from encouraging people to obtain an abortion.[145] In 1971, two years before *Roe*, a weekly newspaper distributed on the University of Virginia campus ran an advertisement for a New York City service that would refer people to an abortion provider in New York, where abortion had recently become legal.[146] The Virginia Supreme Court twice upheld the conviction of the newspaper's managing editor for violating the Virginia statute, both before and after *Roe* was decided.[147]

The U.S. Supreme Court disagreed. In finding that the statute infringed on the publisher's First Amendment rights, the Court made several statements casting doubt on the ability of states to legislate the behavior of their citizens when they travel to another state. The Court was concerned that Virginia, a state where abortion was illegal when the newspaper advertisement in question was published, was infringing on its citizens' ability to travel to New York for an abortion.[148] In discussing these cross-border issues, the Court wrote that Virginia could not "prevent its residents from traveling to New York to obtain [abortion] services or, as

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142. Rachel M. Cohen, The Abortion Provider that Republicans Are Struggling to Stop, Vox (May 7, 2022), https://www.vox.com/23056530/aid-access-abortion-roe-wade-pills-mifepristone/ [https://perma.cc/S2TL-NLGA] (detailing unsuccessful government efforts to stop Aid Access).

143. *Roe*'s companion case, Doe v. Bolton, 410 U.S. 179 (1973), addressed a provision of Georgia law that prohibited out-of-staters from getting an abortion in Georgia. This type of restriction seems far afield from extraterritorial application of abortion law possible now that *Roe* is overturned, since it is hard to imagine in the current political climate that a state which continues to allow abortion within its borders would pass a new law also restricting it to state citizens. Thus, this section does not include *Doe* in this line of precedent that has already addressed the issues covered here.

144. 421 U.S. 809 (1975).

145. Id. at 811.

146. Id. at 811–12. For additional background on the passage of the New York state law, see Bill Kovach, Rockefeller, Signing Abortion Bill, Credits Women's Groups, N.Y. Times (Apr. 12, 1970), https://www.nytimes.com/1970/04/12/archives/rockefeller-signing-abortion-bill-credits-womens-groups.html [https://perma.cc/T7SL-6WJ2].

147. *Bigelow*, 421 U.S. at 814–15.

148. Id. at 812–13.

the State conceded [at oral argument], prosecute them for going there."[149] Broadening this position to a more general statement about extraterritorial application of state law, the Court stated categorically that a "State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."[150]

The other case comes from Missouri, and it relied on *Bigelow* to reach the same conclusion. In *Planned Parenthood of Kansas v. Nixon*, the Missouri Supreme Court reviewed a Missouri law providing a civil cause of action against any person who caused a minor to obtain, or aided or abetted them in obtaining, an abortion without first getting parental consent or a judicial bypass.[151] As part of the lawsuit, the plaintiffs lodged a challenge to a unique provision of the Missouri law that effectively required Missouri minors who traveled out of state for an abortion to follow Missouri's parental consent law, even if the other state had a different requirement for parental involvement or none whatsoever.[152]

In response to this argument, the Missouri Supreme Court reiterated the main points from *Bigelow*. It wrote that "it is beyond Missouri's authority to regulate conduct that occurs wholly outside of Missouri . . . . Missouri simply does not have the authority to make lawful out-of-state conduct actionable here, for its laws do not have extraterritorial effect."[153] Because of this principle against extraterritorial application, the court held that the law was only valid as to conduct occurring at least in part in Missouri.[154] Thus, the legality of an out-of-state abortion must be a defense to crimes charged under the law that consisted of "wholly out-of-state conduct."[155]

Though these two precedents contain strong statements against the application of extraterritorial abortion law, they might not be the final say on the matter. *Bigelow* is dated, relies in part on the now-overturned *Roe*, and concentrated on the First Amendment.[156] The current U.S. Supreme Court, now that it has eviscerated *Roe*, could revisit *Bigelow*'s anti-extraterritoriality principle.[157] Moreover, scholars have argued for decades

149. Id. at 824; see also id. at 827 ("[The public interest] would not justify a Virginia statute that forbids Virginians from using in New York the then legal services of a local New York agency.").

150. Id. at 824.

151. 220 S.W.3d 732, 736 (Mo. 2007) (en banc).

152. Id. at 744–45.

153. Id. at 742 (citing *Bigelow*, 421 U.S. at 827–28).

154. See id. at 742–43.

155. Id. at 743.

156. See *Bigelow*, 421 U.S. at 821–22 (noting that appellant's First Amendment interests as a news service supplied a basis for overturning the conviction and referencing *Roe* to reiterate that Virginia's statute prohibited activity that "pertained to constitutional interests").

157. The question of *Bigelow*'s continuing validity looms as yet another complicated constitutional issue now that *Roe* has been overturned. Cf. Cat Zakrzewski, South Carolina

about whether *Bigelow*'s statements against extraterritorial application are mere dicta.[158] *Nixon* is applicable only in Missouri, gives no clear guidance as to what is "conduct that occurs wholly outside" the state,[159] and has never been cited by any court for its discussion of extraterritorial application of state law.[160]

Complicating this picture even further is how these rules apply to medication abortion. Abortion pills did not exist at the time of *Bigelow* and were not widely used at the time of *Nixon*.[161] These medications can be legally obtained in one jurisdiction, one or both of the drugs can be taken elsewhere, and the pregnancy can end somewhere else entirely.[162] In the immediate aftermath of *Roe*'s demise, abortion providers and lawyers reviewing medication abortion protocols are struggling to answer what had been a simple question with procedural abortion: Where does the abortion occur?[163]

Bill Outlaws Websites that Tell How to Get an Abortion, Wash. Post (July 22, 2022), https://www.washingtonpost.com/technology/2022/07/22/south-carolina-bill-abortion-websites/ (on file with the *Columbia Law Review*) (describing a South Carolina law that—analogously to the Virginia law in *Bigelow* that criminalized advertising abortion services—criminalizes providing online information on abortion access, thereby providing an opportunity for the U.S. Supreme Court to revisit *Bigelow*'s holding).

158. Compare Seth F. Kreimer, The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism, 67 N.Y.U. L. Rev. 451, 459–63 (1992) [hereinafter Kreimer, Law of Choice] (arguing that the extraterritorial principle in *Bigelow* is not simply dictum), with Mark D. Rosen, Extraterritoriality and Political Heterogeneity in American Federalism, 150 U. Pa. L. Rev. 855, 891 (2002) [hereinafter Rosen, Heterogeneity] (arguing that "a careful review" of *Bigelow*'s discussion of extraterritoriality strongly supports the conclusion that it is dictum), and Mark D. Rosen, "Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers, 51 St. Louis U. L.J. 713, 723–25 (2007) [hereinafter Rosen, Pluralism] (arguing that "the language from *Bigelow* was dicta" and, if taken literally, would disrupt various doctrines of constitutional law "without so much as mentioning" them).

159. *Nixon*, 220 S.W.3d at 742.

160. Cf., e.g., State v. Collins, 648 S.W.3d 711, 716 (Mo. 2022) (en banc) (citing *Nixon* for a proposition about construing statutes narrowly to avoid constitutional complications); Bldg. Owners & Managers Ass'n of Metro. St. Louis, Inc. v. City of St. Louis, 341 S.W.3d 143, 149 (Mo. Ct. App. 2011) (citing *Nixon* for a proposition about ripeness of pre-enforcement constitutional claims).

161. Medication abortion was approved by the FDA in 2000. See supra note 70 and accompanying text. In 2007, when *Nixon* was decided, medication abortion accounted for just under 17% of abortions nationwide, compared to 54% in 2020. See Rachel K. Jones, Elizabeth Nash, Lauren Cross, Jesse Philbin & Marielle Kirstein, Medication Abortion Now Accounts for More Than Half of All US Abortions, Guttmacher Inst. (Feb. 24, 2022), https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions/ [https://perma.cc/VHZ7-PU6D] (last updated Mar. 2, 2022) (graphing this information).

162. See supra section I.B.

163. See, e.g., Katheryn Houghton & Arielle Zionts, Montana Clinics Preemptively Restrict Out-of-State Patients' Access to Abortion Pills, NPR (July 7, 2022),

Thus, this area of law is ripe for reassessment once interjurisdictional abortion prosecutions occur. Antiabortion states and cities will not wait for the U.S. Supreme Court to give them permission to apply their laws extraterritorially; as the Missouri bills and sanctuary city ordinances described above make clear, they will just do it.[164] It could take years before the litigation surrounding these developments reaches the Court, and in the meantime, states will try what they can to stop abortion, waiting for courts to call their bluff. Litigation surrounding Texas's SB 8 illustrates that some courts will exploit any legal uncertainty to uphold abortion restrictions. No one believed SB 8 was constitutional, yet it has survived court challenges and effectively outlawed a large portion of abortions in Texas nine months before *Dobbs*.[165] Indeed, the 2022 Missouri bill relied on a similar enforcement mechanism as SB 8, ostensibly to shield the law, if enacted, from federal court review.[166] The Supreme Court may very well ultimately reaffirm its previous statements from *Bigelow*, but that is far from a foregone conclusion. Amidst this less-than-certain legal backdrop, prosecutions and civil liability related to extraterritorial conduct are on the horizon.

B. *Extraterritorial Criminal Law*

If Kentucky does ban abortion after *Dobbs*, can Kentucky prosecutors apply, for instance, Kentucky's abortion ban—which says nothing about extraterritorial application—to someone from Kentucky who travels to Illinois to obtain an abortion that is legal there or to the Illinois provider who performs that abortion? Or, could Kentucky use its non-abortion conspiracy laws to charge the patient's friend who helps the patient travel to Illinois to obtain the out-of-state abortion? An aggressive prosecutor or other state official would not need any specific law governing extraterritorial abortions if existing state law could be applied to legal, out-of-state abortions or to travel to obtain them. In fact, even if existing state law cannot be applied in these situations, an aggressive prosecutor could still chill people from obtaining lawful out-of-state abortions just by threatening legal sanctions in these situations or even by initiating legal proceedings knowing they will fail.[167]

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https://www.npr.org/sections/health-shots/2022/07/07/1110078914/montana-abortion-pills [https://perma.cc/F4W3-ZJ4M].

164. See supra notes 16–18 and accompanying text.

165. See Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495–96 (2021) (declining to enjoin the enforcement of SB 8 while emphasizing that the decision was "not based on any conclusion about the constitutionality of Texas's law"); Whole Woman's Health v. Jackson, 31 F.4th 1004, 1006 (5th Cir. 2022) (per curiam) (directing the district court to "dismiss all challenges to the private enforcement provisions of the statute").

166. See supra note 124 and accompanying text.

167. See, e.g., Commonwealth v. Dischman, 195 A.3d 567, 568 & n.1 (Pa. Super. Ct. 2018) (involving a charge against a pregnant woman for violating state "aggravated assault of an unborn child" law despite clear language in the statute that the law could not be

As a general matter, states cannot use ordinary criminal laws to prosecute people for crimes committed outside of their borders.[168] This "general rule" is, according to the Massachusetts Supreme Judicial Court, "accepted as 'axiomatic' by the courts in this country."[169] This general rule against extraterritorial application of criminal law, however, has enough gaps to allow prosecution of a wide variety of crimes that take place outside the jurisdiction of a state. It is beyond the scope of this Article to explore all the twists and turns of this rule, but a few examples suffice to support the general point here.

First, the "effects doctrine" allows states to prosecute someone for actions that take place outside the state that have detrimental effects in the state. The California Supreme Court has explained that "a state may exercise jurisdiction over criminal acts that take place outside of the state if the results of the crime are intended to, and do, cause harm within the state."[170] This doctrine could have a sweeping impact without *Roe*. Take Georgia's six-week abortion ban: It was passed in 2019 and immediately enjoined as unconstitutional but is now back in effect after *Dobbs*.[171] In addition to banning abortion at six weeks, it also declared that "unborn children are a class of living, distinct persons" who deserve "full legal protection."[172] The actions of a pregnant Georgian who crosses state lines to obtain a legal abortion outside Georgia would have the effect of killing a "living, distinct" Georgian deserving of "full legal recognition."[173] An aggressive prosecutor could use the effects doctrine to argue that the out-of-state killing has the in-state effect of removing a recognized member of

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construed to "impose criminal liability . . . [u]pon the pregnant woman in regard to crimes against her unborn child" (alteration in original) (internal quotation marks omitted) (quoting 18 Pa. Stat. and Cons. Stat. Ann. § 2608(a)(3) (West 1997))).

168. Much of the discussion in this section and the one that follows covers *criminal* law. Many of the same considerations, though not all, apply to extraterritorial application of civil law, especially punitive civil laws like SB 8. See infra note 259. Additional considerations beyond the scope of this Article arise as well, such as principles in the field of choice of laws. See, e.g., Appleton, supra note 141, at 677–82 (discussing conflict of laws questions arising out of application of tort liability and statutory causes of actions against extraterritorial abortion).

169. In re Vasquez, 705 N.E.2d 606, 610 (Mass. 1999).

170. People v. Betts, 103 P.3d 883, 887 (Cal. 2005) (discussing the effects doctrine in the context of "lewd acts committed on a child," some of which occurred outside the state of California); see also Strassheim v. Daily, 221 U.S. 280, 285 (1911) (noting, in the context of a state's fraud prosecution, that "[a]cts done outside a jurisdiction, but . . . producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect").

171. See H.B. 481, 155th Gen. Assemb., Reg. Sess. (Ga. 2019) (codified as amended at Ga. Code Ann. § 16-12-141 (2022)); see also SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga., 40 F.4th 1320, 1323–24 (11th Cir. 2022) (permitting the law's enforcement after *Dobbs*).

172. See Ga. H.B. 481, § 2(3)–(4); see also Ga. Code Ann. § 16-12-141 (2022) (recording in the section notes that the legislature made quoted findings but declined to codify them).

173. See Ga. H.B. 481, § 2(3)–(4).

the Georgia community from existence. While prosecutions for murders occurring in another state are rare under this doctrine,[174] states and prosecutors seeking to enforce new criminal laws prohibiting abortion or protecting fetal "persons" may wish to deploy this legal strategy to the maximum extent possible.

This doctrine could apply even more broadly, reaching anyone involved with the killing of a "living, distinct" resident of a state with an abortion ban. That would include anyone who worked at the out-of-state abortion clinic and anyone who helped the patient travel to the clinic. Once a state declares a fetus a separate life, the effects doctrine could result in myriad criminal prosecutions related to out-of-state abortions. Whether courts are willing to give prosecutors this much authority over otherwise lawful out-of-state activity will become a complicated jurisdictional issue that state and possibly federal courts will confront now that *Roe* has been overturned.[175]

Second, most states already have general criminal jurisdictional provisions that could offer avenues for extraterritorial application of abortion law. For instance, borrowing what Professor Gabriel Chin calls the "reasonably representative" jurisdictional statute from Pennsylvania,[176] the complexities become obvious. The Pennsylvania statute provides jurisdiction over any person when any of the following occur in the state: an element of the offense; an attempt to commit an offense; a conspiracy, attempted conspiracy, or solicitation of a conspiracy; or an omission of a legal duty.[177] The statute also provides that any Pennsylvania law specifically applying outside its borders creates jurisdiction if "the conduct bears a reasonable relation to a legitimate interest of [Pennsylvania] and the actor knows or should know that his conduct is likely to affect that interest."[178]

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174. See, e.g., Heath v. Jones, 941 F.2d 1126, 1139 (11th Cir. 1991) (allowing prosecution in Alabama of a murder that took place in Georgia); State v. Willoughby, 892 P.2d 1319, 1330–32 (Ariz. 1995) (allowing prosecution in Arizona for a murder that took place in Mexico).

175. These kinds of complicated legal questions have doomed antiabortion efforts in the past. See 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/YP7J-KR3C] (noting that in 2010, Mississippi voters, concerned about the "troubling prospects" of declaring fetuses legal persons, rejected a state constitutional amendment that "would have legally defined human life at the moment of fertilization"). But there is no reason to be confident that would be the case in the future, especially with an energized antiabortion movement now that *Roe* is overturned.

176. Gabriel J. Chin, Policy, Preemption, and Pot: Extra-Territorial Citizen Jurisdiction, 58 B.C. L. Rev. 929, 933 (2017).

177. 18 Pa. Stat. and Cons. Stat. Ann. § 102(a)(1)–(5) (West 1997).

178. Id. § 102(a)(6); see generally Commonwealth v. Peck, 242 A.3d 1274 (Pa. 2020) (discussing the application of the jurisdictional statute to out-of-state drug crimes).

Provisions like these create opportunities for chaos in the application of criminal laws to extraterritorial conduct. The scenarios outlined above with respect to Georgia's personhood law are illustrative.[179] Would a conspiracy between two people to obtain an abortion out of state be chargeable in Georgia if the agreement and travel taking place in state is considered an "overt act" in furtherance of the conspiracy to murder the fetus (a person under Georgia law)? Would obtaining the assistance of abortion funds or travel support while in state be an act that provides sufficient jurisdiction to criminalize the out-of-state abortion? How about a neighbor watching an abortion-seeker's children while she travels to another state? Or, thinking about medication abortion, would a Georgia resident who receives pills by mail at a friend's house over the border in North Carolina but returns home and takes some or all of the pills in her home state be guilty of homicide, either because consumption of the pills occurred in Georgia or because the fetal remains are in Georgia? And would the friend in North Carolina be guilty of the Georgia crime of conspiracy or aiding and abetting? These questions would be answered state-by-state and case-by-case, all but ensuring disparate results even within a state.

Third, even if a court found that the in-state conduct was sufficient to establish jurisdiction, a related point of contention would be whether a state can criminalize a conspiracy to commit an act that is legal in the destination state but illegal in the home state.[180] As Chin points out, statutes like Pennsylvania's generally "require that the offense be criminalized in the out-of-state jurisdiction."[181] However, not all states follow this rule. The California Supreme Court reserved this question "for another day,"[182] and Alabama's criminal jurisdiction statute leaves out the requirement that the crime be punishable in the destination state.[183]

These wrinkles become even more visible in the context of medication abortion, when the provider might follow their home state's laws by prescribing pills to an out-of-state patient who travels to the abortion-supportive state to obtain the medication, but then returns to

179. See supra notes 171–174 and accompanying text.

180. Generally, a conspiracy exists when two or more people intend to promote or facilitate the commission of a crime and an overt act is committed in furtherance of the agreement. See, e.g., 18 Pa. Stat. and Cons. Stat. Ann. § 903(a), (e) (West 1978).

181. Chin, supra note 176, at 951–52.

182. People v. Morante, 975 P.2d 1071, 1086 (Cal. 1999) ("We reserve for another day the issue whether a conspiracy in state to commit an act criminalized in this state but not in the jurisdiction in which the act is committed, also may be punished under California law.").

183. See Ala. Code § 13A-4-4 (1975) ("A conspiracy formed in this state to do an act beyond the state, which, if done in this state, would be a criminal offense, is indictable and punishable in this state in all respects as if such conspiracy had been to do such act in this state."). This law has not appeared in any reported decisions, so it would be ripe for testing from an aggressive prosecutor trying to stop people in the state from working with others to obtain an out-of-state abortion now that *Roe* has been overturned.

take the pills in the patient's antiabortion home state. Returning to the Kentucky–Illinois jurisdictional hypothetical above, would the illegal act be the provider's actions that occurred in Illinois, where abortion was legal, or the patient's actions in Kentucky, where it was not? That the provider and the patient can be in two different jurisdictions over the course of abortion care in the age of medication abortion creates a messy situation for extraterritorial jurisdiction.[184]

C. *Extraterritoriality and the Constitution*

Separate from whether ordinary criminal abortion law applies extraterritorially is the constitutionality of laws that specifically target extraterritorial abortions instead of using existing state law to prosecute out-of-state abortions.[185] Much like the introduced Missouri bills discussed above, such a law could create civil or criminal liability for anyone with sufficient ties to the antiabortion state who obtains or helps someone obtain an abortion anywhere, not just in the state.[186] Or the law could impose liability for anyone who performs or aids and abets the performance of an abortion on a person with sufficient ties to the antiabortion state. The law could also target abortion travel, prohibiting anyone from traveling out of state to get an abortion or from aiding or abetting someone in traveling out of state to get an abortion.

Without well-established doctrine or case law as guideposts, a small cohort of scholars have attempted to parse these issues in the past, and they fall largely into three different camps: those who believe that extraterritorial application of abortion law would violate various provisions of the Constitution;[187] those who believe it would not;[188] and those who believe that it would raise complicated and unanswered issues of constitutional law that would throw the Court into bitter disputes about foundational issues of federalism.[189]

In the first camp, scholars have relied on a right to travel, conflict of laws, and the Dormant Commerce Clause to cast doubt on states' extraterritorial reach. Professor Seth Kreimer provided the most developed explanation of the position in the early 1990s. In two different articles, he developed both an originalist and a normative argument against extraterritorial application of abortion laws. In the originalist argument, he

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184. See supra section I.B (detailing current regulations on and availability of medication abortion).

185. These constitutional issues also arise in the situations described in the previous section—when state prosecutors attempt to use already-existing criminal laws to capture cross-border abortion care. See supra section II.B.

186. See supra notes 124–128 and accompanying text.

187. See infra notes 190–196 and accompanying text.

188. See infra notes 197–203 and accompanying text.

189. See infra notes 204–206 and accompanying text.

explained that the Constitution's framers held a strong commitment to a legal system in which state sovereignty was limited to application within its own borders and to a conception of national citizenship that protected a strong right to travel to other states.[190] This commitment is evident in the Commerce Clause, Article IV's Privileges and Immunities Clause, and the Citizenship Clause of the Fourteenth Amendment.[191] In a separate article, he argued that, normatively, the right to travel to other states and take advantage of their laws is an essential component of liberty[192] and that to further the Constitution's goal of "establishing a single national identity" there is value in people having the same privileges and responsibilities when located within a state, whether as a visitor or a resident.[193] His ultimate conclusion is that "citizens who reside in each of the states of the Union have the right to travel to any of the other states in order to follow their consciences, and they are entitled to do so within the frameworks of law and morality that those sister states provide."[194]

A small group of scholars have agreed with Kreimer. Professor Lea Brilmayer, applying conflict of laws principles, argued that the policy of the "territorial state" should trump the state of residence because states that permit abortion have a strong interest in regulating what happens within their state.[195] Taking a different approach, Professor Susan Lorde Martin, though touching on abortion only passingly, opined that the modern Dormant Commerce Clause doctrine prohibits extraterritorial

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190. See Kreimer, Law of Choice, supra note 158, at 464–72 (explaining how, at both the founding and at the time of the Civil War amendments, "the [constitutional] equilibrium . . . apportioned each state moral sovereignty within its own boundaries and obliged neighboring states to accede to that sovereignty"); id. at 497–508 (explaining the role of the conception of national citizenship in the Constitution and its relation to a national right to travel).

191. See id. at 488–97 (arguing that "[f]or state citizens who seek more hospitable jurisdictions in which to engage in morally-contested activities barred to them at home, the federal protection of interstate commerce offers shelter"); id. at 497–508 (explaining that "[t]he purpose of the privileges and immunities clause . . . was to recognize a national identity" which entailed a "right of citizens of each of the newly-formed United States to travel among the states on a basis of equality," a purpose furthered with the Fourteenth Amendment).

192. Seth F. Kreimer, "But Whoever Treasures Freedom . . . ": The Right to Travel and Extraterritorial Abortions, 91 Mich. L. Rev. 907, 914–15 (1993).

193. Id. at 919–21 ("[A] system in which my opportunities upon entering California remain subject to the moral demands of Pennsylvania undercuts this sense of national unity.").

194. Id. at 938.

195. Lea Brilmayer, Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die, 91 Mich. L. Rev. 873, 884–90 (1993); see also Katherine Florey, State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation, 84 Notre Dame L. Rev. 1057, 1121–22 (2009) (arguing that, compared with ex ante regulation, the imposition of liability "tends to imply less of a moral judgment" and "permits prospective actors more freedom to continue to engage in the conduct at issue").

application of a state's laws; indeed, she called this principle a "bedrock of a federalist system."[196]

At the other end of the spectrum lie scholars who have analyzed the same doctrines and concluded that there is nothing in the Constitution that prohibits states from enforcing laws targeting out-of-state abortions or abortion travel. Professor Mark Rosen has provided the most detailed analysis, concluding that none of the previously identified constitutional doctrines prohibit states from applying their criminal laws outside state borders.[197] According to Rosen, the Supreme Court, state courts, and model codes have long supported states regulating out-of-state activity.[198] Rosen recognized that the Constitution places some limits on extraterritorial application of state law, but he argued that those narrow doctrines have no applicability when one state applies its criminal law to its own citizens acting in another state.[199] Allowing states to determine the reach of their own powers, according to Rosen, is normatively preferable to prevent people picking and choosing which state policies to follow and to ensure that states are actually able to enact and enforce different policies that suit their interests.[200]

Rosen has developed the most sustained defense of extraterritorial enforcement of criminal abortion law, but he is not alone. Professor Donald Regan argued that the "reality and significance of state citizenship" includes states having an interest in controlling their citizens' conduct no matter where they are.[201] Professor William Van Alstyne similarly contended that there is no constitutional right to "eva[de]" your home state's criminal law by traveling to another state,[202] and Professor Joseph Dellapenna

196. See Susan Lorde Martin, The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead, 100 Marq. L. Rev. 497, 526 (2016).

197. Rosen, Heterogeneity, supra note 158, at 896–933 (discussing Article IV's Privileges and Immunities Clause, the right to travel, and the Dormant Commerce Clause); Rosen, Pluralism, supra note 158, at 726–30, 733–38 (discussing the Dormant Commerce Clause, Article IV's Privileges and Immunities Clause, the right to travel, and the Citizenship Clause of the Fourteenth Amendment); Mark D. Rosen, State Extraterritorial Powers Reconsidered, 85 Notre Dame L. Rev. 1133, 1134 (2010) [hereinafter Rosen, State Extraterritoriality Powers] (critiquing Professor Katherine Florey's treatment of due process and the Dormant Commerce Clause and suggesting that "the Constitution itself does not set the limits on state extraterritorial powers"). Rosen is clear in his work that Congress could enter this field and prohibit extraterritoriality. See Rosen, State Extraterritoriality Powers, supra, at 1134.

198. See Rosen, Pluralism, supra note 158, at 719–23.

199. See id. at 733–40.

200. Rosen, Heterogeneity, supra note 158, at 883–91.

201. Donald H. Regan, Siamese Essays: (I) *CTS Corp. v. Dynamics Corp. of America* and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation, 85 Mich. L. Rev. 1865, 1908–12 (1987).

202. See William Van Alstyne, Closing the Circle of Constitutional Review From *Griswold v. Connecticut* to *Roe v. Wade*: An Outline of a Decision Merely Overruling *Roe*, 1989 Duke L.J. 1677, 1684–85.

maintained that states can apply their own law extraterritorially because people always have the option of moving to a different state if they want to take advantage of more permissive abortion laws.[203]

The third camp straddles these two positions. Unlike the other two, which hold either that constitutional law already permits or prohibits such state laws, the third camp believes constitutional law provides no clear answers to these questions that can be separated from the various legal issues associated with abortion itself. Professor Richard Fallon took this approach: If *Roe* were overturned, he maintains, then "very serious constitutional questions would arise—and, somewhat ironically, a central issue for the Supreme Court would likely be whether the states' interest in preserving fetal life is weighty enough to justify them in regulating abortions that occur outside their borders."[204] After surveying the issues, Fallon explained that he could not "pronounce a confident judgment" but had "no hesitation in concluding that this question would be a difficult one that is not clearly resolved" by Supreme Court precedent.[205] Professor Susan Appleton agreed with Fallon, arguing that choice of law doctrine would make any prosecution of out-of-state individuals (like the abortion provider or the clinic worker) a highly contentious matter, presenting courts with "excruciatingly challenging constitutional issues."[206]

While the first camp is more convincing both doctrinally and normatively, Fallon's and Appleton's position is a better prediction of what the future holds for four reasons. First, constitutional doctrines related to extraterritoriality are notoriously underdeveloped. For instance, the Fourteenth Amendment's Privileges or Immunities Clause was given very limited application early in its history when the Court ruled that only a very narrow set of national privileges or immunities were protected against state intrusion.[207] Only once has the Court used the clause to strike down

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203. See Joseph W. Dellapenna, Abortion Across State Lines, 2008 BYU L. Rev. 1651, 1694; cf. Reva B. Siegel, ProChoiceLife: Asking Who Protects Life and How—And Why It Matters in Law and Politics, 93 Ind. L.J. 207, 218–21 (2018) (explaining that "large numbers of women who choose abortion are poor and end pregnancies as a way of preserving scant resources to support themselves and their families").

204. Richard H. Fallon, Jr., If *Roe* Were Overruled: Abortion and the Constitution in a Post-*Roe* World, 51 St. Louis U. L.J. 611, 613 (2007).

205. Id. at 632.

206. Appleton, supra note 141, at 682–83.

207. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78–80 (1873) (providing a very narrow reading of the rights protected by the clause).

a state law.[208] Since then, the Court has not taken any opportunity to further develop the clause's jurisprudence.[209]

The same can be said of the Dormant Commerce Clause and the Citizenship Clause in this context. Before he became a Supreme Court Justice, Tenth Circuit Judge Neil Gorsuch called the extraterritorial principle "the least understood of the Court's three strands of dormant commerce clause jurisprudence."[210] Unable to resist the pun, Judge Gorsuch continued that this strand is "certainly the most dormant," considering the Court has used it to strike down only three state laws.[211] Commentators have noted the confusion, calling it "all but clear"[212] and bemoaning the "difficulty of its application," which has resulted in "courts struggl[ing] to define the extraterritorial principle's precise scope."[213] Yet, the extraterritoriality principle continues to appear in lower court opinions from time to time as the basis for striking down the occasional law,[214] and the Supreme Court, in its 2022 term, will decide whether the principle is "now a dead letter."[215] Similarly, outside of debates about

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208. See Saenz v. Roe, 526 U.S. 489, 502–07 (1999) (holding that the right to travel prohibits states from imposing durational residency requirements that withhold the privileges and immunities of a state's citizens from people who have newly arrived in that state). The Court did rely on the clause to strike down a state law that imposed a discriminatory income tax on out-of-state loans in Colgate v. Harvey, 296 U.S. 404, 419 (1935), but overruled that decision five years later in Madden v. Commissioner, 309 U.S. 83, 93 (1940).

209. *Saenz* has been cited only seven times by the Court and only twice in a majority opinion. See Alden v. Maine, 527 U.S. 706, 751 (1999) (citing *Saenz* merely for a general quote about federalism); see also Cameron v. EMW Women's Surgical Ctr., P.S.C., No. 20-601, slip op. at 7 (U.S. Mar. 3, 2022) (quoting *Alden* which in turn quotes *Saenz* for the general federalism proposition).

210. Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015).

211. Id.; see also Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 378 (6th Cir. 2013) (Sutton, J., concurring) (describing the doctrine as "a relic of the old world with no useful role to play in the new").

212. Tyler L. Shearer, Note, Locating Extraterritoriality: *Association for Accessible Medicines* and the Reach of State Power, 100 B.U. L. Rev. 1501, 1504 (2020).

213. Recent Case, Dormant Commerce Clause—Extraterritoriality Doctrine—Fourth Circuit Invalidates Maryland Statute Regulating Price Gouging in the Sale of Generic Drugs. —Association for Accessible Medicines v. Frosh, 887 F.3d 664 (4th Cir. 2018), 132 Harv. L. Rev. 1748, 1748 (2019); see also Brannon P. Denning, Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem, 73 La. L. Rev. 979, 990–92 (2013) (arguing that Pharmaceutical Research & Manufacturers of America v. Walsh, 538 U.S. 644 (2003), marked the Court's abandonment of a freestanding rule against extraterritorial regulation under the Dormant Commerce Clause doctrine).

214. See Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 670 (4th Cir. 2018) (striking a Maryland price gouging law because "the Act controls the prices of transactions that occur outside the state").

215. See Petition for a Writ of Certiorari at i, Nat'l Pork Producers Council & Am. Farm Bureau Fed'n v. Ross, No. 21-468, 2021 WL 4480405 (deciding "[w]hether allegations that a state law has dramatic economic effects largely outside of the state and requires pervasive changes to an integrated nationwide industry state a violation of the dormant Commerce Clause, or whether the extraterritoriality principle described in this Court's decisions is now

birthright citizenship, the Citizenship Clause's implications for federal identity—and the promotion of a national citizenship that underpins a right to travel[216]—have long been "[n]eglected by courts and scholars."[217]

That leaves the Due Process Clause as the most likely basis for vetting the extraterritorial application of abortion law. This clause certainly has received more attention than the other three in this context, and Justice Brett Kavanaugh's *Dobbs* concurrence indicated his support for constitutional protection for the right to travel.[218] However, the clause's substantive dimension has been controversial. Indeed, although Justice Alito took pains to distinguish abortion from all other rights protected by the Due Process Clause,[219] the opinion's limited view of substantive due process has caused many commentators to question the strength of the doctrine's foundation as a whole.[220] Justice Clarence Thomas's *Dobbs* concurrence argued that the Due Process Clause provides no substantive protections; under this interpretation, due process protections for travel,

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a dead letter"), cert. granted, 142 S. Ct. 1413, 1413 (2022) (mem); see also John Fritze, How a Supreme Court Case About Pig Farms Could Muddy Looming Debate Over Out-of-State Abortions, USA Today (May 12, 2022), https://www.usatoday.com/story/news/politics/2022/05/12/supreme-court-out-of-state-abortion-bans/9719136002/ (on file with the *Columbia Law Review*).

216. Cf. Kreimer, Law of Choice, supra note 158, at 519 ("[T]he American Constitution as reformulated after the Civil War contemplates a national citizenship which gives to each of its members the right to travel to other states where, on a basis of equality with local residents, they can take advantage of the economic, cultural and moral options permitted there.").

217. Rebecca E. Zietlow, Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism, 62 U. Pitt. L. Rev. 281, 283 (2000).

218. Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 10 (U.S. June 24, 2022) (Kavanaugh, J., concurring) ("[M]ay a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel."). This discussion responded to the dissenting opinion's raising of this complicated issue, which cited and discussed an initial draft version of this Article. See id. at 36 (Breyer, Sotomayor & Kagan, JJ., dissenting). That draft is preserved as David S. Cohen, Greer Donley & Rachel Rebouché, The New Abortion Battleground, 123 Colum. L. Rev. (forthcoming 2023) (on file with the *Columbia Law Review*).

219. See, e.g., id. at 30–32 (majority opinion) ("What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call 'potential life' and what the law [here] . . . regards as the life of an 'unborn human being.'" (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992); Roe v. Wade, 410 U.S. 113, 159 (1973))).

220. See, e.g., Jeannie Suk Gersen, When the Supreme Court Takes Away a Long-Held Constitutional Right, New Yorker: Daily Comment (June 24, 2022), https://www.newyorker.com/news/daily-comment/when-the-supreme-court-takes-away-a-long-held-constitutional-right/ (on file with the *Columbia Law Review*) (arguing that other due process rights might be overturned); Melissa Murray, John Garvey, Mary Ziegler, Mary Bonauto, Kathryn Kolbert & Erika Bachiochi, Opinion, 'Abortion Is Just the Beginning': Six Experts on the Decision Overturning *Roe*, N.Y. Times, https://www.nytimes.com/interactive/2022/06/24/opinion/politics/dobbs-decision-perspectives.html (on file with the *Columbia Law Review*) (last visited Sept. 3, 2022).

family formation, and intimacy are all subject to Court reversal or reinterpretation.[221] Moreover, the Court has developed a jurisprudence critical of extraterritoriality under due process only in the very specific context of punitive damages for a defendant's out-of-state actions,[222] and that doctrine has not been expanded.[223]

Similarly, other legal doctrines outside of constitutional law, like conflict of laws jurisprudence, are just as indeterminate. Professor Appleton has explained that "criminal law has customarily remained immune from scrutiny through a choice-of-law lens."[224] And Professor Dellapenna has written, despite forcefully arguing that conflicts doctrine allows extraterritorial application of abortion restrictions, that "[t]his domain is notoriously unstable and contested."[225]

Second, determining the legality of extraterritorial application of abortion law would involve resolving claims of competing fundamental constitutional values. Values on the side of allowing extraterritorial application include local experimentation, preventing the proverbial "race to the bottom," and judicial restraint.[226] On the side of prohibiting extraterritorial application are the constitutional values of national citizenship, liberty of travel, and freedom of choice.[227] And the interest in state sovereignty cuts both ways, as both restrictive and permissive states want their local policy choices to have the broadest possible reach.[228] Having competing constitutional values would in no way be unique to this particular issue, as this is standard fare for most high-profile constitutional disputes.[229] However, because these constitutional values, which are in theory separate from the values underlying the abortion debate, will

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221. *Dobbs*, slip op. at 1–7 (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").

222. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572–74 (1996).

223. See Fallon, supra note 204, at 629–32 (noting that "the categorical claim that states may never enact or enforce extraterritorial criminal legislation seems too strong" and providing examples of states applying state criminal laws to out-of-state events).

224. Appleton, supra note 141, at 667.

225. Dellapenna, supra note 203, at 1654.

226. Cf. Appleton, supra note 141, at 656 (noting the "often-cited slogan of federalism" that states function as "laboratories" for democracy).

227. Cf. Fallon, supra note 204, at 639–40 (querying whether a "state's interest in protecting fetal life [can] outweigh a woman's asserted right, rooted in her national citizenship, to migrate to another state and to enjoy the privileges or immunities of citizenship of that other state").

228. Cf. Kreimer, Law of Choice, supra note 158, at 464–72 (describing a constitutional "equilibrium [which] . . . apportioned each state moral sovereignty within its own boundaries and obliged neighboring states to accede to that sovereignty").

229. See, e.g., Jamal Greene, Foreword: Rights as Trumps?, 132 Harv. L. Rev. 28, 31 (2018) (describing Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018), as "a portrait of rights on all sides").

become proxies for the abortion debate, the conflict of fundamental values will become even more difficult for courts to resolve.[230]

Third, as this brief sampling of pertinent scholarship indicates, any solution to the constitutional questions raised here implicates not only competing constitutional foundational principles but also competing notions of constitutional interpretation. Historical disputes about the original understanding of the different clauses at issue will lead the Court to pick among different versions of complex history.[231] Perhaps to state the obvious, the present Supreme Court, which relied on a contested history of abortion regulation to overturn *Roe*,[232] could also marshal history and originalism in ways that undermine constitutional arguments against abortions laws with extraterritorial reach. Differing interpretations of constitutional history will further enflame longstanding concerns about judicial neutrality.[233]

Fourth, and finally, given the various ways that states might attempt to restrict extraterritorial abortions, especially in an era of telehealth for abortion, courts will parse cases based on different facts and thus render different outcomes based on differing in- and out-of-state activities. This will subject courts to the same criticism leveled at *Casey* that any resulting

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230. Cf. Fallon, supra note 204, at 652–53 ("The obvious but unavoidable awkwardness is that differences about how to define, weigh, and accommodate [state] interests would implicate issues close to the heart of our deepest cultural divisions. Given the nature of the constitutional debate, courts could not simultaneously retreat to neutral ground and fulfill their constitutional obligations . . . .").

231. For instance, compare the majority and dissenting opinions' uses of history in McDonald v. Chicago, 561 U.S. 742 (2010), and District of Columbia v. Heller, 554 U.S. 570 (2008). See, e.g., *McDonald*, 561 U.S. at 914 (Breyer, J., dissenting) (noting that "the relevant history in [*Heller*] was far from clear" as "four dissenting Justices disagreed with the majority's historical analysis" and that "disputed history provides treacherous ground on which to build decisions written by judges who are not expert at history").

232. Compare Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 15–30 (U.S. June 24, 2022) (surveying historical statutory and common law treatment of abortion), with Brief for Amici Curiae American Historical Association and Organization of American Historians in Support of Respondents at 4, *Dobbs*, No. 19-1392, 2021 WL 4341742 (arguing that "historical evidence . . . refutes any claim that, from the adoption of the Constitution through 1868, our nation had a settled view on the criminality of abortion"), and Aaron Tang, After *Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban, 75 Stan. L. Rev. (forthcoming 2023) (manuscript at 11–30), https://ssrn.com/abstract=4205139 [https://perma.cc/2Y4W-N5A9] (presenting evidence that at the time of the Fifth Amendment's ratification in 1791, "the liberty interest in obtaining an abortion during early . . . pregnancy was . . . respected . . . by every state in the union").

233. See, e.g., Saul Cornell, Originalism on Trial: The Use and Abuse of History in *District of Columbia v. Heller*, 69 Ohio St. L.J. 625, 626 (2008) (arguing that, in the example of *Heller*, "plain-meaning originalism is not a neutral interpretive methodology, but little more than a lawyer's version of a magician's parlor trick—admittedly clever, but without any intellectual heft"); John Paul Stevens, Originalism and History, 48 Ga. L. Rev. 691, 693 (2014) (analyzing problems associated with the use of history in interpreting legal text).

standard is not workable.[234] Imagine different situations based on a variety of factors: the abortion patient's ties to the state where abortion is illegal (do they live in the state where they are a citizen or live temporarily elsewhere?), the provider's ties to the state where abortion is illegal (are they licensed in that state but practicing elsewhere or do they have no connection to that state at all?), the type of assistance someone else provides the patient (does a friend provide a place to stay in the state where abortion is legal, drive the patient across state lines, or deliver pills from a state where they are legal to a state where they are not?). For telabortion, these factors are compounded by complexities including where the provider and patient are located during the video visit, where the medication is received in the mail, where it is taken (which can possibly be multiple locations for the two different drugs), and where the pregnancy tissue is expelled.[235]

It is possible that the Supreme Court and lower courts reach a consistent rule despite these varying interests and hold that these laws are always permissible or always prohibited. But it is much more likely that some combination of the scenarios listed above would strike some judges as appropriate and others as going too far, whether because of a sense of fundamental fairness,[236] the constitutional theories already discussed in this section, or other constitutional concerns.[237] Given the underdeveloped and contested jurisprudence, the competing fundamental constitutional principles involved, and the complex web of factual scenarios that could possibly arise, the post-*Roe* judiciary will soon be mired in interjurisdictional complexities that will make the workability of the previous era look simple in comparison.

D. *Shield Laws*

So far, this section has explored the difficult legal issues that arise when antiabortion states attempt to apply their laws beyond state borders. Antiabortion states are not alone, however, in thinking about extraterritoriality after *Roe*. Abortion-supportive states have been exploring ways to thwart antiabortion states from applying their laws to

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234. See supra notes 9–11 and accompanying text.

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

236. See Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24–25 (1981) ("Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.").

237. This might include concerns over minimum contacts from personal jurisdiction doctrine, see International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), or the impact on other areas of law, see Brief of Firearms Policy Coalition as Amicus Curiae in Support of Petitioners at 18, Whole Woman's Health v. Jackson, No. 21-463 (U.S. Dec. 10, 2021), 2021 WL 5029025 (expressing concern that "if pre-enforcement review can be evaded in the context of abortion it can and will be evaded in the context of the right to keep and bear arms").

abortions that occur outside their borders. Since the online posting of the first draft of this Article in February 2022,[238] Massachusetts has passed the most comprehensive legislation, often referred to as an interstate shield law, with California, Connecticut, Delaware, New Jersey, and New York offering a panoply of protections as well.[239] Illinois and the District of Columbia have pending bills addressing the issue.[240] And governors of twelve states (California, Colorado, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Pennsylvania, Rhode Island, and Washington) have issued executive orders following *Dobbs* that accomplish some of the goals discussed here.[241] This section explores

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238. Some of the state efforts attempting to accomplish the protection described in this section have happened independent of this Article, such as the work of the California Future of Abortion Council. Other efforts have emerged in direct response to this Article's exploration of how abortion-supportive proposals might be implemented. Over the past year, the authors have been actively involved in consulting with legislators and advocates in different states on protecting abortion care from out-of-state legal action. Thus, the first draft of this Article spoke of these efforts as possibilities; as of November 2022, lawmakers and executive officials have enacted or introduced concrete laws and executive orders inspired—at least in part—by this Article.

239. See generally Assemb. B. 1242, 2021–2022 Leg. Sess. (Cal. 2022) (codified as amended in scattered sections of Cal. Penal Code); Assemb. B. 2626, 2021–2022 Leg. Sess. (Cal. 2022) (codified as amended in scattered sections of Cal. Bus. & Prof. Code); Assemb. B. 1666, Leg. Sess. 2021–2022 (Cal. 2022) (codified as amended at Cal. Health & Safety Code § 123467.5 (2022)); Pub. Act No. 22-19, Gen. Assemb. (Conn. 2022) (codified as amended at Conn. Gen. Stat. Ann. §§ 54-82i(b), 54-162, 19a-602 (West 2022)); H.B. 455, 151st Gen. Assemb. (Del. 2022) (codified as amended in scattered sections of titles 10, 11, 18, and 24); H.B. 5090, 192nd Gen. Ct. (Mass. 2022); A3975, 220th Leg. (N.J. 2022) (codified as amended at N.J. Stat. Ann. §§ 2A:84A-22.18, -22.19, 45:1-21 (West 2022)); A3974, 220th Leg. (N.J. 2022) (codified as amended at N.J. Stat. Ann. § 2A:160-14.1 (West 2022)); S. 9039A, 2021–2022 Leg. Sess. (N.Y. 2022) (codified as amended at N.Y. Civ. Rights Law § 70-b (McKinney 2022)); S. 9077A, 2021–2022 Leg. Sess. (N.Y. 2022) (codified in scattered sections of N.Y. Crim. Proc. Law, N.Y. Exec. Law, and N.Y. C.P.L.R.); S. 9384A, 2021–2022 Leg. Sess. (N.Y.) (codified as amended at N.Y. Exec. Law § 108 (McKinney 2022)); A. 9687B, 2021–2022 Leg. Sess. (N.Y. 2022) (codified as amended at N.Y. Educ. Law §§ 6505-d, 6531-b (McKinney 2022), N.Y. Pub. Health Law § 230 (McKinney 2022)); A. 9718B, 2021–2022 Leg. Sess. (N.Y. 2022) (codified as amended at N.Y. Ins. Law § 3436-a (McKinney 2022)).

240. See generally B. 24-0808, 24th Council (D.C. 2022); B. 24-0726, 24th Council (D.C. 2022); H.B. 1464, 102nd Gen. Assemb. (Ill. 2022).

241. Cal. Exec. Order N-12-22 (June 27, 2022), https://www.gov.ca.gov/wp-content/uploads/2022/06/6.27.22-EO-N-12-22-Reproductive-Freedom.pdf [https://perma.cc/2PFK-EJ73]; Colo. Exec. Order D 2022 032 (July 6, 2022), https://ewscripps.brightspotcdn.com/ea/92/9ab8c1ad465d81a69889dd38faba/d-2022-032-reproductive-health-eo-3.pdf [https://perma.cc/ZW63-5FLK]; Me. Exec. Order 4 (July 5, 2022), https://www.maine.gov/governor/mills/official_documents/executive-orders/2022-07-executive-order-4-order-protecting-access-reproductive [https://perma.cc/RHR4-X5HG]; Mass. Exec. Order 600 (June 24, 2022), https://www.mass.gov/executive-orders/no-600-protecting-access-to-reproductive-health-care-services-in-the-commonwealth [https://perma.cc/BEF3-Z3NR]; Mich. Exec. Order 2022-4 (July 13, 2022), https://www.michigan.gov/whitmer/news/state-orders-and-directives/2022/07/13/executive-order-2022-4-unavailability-of-interstate-extradition [https://perma.cc/EY44-ECBE]; Minn. Exec. Order 22-16 (June 25, 2022), https://mn.gov/governor/assets/EO%2022-

several avenues by which states can blunt the force of antiabortion states' extraterritorial reach. Importantly, each of these interventions would strike at the heart of basic, fundamental principles of law in the United States' federalist system—interstate comity and cooperation. And none of them would protect the patients and helpers who stay in, or return to, an antiabortion state if a law targets their conduct.

With these risks in mind, an abortion-supportive state could nevertheless protect its providers' licenses and malpractice insurance rates. Ever since SB 8 took effect in September 2021, some have wondered why Texas abortion providers have not engaged in civil disobedience and provided abortions after six weeks that violate the law.[242] The answer is not just the risk of being forced to pay the $10,000 (or more) bounty. Texas abortion providers, many of whom also practice other areas of medicine or provide abortions in other states, also fear losing their medical licenses and facing cost-prohibitive malpractice insurance rates.[243] Lawsuits and complaints in which providers are named as defendants typically are reported to their licensing bodies and insurers.[244] In this context, that means that if an antiabortion state tries to impose criminal or civil liability on an abortion provider for providing an abortion to someone from

16_tcm1055-532111.pdf [https://perma.cc/HU5D-AN9E]; Nev. Exec. Order 2022-08 (June 28, 2022), https://gov.nv.gov/News/Executive_Orders/2022/Executive_Order_2022-08_Protecting_Access_to_Reproductive_Health_Services_in_Nevada/ [https://perma.cc/6M4D-J874]; N.M. Exec. Order 2022-107 (June 27, 2022), https://www.governor.state.nm.us/wp-content/uploads/2022/06/Executive-Order-2022-107.pdf [https://perma.cc/BK47-WE6G]; N.C. Exec. Order 263 (July 6, 2022), https://governor.nc.gov/media/3298/open [https://perma.cc/MA5C-8WJJ]; Pa. Exec. Order 2022-01 (July 12, 2022), https://www.governor.pa.gov/wp-content/uploads/2022/07/20220712-EO-2022-01.pdf [https://perma.cc/9P7Z-RYTX]; R.I. Exec. Order 22-28 (July 5, 2022), https://governor.ri.gov/executive-orders/executive-order-22-28 [https://perma.cc/7QHH-S7YV]; Wash. Exec. Order 22-12 (June 30, 2022), https://www.governor.wa.gov/sites/default/files/directive/22-12%20-%20Prohibiting%20assistance%20with%20interstate%20abortion%20investigations%20(tmp).pdf?utm_medium=email&utm_source=govdelivery [https://perma.cc/3C7V-ZMDL].

242. Cf. Alexi Pfeffer-Gillett, Civil Disobedience in the Face of Texas's Abortion Ban, 106 Minn. L. Rev. 203, 205 (2021) (analyzing the possibility of civil disobedience in response to SB 8).

243. See United States' Emergency Motion for a Temporary Restraining Order or Preliminary Injunction at 11, United States v. Texas, 566 F. Supp. 3d 605 (W.D. Tex. 2021) (No. 1:21-cv-796-RP), ECF No. 6-1 (supplying statements from providers that they fear the repercussions of lawsuits related to SB 8).

244. See About Physician Discipline: How State Medical Boards Regulate Physicians After Licensing, Fed'n of State Med. Bds., https://www.fsmb.org/u.s.-medical-regulatory-trends-and-actions/guide-to-medical-regulation-in-the-united-states/about-physician-discipline/ [https://perma.cc/5YCE-Q5A8] (last visited Sept. 27, 2022). Malpractice payments are reported to the National Practitioner Data Bank, which is part of the Health Resource and Services Administration of the Department of Health and Human Services (HHS). Reporting Medical Malpractice Payments, Nat'l Prac. Data Bank, HHS, https://www.npdb.hrsa.gov/guidebook/EMMPR.jsp [https://perma.cc/TTM8-4GYG] (last visited Sept. 2, 2022).

another state—an abortion legal in the provider's state—that prosecution or lawsuit could be reported to the provider's licensing board, which typically has broad discretion in governing provider ethics and standards of conduct.[245] Being named as a defendant too many times or being subject to a disciplinary investigation, even if the provider ultimately prevails, could result in licensure suspension, high malpractice insurance costs, and reputational damage, given that lawsuits are publicly available and figure into ratings of physician competence.[246] These effects threaten providers' ability to practice medicine and support themselves and their families.

To prevent this, an abortion-supportive state can pass legislation that prohibits its medical boards and in-state malpractice insurance companies from taking any adverse action against providers who face out-of-state legal consequences for assisting out-of-state abortion patients. This would not be a blanket immunity for abortion providers but rather a targeted protection applicable to out-of-state investigations, disciplinary actions, lawsuits, or prosecutions arising from abortions performed in compliance with the home state's law. Several of the shield laws and executive orders offer this protection to abortion providers.[247]

Beyond this kind of professional insulation, abortion-supportive states might also attempt to thwart interstate investigations and discovery, both civil and criminal, into the care provided in their states for patients from other states. These investigations and discovery attempts, even if they do not result in liability, could be used to harass providers, chilling abortion provision for out-of-state patients, and to gather evidence that is used to form the basis of an extraterritorial lawsuit or prosecution. On the civil side, most states have enacted some form of the Uniform Interstate

245. Jacqueline Landess, State Medical Boards, Licensure, and Discipline in the United States, 17 Focus 337, 338 (2019) (summarizing the history of state medical boards and their "broad discretion").

246. See Am. Coll. of Emergency Physicians, So, You Have Been Sued!: An Information Paper § C.7 (2019), https://www.acep.org/globalassets/uploads/uploaded-files/acep/clinical-and-practice-management/resources/medical-legal/so-you-have-been-sued.pdf [https://perma.cc/V6F5-TMSP] (noting that "premium rates will certainly go up" when a physician is subject to a malpractice suit, regardless of its outcome); Physician Discipline, Fed'n of State Med. Bds., https://www.fsmb.org/u.s.-medical-regulatory-trends-and-actions/u.s.-medical-licensing-and-disciplinary-data/physician-discipline/ [https://perma.cc/YN47-EDMT] (last visited Sept. 27, 2022) (providing public access to data on physician disciplinary action).

247. H.B. 455, 151st Gen. Assemb. §§ 1, 2, 5 (Del. 2022) (codified as amended at Del. Code tit. 18, § 2535 (2022); Del. Code tit. 24, §§ 1702, 1731(b)(26), 1733(c), 1922(d), 1935(b)(5) (2022)); H.B. 5090, 192nd Gen. Ct. §§ 5, 10, 11, 15, 16, 17, 23 (Mass. 2022); S2633, 220th Leg. § 3 (N.J. 2022) (codified as amended at N.J. Stat. Ann. § 45:1-21 (West 2022)); Assemb. 9687B, 2021–2022 Leg. Sess. §§ 1, 4 (N.Y. 2022) (codified as amended at N.Y. Educ. Law §§ 6505-d, 6531-b (McKinney 2022); N.Y. Pub. Health Law § 230.9-c (McKinney 2022); N.Y. Ins. Law § 3436-a (McKinney 2022)); N.M. Exec. Order 2022-107 ¶ 3 (June 27, 2022), https://www.governor.state.nm.us/wp-content/uploads/2022/06/Executive-Order-2022-107.pdf [https://perma.cc/BK47-WE6G].

Depositions and Discovery Act which simplifies the process for litigants to take depositions and engage in discovery with people from another state by streamlining the process for an out-of-state court to enforce the original state's subpoena or discovery order.[248] On the criminal side, the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, a version of which every state has enacted, accomplishes the same goal for witness summons in criminal cases.[249] And even before witnesses are called, police departments usually work with one another across state lines via formal and informal cooperation agreements.[250]

States could protect their providers from antiabortion state investigations, lawsuits, and prosecutions by exempting abortion providers from the interstate discovery and interstate witness subpoena laws while also prohibiting state and local law enforcement agencies from cooperating with other states' investigations into abortion-related crimes and lawsuits.[251] As with the professional disciplinary exemptions above, this would not be for any and all abortions. Rather, it would apply only to abortions that are otherwise legal in the provider's state. And a state passing such an exemption or waiver would not be able to protect providers if they ever traveled to the antiabortion state, where they would then be subject to that state's laws or a judgment entered in that state's courts.[252] This form of protection, however, would prevent the courts of the provider's home state from enforcing these out-of-state subpoenas and discovery requests. It would also prevent the law enforcement agencies of the provider's home state from becoming a cooperating arm of the antiabortion state's investigation apparatus. All of the shield laws so far include these protections and several of the executive orders do as well.[253]

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248. Unif. Interstate Depositions and Discovery Act § 3 (Unif. L. Comm'n 2007).

249. See Unif. Act to Secure the Attendance of Witnesses From Without a State in Crim. Proc. § 3 (Unif. L. Comm'n 1936) ("If a person in any state . . . is a material witness in a prosecution pending in a court of record in this state . . . a judge of such court may issue a certificate . . . stating these facts and specifying the number of days the witness will be required."); see also Attendance of Out-of-State Witnesses Act, Unif. L. Comm'n, https://www.uniformlaws.org/committees/community-home?communitykey=69a013a1-5b59-4d8d-aee3-deb474a4a6b8#LegBillTrackingAnchor/ (on file with the *Columbia Law Review*) (last visited Sept. 26, 2022) (providing a map indicating that every state has enacted the uniform law).

250. Bridget A. Fahey, Federalism by Contract, 129 Yale L.J. 2326, 2329 (2020) (exploring the different types of intergovernmental agreements).

251. The Full Faith and Credit Clause is "inapplicable to the enforcement of an out-of-state court's decision to issue a commission authorizing certain depositions and a demand for document production" because it only applies to final judgments. 16B Am. Jur. 2d Constitutional Law § 1024, Westlaw (database updated Nov. 2022).

252. Moreover, if a default judgment is entered against a provider in another state, creditors might try to collect on that judgment, creating a separate problem for the provider.

253. Assemb. B. 1666, Leg. Sess. 2021–2022 (Cal. 2022) (codified as amended at Cal. Health & Safety Code § 123467.5 (2022)); Pub. Act No. 22-19 §§ 3, 4 (Conn. 2022) (section

An abortion-supportive state could separately exempt abortion providers from the state's extradition law for legal abortions in the provider's home state. The Constitution requires states to extradite an accused criminal who flees to that state.[254] Thus, for instance, Illinois cannot constitutionally refuse to extradite an Illinois provider who travels to Kentucky, performs an illegal abortion there, and then goes back to Illinois. However, the Constitution's extradition clause does not cover extradition of people who did not flee, meaning a state is not constitutionally required to extradite an Illinois provider who never stepped foot in Kentucky.[255] Outside of constitutional requirements, some states' extradition laws permit or obligate the state to extradite accused criminals, even if they have never been in the other state and thus have not fled.[256] An abortion-supportive state could exempt providers and others from these provisions so that the provider could perform abortions pursuant to their home state laws for out-of-state patients without fear of

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4 codified as amended at Conn. Gen. Stat. Ann. § 54-82i(b) (West 2022)); H.B. 455, 151st Gen. Assemb. § 3 (Del. 2022) (codified as amended at Del. Code tit. 10, §§ 3926A, 3928 (2022)); S2633, 220th Leg. § 4 (N.J. 2022) (codified as amended at N.J. Stat. Ann. § 2A:84A-22.18 to -22.19 (West 2022)); S. 9077A, 2021–2022 Leg. Sess. § 2 (N.Y. 2022) (codified as amended at N.Y. Crim. Proc. Law § 140.10.3-a(3) (McKinney 2022); N.Y. Exec. Law § 837-w (McKinney 2022); N.Y. C.P.L.R. 3119(g), 3102(e) (McKinney 2022)).

254. See U.S. Const. art. IV, § 2, cl. 2. That provision reads:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

255. See Hyatt v. New York, 188 U.S. 691, 709–13 (1903) ("[T]he person who is sought must be one who has fled from the demanding state, and he must have fled (not necessarily directly) to the state where he is found."). Constructive presence is not enough to qualify as a fleeing fugitive. See In re Rowe, 423 N.E.2d 167, 171 (Ohio 1981) (requiring corporeal presence). Thus, an abortion provider who uses video conferencing to communicate with a patient in an antiabortion state would not be considered present in that state because, even though the video reached into the state, the provider's physical presence did not. This means the constitutional requirement of extradition does not apply. See Jack L. Goldsmith, Against Cyberanarchy, 65 U. Chi. L. Rev. 1199, 1220 (1990) (noting that transmitting digital information into a state where such transmission constitutes a crime likely does not subject a person to extradition because extradition obligations "have long been limited to persons who were physically present in the demanding state at the time of the crime's commission"). See generally Alejandra Caraballo, Cynthia Conti-Cook, Yveka Pierre, Michelle McGrath & Hillary Aarons, Extradition in Post-*Roe* America, 26 CUNY L. Rev. (forthcoming 2023) (on file with the *Columbia Law Review*) (investigating current and historical extradition practices, including international extradition and pre-Civil War extraditions related to fugitive slaves, for their relation to abortion extraditions).

256. See, e.g., Cal. Penal Code § 1549.1 (2022) (providing for extradition to a demanding state where the accused's actions committed in the demanded-of state "intentionally result[ed] in a crime in the [demanding] state . . . even though the accused was not in the demanding state at the time of the commission of the crime, and has not fled therefrom"); N.J. Stat. Ann. § 2A:160-14 (West 2022) (similar).

being extradited.[257] The shield laws that have passed so far exempt extradition in such cases, and almost all of the executive orders declare that the governors will not use their discretion in this context.[258]

Another concern that is spurring interstate protection is the threat of out-of-state civil judgments under laws such as Texas's SB 8.[259] Imagine an Illinois abortion provider, volunteer driver, funder, or other helper assisting a Texas patient to obtain an abortion that is contrary to SB 8 (one that is past six weeks and performed by a Texas-licensed physician). Under

257. If, however, the other state issues a warrant for the provider's arrest, the provider would still face serious risks to their liberty because they might not be comfortable traveling to any state that does not have the protections discussed in this section. Thus, protection from extradition would help limit a provider's risk, but to completely eliminate the provider's risk, the provider would need to limit their own future travel.

258. Pub. Act No. 22-19 § 5 (Conn. 2022) (codified as amended at Conn. Gen. Stat. Ann. § 54-162 (West 2022)); H.B. 455, 151st Gen. Assemb. § 4 (Del. 2022) (codified as amended at Del. Code tit. 11, § 2506 (2022)); S2642, 220th Leg. § 1 (N.J. 2022) (codified as amended at N.J. Stat. Ann. § 2A:160-14.1 (West 2022)); S. 9077A, 2021–2022 Leg. Sess. § 1 (N.Y. 2022) (codified as amended at N.Y. Crim. Proc. Law § 570.17 (McKinney)); Colo. Exec. Order D 2022 032 § II.D (July 6, 2022), https://ewscripps.brightspotcdn.com/ea/92/9ab8c1ad465d81a69889dd38faba/d-2022-032-reproductive-health-eo-3.pdf [https://perma.cc/ZW63-5FLK]; Me. Exec. Order 4 § III (July 5, 2022), https://www.maine.gov/governor/mills/official_documents/executive-orders/2022-07-executive-order-4-order-protecting-access-reproductive [https://perma.cc/RHR4-X5HG]; Mass. Exec. Order 600 § 3 (June 24, 2022), https://www.mass.gov/executive-orders/no-600-protecting-access-to-reproductive-health-care-services-in-the-commonwealth [https://perma.cc/BEF3-Z3NR]; Mich. Exec. Order 2022-4 (July 13, 2022), https://www.michigan.gov/whitmer/news/state-orders-and-directives/2022/07/13/executive-order-2022-4-unavailability-of-interstate-extradition [https://perma.cc/EY44-ECBE]; Minn. Exec. Order 22-16 § 4 (June 25, 2022), https://mn.gov/governor/assets/EO%2022-16_tcm1055-532111.pdf [https://perma.cc/HU5D-AN9E]; Nev. Exec. Order 2022-08 § 3 (June 28, 2022), https://gov.nv.gov/News/Executive_Orders/2022/Executive_Order_2022-08_Protecting_Access_to_Reproductive_Health_Services_in_Nevada/ [https://perma.cc/6M4D-J874]; N.C. Exec. Order 263 § 4 (July 6, 2022), https://governor.nc.gov/media/3298/open [https://perma.cc/MA5C-8WJJ]; Pa. Exec. Order 2022-01 § 5 (July 12, 2022), https://www.governor.pa.gov/wp-content/uploads/2022/07/20220712-EO-2022-01.pdf [https://perma.cc/9P7Z-RYTX]; R.I. Exec. Order 22-28 § 2 (July 5, 2022), https://governor.ri.gov/executive-orders/executive-order-22-28 [https://perma.cc/7QHH-S7YV].

259. S.B. 8, 87th Gen. Assemb., Reg. Sess. (Tex. 2021) (codified as amended at Tex. Health & Safety Code Ann. §§ 171.201–.212 (West 2022)). Texas's SB 8 creates civil liability for anyone who performs or aids an abortion performed by a Texas-licensed provider. See id. §§ 171.201(4), 171.203(b), 171.208 (defining a "physician" as a "an individual licensed to practice medicine in this state," prohibiting physicians from performing abortions if a fetal heartbeat is detectible, and providing for private civil suits for violations of the act). More recent SB 8-style laws lack any requirement of a connection to the home state. For instance, the Oklahoma copycat law creates civil liability for any abortion starting at conception without any explicit connection to Oklahoma required by the text, creating a much wider opening for these kinds of lawsuits. See H.B. 4327, 2022 Leg., Reg. Sess. (Okla. 2022) (codified as amended at Okla. Stat. tit. 63, §§ 1-745.51, 1-745.55 (2022)) (defining "abortion" without reference to whether it is performed by an Oklahoman doctor or on an Oklahoman patient and providing for private civil suits against abortion providers).

that law, anyone could sue that Illinois person for $10,000 or more.[260] If a Texas court issues a final judgment in that case finding the Illinois resident liable under SB 8, the Full Faith and Credit Clause would ordinarily require Illinois's courts to enforce that judgment.[261] Individual Illinois litigants attempting to evade the force of the judgment could try to take advantage of two recognized exceptions to the Full Faith and Credit Clause by claiming the Texas court had no personal jurisdiction over them[262] or that SB 8 is really a penal law.[263]

But abortion-supportive states might chill the uptake of these judgment enforcement actions by creating a cause of action against anyone who interferes with lawful reproductive healthcare provision or support. The states that have passed shield laws so far have included this new cause of action in the form of a clawback provision.[264] These provisions recognize the out-of-state judgment, as the Constitution requires, but subject the person seeking to enforce it to a new state tort claim for interfering with reproductive healthcare provision that was lawful in the state it occurred. In passing such a law, states would hope to thwart out-of-state enforcement actions in the first place because people would fear bringing these actions into a state with this new cause of action. Or, if there is an enforcement action in the abortion-supportive state, the new cause of action would lead to the negation of the financial impact of the out-of-state judgment by forcing both parties to pay damages of the same amount to each other.

In addition, abortion-supportive states could protect providers' home addresses from public discovery out of concern that they will be targeted by antiabortion extremists from afar now that they are caring for an increased number of out-of-state patients.[265] As part of their shield bills,

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260. See Tex. S.B. 8, § 3.

261. U.S. Const. art. IV, § 1.

262. Milliken v. Meyer, 311 U.S. 457, 462 (1940) ("Where a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is of course open to inquiry.").

263. Nelson v. George, 399 U.S. 224, 229 (1970) ("[T]he Full Faith and Credit Clause does not require that sister States enforce a foreign penal judgment . . . ."); City of Oakland v. Desert Outdoor Advert., Inc., 267 P.3d 48, 49–50 (Nev. 2011) (deciding that a penal judgment in California is unenforceable in Nevada).

264. Pub. Act No. 22-19 § 1(b) (Conn. 2022); H.B. 455, 151st Gen. Assemb. § 3 (Del. 2022) (codified as amended at Del. Code tit. 10, § 3929 (2022)); S2633, 220th Leg. § 1(b) (N.J. 2022); S. 9039A, 2021–2022 Leg. Sess. § 3 (N.Y. 2022) (codified as amended at N.Y. Civ. Rights Law § 70-b (McKinney 2022)).

265. Cf. Cal. Gov't Code § 6215(a), (c) (2022) (declaring that "[p]ersons working in the reproductive health care field, specifically the provision of terminating a pregnancy, are often subject to . . . acts of violence" and that "it is necessary for the Legislature to ensure that the home address information of these individuals is kept confidential"); N.J. Stat. Ann. § 47:4-2 (West 2022) (making similar legislative findings and commitments).

Massachusetts and New York expanded their address confidentiality programs to include abortion providers and patients.[266]

Finally, and much more controversially, states could attempt to protect providers who are not only providing care to those traveling to their state but also to patients who stay where abortion is illegal by mailing medication to them.[267] Telehealth policies and the relevant standard of care typically define the location of care as where the patient is.[268] Thus, if an Illinois-licensed provider is located in Illinois while caring via telehealth for a patient who remains in Kentucky, then the physician is acting illegally by practicing medicine without a license in Kentucky, even if abortion via telehealth is legal in Illinois.[269] Changing this default means that the provider's home state would not consider the provider to be practicing without a license or in violation of another state's law when offering telabortion to out-of-state residents. As of now, only the Massachusetts shield law has this provision.[270]

Changing the default location of care would have significant consequences for the entire healthcare ecosystem, and as a result, current proposals are limited to abortion care (and in Massachusetts, gender-affirming care as well). Even with that limitation, as section III.D notes, this change has ripple effects for interstate licensure compacts and model laws on telehealth. And, more significantly, abortion-supportive states could not protect their providers from consequences in the antiabortion state, which would view the provider's actions as a violation of the state's abortion laws as well as its licensing laws. Though their home state's shield

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266. H.B. 5090, 192nd Gen. Ct. § 2 (Mass. 2022); S. 9384A, 2021–2022 Leg. Sess. (N.Y. 2022) (codified as amended at N.Y. Exec. Law § 108 (McKinney 2022)).

267. See generally Emily Bazelon, Risking Everything to Offer Abortions Across State Lines, N.Y. Times Mag. (Oct. 4, 2022), https://www.nytimes.com/2022/10/04/magazine/abortion-interstate-travel-post-roe.html (on file with the *Columbia Law Review*) (last updated Oct. 7, 2022) (reporting on doctors' efforts to furnish abortion care under restrictive state regimes and describing shield laws as "[t]he most promising" route available for supportive states).

268. Telehealth Policy 101: Cross State Licensing & Compacts, Ctr. for Connected Health Pol'y, https://www.cchpca.org/policy-101/?category=cross-state-licensing-compacts [https://perma.cc/8BL3-JEWX] (last visited Sept. 2, 2022) ("Typically, during a telehealth encounter . . . the location of the patient [] is considered the 'place of service', and the distant site provider must adhere to the licensing . . . regulations of the state [where] the patient is located, even if the . . . provider is not a resident [thereof] . . . .").

269. Cf. Information Release, Interstate Med. Licensure Compact (June 29, 2022), https://www.imlcc.org/wp-content/uploads/2022/06/IMLCC_Information-Release_June-29-2022_Physicians-licensed-in-multiple-states-1.pdf [https://perma.cc/PAP9-H4VY] ("[Under the Interstate Medical Licensure Compact, a] physician must be licensed in the state where the patient is . . . receiving care . . . and "care received is based on the [state's] medical practice act . . . where the patient is located . . . [when] they . . . receiv[e] care.").

270. See Mass. H.B. 5090 § 1 ("[T]he provision of such a health care service by a person duly licensed under the laws of the commonwealth and physically present in the commonwealth . . . shall be legally protected if the service is permitted under the laws of the commonwealth.").

law may protect them when in their state, any travel outside the state may be high risk.

Beyond a provider who knowingly mails medication abortion to a person in a state that bans it, questions of location—in practice—will be much more unclear, and states may choose to embrace that ambiguity. For in-person care, the provider and patient are in the same place, so location of care is not at issue. But for remote care, there will be instances in which a provider believes a patient is in an abortion-supportive state when they are not. Though some states have statutory or regulatory requirements that require abortion providers to ask for a patient's residence,[271] some patients will evade questions of location or use work-arounds like mail forwarding. Even when patients physically travel to the abortion-supportive state, legal risks for providers increase if patients take medication abortion home with them into an antiabortion state. Under *Casey*, state laws that required reporting purported to serve the purpose of "medical research"[272]—not to police from where patients hailed. By that reasoning, they, along with other reporting requirements, continue to serve the purpose of collecting abortion data, but that purpose must be balanced against the risk of extraterritorial punishment. Abortion-supportive states could revisit laws requiring providers to collect or report data on a patient's location or residence, and professional organizations might rethink advising providers to confirm patient location in the abortion context.[273]

Moreover, abortion providers with the support of national professional organizations are tailoring their policies to comply with the threat of extraterritorial prosecutions. Some providers are offering different services to out-of-state patients or considering having patients sign a waiver that states, "I have been advised to take this medication in [the abortion-supportive state]." But herein lies another problem: Waivers shift liability to the patient, and if state laws begin to target patients, then those individuals will bear all the costs. It also highlights an under-analyzed issue: how clinical practice will change to respond to threats of cross-

271. See, e.g., Abortion Reporting, Elec. Frontier Found., https://www.eff.org/issues/abortion-reporting [https://perma.cc/3XTM-99PS] (last visited Sept. 2, 2022) (citing the example of Nebraska, "[a] typical state reporting form," which uses a reporting form that includes the patient's legal residence).

272. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 900–01 (1992) (plurality opinion) ("The collection of information with respect to actual patients is a vital element of medical research, and so it cannot be said that the requirements serve no purpose other than to make abortions more difficult.").

273. Fed'n of State Med. Bds., The Appropriate Use of Telemedicine Technologies in the Practice of Medicine 6 (2022), https://www.fsmb.org/siteassets/advocacy/policies/fsmb-workgroup-on-telemedicineapril-2022-final.pdf [https://perma.cc/VVP6-DYPK] ("[P]hysician[s] [are] discouraged from rendering medical advice and/or care using telemedicine technologies without . . . fully verifying and authenticating the location and, to the extent possible, identifying the requesting patient . . . .").

border liability and punishment, potentially adopting policies that impose restrictions not required by their own state's law.[274]

Even if the suggestions included in this section are on constitutionally firm ground,[275] there is no denying that each of these proposals would threaten basic principles of comity between states, possibly resulting in the breakdown of state-to-state relations and ultimately retaliation. After all, if Illinois refuses to extradite an abortion provider to Kentucky, will Kentucky retaliate and refuse to extradite a gun dealer to Illinois? The shield provisions discussed here would go a long way toward protecting a state's providers and increasing access for out-of-state patients seeking out those providers, but they would also intensify interstate conflict in a way that could have unintended consequences for other areas of law as well as for the general fabric of the country's federalist form of government. As this Article maintains throughout, these are the inevitable effects of overturning *Roe*.

III. PREEMPTION, FEDERAL LAND, AND HEALTH POLICY

Interstate issues are not the only area that will cause deep confusion: Interaction between federal and state law will also be complicated and in flux. This Part will explore how possible federal actions in the wake of *Dobbs* would interact with—and possibly preempt—state laws to the contrary. As with everything described already in this Article, each move will face legal uncertainty and depend on political mobilization. But with *Roe* overturned, the Biden Administration faces increasing pressure to use its power, however untested, to protect abortion rights. This Article contemplates the avenues for how it can do so in the immediate future.[276]

The President cannot restore the right to abortion, but he can use executive power to improve abortion access, even without currently

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274. At the time of writing, some examples of emerging clinical practice seek to minimize provider liability by contemplating a protocol that administers medication abortion in one visit—over six-to-eight hours—rather than over one-to-two days, presumably so that the patient can complete an abortion at a clinic rather than take pills at home. Another facility stopped providing medication abortion to out-of-state patients. Email from Martha Fuller, President & CEO, Planned Parenthood of Mont., to Staff, Planned Parenthood of Mont. (June 30, 2022) (on file with the *Columbia Law Review*).

275. The suggestions as described here are constitutionally sound. That does not mean that every aspect of the various bills that have been introduced in different states that mirror these suggestions is constitutionally sound as the particular language of each provision must be assessed individually. Nor does it mean that a motivated judiciary might not change existing well-settled constitutional principles to strike down these provisions.

276. In the days following *Dobbs*, the Biden Administration issued statements and guidance promoting many of the theories mentioned below (some of which have already been challenged in court), but more could and should be done. See David S. Cohen, Greer Donley & Rachel Rebouché, Opinion, Joe Biden Can't Save *Roe v. Wade* Alone. But He Can Do This., N.Y. Times (Dec. 30, 2021), https://www.nytimes.com/2021/12/30/opinion/abortion-pills-biden.html (on file with the *Columbia Law Review*).

stalemated legislative proposals.[277] One possible tool at the federal government's disposal is preemption—the doctrine that federal laws trump conflicting state laws. Section III.A discusses federal laws that could partially preempt state abortion bans, the most significant of which relates to the FDA's regulatory authority over abortion-inducing drugs. Asserting another form of power, the federal government could take the novel approach of using its jurisdiction over federal land within antiabortion states to insulate providers who offer abortion care on that land; this is the subject of section III.B. Complementing these strategies, and in partnership with states, the executive branch could encourage investment in telehealth and the adoption of interstate compacts that will improve abortion care throughout the country, the subject of section III.C.

A. *Federal Preemption*

The U.S Constitution's Supremacy Clause states that federal law is the "supreme law of the land" and trumps any state law to the contrary.[278] For this reason, if Congress were to create a federal right to abortion, passing, for instance, the Women's Health Protection Act,[279] this federal law arguably would preempt state abortion bans. However, given the current stalemate in the Senate, the prospects of a new federal law protecting abortion rights are slim to none in the short term. But existing federal law and regulation might already conflict with aspects of state abortion bans. If that is the case, federal law could be a sword to poke holes in state abortion bans; it could also be used as a shield against criminal prosecution or civil liability when the conduct at issue is protected or required under federal law. This section starts with the boldest preemption argument: that states cannot ban medication abortion or regulate it more harshly than the FDA. This would force states to permit medication abortion through ten weeks. The discussion concludes with additional preemption arguments related to medically necessary abortions and reporting of abortion-related crimes.

1. *The FDA's Power Over Medication Abortion.* — Ever since the FDA approved medication abortion in 2000, it has used its authority to restrict access to the drug in a variety of ways. The FDA's current regulation of mifepristone—the first medication in the two-medication regimen for

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277. See Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. (2021) (prohibiting government restrictions on access to abortion services by providers); see also Press Release, Statement From President Biden on the Senate Vote on the Women's Health Protection Act, The White House (May 11, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/11/statement-from-president-biden-on-the-senate-vote-on-the-womens-health-protection-act/ [https://perma.cc/44RF-JDSK] (expressing President Biden's dissatisfaction after a Senate cloture vote on the Women's Health Protection Act failed).

278. U.S. Const. art. VI, cl. 2.

279. H.R. 3755.

medical abortions—includes a Risk Evaluation and Mitigation System (REMS).[280] The imposition of a REMS is a rare action that, by statute, can only be imposed if a REMS is necessary to ensure that the drug's benefits outweigh its risks.[281] Scholars have argued that the FDA's use of the REMS for mifepristone is unnecessary and, contrary to the REMS statute, "unduly burdens" access to the drug.[282]

The FDA's current REMS, which now reflects a recent policy change that clears the way for virtual care, has the following requirements: (1) only certified providers can prescribe the drug, (2) patients must sign a Patient Agreement Form, and (3) only certified providers or certified pharmacies can dispense the drug.[283]

In the process of revising the REMS numerous times over the past decade, the FDA has removed or modified requirements based on specific scientific findings that they were unnecessary for safety and efficacy.[284] In 2016, the agency removed its earlier requirement that patients consume the drug in-person, allowing patients to take the pills at home after picking them up at a healthcare facility.[285] It also removed the requirement that only physicians could prescribe the drug, allowing physician assistants and nurse practitioners to prescribe as well.[286] It moreover approved the drug's use through the tenth week of pregnancy when it had previously only approved the drug's use through the seventh week.[287] And finally, in December 2021, the agency lifted the REMS provision that forced patients to pick up the medication at a healthcare facility, paving the way for abortion via telehealth with medication delivered through the mail.[288]

Various state laws conflict with these determinations. Up until and even after *Dobbs*, nineteen states require a physician to be present upon delivery of medication abortion, thus rendering entirely remote abortion impossible.[289] State legislation that requires in-person visits for counseling

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280. FDA, Mifepristone Information, supra note 71.

281. 21 U.S.C. § 355-1(a)(1) (2018) (requiring the submission of a REMS plan if "the Secretary . . . determines that a [REMS] is necessary to ensure that the benefits of the drug outweigh the risks of the drug"); see also Donley, supra note 70, 663–66 (arguing that the REMS is improper because "the benefits of mifepristone outweigh the risks without" the REMS).

282. Donley, supra note 70, at 654 (maintaining that "the REMS is not actually correlated with any of mifepristone's safety risks").

283. FDA, Mifepristone Information, supra note 71.

284. See Ctr. for Drug Evaluation & Rsch., Application Number: 020687Orig1s020: Summary Review 5–9 (2016), https://www.accessdata.fda.gov/drugsatfda_docs/nda/2016/020687Orig1s020SumR.pdf [https://perma.cc/9AGC-UF22] (discussing clinical research into mifepristone's efficacy).

285. See id. at 15, 17.

286. See id. at 16–17.

287. See id. at 3, 15, 17.

288. See supra notes 74–75 and accompanying text.

289. See Guttmacher Inst., Medication Abortion, supra note 23 (highlighting that "19 states require the clinician providing a medication abortion to be physically present when

or ultrasounds precludes a wholly remote process.[290] Moreover, twenty-nine states only allow physicians to prescribe medication abortion.[291] Many states have required patients to consume the drug in the presence of a provider—that is, they cannot take the drug at home.[292] In September 2021, Texas enacted a law making it illegal to use medication abortion after the first seven weeks of pregnancy.[293] More urgently, many states have now banned abortion entirely, essentially prohibiting the provision of medication abortion in their borders.

Though many of the laws that specifically target medication abortion will be subsumed by a state's general abortion ban, not all will. For instance, Pennsylvania is not expected to ban abortion, but it still requires abortion providers to be physicians.[294] There are now deeper incentives to

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the medication is administered, thereby prohibiting the use of telemedicine to prescribe medication for abortion"). Seven states also have statutes that explicitly ban the use of telemedicine for abortion even though existing in-person requirements accomplish the same end. See Laurie Sobel, Amrutha Ramaswamy & Alina Salganicoff, The Intersection of State and Federal Policies on Access to Medication Abortion via Telehealth, Kaiser Fam. Found. (Feb. 7, 2022), https://www.kff.org/womens-health-policy/issue-brief/the-intersection-of-state-and-federal-policies-on-access-to-medication-abortion-via-telehealth [https://perma.cc/3YW5-CJMG] (providing this information in an appendix to the article). State courts in two of those states have enjoined the in-person requirement. See Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med., 865 N.W.2d 252, 269 (Iowa 2015) (enjoining Iowa's in-person requirement); Carrie N. Baker, Advocates Cheer FDA Review of Abortion Pill Restrictions, Ms. Mag. (May 11, 2021), https://msmagazine.com/2021/05/11/fda-review-abortion-pill-restrictions-mifepristone-biden/ [https://perma.cc/LYM4-5WFW] (describing Ohio's in-person requirement and the state court injunction against it).

290. See Counseling and Waiting Periods for Abortion, Guttmacher Inst., https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion [https://perma.cc/MYS5-NMHS] (last updated Sept. 1, 2022) (noting that of the "32 states [that] require . . . patients [to] receive counseling before an abortion is performed," "15 states require that counseling be provided in person and that the counseling take place before the waiting period begins, thereby necessitating two separate trips to the facility"); Requirements for Ultrasound, Guttmacher Inst., https://www.guttmacher.org/state-policy/explore/requirements-ultrasound [https://perma.cc/H78A-Z8AJ] (last updated Sept. 1, 2022) (noting that "6 states mandate that an abortion provider perform an ultrasound on each person seeking an abortion and require the provider to show and describe the image," and "10 states mandate that an abortion provider perform an ultrasound on each person seeking an abortion").

291. Guttmacher Inst., Medication Abortion, supra note 23 (noting that "29 states require clinicians who administer medication abortion to be physicians").

292. See id. (noting that nineteen states carry such an in-person consumption requirement).

293. See S.B. 4, 87th Sess., 2d Sess. § 5(c)(6) (Tex. 2021).

294. Jason Laughlin, What to Know About the Abortion Pill in Pennsylvania and New Jersey After the *Dobbs* Decision, Phila. Inquirer (May 3, 2022), https://www.inquirer.com/health/abortion-pill-access-pennsylvania-nj.html [https://perma.cc/FMJ3-HMQ3] (last updated June 24, 2022) ("Both Pennsylvania and New Jersey allow people to receive abortion pills prescribed by a medical provider through the mail . . . . Pennsylvania patients must have a consultation with a certified abortion provider 24 hours before they can be

challenge these specific laws under preemption doctrines to expand access in states that have not banned abortion. Whether preemption could go even further and partially invalidate general abortion bans—that is, force states to allow the sale and use of medication abortion—is uncertain.

The crux of any preemption argument is congressional purpose, which is "the ultimate touchstone in every pre-emption case."[295] Congress can express this preemptive purpose explicitly or implicitly, but in the context of federal preemption of state drug law, plaintiffs must rely on implied preemption theories: Congress expressly preempted state law when it created legislation that governed medical devices but never did so for pharmaceuticals.[296]

Implied preemption of state law occurs in a few contexts: when it is impossible to comply with both state and federal law (impossibility preemption),[297] when a state law would frustrate the purpose underlying federal law (obstacle preemption),[298] or when federal law entirely occupies a field (field preemption).[299] The former two types of implied preemption—impossibility and obstacle preemption, together considered conflict preemption—are more commonly relied upon to prove preemption in the context of federal drug law.[300] The Supreme Court has considered whether the Food, Drug, and Cosmetic Act (FDCA), and the regulatory scheme implementing it, preempt state law a few times in the past decade—all using conflict preemption theories.[301] Recent decisions increasingly have accepted the preemptive force of FDA rules.

The framing of congressional purpose is key to an obstacle preemption theory.[302] In the context of state regulation of mifepristone, there are three potential purposes plaintiffs could rely upon: (1) Congress envisioned the FDA's role, in part, as protecting patient access to safe and effective drugs, and thus state laws that restrict drug access thwart this purpose; (2) Congress created the FDA with the purpose of establishing a

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prescribed the medication and provide signed consent, but that can be done virtually . . . .").

295. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (internal quotation marks omitted) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

296. Id. at 567; Patricia J. Zettler, Pharmaceutical Federalism, 92 Ind. L.J. 845, 862 (2017).

297. English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990).

298. Id.

299. Id.

300. See Zettler, supra note 296, at 862. Because the Food, Drug, and Cosmetic Act (FDCA) does not disrupt the states' ability to regulate drugs in certain confined contexts, like tort law or the practice of medicine, the FDA may not presumptively occupy the entire field. Id. at 859, 874.

301. See Mut. Pharm. Co. v. Bartlett, 570 U.S. 472, 475 (2013); PLIVA, Inc. v. Mensing, 564 U.S. 604, 609 (2011); *Wyeth*, 555 U.S. at 565.

302. See Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." (internal quotation marks omitted) (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963))).

nationally uniform, definitive, and rigorous drug approval system, and thus state laws creating variation across states thwart that purpose; and (3) Congress created the REMS program specifically so that the FDA could balance the important goals associated with drug safety and drug access, and thus state laws that balance these goals differently for drugs subject to a REMS thwart this purpose. Each of these congressional purposes is supported either by statutory text or by legislative history.[303]

The third purpose is most relevant to preemption challenges to state laws regulating mifepristone more harshly than the FDA—laws like physician-only mandates or in-person dispensing laws that might control in a few states that do not ban abortion after *Dobbs*. This is because those states' laws directly conflict with the FDA's determinations under the REMS. Indeed, it is the FDA's imposition of a REMS—and the extra control that comes with it—that strengthens a preemption argument. When Congress created the REMS program in 2007, it gave the FDA the ability to impose additional controls on certain approved drugs but, in doing so, required the agency to use the least restrictive means of protecting the public.[304] The statute specifically said that the REMS may "not be unduly burdensome on patient access to the drug."[305] Thus, in imposing a REMS for mifepristone, the FDA has chosen to exercise more control over the drug than it does for the 95% of approved drugs that are not subject

303. As for (1), the FDA's codified mission statement provides some support for the idea that the FDA's mission is not only to protect consumers from dangerous products but also to advance the public health by approving helpful products, Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, § 406(a), 111 Stat. 2296, 2369 (codified as amended at 21 U.S.C. § 393(b) (2018)), as do various agency statements about its mission on the agency's website, What We Do, FDA, https://www.fda.gov/about-fda/what-we-do [https://perma.cc/45ZF-J2D5] (last updated Mar. 28, 2018) ("FDA is responsible for advancing the public health by helping to speed innovations that make medical products more effective, safer, and more affordable and by helping the public get the accurate, science-based information they need to use medical products and foods to maintain and improve their health."). As for (2), Peter Hutt and other authors have argued that "[t]he appeal of national uniformity was an important argument in favor of federal [food and drug] legislation." Peter Barton Hutt, Richard A. Merrill & Lewis A. Grossman, Food and Drug Law: Cases and Materials 7 (4th ed. 2013). The argument for (3) is the strongest because it is located in the operative text of the REMS statute, which demands that the REMS "not be unduly burdensome on patient access to the drug, considering in particular . . . patients who have difficulty accessing health care (such as patients in rural or medically underserved areas)." 21 U.S.C. § 355-1(f)(2)(C).

304. The statute requires that the Elements to Assure Safe Use (ETASU) be "commensurate with the specific serious risk listed in the labeling of the drug," "not be unduly burdensome on patient access to the drug, considering in particular . . . patients who have difficulty accessing health care (such as patients in rural or medically underserved areas)," and "conform with elements to assure safe use for other drugs with similar, serious risks." 21 U.S.C. § 355-1(f)(2)(A), (C), (D)(i). The statute also required that the agency, "to the extent practicable, . . . minimize the burden on the health care delivery system." Id. § 355-1(f)(2)(D).

305. Id. § 355-1(f)(2)(C).

to a REMS.[306] And, in exercising that control, it has had to justify its decisions with evidence that balanced safety and efficacy with access.[307]

State laws that overregulate medication abortion rest on scientific conclusions that are directly at odds with those that Congress required the FDA to make when issuing a REMS. As noted, the FDA has specifically considered and rendered judgment about whether medication abortion can be safely and effectively (1) prescribed by non-physician providers;[308] (2) used through ten weeks of pregnancy;[309] (3) consumed at home;[310] and (4) dispensed by mail or certified pharmacy.[311] Thus, in addition to bans on all abortion, discussed below, any state laws that remain after *Dobbs* that require physician prescribing, limit the length of use, mandate in-person pickup or consumption, ban the use of telehealth, or prohibit mailing medication abortion conflict directly with the agency's evidence-based conclusions required by the REMS statute.[312] Courts have preempted state laws that are directly at odds with the FDA's determinations in other contexts. For instance, state tort laws are preempted when they require risk disclosures that the FDA has specifically considered and rejected as not necessary.[313] Because this REMS-focused purpose would only apply to a small subset of drugs, it might be less likely to have unintended consequences on state public health efforts related to other FDA-regulated products, like tobacco.

When the congressional purpose changes to drug accessibility, there is case law suggesting that states cannot remove an FDA-approved drug from the market or make it less accessible. For instance, the U.S. District Court for the District of Massachusetts invalidated a state's attempt to

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306. Donley, supra note 70, at 656.

307. See supra notes 283–287.

308. Ctr. for Drug Evaluation & Rsch., supra note 284, at 17 ("[H]ealthcare providers other than physicians can effectively and safely provide abortion services, provided that they meet the requirements for certification described in the REMS.").

309. Id. at 9 ("The data and information reviewed constitute substantial evidence of efficacy to support the proposed dosing regimen . . . for pregnancy termination through 70 days [or ten weeks] gestation.").

310. Id. at 15 (explaining that "there is no clinical reason to restrict the location in which misoprostol may be taken" because "allowing dosing at home increases the chance that the woman will be in an appropriate and safe location when the process begins").

311. FDA, Cavazzoni Letter, supra note 76, at 6 ("We have concluded that mifepristone will remain safe and effective for medical abortion if the in-person dispensing requirement is removed, provided all the other requirements of the REMS are met and pharmacy certification is added.").

312. It is worth noting that the FDA reviewed and reiterated its scientific conclusions from 2016 in 2021. Id. at 3.

313. See, e.g., Seufert v. Merck Sharp & Dohme Corp., 187 F. Supp. 3d 1163, 1175–77 (S.D. Cal. 2016) (finding that a state duty-to-warn case was preempted because the manufacturer could not have been required to warn patients of a risk that the FDA has specifically concluded did not exist); see also In re Zofran (Ondansetron) Prods. Liab. Litig., 541 F. Supp. 3d 164, 203 (D. Mass. 2021) (same).

regulate a newly approved and controversial opioid, Zohydro, more harshly than the FDA.[314] Of particular concern was the state requirement that a prescribing physician verify "that other pain management treatments had failed."[315] The court evaluated "whether the regulations prevent[ed] the accomplishment of the FDA's objective that safe and effective drugs be available to the public."[316] The judge preliminarily enjoined the regulation, finding the plaintiffs likely to succeed on their preemption theory because "if the Commonwealth interprets its regulation to make Zohydro a last-resort opioid, it undeniably makes Zohydro less available."[317] When the state changed the requirement to only require a showing that other pain-management treatments were "inadequate," mimicking the FDA-approved label, the court upheld the law.[318] Based on this reasoning, a state law that makes a drug less accessible than the FDA frustrates Congress's purpose in ensuring the accessibility of safe and effective drugs.

Some scholars have been skeptical that one of Congress's purposes in creating the national drug review system was to make approved drugs accessible (instead of just safe and effective).[319] But this accessibility purpose is clearly incorporated into the REMS statute,[320] strengthening the argument that congressional purpose would be frustrated if states attempt to ban a drug regulated through the REMS program. Professor Patricia Zettler agrees that in the context of a REMS, the preemption argument is stronger because "Congress has arguably required the FDA to do a complex balancing of numerous considerations, both in determining whether a REMS is necessary at all, and in determining what to include in a REMS when one is needed."[321] As a result, any additional restrictions might "pose an obstacle to the FDA's responsibility to satisfy these Congressional objectives."[322] Recently, Professors Zettler and Sarpatwari applied this line of reasoning to medication abortion:

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314. Zogenix, Inc. v. Baker, No. 14-11689-RWZ, 2015 WL 1206354, at *3–4 (D. Mass. Mar. 17, 2015). The FDA's own advisory committee had recommended against approving Zohydro on the ground that there was no "need for a new form of one of most widely abused prescription drugs in the United States," but the FDA nevertheless approved it. Lars Noah, State Affronts to Federal Primacy in the Licensure of Pharmaceutical Products, 2016 Mich. St. L. Rev. 1, 3 n.9.

315. *Zogenix*, 2015 WL 1206354, at *2.

316. Id. at *4.

317. Zogenix, Inc. v. Patrick, No. 14-11689-RWZ, 2014 WL 3339610, at *4 (D. Mass. July 8, 2014), vacated in part, No. 14-11689-RWZ, 2014 WL 4273251 (D. Mass. Aug. 28, 2014).

318. Id. at *3.

319. See Noah, supra note 314, at 8–12.

320. 21 U.S.C. § 355-1(f)(2)(C) (2018) (noting that "elements to assure safe use under" the REMS protocol provided for in "paragraph (1) shall . . . not be unduly burdensome on patient access to the drug").

321. Zettler, supra note 296, at 875.

322. Id.

> While the mifepristone REMS remains in place, a strong case can be made that state-required measures that go beyond the conditions in the REMS . . . upset the complex balancing of safety and burdens on the health care system that federal law requires of the FDA when it imposes a REMS like the one for mifepristone.[323]

They note that these laws are troubling when they "are grounded in drug-safety arguments" because they encroach on the FDA's clear authority.[324]

Antiabortion states will resist these efforts, and one of their primary arguments will be that states have the sole authority to regulate the practice of medicine, which includes what drugs providers may prescribe.[325] As scholars have explained, "[C]ourts, lawmakers, and the FDA itself have long opined that state jurisdiction is reserved for medical practice—the activities of physicians and other healthcare professionals—and federal jurisdiction for medical products, including drugs."[326] The practice-of-medicine defense was raised and rejected in the Zohydro litigation, however.[327] Professor Zettler contends that the Zohydro litigation is one of many recent examples showing that "the distinction between regulating medical practice and medical products is nebulous" and "the FDA's preemptive reach can extend into medical practice regulation in certain circumstances."[328] Zettler suggests that if the state is attempting to regulate drugs—even if it does so through the smokescreen of provider conduct—it is attempting to displace federal law and frustrate congressional purpose.[329]

And that raises the much more urgent and complex question: Can FDA regulations preempt a state's general ban on abortion?[330] Returning to the purpose of the FDA, its most famous and uncontested role is to act as a gatekeeper. To earn the right to sell a drug product, manufacturers must produce years, if not decades, of expensive, high-quality research

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323. Patricia J. Zettler & Ameet Sarpatwari, State Restrictions on Mifepristone Access—The Case for Federal Preemption, 386 New Eng. J. Med. 705, 706 (2022).

324. Id.

325. Zettler, supra note 296, at 869 n.160.

326. Id. at 849.

327. Id. at 872.

328. Id. at 886.

329. Id. at 887.

330. In addition to general abortion bans, some states have introduced laws that would simply ban mifepristone. See, e.g., H.R. 261, 2022 Leg., Reg. Sess. § 3(a) (Ala. 2022) ("It is unlawful for any person or entity to manufacture, distribute, prescribe, dispense, sell, or transfer the 'abortion pill,' otherwise known as RU-486, 8 Mifepristone, Mifegyne, or Mifeprex, or any substantially similar generic or non-generic abortifacient drug in Alabama."); H.R. 2811, 55th Leg., 2d. Reg. Sess. § 1 (Ariz. 2022) (making it illegal to "prescribe . . . [or] dispense . . . an abortion medication that is intended to cause or induce an abortion"). The preemption argument in the context of these laws would be strong and nearly identical to the Zohydro litigation.

proving that the drug is safe and effective.[331] If they are successful, they can sell their product in every state; if unsuccessful, they cannot sell their product anywhere.[332] When a state bans abortion, it bans the sale of an FDA-approved drug. And whether a state has the authority to do that has been considered peripherally by the Supreme Court in a trio of cases and directly by a lower court in a series of cases.

In 2009, the Court held in *Wyeth v. Levine* that the FDA's regulatory scheme did not preempt state tort laws that would have required greater drug warnings than those required by the FDA.[333] There, the Court rejected the impossibility preemption theory because it was not impossible for the brand-name manufacturer to comply with both state and federal law—FDA regulation allowed the manufacturer to change its drug labels to be more protective, though not less, without the FDA's approval.[334] The Court also rejected an obstacle preemption argument, finding that Congress's "silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness."[335] Though the FDA had stated in a piece of regulatory preamble that its labeling regulations preempt state tort laws, the Court refused to defer to the agency's conclusions regarding preemption because its determination was conclusory, procedurally defective, and contrary to its past position.[336]

Two years later, however, the Court distinguished *Wyeth* in the context of generic drugs. In *PLIVA, Inc. v. Mensing*, the Court held that because generic drugs are required to adhere to the brand drug's labeling—and companies are unable to make a drug's label more stringent without departing from the brand label—it would be impossible for a generic drug company to change its labels to avoid a failure-to-warn tort action, while also remaining compliant with FDA law.[337] In this case, a plurality of the Court seemed to shift its understanding of preemption doctrine to recognize implied invalidation of state law, concluding that courts "should

331. See Cost of Clinical Trials for New Drug FDA Approval Are Fraction of Total Tab, Johns Hopkins Bloomberg Sch. of Pub. Health (Sept. 24, 2018), https://publichealth.jhu.edu/2018/cost-of-clinical-trials-for-new-drug-FDA-approval-are-fraction-of-total-tab/ [https://perma.cc/NF9R-7JRP] (noting that the cost of developing an individual drug is only around nineteen million dollars on average, but that number balloons to over a billion dollars when taking into account failed drugs).

332. See FDA Activities to Remove Unapproved Drugs From the Market, FDA, https://www.fda.gov/drugs/enforcement-activities-fda/fda-activities-remove-unapproved-drugs-market/ [https://perma.cc/CSJ7-Q3DB] (last updated June 2, 2021) (noting the number of unapproved prescription drugs that the FDA has taken off the market).

333. 555 U.S. 555, 569 (2009).

334. Id. at 569–72.

335. Id. at 575.

336. Id. at 576–79.

337. 564 U.S. 604, 618–19 (2011).

not distort federal law to accommodate conflicting state law."[338] Thus, in a case with very similar facts to *Wyeth*, the Court found that federal drug law preempted state failure-to-warn tort actions against generic manufacturers.[339] Then, in *Mutual Pharmaceutical Co. v. Bartlett*, in 2013, the Court reiterated that conclusion by finding preemption of a design defect tort action against a generic manufacturer on the ground that a generic manufacturer similarly cannot alter the composition of a drug.[340]

Importantly, in both *Mensing* and *Bartlett*, which relied on impossibility preemption, the tort plaintiffs argued that the manufacturer could comply with both state and federal law by refusing to sell their product in those states. The Court rejected this argument explicitly in *Bartlett*: "We reject this 'stop-selling' rationale as incompatible with our pre-emption jurisprudence. Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability."[341] In fact, the Court went so far as to say that requiring a manufacturer to remove a product from a state market would render the entire doctrine of impossibility preemption "all but meaningless."[342] Thus, the Supreme Court implied in *Mensing* and *Bartlett* that states cannot ban FDA-approved drugs: "[I]f the relatively more attenuated command of design defect scrutiny in tort law created an actual conflict with federal law governing FDA-approved drugs, then surely an outright sales prohibition imposed by state officials would do so."[343] Notably, it was the conservative Justices—who tend to be more sympathetic to business interests—that were in the majority.

There is very little case law directly evaluating whether a state can ban an FDA-approved drug, mainly because states rarely attempt it. The most analogous case to date is an earlier iteration of the same District of Massachusetts case discussed above. Before Massachusetts crafted extra restrictions for Zohydro, it first banned the drug entirely, and the court considered whether that ban was invalid under an obstacle preemption theory.[344] In issuing a preliminary injunction, the U.S. District Court for

338. Id. at 623.

339. Id.

340. See 570 U.S. 472, 475–76 (2013) (invalidating a state law that, where underlying drug chemistry could not be altered, required a manufacturer to provide stronger label warnings—an outcome disallowed by Supreme Court jurisprudence because the "state law imposed a duty on [the manufacturer] not to comply with federal law").

341. Id. at 488.

342. Id. (quoting *Mensing*, 564 U.S. at 621).

343. Noah, supra note 314, at 35.

344. Zogenix, Inc. v. Patrick, No. 14-11689-RWZ, 2014 WL 1454696, at *2 (D. Mass. Apr. 15, 2014). The manufacturer also brought a Dormant Commerce Clause challenge, which the judge rejected. Zogenix, Inc. v. Baker, No. 14-11689-RWZ, 2015 WL 1206354, at *7 (D. Mass. Mar. 17, 2015). The court found that the state interest in "promoting public health and safety" outweighed these interstate commerce effects: "It does not contravene the dormant commerce clause for a state merely to regulate the distribution within its borders

the District of Massachusetts concluded that the drug manufacturer was likely to succeed at showing that the ban would frustrate Congress's purpose in ensuring that drugs are accessible, not only safe and effective: "If the Commonwealth were able to countermand the FDA's determinations [on safety and efficacy] and substitute its own requirements, it would undermine the FDA's ability to make drugs available to promote and protect the public health."[345] The court distinguished *Wyeth* by noting that there, the Supreme Court "assumed the availability of the drug at issue."[346]

Though many FDA law scholars agree that a state ban of an FDA-approved drug would be preempted,[347] as noted above, some scholars have disagreed with the district court's reasoning, which emphasized that one of the FDA's purposes was to ensure that drugs are accessible.[348] Though there is certainly some statutory support for the proposition that Congress wanted the FDA to safeguard drug safety, efficacy, and access, outside the context of a REMS, the agency's primary role as a gatekeeper cuts against this view. Professor Lars Noah has argued, for instance, that the agency typically has no say over whether pharmaceutical companies charge reasonable prices or remove important, but unprofitable, drugs from the market—both of which impede access.[349] To the extent the FDA has any role in promoting access to drugs, it is secondary to its role in protecting patients from unsafe or ineffective drugs.[350] Instead, Noah suggests, a state ban on an FDA-approved drug likely frustrates a different congressional purpose: the creation of a uniform, national, definitive judgment about drug safety and efficacy.[351] When seen through this lens, a state ban is problematic because it frustrates the uniformity promised by a national drug review system; it revokes the promise of a national market for drugs

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of a product that travels in interstate commerce." Id. at *7–8. The court did admit that "Zohydro's theory about national pharmacies refusing to dispense Zohydro may be sufficient to show a burden on interstate commerce" but found the plaintiff's allegations too speculative. Id. at *7.

345. *Zogenix*, 2014 WL 1454696, at *2.

346. Id.

347. See Noah, supra note 314, at 54 (noting that if "one takes seriously the Supreme Court's expansive approach to implied preemption in . . . *Bartlett*" then a state ban on an FDA-approved drug would "run afoul of the Constitution"); Zettler, supra note 296, at 865 ("[T]he Court may find a prohibition on an FDA-approved drug . . . to be preempted on impossibility grounds in some circumstances.").

348. Noah, supra note 314, at 8–12 (arguing that "the FDA's . . . mission statement" that its purpose is to make available beneficial drugs "hardly supports" the court's "claim of an overriding federal purpose to promote patient access to approved drugs").

349. Id. ("[L]icense holders generally have no obligation to commercialize their products, to do so at an affordable price, or in a manner that ensures easy access.").

350. Id. at 8 ("Congress crafted the current version of the licensing scheme for new drugs in order to prevent the introduction of unsafe or ineffective pharmaceutical products . . . .").

351. Id. at 12.

that meet the demands of an onerous review process.[352] Certainly, if a state can ban a drug—either directly or indirectly—it frustrates the purpose of having one uniform system of drug approval. And pharmaceutical companies would realign their research and development of drugs if states could ban products after companies have invested tens of millions of dollars in obtaining FDA approval.

Consumer safety often is offered as a reason to oppose preemption in the context of state efforts to regulate drugs.[353] After all, the FDA regulates all sorts of products, such as tobacco, and states have often tried innovative approaches to protect their citizen's health. There is the fear that a preemption win for medication abortion would have collateral consequences on state efforts to protect health and safety. But medication abortion's excellent safety record and unique regulatory history challenge this critique.[354] For instance, the dissenters in *Bartlett* who opposed preemption made clear that the particulars of the drug at issue matter. For instance, Justice Breyer's dissent, which was joined by Justice Kagan, noted that "the more medically valuable the drug, the less likely Congress intended to permit a State to drive it from the marketplace."[355] Thus, a finding that states cannot ban or overregulate medication abortion might not preclude states from regulating dangerous products.

Justice Sotomayor's dissent in *Bartlett* provides further support for a REMS-tailored preemption doctrine. There, she suggested that the Court should "consider evidence about whether Congress intended the FDA to make an optimal safety determination and set a maximum safety standard (in which case state tort law would undermine the purpose) rather than a minimal safety threshold (in which case state tort law could supplement it)."[356] In the context of a drug regulated under a REMS, the statute envisions not just a regulatory floor, but a ceiling that accounts for patient

352. Id.

353. For years, liberal scholars have opposed preemption challenges based on food and drug law because they were often brought by pharmaceutical and tobacco companies who were attempting to invalidate state efforts to require additional warnings or impose stricter safety regulations. See, e.g., id. at 15 (critiquing preemption challenges by pharmaceutical companies on the ground that "Congress evidently did not intend . . . to intrude upon the well-accepted powers of the states to regulate the activities of health care professionals"); see also Eric Crosbie & Laura A. Schmidt, Preemption in Tobacco Control: A Framework for Other Areas of Public Health, 110 Am. J. Pub. Health 345, 345 (2020) ("State preemption has been detrimental to tobacco control by dividing the health community, weakening local authority, chilling public education and debate, and slowing local policy diffusion.").

354. See Donley, supra note 70, at 641–49 (arguing that medication abortion has been subject to exceptional treatment).

355. Mut. Pharm. Co. v. Bartlett, 570 U.S. 472, 494 (2013) (Breyer, J., dissenting).

356. Id. at 514 (Sotomayor, J., dissenting).

access.[357] Combined, mifepristone's strong safety profile and regulation under a REMS makes the preemption arguments stronger than past cases.[358] The authors are not blind to concerns that preemption for abortion-inducing drugs could have effects that impact other state regulation of health products. But the industry already is bringing these lawsuits, so courts will decide these questions regardless. It would be a missed opportunity to not take advantage of these cases to *further* public health by expanding abortion access.

There are important counterarguments to the preemption theory in the context of general abortion bans.[359] First, states will argue that their laws do not ban medication abortion drugs entirely because they could be sold and used for other uses.[360] Misoprostol, in particular, is used for a variety of obstetric purposes, including inducing labor and treating miscarriage, and was originally approved to treat ulcers.[361] Thus, the ban would not be on a drug but on a use of the drug.

This distinction may be less important than it initially appears. First, to be clear, some states have introduced laws that directly prohibit the sale or dispensation of mifepristone for any purpose.[362] If those bills became law, this criticism would not apply. Second, the FDA has approved mifepristone only for abortion, and its manufacturers are only legally allowed to market it for that one use.[363] And though providers, as distinct

357. Of note, the mifepristone REMS required the FDA to make an on-the-record agency determination related to risk, benefit, and access that the Court found missing in *Wyeth*. Jennifer L. Bragg & Maya P. Florence, Life With a REMS: Challenges and Opportunities, 13 J. Health Care L. & Pol'y 269, 278 (2010) (noting that "the REMS process is likely to generate a substantial administrative record demonstrating FDA's consideration of the specific risk and, perhaps, the agency's rationale in approving the ultimate balance reflected in the REMS").

358. Zettler & Sarpatwari, supra note 323, at 707 ("[P]reemption challenges to state mifepristone restrictions should not be understood as risking the future viability of public health federalism more broadly.").

359. One challenge not mentioned above is the following: Though the practice–product distinction may be less stark than previously assumed, courts might be more willing to find that a state's regulation of all abortion (even procedure-based abortion) to more obviously fit a practice-of-medicine regulation reserved for the states than a ban on an FDA-approved product. This might be the case, but the preemption challenge would not be to the whole law: Instead, it would be to the law's application over medication abortion.

360. Donley, supra note 70, at 633–34 (noting non-abortion uses of medication abortion drugs).

361. Id. at 633.

362. Christine Vestal, As Abortion Pills Take Off, Some States Move to Curb Them, The Pew Charitable Trs. (Mar. 16, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/03/16/as-abortion-pills-take-off-some-states-move-to-curb-them/ [https://perma.cc/X8E8-KWZA] ("Outright bans on dispensing or using the FDA-approved medications have been proposed in Alabama, Arizona, Iowa, South Dakota, Illinois, Washington and Wyoming.").

363. See Ctrs. for Medicare & Medicaid Servs., Off-Label Pharmaceutical Marketing: How to Recognize and Report It 1 (2015), https://www.cms.gov/Medicare-Medicaid-

from manufacturers, are generally allowed to prescribe drugs off-label, the REMS has made it almost impossible for them to do so with mifepristone[364]—underscoring that an abortion ban is a de facto ban on mifepristone. The drug company would not be able to market its product at all in half the country. Recall that the payoff at the end of the long, expensive drug approval process is an assurance that manufacturers can sell their drug throughout the country.[365] Without that assurance, manufacturers would not invest the time and money to complete the drug review process. In this way, FDA approval "represent[s] more than simply federal permission to market a pharmaceutical product[;] . . . [rather, it] amount[s] to licenses, which qualify as a form of intangible property entitled to constitutional recognition."[366] When a state bans the only use of an approved drug, that state has thwarted the purpose of the FDA approval process by effectively banning the drug.

This argument is more complex with misoprostol given that the drug manufacturer was never legally allowed to market the drug for abortion, since that is an off-label use, and it could continue to market the drug to treat ulcers.[367] Even with misoprostol, however, abortion bans have affected access to the drug for other uses. For instance, some pharmacies have stopped dispensing misoprostol for any purpose in states that ban abortion.[368] Typically, pharmacies are not given any information related to the use of the drug, so the pharmacist cannot be sure whether the drug is

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Coordination/Fraud-Prevention/Medicaid-Integrity-Education/Downloads/off-label-marketing-factsheet.pdf [https://perma.cc/8TXT-QKEQ] ("Unlawful off-label drug promotion has been the subject of significant health care fraud enforcement efforts by the United States Department of Justice (DOJ) and the States' attorneys general using the Federal False Claims Act (FCA).").

364. Donley, supra note 70, at 662 (arguing that the REMS burdens the use of the drug for miscarriage management even though it is the most effective drug treatment option for that use).

365. See supra notes 331–332 and accompanying text.

366. Noah, supra note 314, at 32.

367. See Donley, supra note 70, at 633 (describing misoprostol's on- and off-label uses). The preemption argument is also harder for misoprostol because it lacks a REMS, and therefore the arguments presented above that depend on the presence of a REMS might be inapplicable. One could argue, however, that misoprostol is incorporated explicitly by reference into the mifepristone REMS because the mifepristone use depends on its combination with misoprostol. FDA, Mifepristone Information, supra note 71.

368. See Christina Cauterucci, Abortion Bans Are Already Messing up Access to Other Vital Meds, Slate (May 24, 2022), https://slate.com/news-and-politics/2022/05/abortion-texas-pharmacies-refusing-prescriptions-misoprostol-methotrexate.html [https://perma.cc/PW84-PZA2] (reporting growing concerns among pharmacists about filling prescriptions for medication abortion drugs—even if not intended for such use—due to threats of civil and criminal litigation).

being used for ulcers, miscarriage, or abortion.[369] An abortion ban thus impedes access to abortion-inducing drugs for all uses.[370]

Second, states will argue that even if FDA regulations can preempt state laws concerning public health, they cannot preempt state laws concerning morality, which is outside the FDA's purview and within states' historic police powers. Many state abortion laws are justified on public health grounds, especially those that impose extra hurdles in accessing medication abortion, but many general abortion bans will likely be justified on moral grounds, such as, to borrow a state interest cited in *Dobbs*, "respect for and preservation of prenatal life at all stages of development."[371] Preemption is always anchored in congressional intent,

369. See Alice Miranda Ollstein & Daniel Payne, Patients Face Barriers to Routine Care as Doctors Warn of Ripple Effects From Broad Abortion Bans, Politico (Sept. 28, 2022), https://www.politico.com/news/2022/09/28/abortion-bans-medication-pharmacy-prescriptions-00059228 [https://perma.cc/YJU3-YZMU] ("While a doctor's prescription details the medication, it does not always specify the diagnosis, and pharmacists said the risk of a felony charge or loss of license is too high for them to simply take a patient's word.").

370. HHS Secretary Xavier Becerra has issued a guidance document arguing that this pharmacy conduct is illegal sex discrimination, but it is unclear whether it will have an effect. Off. for Civ. Rts., HHS, Guidance to Nation's Retail Pharmacies: Obligations Under Federal Civil Rights Laws to Ensure Access to Comprehensive Reproductive Health Care Services 2–3 (2022), https://www.hhs.gov/sites/default/files/pharmacies-guidance.pdf [https://perma.cc/9JXD-SYL4] [hereinafter HHS Guidance]; Press Release, HHS, HHS Issues Guidance to the Nation's Retail Pharmacies Clarifying Their Obligations to Ensure Access to Comprehensive Reproductive Health Care Services (July 13, 2022), https://www.hhs.gov/about/news/2022/07/13/hhs-issues-guidance-nations-retail-pharmacies-clarifying-their-obligations-ensure-access-comprehensive-reproductive-health-care-services.html [https://perma.cc/FQ95-9YDN].

371. Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 78 (U.S. June 24, 2022). One example sometimes raised is life-ending medications, which are FDA-approved drugs that are used off-label to end a person's life. See Jennie Dear, The Doctors Who Invented a New Way to Help People Die, Atlantic (Jan. 22, 2019), https://www.theatlantic.com/health/archive/2019/01/medical-aid-in-dying-medications/580591/ (on file with the *Columbia Law Review*) (discussing Secobarbital, a preferred drug used in physician-assisted death that is intended to only be used as treatment for insomnia or pre-surgery anxiety). Physician aid in dying is banned in most states, potentially raising many of the same issues. This example, however, is inapt given the agency's extensive history with life-ending drugs in the capital punishment context; there, the agency has long explicitly disclaimed any jurisdiction over such drugs. This avoidance was the subject of a Supreme Court case, Heckler v. Chaney, 470 U.S. 821, 827–38 (1985), concerning drugs used for lethal injections. In 2012, the U.S. District Court for the District of Columbia issued a permanent injunction forcing the FDA to block the importation of drugs used for lethal injections that were not sold in the United States. Beaty v. Food & Drug Admin., 853 F. Supp. 2d 30, 35 (D.D.C. 2012). Finally, in 2019, the Office of Legal Counsel for the DOJ wrote a slip opinion arguing that the FDA lacked jurisdiction over capital punishment drugs because they could never be found safe or effective. See Whether the Food and Drug Administration Has Jurisdiction Over Articles Intended for Use in Lawful Executions, 43 Op. O.L.C. 1, 1–2 (2019). Though the analogy between physician aid in dying and lethal injection is not perfect, surely the conclusion that the drugs cannot be safe or effective would apply to both situations, undercutting any argument that the FDA has occupied the space or preempted

so the argument would be that Congress may not have intended the FDA's reach to extend into states' control of moral questions. Courts will have to decide whether the purpose of the state statute matters when the effect—the inability to sell an FDA-approved drug in half the country—is the same. For instance, it would likely violate the FDCA if a state tried to permit the sale of a new drug treatment for its citizens on moral grounds when the FDA refused to approve it, so it is not clear why the opposite would not also violate the law.

The strongest counterargument is that the FDCA does not evince congressional intent for the FDA to regulate abortion. A similar argument was raised when the FDA attempted to regulate tobacco products by claiming that nicotine met the definition of a drug and that a cigarette was therefore a drug delivery device. In *FDA v. Brown & Williamson*, the Supreme Court rejected that interpretation, holding that "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[372] *Brown & Williamson* is often pinpointed for the emergence of the "no-elephants-in-mouseholes" doctrine—the concept that Congress does not hide huge, politically relevant policy decisions in the interstices of a statute.[373] The Court found it anomalous that the FDCA could be interpreted to regulate (maybe even ban) a product, cigarettes, that was so politically and economically important to states when Congress never considered or debated that possibility when it passed the statute.[374] One could imagine the same type of analysis in the case of mifepristone. If Congress wants to preempt any state action on abortion, the argument goes, it must say so explicitly.

Relatedly, to the extent the FDA gets involved in any future lawsuit and claims its interpretation is entitled to deference, another doctrine—the major questions exception—could thwart deference to the agency.[375] This doctrine states that courts should not defer to agencies when their interpretation concerns a major economic or political question.[376] As part of its broader efforts to dismantle the administrative state, the current Supreme Court has struck down many important agency decisions in recent

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state regulation. If anything, the agency has gone out of its way to suggest that it has no power in this space.

372. 529 U.S. 120, 159–60 (2000).

373. See, e.g., Jacob Loshin & Aaron Nielson, Hiding Nondelegation in Mouseholes, 62 Admin. L. Rev. 19, 21 (2010) (describing the doctrine).

374. *Brown & Williamson*, 529 U.S. at 146–47.

375. See Jonas J. Monast, Major Questions About the Major Questions Doctrine, 68 Admin. L. Rev. 445, 447 (2016) ("[T]he Court's reliance on the major questions doctrine potentially signals a significant limitation on *Chevron* deference . . . .").

376. See King v. Burwell, 576 U.S. 473, 486 (2015).

years relying on this doctrine.[377] This doctrine would certainly be a large obstacle to the FDA claiming that its preemption interpretation deserves deference because arguably, the agency is "adopt[ing] a regulatory program that Congress had conspicuously declined to enact itself."[378] But the FDA need not be involved in abortion preemption lawsuits. Indeed, if one of the drug manufacturers brings suit and the FDA remains neutral, then deference is not an issue in the case. The Court would decide the statutory interpretation and congressional purpose questions on its own. Indeed, the FDA's involvement in such litigation could divert attention from the drug manufacturer's claim and the business interests involved, allowing the Court to opine on agency overstep instead of the preemption issue, hampering the lawsuit more than helping it.

Though these related doctrines provide a much stronger argument against preemption, they are not failproof. Unlike tobacco regulation in the *Brown & Williamson* era,[379] FDA's close regulation of mifepristone has been ongoing for decades and is statutorily authorized.[380] Its regulation of the product is not new or controversial—its particular regulatory decisions might be but not its ability to regulate. Recall that *Brown & Williamson* relied on the fact that the FDA had previously denounced its ability to regulate tobacco products, while, in the meantime, Congress had assumed that role.[381] The opposite is true in the case of medication abortion: The FDA has exercised sustained control over medication abortion, even imposing a REMS so that it could regulate the drug more closely than 95% of the drugs it approves,[382] and Congress has done nothing to impede the agency's actions and decisions.[383] And though members of Congress routinely issue letters to the FDA about its regulation of this drug, they have never overruled the FDA's decision by statute or removed its power to regulate in this space.[384] The FDA here is not using "vague language" of

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377. See West Virginia v. Env't Prot. Agency, No. 20-1530, slip op. at 28 (U.S. June 30, 2022) ("[T]he Government must—under the major questions doctrine—point to 'clear congressional authorization' to regulate in that manner.").

378. Id. at 5.

379. The FDA gained authority to regulate tobacco by statute decades later. See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 901(a), 123 Stat. 1776, 1786–87 (2009) (codified in scattered sections of 5, 10, 15, and 21 U.S.C.).

380. Donley, supra note 69, at 637–42 (describing the FDA's history of mifepristone regulation and its statutory powers to so regulate); see also 21 U.S.C. § 355-1 (2018) (providing for the REMS program under which the FDA has regulated mifepristone).

381. Food & Drug Admin. v. Brown & Williamson, 529 U.S. 120, 157–60 (2000).

382. Donley, supra note 70, at 640.

383. Congress knows about the agency's regulation of these drugs; individual congresspeople frequently write to the agency when they disagree with its choices.

384. See, e.g., Letter from Jody Hice, U.S. Rep., et al., to Stephen Hahn, Comm'r, FDA (Sept. 1, 2020), https://hice.house.gov/uploadedfiles/house_fda_letter_hicecruz.pdf [https://perma.cc/3NZR-KVX9]; see also Letter from Gretchen Whitmer, Governor, State of Mich., to Robert Califf, Comm'r, FDA (July 21, 2022), https://content.govdelivery.com/

a "long-extant" but "rarely . . . used" statute to assert new authority but rather continuing its decades-long regulation of medication abortion.[385]

After the *Dobbs* decision, the Biden Administration has appeared to support this theory to some degree.[386] The strongest statement came from Attorney General Merrick Garland, who said: "The FDA has approved the use of the medication Mifepristone. States may not ban Mifepristone based on disagreement with the FDA's expert judgment about its safety and efficacy."[387] Shortly thereafter, President Biden signed an executive order directing the Department of Health and Human Services (HHS) to identify potential actions to "protect and expand access to abortion care, including medication abortion."[388] Explaining his decision, he noted that this medication was approved by the FDA as "safe and effective over twenty years ago."[389] Though this suggests the Administration supports this theory, it is not clear whether it will choose to participate in litigation based on political or strategy considerations, including whether any lawsuit might fare better without the government's involvement. But regardless, the issue will be litigated.

Indeed, when Mississippi banned nearly all abortions after *Dobbs*, mifepristone's generic manufacturer, GenBioPro, which had already started a preemption lawsuit based on Mississippi's pre-*Dobbs* abortion laws, moved to amend the complaint to challenge Mississippi's general ban.[390] GenBioPro argued that Mississippi's new, general abortion ban

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attachments/MIEOG/2022/07/21/file_attachments/2223974/220721%20-%20FDA%20letter%20%28with%20signature%29.pdf [https://perma.cc/XJ8W-GTHG].

385. West Virginia v. Env't Prot. Agency, No. 20-1530, slip op. at 20 (U.S. June 30, 2022).

386. See White House, Actions in Light of *Dobbs*, supra note 65 ("[T]he President directed the Secretary of Health and Human Services to identify all ways to ensure that mifepristone is as widely accessible as possible . . . .").

387. Press Release, Merrick B. Garland, Att'y Gen., Attorney General Merrick B. Garland Statement on Supreme Court Ruling in *Dobbs v. Jackson Women's Health Organization* (June 24, 2022), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-supreme-court-ruling-dobbs-v-jackson-women-s [https://perma.cc/NG28-LMML].

388. Exec. Order No. 14,076, 87 Fed. Reg. 42,053 (July 8, 2022).

389. White House, Protecting Access, supra note 26.

390. See Complaint at 27, GenBioPro, Inc. v. Dobbs, No. 3:20-cv-00652-HTW-LRA (S.D. Miss. Oct. 9, 2020) (arguing that Mississippi's pre-*Dobbs* requirements that a physician prescribe mifepristone and that it be ingested in the physician's presence were preempted because they were "an impermissible effort by Mississippi to establish its own drug approval policy and directly regulate the availability of drugs within the state"). In addition, GenBioPro argued that the Mississippi statute is a "significant burden on interstate commence because [it] interferes with the FDA's national and uniform system of regulation," in violation of the Commerce Clause. Id. at 28. Mississippi countered that an arcane law, which bans mailing any "article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion," 18 U.S.C. § 1461 (2018), is now effective with *Roe* overturned, suggesting that federal policy does not permit mailing medication abortion. See Defendant's Memorandum in Opposition to Plaintiff's Motion for Leave to File Amended Complaint at 11, *GenBioPro*, No. 3:20-cv-00652-HTW-LRA. The

"operates as a de facto ban on mifepristone and renders it essentially impossible for GBP to operate in Mississippi," citing the Zohydro opioid litigation.[391] GenBioPro does not need the FDA's support to lodge a preemption challenge based on its business interests. Though GenBioPro moved to dismiss its own lawsuit on August 19, 2022,[392] its public statement suggests that it continues to believe in the litigation strategy—signaling that it will likely file in a more favorable jurisdiction.[393]

2. *HHS's Role in Other Healthcare Matters.* — Preemption theories concerning medication abortion, if accepted, could be transformative. But there are other federal statutes that could be used to preempt state abortion laws on a smaller—and perhaps, less controversial—scale. This section does not purport to offer an exhaustive list of federal statutes that could be used to preempt state abortion bans,[394] but it highlights a few

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statute Mississippi cites, however, has been limited by long-standing precedent. See United States v. One Package, 86 F.2d 737, 739 (2d Cir. 1936) (limiting the Comstock Act of 1873, from which the predecessor of 18 U.S.C. § 1461 derives, to "unlawful abortions" as other parts of the statute did explicitly).

391. GenBioPro, Inc.'s Memorandum in Support of Its Motion for Leave to File Amended Complaint at 6, *GenBioPro*, No. 3:20-cv-00652-HTW-LRA.

392. Notice of Voluntary Dismissal Without Prejudice at 1, *GenBioPro*, No. 3:20-cv-00652-HTW-LRA.

393. See Ian Lopez & Celine Castronuovo, GenBioPro Gives up Abortion Pill Suit Against Mississippi (2), Bloomberg L. (Aug. 19, 2022), https://news.bloomberglaw.com/health-law-and-business/genbiopro-gives-up-abortion-pill-suit-against-mississippi [https://perma.cc/ZRK4-TYY5] ("We continue to believe that GenBioPro's legal strategy is an important path forward to ensuring access to medication abortion care." (internal quotation marks omitted) (quoting Evan Masingill, GenBioPro President)).

394. Additional preemption arguments rooted in existing federal statutes, though not evaluated in depth here, include the following. First, the Employee Retirement Income Security Act of 1974, which governs employer-sponsored insurance plans and preempts state law, might provide protection for employers that cover abortion care or abortion-related travel in states that ban it. See Brendan S. Maher, Pro-Choice Plans 2, at 42–48 (July 25, 2022) (unpublished manuscript), https://ssrn.com/abstract=4172420 [https://perma.cc/6SPM-BTQQ] (arguing that "under ERISA, [a] bounty law" like Texas's SB 8 "is substantively preempted"). Second, the Medicare conditions of participation, which create rules for hospitals that accept Medicare, might be used to require hospitals to offer abortion care. Before the Supreme Court decided *Obergefell v. Hodges*, the federal government required hospitals everywhere to allow same-sex couples visitation rights. See Medicare and Medicaid Program, Revisions to Certain Patient's Rights Conditions of Participation and Conditions for Coverage, 79 Fed. Reg. 73,873, 73,874 (Dec. 12, 2014) (to be codified at 42 C.F.R. pts. 416, 418, 482, 483, and 485) (providing regulatory changes "to promote equality and ensure the recognition of the validity of same-sex marriages when administering . . . patient rights and services"). Third, the Affordable Care Act's prohibition of sex discrimination in healthcare, known as Section 1557, might also be used to supplement these efforts. HHS Secretary Becerra used Section 1557 to issue a guidance document to pharmacies, explaining that withholding medications because they might cause miscarriage or abortion violated federal law. See HHS Guidance, supra note 370, at 1–3. Fourth, the Hyde Amendment's exceptions for life, rape, and incest could be used to force states with abortion bans that do not include these exceptions to allow Medicaid patients to obtain abortions under these circumstances. Cf. Alina Salganicoff, Laurie Sobel & Amrutha Ramaswamy, The Hyde Amendment and Coverage for

opportunities for HHS to use its interpretive and enforcement authority to protect abortion access.[395]

The first, the Emergency Medical Treatment and Labor Act (EMTALA), is a federal statute that requires all hospitals participating in Medicare with an emergency room to both screen patients for medical emergencies and provide stabilizing treatment when emergencies exist.[396] This statute could preempt state abortion bans that do not have exceptions to save the health or the life of the pregnant person; it could also preempt state abortion bans when health-or-life exceptions are more narrow than the demands of EMTALA.[397] Notably, as the antiabortion movement grows more extreme, its recent abortion bans rarely contain health exceptions, and some states are even considering bans without a life exception.[398]

Even when a state has exceptions for the life and health of the pregnant person, they are notoriously vague or narrow, and, fearing liability under the state law, physicians have delayed medically necessary

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Abortion Services, Kaiser Fam. Found. (Mar. 5, 2021), https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services/ [https://perma.cc/2KPN-QQDV] (noting that the Hyde Amendment requires Medicaid coverage be available for abortion in cases of life endangerment, rape, and incest but that some states fail to offer such coverage). Fifth, and finally, the Department of Veterans Affairs (VA) has issued a guidance document arguing that it has authority pursuant to federal law to provide abortions in the context of rape, incest, and health (broadly defined) in VA hospitals even in states that ban abortion in those contexts due to federal preemption. See Reproductive Health Services, 87 Fed. Reg. 55,287, 55,293–94 (proposed Sept. 9, 2022) (to be codified at 38 C.F.R. pt. 17). In October, the authors submitted commentary to the VA supporting their new policy. See Letter from Greer Donley, David S. Cohen & Rachel Rebouché, Professors of L., to Shereef Elnahal, Under Sec. of Health, Dep't of Veteran Affs. (Oct. 11, 2022), https://www.regulations.gov/comment/VA-2022-VHA-0021-54578 [https://perma.cc/N6MG-TB5R].

395. Notably, in a similar context, the Third Circuit—in an opinion joined by then-judge Samuel Alito—previously held that HHS's interpretation of the Hyde Amendment preempted state abortion laws to the contrary. Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170, 172 (3d Cir. 1995). There, HHS had interpreted Hyde's rape and incest exceptions to permit states to require that the person report the crime to law enforcement, but only if there was an option for a physician to waive that requirement. The Court found that a Pennsylvania law requiring a patient to report their rape or incest to law enforcement to be eligible for Medicaid funding that lacked a waiver was preempted. Id. at 182–83.

396. 42 U.S.C. § 1395dd(a)–(b) (2018).

397. See generally Greer Donley & Kimberly Chernoby, How to Save Women's Lives After *Roe*, Atlantic (June 13, 2022), https://www.theatlantic.com/ideas/archive/2022/06/roe-v-wade-overturn-medically-necessary-abortion/661255/ [https://perma.cc/94VX-D4N5] (describing how EMTALA, which trumps state abortion laws, has a broader definition of a medical emergency that includes many urgent pregnancy conditions).

398. See, e.g., Mary Ziegler, Why Exceptions for the Life of the Mother Have Disappeared, Atlantic (July 25, 2022), https://www.theatlantic.com/ideas/archive/2022/07/abortion-ban-life-of-the-mother-exception/670582/ [https://perma.cc/9TSP-DRGY] (last updated Aug. 2, 2022) (describing how GOP leaders and antiabortion-rights groups in Idaho, Michigan, and Wisconsin oppose lifesaving exceptions to abortion bans).

abortion care even though the patient's life is on the line.[399] Waiting too long to treat a patient can cause hemorrhage, loss of a uterus and future fertility, or death.[400] Since *Dobbs*, throughout the country, there have been numerous media reports of patients who have been forced to travel in the middle of a medical emergency to access lifesaving abortion care because of physician delay and uncertainty.[401] One study conducted in two Dallas hospitals after SB 8 made post-six-week abortions illegal found that 57% of the patients whose life-saving abortions were delayed to accommodate abortion bans developed a serious morbidity, including the loss of a uterus, and none of their babies survived.[402] Patients are suffering, and some could lose their lives, because of medical inaction.[403]

Shortly after SB 8 went into effect in Texas, in September 2021, HHS Secretary Xavier Becerra sent a memorandum to hospitals entitled "Reinforcement of EMTALA Obligations specific to Patients Who Are

399. Sneha Dey & Karen Brooks Harper, Abortion Restrictions Threaten Care for Pregnant Patients, Providers Say, Tex. Trib. (May 24, 2022), https://www.texastribune.org/2022/05/24/texas-abortion-law-pregnancy-care/ [https://perma.cc/T4HB-A3RG] ("Cheng, in San Antonio, doesn't use the word abortion anymore in her conversations with patients about their medical options—her hospital has asked her to try to be nonspecific."); Madeline Heim, If *Roe* Is Overturned, Wisconsin Law Would Allow Abortion Only 'To Save the Life of the Mother.' Doctors Say It's Not Always So Clear-Cut., Post Crescent (May 10, 2022), https://www.postcrescent.com/story/news/2022/05/10/doctors-say-wisconsin-abortion-laws-lifesaving-exception-vague-if-roe-v-wade-overturned/7402200001/ [https://perma.cc/Q7NB-5UHC] (last updated May 15, 2022) (describing how doctors in Michigan, Tennessee, and Wisconsin are anticipating having to limit medical treatments due to the extremely narrow exceptions in these states' abortion laws).

400. In Ireland, for instance, Savita Halappanavar died while waiting for lifesaving abortion care, spurring a massive backlash to the country's abortion laws. See Megan Specia, How Savita Halappanavar's Death Spurred Ireland's Abortion Rights Campaign, N.Y. Times (May 27, 2018), https://www.nytimes.com/2018/05/27/world/europe/savita-halappanavar-ireland-abortion.html (on file with the *Columbia Law Review*).

401. See Reena Diamante, 'We Have Already Reached Capacity': Abortion Clinics Overwhelmed by Out-of-State Travel, Bay News 9 (Aug. 31, 2022), https://www.baynews9.com/fl/tampa/politics/2022/08/31/abortion-services-have-taken–emotional-toll–on-patients–advocates-say- [https://perma.cc/W7VY-6RDL] (describing how out-of-state patients are flooding abortion clinics in Colorado, Kansas, and New Mexico, including patients experiencing medical emergencies such as ectopic pregnancies).

402. Anjali Nambiar, Shivani Patel, Patricia Santiago-Munoz, Catherine Y. Spong & David B. Nelson, Maternal Morbidity and Fetal Outcomes Among Pregnant Women at 22 Weeks' Gestation or Less With Complications in 2 Texas Hospitals After Legislation on Abortion, 227 Am. J. Obstetrics & Gynecology 648, 649 (2022).

403. See Healy, supra note 56 (describing how patients in Tennessee, Texas, and Utah face medical risks due to these states' strict abortion bans); Carole Joffe & Jody Steinauer, Opinion, Even Texas Allows Abortions to Protect a Woman's Life. Or Does It?, N.Y. Times (Sept. 12, 2021), https://www.nytimes.com/2021/09/12/opinion/abortion-texas-roe.html (on file with the *Columbia Law Review*) (describing how about 700 women die each year from pregnancy complications and that this number is expected to increase in the aftermath of *Dobbs*).

Pregnant or Are Experiencing Pregnancy Loss."[404] The memo reminded hospitals of their obligations under EMTALA, noting that EMTALA duties "preempt[] any directly conflicting state law or mandate that might otherwise prohibit or prevent such treatment" and that "[a] hospital cannot cite State law or practice as the basis for transfer" out of state.[405] It specifically mentioned that ectopic pregnancy and complications from pregnancy loss would qualify as emergency medical conditions.[406] Secretary Becerra announced this position in a press release entitled, "HHS Secretary Xavier Becerra Announces Actions to Protect Patients and Providers in Response to Texas' SB 8," implying that the policy was a direct response to Texas's abortion ban.[407]

Contrary to the press release's title, which did not go to hospitals, the memorandum was ambiguous and tepid. The memorandum did not use the word abortion once.[408] Instead it focused on people experiencing pregnancy loss.[409] Many clinicians call abortions in the context of inevitable or impending pregnancy loss by a different name: miscarriage management—a term that more traditionally refers to treatment for someone whose pregnancy has already ended. But the euphemism "pregnancy loss" creates confusion.[410] Hospitals may decide that they are only obligated to provide treatment for "pregnancy loss" after the fetus's heart has stopped, thereby creating no conflict with state law. Certainly, there is precedent for this interpretation. For decades, religious hospitals have delayed medically necessary abortion care until the fetus's heart had

404. Memorandum from Karen L. Tritz, Dir., Surv. & Operations Grp. & David R. Wright, Dir., Quality, Safety & Oversight Grp., to State Surv. Agency Dirs. (Sept. 17, 2021), https://www.cms.gov/files/document/qso-21-22-hospital.pdf [https://perma.cc/YK2B-3QSJ] [hereinafter CMS Memo].

405. Id. at 1, 3.

406. Id. at 4.

407. Press Release, HHS, HHS Secretary Xavier Becerra Announces Actions to Protect Patients and Providers in Response to Texas' SB 8 (Sept. 17, 2021), https://www.hhs.gov/about/news/2021/09/17/hhs-secretary-xavier-becerra-announces-actions-protect-patients-and-providers-response-texas-sb.html [https://perma.cc/Q89T-B3B6].

408. See CMS Memo, supra note 404.

409. Id. at 4 (instructing that "[e]mergency medical conditions [include] . . . ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders" and that EMTALA requires that "all patients receive an appropriate medical screening, stabilizing treatment, and transfer, if necessary, irrespective of any state laws or mandates").

410. See Gabriela Weigel, Laurie Sobel & Alina Salganicoff, Understanding Pregnancy Loss in the Context of Abortion Restrictions and Fetal Harm Laws, Kaiser Fam. Found. (Dec. 4, 2019), https://www.kff.org/womens-health-policy/issue-brief/understanding-pregnancy-loss-in-the-context-of-abortion-restrictions-and-fetal-harm-laws/ [https://perma.cc/4VF2-7AWE] ("Under less common circumstances, however, fetal cardiac activity may be present during cases of miscarriage . . . . It is therefore possible that surgical bans on abortion may limit medical decision making in nuanced cases of pregnancy loss.").

stopped or a person's death was imminent.[411] By not saying the word abortion, HHS implicitly supported the far-too-common approach of requiring a pregnancy loss to be completed before offering care.

Providers needed clear, unequivocal guidance that, when an emergency medical condition is present, EMTALA requires hospitals and doctors to offer stabilizing abortion care without delay even when the state bans it.[412] Under the statute, a person is having a medical emergency if they are in labor or suffering from a condition that, without immediate attention, could be reasonably expected to place their health in serious jeopardy, seriously impair their bodily function, or cause serious dysfunction to an organ.[413] This definition covers many urgent pregnancy conditions, including preterm premature rupture of membranes, ectopic pregnancy, and complications from incomplete miscarriage or self-managed abortion, where offering abortion is often the standard of care.[414] Notably, because possible damage to an organ qualifies, EMTALA

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411. See, e.g., Lori R. Freedman, Uta Landy & Jody Steinauer, When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals, 98 Am. J. Pub. Health 1774, 1777 (2008) ("Physicians working in Catholic-owned hospitals in all 4 US regions of our study disclosed experiences of being barred from completing emergency uterine evacuation while fetal heart tones were present, even when medically indicated. As a result, they had to delay care or transfer patients to non-Catholic-owned facilities."); Lee A. Hasselbacher, Luciana E. Herbert, Yuan Liu & Debra B. Stulberg, "My Hands Are Tied": Abortion Restrictions and Providers' Experiences in Religious and Nonreligious Health Care Systems, 52 Persps. on Sexual Reprod. Health 107, 112 (2020) ("Many providers and nonproviders noted the delays in care that patients experience as a result of transfers, referrals and ethics committee deliberations at both Catholic and Protestant hospitals."). Though the ACLU attempted to sue a Catholic hospital system under EMTALA in 2016, the lawsuit was dismissed for lack of standing. ACLU v. Trinity Health Corp., 178 F. Supp. 3d 614, 618–21 (E.D. Mich. 2016). When an OBGYN was effectively fired for providing a medically necessary abortion, however, he sued arguing that he was obligated to provide the abortion to stabilize the patient under EMTALA. Ritten v. Lapeer Reg'l Med. Ctr., 611 F. Supp. 2d 696, 704, 709–10 (E.D. Mich. 2009). The court refused to dismiss the lawsuit and it settled before trial. Id. at 718; see also Stipulation and Order of Dismissal With Prejudice at 1–2, *Ritten*, 611 F. Supp. 2d 696 (No. 2:07-cv-10265).

412. Until recently, hospitals and hospital systems that were considering their obligations after *Dobbs* were not taking EMTALA into account. Compare, e.g., Lisa H. Harris, Navigating Loss of Abortion Services—A Large Academic Medical Center Prepares for the Overturn of *Roe v. Wade*, 386 New Eng. J. Med. 2061, 2061–64 (2022) (discussing a hospital's consideration of options for pregnant patients without a discussion of EMTALA), with Memorandum from Karen L. Tritz, Dir., Surv. & Operations Grp. & David R. Wright, Dir., Quality, Safety & Oversight Grp., to State Surv. Agency Dirs. (July 11, 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf [https://perma.cc/JXP4-M5K5] (reminding hospitals of their obligations under EMTALA to provide emergency abortion services).

413. 42 U.S.C. § 1395dd(e) (2018).

414. Donley & Chernoby, supra note 397. Indeed, the Office for Civil Rights within HHS said as much in a guidance document released on the same day but also not sent to hospitals: "Lawful abortions under the Church Amendments also include abortions performed in order to stabilize a patient when required under the Emergency Medical

would require abortion treatment that, if delayed, could damage the uterus and fallopian tubes, not just threaten a life.

Fortunately, the Biden Administration took further steps in the months following *Dobbs* to clarify EMTALA's relevance. The new government website that was launched on the day *Dobbs* was decided, reproductiverights.gov, states that under EMTALA, a "hospital is required to provide you with the emergency care necessary to save your life, including abortion care."[415] And President Biden's executive order mentioned above also directs HHS to "ensure that all patients—including pregnant women and those experiencing pregnancy loss, such as miscarriages and ectopic pregnancies—receive the full protections for emergency medical care afforded under the law."[416] Very soon after these actions were taken, the Texas Attorney General filed a lawsuit against HHS, arguing that its interpretation of EMTALA "attempt[ed] to use federal law to transform every emergency room in the country into a walk-in abortion clinic" and that EMTALA cannot "compel healthcare providers to perform abortions."[417]

But HHS was not deterred; instead, it worked with the DOJ to file its own lawsuit that facially challenges Idaho's abortion ban as violating EMTALA for containing only a narrow life exception and no health exception.[418] This development is important—guidance documents mean nothing without corresponding action. In August 2022, district courts in Texas and Idaho issued conflicting decisions within one day of each other. The Texas court invalidated the HHS guidance for being procedurally defective and going beyond the EMTALA statute, which the court found "protects both mothers and unborn children."[419] The Idaho court, however, found that Idaho's abortion ban was partially preempted by EMTALA and enjoined it to the extent of a conflict, allowing the EMTALA standard to govern for emergency, hospital-based abortions.[420] These

Treatment and Active Labor Act . . . ." Off. for Civ. Rts., HHS, Guidance on Nondiscrimination Protections Under the Church Amendments for Health Care Personnel 2 (Sept. 17, 2021), https://www.hhs.gov/sites/default/files/church-guidance.pdf [https://perma.cc/7PPZ-X75L].

415. Know Your Rights: Reproductive Health Care, HHS, https://reproductiverights.org [https://perma.cc/8YSV-NT8T] (last visited Sept. 4, 2022); see also Press Release, HHS, Know Your Rights: Reproductive Health Care (June 25, 2022), https://www.hhs.gov/about/news/2022/06/25/know-your-rights-reproductive-health-care.html [https://perma.cc/KT6Q-D2UV] (announcing the launch of the reproductiverights.gov website).

416. Exec. Order No. 14,076, 87 Fed. Reg. 42,053, 42,054 (July 8, 2022).

417. State of Texas's Original Complaint at 1–2, Texas v. Becerra, No. 5:22-cv-185 (N.D. Tex. filed July 14, 2022), 2022 WL 2763763.

418. See Complaint at 2, 8, United States v. Idaho, No. 1:22-cv-329 (D. Idaho filed Aug. 8, 2022), 2022 WL 3137290 ("The *prima facie* criminal prohibition in Idaho's law does not contain any exceptions for when the pregnant patient's health or life is endangered.").

419. *Texas*, 2022 WL 3639525, at *1.

420. *Idaho*, 2022 WL 3692618, at *2.

decisions will likely be appealed to the Fifth and Ninth Circuits, setting up the first potential abortion-related circuit split of the post-*Dobbs* era.

HHS should also enforce the statute against specific hospitals that are accused of delaying care. Those enforcement actions, however, require patients to file complaints with the agency before the agency can act.[421] At the time of writing, the first EMTALA investigation against a hospital in Missouri that denied a patient emergency abortion care made headlines.[422] HHS should continue to spread awareness about the law and make the complaint filing system more user-friendly so that more complaints surface, and the agency can enforce the statute.[423]

A second federal law, the Health Insurance Portability and Accountability Act (HIPAA), preempts policies or actions that compromise the privacy of abortion seekers.[424] This law generally prohibits healthcare workers from disclosing people's private health information. Commentators have been quick to note that HIPAA is narrow: It does not protect personal healthcare data not in the possession of covered healthcare entities (e.g., a person's search histories, menstruation app information, location data), and it does not apply to nonhealthcare workers (e.g., friends and family or fake abortion clinic workers).[425] Nevertheless, it can be enforced against covered healthcare workers who report patients to law enforcement for suspected abortion unless one of the law enforcement exceptions are met.[426] A small number of people who use medication abortion without legal permission will seek medical care at

421. See 42 U.S.C. § 1395dd(d) (2018) (providing enforcement mechanisms for EMTALA complaints against hospitals).

422. See Rudi Keller, Missouri Hospital the First Confirmed Federal Investigation of Denied Emergency Abortion, Mo. Independent (Nov. 2, 2022), https://missouriindependent.com/2022/11/02/missouri-hospital-the-first-confirmed-federal-investigation-of-denied-emergency-abortion/ [https://perma.cc/8XRL-MPAZ] ("[A Joplin, Missouri] hospital is apparently the first in the nation to be investigated for possibly violating federal law by telling a woman experiencing an emergency that she needed to terminate her pregnancy to protect her health but that the abortion could not take place in the state.").

423. Donley & Chernoby, supra note 397 ("But CMS can make its complaint process more user-friendly and do a better job spreading public awareness of how to file complaints, so that it can act.").

424. 42 U.S.C. §§ 1320d-6 to -7 (2018).

425. See Anya E.R. Prince, Reproductive Health Surveillance, 64 B.C. L. Rev. (forthcoming 2023) (manuscript at 12–13), https://ssrn.com/abstract=4176557 [https://perma.cc/77VG-43KM] (noting that the "siloed nature of [HIPAA] . . . means that the vast amount of health information existing outside of the [covered] healthcare space is not similarly protected").

426. See HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care, HHS, https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html [https://perma.cc/3EHQ-RLF8] [hereinafter HHS, Privacy Rule and Disclosures] (last updated June 29, 2022) (explaining that regulated providers cannot "use or disclose" protected health information unless it is "expressly permitted or required" by HIPAA).

a hospital. Past experience suggests that some hospital staff will report those they suspect of self-managed abortion.[427] These covered employees are violating HIPAA if they are not acting pursuant to a legal exception.

The relevant exceptions are all created by regulations: (1) if a state law mandates disclosure; (2) if the covered employee is complying with a lawfully executed subpoena or similar document; (3) if the covered employee suspects a crime occurred involving the death of a person; (4) if the covered employee suspects child abuse; (5) if the covered employee acts to avert a serious threat to health or safety; or (6) if the covered employee suspects a crime occurred on hospital property.[428] These exceptions create many problems. First, states can get around HIPAA if they pass a law requiring healthcare providers to report suspected abortion. At time of publication, no state has such a law, but mandated disclosure could eventually come into play. Second, HIPAA is not violated if the covered employee is served with a summons, warrant, subpoena, or administrative request. Note, though, that for this exception to apply, the provider would be responding to, not initiating contact with law enforcement.

Third, if a state passes a law endowing fetuses with personhood status, like in Georgia, then HIPAA might permit a provider to report a patient to law enforcement on the premise that they suspect a crime occurred that involved the death of a person (the fetus). The child abuse exception is similar—some states interpret a fetus to be a child under child abuse laws.[429] To address this issue, the federal government could issue guidance that, under federal law, a fetus is not a person or a child, preempting state interpretations to the contrary under HIPAA.[430] Like the EMTALA discussion above, HHS would not only need to issue guidance but also to

427. Carrie N. Baker, Texas Woman Lizelle Herrera's Arrest Foreshadows Post-*Roe* Future, Ms. Mag. (Apr. 16, 2022), https://msmagazine.com/2022/04/16/texas-woman-lizelle-herrera-arrest-murder-roe-v-wade-abortion/ [https://perma.cc/UNA5-4NSU] (describing how a Texas hospital's report of a woman's "self-induced abortion" led to her arrest and charge for murder).

428. Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule: A Guide for Law Enforcement, HHS, https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/special/emergency/final_hipaa_guide_law_enforcement.pdf [https://perma.cc/WU7Z-BSQQ] (last visited Sept. 4, 2022).

429. See, e.g., Whitner v. South Carolina, 492 S.E.2d 777, 779 (S.C. 1997) ("South Carolina law has long recognized that viable fetuses are persons holding certain legal rights and privileges.").

430. Finally, a provider could argue that HIPAA does not apply in the context of self-managed abortion because a crime is occurring on the provider's property. This is the most attenuated argument, suggesting that an abortion crime continues past the act of taking the medication and into the process of expelling pregnancy tissue over the course of days or weeks. Again, the federal government could clarify that this exception is met only if a patient takes abortion-inducing drugs on hospital property.

enforce the statute if it wants to pressure covered entities in a way that mitigates the risk on the other side.

In June 2022, the Biden Administration issued guidance seeking to clarify how HIPAA relates to abortion-related crimes.[431] Though there is more that can be said, as noted above, and more that can be done, this was an important step. The guidance discussed the mandated disclosure exception: "Where state law does not expressly require [the reporting of abortion crimes], the Privacy Rule would not permit a disclosure to law enforcement under the 'required by law' permission."[432] For the court order exception, the guidance stated: "If the request is not accompanied by a court order or other mandate enforceable in a court of law, the Privacy Rule would not permit the clinic to disclose PHI in response to the request."[433] It also addressed the exception allowing disclosures to avert a serious threat to health or safety, noting that healthcare workers cannot disclose protected health information (PHI) just because they believe such a disclosure would prevent harm to a fetus.[434] Specifically, the agency addressed the example where a patient tells a healthcare worker that they plan to obtain an abortion out of state. In this context, the healthcare workers may not share that with law enforcement absent a court-order document.[435]

Outside of issuing guidance, the Biden Administration could go further. All of the law enforcement exceptions are created by regulation,[436] meaning that HHS could initiate rulemaking to modify the regulations to specifically exempt abortion-related crimes from each exception, even when the state mandates disclosure or issues a subpoena. If that were to happen, federal law theoretically would preempt the state law, subject to some of the counterarguments raised in the section above.

As the arguments for and against preemption make clear, the stakes are high for federal agencies and for states deploying what they consider to be their police powers to ban abortion. The uncertainty of the result is perhaps why preemption has not been litigated by abortion supporters until now. But as the abortion crisis intensifies, the stakes have changed. Though the composition of the current Supreme Court calls into question the likelihood of success on the more ambitious of these preemption arguments, some are less controversial, and lower courts could be amenable to all of them. This effort, along with more like it in the future,

431. HHS, Privacy Rule and Disclosures, supra note 426.

432. Id. (emphasis omitted).

433. Id. (emphasis omitted).

434. Id.

435. Id.

436. See, e.g., 45 C.F.R. § 164.512 (2021) (allowing disclosure of health information without authorization for law enforcement matters).

will spark new debates about the balance of state–federal power in abortion law.

B. *Federal Land*

Another opportunity the federal government has to promote abortion access is to use federal land. About 28% of the United States' land mass is owned by the federal government—in such forms as national parks, wilderness preserves, military bases, and more.[437] State abortion bans might be inapplicable on these lands. For example, located forty-five miles from Jackson, Mississippi, is the federally owned Bienville National Forest,[438] and the federal government may lease land it owns in urban areas, such as decommissioned military facilities.[439] Traveling to such sites to receive care—travel that could be much less burdensome than traveling out of state—would help abortion seekers in states with bans, as long as those bans did not apply on federal land.

There is neither a general federal prohibition on abortion, nor, for purposes of this section, a prohibition on abortions being performed on federal land. There is, under the Hyde Amendment, a prohibition on the use of federal dollars to perform abortions that do not fall within the provision's exceptions for life, incest, or rape.[440] However, that leaves room for the federal government to lease space on federal land or otherwise permit some private entity to perform abortions there.[441] Those providers

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437. See Carol Hardy Vincent, Laura A. Hanson & Lucas F. Bermejo, Cong. Rsch. Serv., R42346, Federal Land Ownership: Overview and Data 1–3 (2020), https://sgp.fas.org/crs/misc/R42346.pdf [https://perma.cc/H6YA-5476]. Title 18 of the U.S. Code defines federal land as:

> Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

18 U.S.C. § 7(3) (2018).

438. See Bienville National Forest, Miss. State Parks, https://stateparks.com/bienville_national_forest_in_mississippi.html [https://perma.cc/AL7B-ZX7A] (last visited Oct. 17, 2022); see also Federal Land Policy in Mississippi, Ballotpedia, https://ballotpedia.org/Federal_land_policy_in_Mississippi [https://perma.cc/2EBN-2W4Z] (last visited Oct. 31, 2022).

439. See Org. for Econ. Coop. & Dev., The Governance of Land Use: Country Fact Sheet United States (2017), https://www.oecd.org/regional/regional-policy/land-use-United-States.pdf [https://perma.cc/X74U-A5TB].

440. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, §§ 506–507, 134 Stat. 1182, 1622, div. H (2022).

441. Under a lease between the federal government and an abortion provider, the money would flow from abortion providers to the federal government rather than the other way around; thus, the Hyde Amendment would not be implicated. Further, leasing property to an abortion provider would be no different than leasing property to any other business on federal land—such as a Popeye's chicken restaurant. See Peoples v. Puget Sound's Best

would have a reasonable—though certainly controversial—argument that state criminal and civil abortion bans do not apply on federal land, and they are therefore free to lawfully provide abortions there, even if the state within which the federal land is situated has otherwise banned abortion.

The key to this legal analysis is the Assimilative Crimes Act (ACA).[442] This relatively little-known federal law is the mechanism by which the federal government bans criminal activity on federal land without passing specific laws to do so. When someone engages in behavior on federal land for which there is no crime "punishable by any enactment of Congress," this Act makes it a federal crime if that behavior "would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which [the federal land] is situated."[443] Someone falling under this provision is "guilty of a like offense and subject to a like punishment."[444]

The ACA in this regard applies only on particular federal land. The statute differentiates between federal land that is considered an exclusive enclave, which would mean it is covered by the ACA, and federal land over which the state reserved jurisdiction when it transferred the land to the federal government, which would put it outside the coverage of the ACA.[445] Unfortunately, there is no easy or publicly accessible way to categorize federal land, as this determination involves intense factual analysis relying on dated documents and often contested history.[446] Thus, as a preliminary matter, discerning exactly where the ACA applies and where it does not is a difficult hurdle.[447]

Chicken!, Inc., 345 P.3d 811, 812 (Wash. Ct. App. 2015) (noting that defendants operated a fast-food restaurant leased on what was federal-enclave land and devoting little analytical space to this issue, assuming it to present little analytical difficulty). The President would not need to be involved through any executive order or any new agency regulation (just as neither was needed, for instance, to lease property to Popeye's). Knowing that the Biden Administration supports this option, however, would be a prerequisite to a provider considering exploring this possibility because of the role the DOJ has in directing enforcement of federal law and the President has in issuing pardons. See infra notes 450–451 and accompanying text. So far, the Biden Administration has shown little interest in this option despite other Democrats urging the President to try. See Platoff, supra note 66 (noting the Biden Administration has resisted exploring use of federal lands).

442. 18 U.S.C. § 13.

443. Id. § 13(a).

444. Id.

445. It is estimated that just 6% of federal land is considered a federal enclave. John D. Leshy, Robert L. Fischman & Sarah A. Krakoff, Coggins & Wilkinson's Federal Public Land and Resources Law 142 (8th ed. 2022).

446. See Paul v. United States, 371 U.S. 245, 268–69 (1963) (looking deeply into the history of state laws governing transfers of land from the state to the federal government).

447. National parks are federal enclaves, United States v. Harris, 10 F.4th 1005, 1008 (10th Cir. 2021), as are many military bases and related locations, see, e.g., Stiefel v. Bechtel Corp., 497 F. Supp. 2d 1138, 1144 (S.D. Cal. 2007) (noting the uncontested fact that a federal nuclear generating station is a federal enclave). But federal properties located on

At first blush, it may seem that state laws criminalizing abortion would be actionable under the ACA. But there are a few pieces of the ACA that are important to understand for the argument. First, someone who engages in behavior on federal land that is punishable as a crime under state law is not prosecuted by the state.[448] Rather, the ACA incorporates the state crime into federal law so that, technically, the person has violated the federal ACA, not the state law.[449] That means that federal prosecutors prosecute these crimes in federal court, not state prosecutors in state court.[450] Federal prosecutors in an administration that supports abortion rights could exercise enforcement discretion on federal land, and state prosecutors who disagree would have no ability to prosecute on their own. Further, a President who supports abortion rights—but is fearful that a successor who feels otherwise might later prosecute within the statute of limitations—could pardon the providers on federal land for all potential abortion-related crimes under the ACA.[451] If that were to happen, those providers would be immune from prosecution for past abortions even if the White House's position on abortion changes.[452] Abortion provision in the future, however, would be vulnerable.

Second, the ACA does not incorporate all state criminal law. In *Lewis v. United States*, the Court laid out a two-step test for determining if the ACA assimilates state criminal law.[453] First, if the defendant's act or omission is not made punishable by a federal law, "that will normally end the matter" because without federal law criminalizing the conduct, "[t]he ACA presumably would assimilate the [state] statute."[454] Lower courts have made clear that this inquiry includes exploring whether federal

state land, such as post office buildings, courthouses, office buildings, and prisons, are not enclaves unless they are located on federal land that qualifies. See W. River Elec. Ass'n, Inc. v. Black Hills Power & Light Co., 719 F. Supp. 1489, 1499 (D.S.D. 1989).

448. United States v. Brown, 608 F.2d 551, 553 (5th Cir. 1979) ("Prosecution under the ACA is not for enforcement of state law but for enforcement of federal law assimilating a state statute.").

449. See id.

450. United States v. Warne, 190 F. Supp. 645, 659 (N.D. Cal. 1960), aff'd in part, vacated in part sub nom. *Paul*, 371 U.S. 245. *Paul* reaffirmed the principle that congressional regulation of federal land "bars state regulation without specific congressional action." 371 U.S. at 263.

451. Cf. Ex parte Garland, 71 U.S. (4 Wall.) 333, 351 (1866) (recognizing the President's constitutional grant of an "unlimited power in respect to pardon, save only in cases of impeachment"—a power "not merely to take away the penalty, but to forgive and obliterate the offence").

452. Lydia Wheeler, Progressives Look to Pardon Power as Abortion Access Fix, Bloomberg L. (July 12, 2022), https://news.bloomberglaw.com/us-law-week/progressives-look-to-pardon-power-as-abortion-access-fix [https://perma.cc/B9SS-WFT7].

453. 523 U.S. 155, 164 (1998).

454. Id.

regulations cover the conduct.[455] If federal law does make the act punishable, courts must ask the second question of whether application of state law would interfere with federal policy, rewrite an offense Congress carefully considered, or conflict with a federal law occupying the field.[456] This two-step analysis poses a challenge because the answer to the first question with respect to almost all state abortion law is that Congress has not made abortion punishable by federal law.[457]

The Court in *Lewis*, however, indicated that incorporating state law if there is no federal law criminalizing the conduct is only the "normal" and "presumptive" conclusion; it did not foreclose a different conclusion in all situations. There is a strong argument—though untested post-*Lewis*—that state abortion law does not apply despite the fact that there is no federal law prohibiting abortion. The *Lewis* inquiry was developed in the context of criminal activity that is universally prohibited, such as the homicide at issue in that case, because the inquiry answers which sovereign's law should apply.[458] *Lewis* makes less sense for actions that are not universally prohibited. In fact, it is hard to argue that *Lewis* has any application when the current federal government has a policy of protecting the behavior the state government makes criminal, something that is certainly not the case for homicide but is the case for abortion.[459] There is precedent for this line of argument under the ACA from multiple lower courts that refused to apply state bans on union shop agreements on federal land because federal law "expressly permits union shop agreements."[460] Although these lower court cases about federal law permitting behavior predate *Lewis* and

455. See, e.g., United States v. Hall, 979 F.2d 320, 322 (3d Cir. 1992) ("We agree with those courts that have concluded that a federal regulation does qualify as 'an enactment of Congress.'" (quoting language used by multiple lower courts)); United States v. Palmer, 956 F.2d 189, 191 (9th Cir. 1992) (considering the extent to which a federal regulation concerning drunk driving on federal land adopts state law crimes' substance and attendant penalties).

456. *Lewis*, 523 U.S. at 164.

457. One exception is found in § 1531, which prohibits a particular abortion procedure Congress dubbed "partial-birth abortion." 18 U.S.C. § 1531 (2018).

458. *Lewis*, 523 U.S. at 166.

459. Cf. Joseph R. Biden, President, United States, Remarks by President Biden on Protecting Access to Reproductive Health Care Services (July 8, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/07/08/remarks-by-president-biden-on-protecting-access-to-reproductive-health-care-services/ [https://perma.cc/462U-JHRN] (expressing President Biden's desire that the Justice Department "do everything in [its] power to protect . . . women seeking to invoke their right [to abortion]").

460. King v. Gemini Food Servs., Inc., 438 F. Supp. 964, 966 (E.D. Va. 1976); see also Lord v. Local Union No. 2088, 646 F.2d 1057, 1061–62 (5th Cir. 1981) (holding that because "union security agreements are not illegal under federal law," it would be inconsistent to apply state law to the contrary); Vincent v. Gen. Dynamics Corp., 427 F. Supp. 786, 800 (N.D. Tex. 1977) ("[S]ince federal labor policy favors union security agreements, the criminal provisions of the Texas 'right-to-work' laws are not incorporated into federal criminal law by 18 U.S.C. § 13.").

its focus on federal laws that criminalize behavior, they are consistent with the Supreme Court's statements about the ACA's goals.[461]

Providers who want to avoid state abortion bans post-*Roe* by leasing space from federal agencies or programs would have several similar arguments at their disposal.[462] Because federal regulations can be the source of federal law under the ACA,[463] the FDA or its parent, HHS, could assist this effort by issuing a regulation about its authority over medication abortion, particularly on federal land. As described earlier, the FDA closely regulates this medication and has approved it because it is safe and effective.[464] An FDA or HHS statement to this effect mentioning federal land in particular would give providers a strong argument that they could prescribe and distribute abortion medication without fear of legal punishment while on federal land. This would not mean that people on federal land would have access to abortion in the same manner as before *Roe* was overturned because abortion medication is, at this time, only FDA-approved for terminating pregnancies up through ten weeks of gestation.[465] Early abortion access would, however, remain in a post-*Roe* world even within states where abortion is illegal as long as the medication was distributed (and perhaps taken) on federal land.[466]

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461. James Stewart & Co. v. Sadrakula, 309 U.S. 94, 103–04 (1940) ("[T]he authority of state laws or their administration may not interfere with the carrying out of a national purpose. Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way.").

462. In many ways, these arguments dovetail with the preemption arguments described above. As discussed in this paragraph and the two that follow, the issue is whether the federal government has a policy, either through FDA regulation of mifepristone or through federal abortion law more generally, that precludes application of state law on federal land because of a conflict between the two under the terms of the ACA and its case law. The preemption argument in section III.A of this Article is similar in that it looks to conflict between state and federal law. Moreover, the general preemption argument would apply beyond federal land and in all parts of a state. Thus, if a general preemption argument prevailed, there would be no need for a federal lands argument.

However, if a general preemption argument were not to succeed, the federal lands argument could still prevail if courts perceive the unique ACA language and case law to apply when the preemption case law does not. For instance, a court might find the comparison to the ACA union shop cases convincing but might not be convinced by a comparison to preemption jurisprudence. Cf. *Lord*, 646 F.2d at 1061; *Vincent*, 427 F. Supp. at 800; *King*, 438 F. Supp. at 966. Moreover, a court might feel less concerned about the interjurisdictional implications of allowing abortion on federal enclaves within a state as opposed to finding that federal law preempts state law throughout the entirety of the state.

463. See United States v. Hall, 979 F.2d 320, 322 (3d Cir. 1992).

464. See supra section I.B.

465. See supra section I.B.

466. The background rule for dispensation of drugs is that the care is provided where it is dispensed, not consumed, but one could imagine an antiabortion state taking the position that the abortion occurs on their land when the pills are consumed there. See supra note 90 and accompanying text noting that the standard of care typically is determined by

There is also an argument that federal law, as it currently exists, already precludes the application of state law regarding abortion on federal land. This argument could take several different forms. For instance, providers could argue that even in the absence of an agency statement, the FDA's approval of the medication abortion regimen, along with its strong statements about the regimen's safety,[467] represents not merely permission from the federal government to perform abortions in this manner; rather, such approval constitutes an affirmative policy of the federal government, something that was certainly absent in *Lewis* for homicide and is more akin to the lower court union shop cases mentioned above.[468] That the FDA has expressly permitted the use of medication abortion could mean that state bans on the use of this protocol—whether through specific bans on medication abortion or general bans on abortion—should not be applicable on federal lands under the ACA.

Taking this argument further, providers could argue that the federal government's regulation of abortion occupies the field with respect to the matter. In addition to FDA regulation, Congress has prohibited so-called "partial-birth abortion"[469] and outlawed acts that cause the death of an "unborn child."[470] Every year, Congress renews the Hyde Amendment, which prohibits federal dollars from being spent on abortion.[471] Under the Affordable Care Act, Congress bans abortion from being part of the insurance options offered through exchanges,[472] and there are many different provisions protecting freedom of conscience with respect to abortion provision and refusal.[473] These different laws, taken together, could be seen as the complete set of laws that Congress has chosen to adopt for purposes of federal abortion law, making legal anything that is not explicitly illegal on federal lands. This interpretation would permit

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where the patient is located. For this reason, it might be safer to require the patient to consume the drugs on federal land as well.

467. See supra section III.A.

468. See supra notes 460–461 and accompanying text explaining that the federal government's approval of union shops amounted to a national policy that barred assimilation through the ACA of state right-to-work laws.

469. See 18 U.S.C. § 1531 (2018).

470. See id. § 1841(a)(1).

471. See, e.g., Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, §§ 201–203, 136 Stat. 49, 131 (2020) ("None of the funds appropriated by this title shall be available to pay for an abortion, except where the life of the mother would be endangered if the fetus were carried to term, or in the case of rape or incest."); Consolidated Appropriations Act, 2021, Pub. L. No. 116-120, 134 Stat. 1182, 1263 §§ 201–203 (2021) (utilizing the same language).

472. 42 U.S.C. § 18023 (2018).

473. For a thorough list of federal laws relating to abortion refusal, see Secretariat of Pro-Life Activities, Current Federal Laws Protecting Conscience Rights (2019), https://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Federal-Conscience-Laws-Fact-Sheet.pdf [https://perma.cc/VZA6-YCTU].

abortions on federal land at any point in pregnancy, so long as it complies with federal abortion laws. The Supreme Court has made clear that "through the comprehensiveness of its regulation," Congress can occupy the field and thus preclude the application of state law through the ACA.[474] This argument would posit that these federal abortion laws and regulations do just that with respect to how the federal government wants to treat abortion within its own laws, meaning on federal lands.[475]

Although the ACA concerns whether criminal abortion law applies on federal land, states have also passed abortion laws that are civil in nature—infamously, Texas's SB 8.[476] For civil law on federal land, there is no law comparable to the ACA that wholesale incorporates nonconflicting state civil law. Rather, there are individual statutes that incorporate some specific state civil laws, such as wrongful death or personal injury.[477] For other civil actions, "[w]hen federal law neither addresses the civil law question nor assimilates pertinent state law, the applicable law is the state law that was in effect at the time that the state ceded jurisdiction to the United States."[478] Because Texas's SB 8 and any copycat laws from other states are of such recent vintage, they would be precluded from being incorporated on federal land.[479] Abortion providers, however, would have to deal with the possibility of a wrongful death lawsuit if allowed under state law in a post-*Roe* world. The risk of such a lawsuit, particularly from patient relatives who might disagree with the patient's decision, might be an insurmountable barrier for some providers.[480]

It is important to note that the ACA analysis here is limited to the legal risk people will face while on federal land. Once those people—whether

474. Lewis v. United States, 523 U.S. 155, 164 (1998) (citing Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 604–05 (1991)).

475. Providers might even claim that because the United States already prohibits one form of abortion, so-called "partial-birth abortion," other forms of abortion are presumed to be lawful under federal law and that this presumption should preclude the application of state law to the contrary. United States v. Butler, 541 F.2d 730, 737 (8th Cir. 1976) ("[T]he fact that the federal statutes are narrower in scope does not allow the federal government to use state law to broaden the definition of a federal crime.").

476. S.B. 8, 87th Gen. Assemb., Reg. Sess. (Tex. 2021) (codified as amended at Tex. Health & Safety Code Ann. §§ 171.201–.212 (West 2022)).

477. See 28 U.S.C. § 5001 (2018) (providing that state law shall govern the rights of parties in civil actions for death or personal injury in a place subject to exclusive jurisdiction of the United States).

478. George Cameron Coggins & Robert L. Glicksman, 1 Pub. Nat. Res. L. § 3:8 (2d ed. 2009) (using Arlington Hotel Co. v. Fant, 278 U.S. 439 (1929), as an illustrative example of this point).

479. Cf. Balderrama v. Pride Indus., Inc., 963 F. Supp. 2d 646, 656 (W.D. Tex. 2013) (stating that "laws of the state adopted after the cession are without any force or effect on the federal enclave").

480. Abortion providers concerned about this liability, however, could require patients—and possibly other persons related to the patient—to sign waivers from suing under state wrongful death provisions.

provider, patient, or helper—travel back on state land, the state's abortion laws would apply. This could subject providers, patients, and helpers to state abortion criminal or civil law when they travel to or from federal land,[481] even if the ACA protects providers, patients, and helpers while on that federal land. Moreover, the location of the clinic within an antiabortion state's borders, albeit on federal land, would make it easy to surveil for the purpose of identifying the people visiting it. While this risk would be real, for over 150 years, the Supreme Court has recognized, under the Fourteenth Amendment's Privileges or Immunities Clause, that every American has the right to travel to and from federal lands to conduct business there.[482] While these precedents specifically refer to conducting business with the federal government, the same rationale of prohibiting states from interfering with people traveling to enjoy the privileges or immunities of their federal government should apply to conducting any federally approved business on federal land.

The authors recognize that the arguments put forth here are based on untested interpretations of federal law that raise thorny questions about the relationship between the federal government and the states. These questions as they apply to federal lands are not well developed in scholarship or federal court decisions, as "relatively few published decisions have engaged the ACA, and even fewer scholars have done so. As a result, the ACA has received little analytical treatment."[483] But the point here is the same as with the other issues covered in this Article: Reliance on the ACA to shield abortion provision on federal land has the potential to increase abortion access in antiabortion states while simultaneously raising unexplored interjurisdictional legal issues previously unaddressed in the long history of abortion conflict.[484]

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481. This is due to all of the complications discussed above in Part II regarding states punishing abortion travel or extraterritorial abortion.

482. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79–80 (1873) ("It is said to be the right of the citizen of this great country . . . 'to come to the seat of government . . . to transact any business [he or she] may have with it . . . .'" (quoting Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1867))).

483. Nikhil Bhagat, Filling the Gap? Non-Abrogation Provisions and the Assimilative Crimes Act, 111 Colum. L. Rev. 77, 80 (2011).

484. Interjurisdictional issues would also arise with abortion provision on Native land, though this Article does not address that complex topic here. See generally Heidi L. Guzmán, *Roe* on the Rez: The Case for Expanding Abortion Access on Tribal Land, 9 Colum. J. Race & L. 95 (2019) (setting out how and why tribal land could support abortion provision); Lauren van Schilfgaarde, Aila Hoss, Sarah Deer, Ann E. Tweedy & Stacy Leeds, The Indian Country Abortion Safe Harbor Fallacy, LPE Project (June 6, 2022), https://lpeproject.org/blog/the-indian-country-abortion-safe-harbor-fallacy/ [https://perma.cc/9AZ4-G8AY] (arguing that "the possibility of an abortion 'safe harbor' on tribal lands . . . overlooks important legal, financial, political, and ethical considerations that . . . make the possibility of abortion safe harbors highly unlikely"). Importantly, the authors agree with the concern that it is racially insensitive and wrong to suggest that Indigenous peoples, who struggle to access equitable healthcare, have any obligation to use

C. *Expanding Access to Medication Abortion*

The federal government, sometimes along with abortion-supportive states, can apply various policies to remove obstacles to medication abortion. With these policy changes, medication abortion would become more accessible everywhere, including in states that ban abortion. Antiabortion states will try to resist this new abortion frontier but might see their efforts thwarted by federal policies and a lack of cooperation from other states. This section explores some of these possibilities and notes the areas in which federal intervention could make a significant difference, namely, in FDA regulation, telehealth infrastructure, medical licensure, and the standard of care for medication abortion.

First, the FDA could lift the remaining restrictions on mifepristone that make the drug harder to access across the country.[485] The first two REMS requirements—that providers become "certified" to prescribe the drug with the manufacturer and that patients sign an extra informed consent form—have existed since the FDA first approved mifepristone.[486] The certification process requires providers to register with the drug manufacturer, affirming that they can identify and treat mifepristone's rare adverse effects.[487] Doing so is an extra administrative burden that discourages providers from prescribing mifepristone given that it might expose them to boycotts, protests, and violence if their status as an abortion provider becomes known to the public.[488] This process also disincentivizes general obstetricians and primary care providers from offering medication abortion as part of their practices.[489] In the same vein,

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their land for this purpose. Moreover, a week after *Dobbs*, the Supreme Court drastically cut back on tribal sovereignty over their own land. See Oklahoma v. Castro-Huerta, No. 21-429, slip op. at 22 (U.S. June 29, 2022) ("[N]o federal law preempts the State's exercise of jurisdiction over crimes committed by non-Indians against Indians in Indian country. And principles of tribal self-government likewise do not preempt state jurisdiction here."). For comprehensive treatment of the issue, see generally Lauren van Schilfgaarde, Alia Hoss, Ann E. Tweedy, Sarah Deer & Stacy Leeds, Tribal Nations and Abortion Access: A Path Forward, 46 Harv. J.L. & Gender (forthcoming 2023), https://ssrn.com/abstract=4190492 [https://perma.cc/NT4X-JGDT] (exploring the challenges, and ethical problems, of utilizing tribal lands for abortion travel).

485. See supra notes 280–288. The FDA could also permit medication abortion through twelve weeks of pregnancy, which is supported by evidence of the drug's effectiveness through that time. The FDA has done this previously, in 2016, when it approved mifepristone use through ten, rather than seven, weeks. Donley, supra note 70, at 641.

486. Donley, supra note 70, at 638.

487. Id. at 641–42 n.104.

488. See generally David S. Cohen & Krysten Connon, Living in the Crosshairs: The Untold Stories of Anti-Abortion Terrorism (2015) (chronicling the ways in which abortion providers are targeted by antiabortion extremists).

489. Carrie N. Baker, Online Abortion Provider and 'Activist Physician' Michele Gomez Is Expanding Early Abortion Options Into Primary Care, Ms. Mag. (Jan. 19, 2022), https://msmagazine.com/2022/01/19/online-abortion-primary-care-doctor-michele-gomez-mya-network/ [https://perma.cc/ZQ27-GS5Q].

the FDA's additional informed consent requirement—the Patient Agreement Form, which patients sign before beginning a medication abortion—remains in place despite duplicating what providers already communicate to patients.[490]

As discussed in the previous Parts, the FDA re-evaluated the mifepristone REMS in December 2021, removing the requirement that patients pick up the drug in person and creating two additional ways that patients can receive mifepristone.[491] The first is through the mail, supervised by a certified provider, which was a practice over most of the pandemic.[492] The second is new: dispensation by a pharmacy.[493] The FDA, however, added a new REMS element that pharmacies also must seek certification to dispense mifepristone.[494] The path ahead for pharmacies is not clear as the FDA has not yet defined the process of pharmacy certification.

Based on the pharmacy certification requirements for other drugs, a range of requirements could be enacted.[495] For example, the FDA could require pharmacies to apply for an authorization number that marks the prescription as valid for a certain period of time or limit the number of times that a drug is dispensed to an individual.[496] Other requirements

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490. Rachel Rebouché, Greer Donley & David S. Cohen, Opinion, Progress in the Bid to Make Abortion Pills More Widely Available, Bos. Globe (Dec. 22, 2021), https://www.bostonglobe.com/2021/12/22/opinion/progress-bid-make-abortion-pills-more-widely-available/ (on file with the *Columbia Law Review*).

491. FDA, Questions and Answers, supra note 71.

492. Id.

493. Id.

494. FDA, Cavazzoni Letter, supra note 76, at 6–7.

495. Other drugs are subject to pharmacy certification under a REMS, and those requirements vary in what additional dispensation and administrative restrictions they impose. See, e.g., FDA, NDA 22-405 Caprelsa (Vandetanib): Risk Evaluation and Mitigation Strategy 1–4 (2017), https://www.accessdata.fda.gov/drugsatfda_docs/rems/Caprelsa_2017-05-16_REMS_Document.pdf [https://perma.cc/U892-WULJ] (describing the certification requirements for healthcare facilities dispensing Capresla, a medication used to treat medullary thyroid cancer); FDA, Risk Evaluation and Mitigation Strategy (REMS) Document: Adasuve (Loxapine) REMS Program 2 (2022), https://www.accessdata.fda.gov/drugsatfda_docs/rems/Adasuve_2022_01_27_REMS_Document.pdf [https://perma.cc/6HPS-U45V] (describing the certification requirements for healthcare facilities dispensing Adasuve, an antipsychotic medication).

496. Cf. FDA, Risk Evaluation and Mitigation Strategy (REMS) Document: Pomalyst (Pomalidomide) REMS Program 1–3 (2021), https://www.accessdata.fda.gov/drugsatfda_docs/rems/Pomalyst_2021_08_05_REMS_Document%20.pdf [https://perma.cc/8P6T-MQJ3] (describing limitations on pharmacists' fulfilment of prescriptions of Pomalyst, a birth-control medication). This rule might attempt to stop a pregnant abortion rights supporter from obtaining multiple prescriptions with the purpose of sending the drugs to people in other states. It could also impede advance provision of medication abortion, the availability of which could vary by state law. See Carrie N. Baker, Online Abortion Provider Robin Tucker: "I'm Trying to Remove Barriers . . . . It Feels Great to Be Able to Help People This Way", Ms. Mag. (Jan. 4, 2022),

might be imposed as well, such as a system that documents compliance with the REMS, ongoing education and training for pharmacists, and counseling for patients.

If the FDA wants to expand abortion access, it can ensure that the yet-to-be-determined pharmacy certification process reflects mifepristone's safety and imposes minimal requirements. As is true for provider certification, overly burdensome obligations on pharmacies will discourage them from carrying mifepristone.[497] A simple way to implement certification is to have a pharmacy representative attest, when ordering mifepristone from the distributor, that there are licensed pharmacists at the pharmacy or within the pharmacy chain willing to dispense it.

For mailed medication abortion, two mail-order pharmacies dispense mifepristone. The leading entity is Honeybee Health, which started in 2018 and began dispensing medication abortion when the in-person requirement was suspended during the pandemic.[498] Operating in a space of regulatory transition while the FDA defines pharmacy certification, Honeybee Health has seen an "80% increase in demand for abortion pills, which now make up roughly 30% of the company's orders."[499] Restrictions that make pharmacy certification easier could entice some pharmacies to carry medication abortion, but, of course, the nature of the certification process is only one factor. Pharmacies may not be willing to risk the costs of stigma and harassment unless those costs decrease and the benefits—symbolic, political, or financial—increase.[500] At the moment, there are few signs that retail pharmacies are eager to dispense mifepristone.[501] In June 2022, the five largest pharmacy companies declined to comment on whether they would seek certification. CVS indicated it would assess future

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https://msmagazine.com/2022/01/04/online-abortion-pills-provider-robin-tucker-virginia-maryland-maine/ [https://perma.cc/4VNX-ECX4] (highlighting a current obstacle in obtaining advance provision abortion pills).

497. Rebouché, Remote Reproductive Rights, supra note 34, at 8 (noting how pharmacy certification, depending on the process, could deter pharmacies from carrying mifepristone).

498. Abigail Abrams, Meet the Pharmacist Expanding Access to Abortion Pills Across the U.S., TIME (June 13, 2022), https://time.com/6183395/abortion-pills-honeybee-health-online-pharmacy/ [https://perma.cc/T9VU-AM3T].

499. Id.

500. When the draft *Dobbs* opinion leaked in May 2022, many companies made it publicly known they would cover travel expenses for employees required to travel out of state for abortion care. That number has only increased since the final opinion was issued on June 24, 2022. In its statement, for example, Levi Strauss sought to rally private industry support: "Given what is at stake, business leaders need to make their voices heard." Emma Goldberg, These Companies Will Cover Travel Expenses for Employee Abortions, N.Y. Times (Aug. 19, 2022), https://www.nytimes.com/article/abortion-companies-travel-expenses.html (on file with the *Columbia Law Review*).

501. Donley, supra note 70, at 646–47.

facts once permitted to dispense mifepristone, and Walgreens implied that it will not seek pharmacy certification.[502]

In sum, easing or eliminating FDA restrictions on medication abortion would make it easier for new providers to practice in abortion-supportive states and pharmacies to dispense it, helping them scale up to meet the demand of out-of-state patients traveling there. Because this decision is part of the FDA's ordinary functions, the agency would not need to rely on any novel legal theories to act.[503] Any challenge to the agency's action here, which would inevitably come, would face legal obstacles.[504]

Second, general barriers to telehealth impede access to remote medication abortion care, which the federal government, along with states, can work to improve. Specifically, the Biden Administration could deploy its power to declare a public health emergency or engender action through a series of executive orders.[505] The executive branch used both types of measures in recent years as responses to the COVID-19 pandemic.

During the pandemic, telehealth exploded across many healthcare sectors and nationally, in part because of the support of federal orders.[506] Despite this growth, there remains unequal access to telehealth, mirroring broader disparities in the distribution of health resources.[507] Most abortion patients live at or below the federal poverty line and indicate that their chief reason for terminating a pregnancy is the inability to afford the costs of raising a child.[508] Those same patients need access to a telehealth-

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502. Cynthia Koons, The Abortion Pill Is Safer Than Tylenol and Almost Impossible to Get, Bloomberg (Feb. 17, 2022), https://www.bloomberg.com/news/features/2022-02-17/abortion-pill-mifepristone-is-safer-than-tylenol-and-almost-impossible-to-get?leadSource=uverify%20wall (on file with the *Columbia Law Review*) (last updated May 3, 2022).

503. Ironically, if the FDA removed the entire REMS, this might undercut the preemption argument made in this Part's first section, see supra section III.A, but it would nevertheless provide broader access to everyone.

504. Donley, supra note 70, at 688–89 (noting that any move by the FDA to remove or relax mifepristone's REMS would face administrative law challenges that would be "unlikely to succeed" because "[t]he FDA's decision would be realigning mifepristone with its treatment of similar drugs," insulating it from an arbitrary and capricious challenge).

505. White House, Protecting Access, supra note 26.

506. See Cason D. Schmit, Johnathan Schwitzer, Kevin Survance, Megan Barbre, Yeka Nmadu & Carly McCord, Telehealth in the COVID-19 Pandemic, *in* Assessing Legal Responses to COVID-19, at 123, 128 (Scott Burris, Sarah de Guia, Lance Gable, Donna E. Levin, Wendy E. Parmet & Nicolas P. Terry eds., 2020) ("Fifteen states expanded the authority to provide telehealth across state lines.").

507. See id. at 123 (noting that "[t]echnology access, digital literacy, and reliable internet coverage are major barriers to telehealth . . . experienced disproportionately among . . . the elderly, persons of color, and individuals with low socioeconomic status"); see also David A. Hoffman, Increasing Access to Care: Telehealth During COVID-19, 7 J.L. & Bioscis. 1, 2 (2020) (describing similar barriers to telehealth).

508. See Guttmacher Inst., Abortion Patients, supra note 52 ("Nearly half of abortion patients in the United States are poor and another 26% are low income.").

capable device, high-speed data transmission, and digital literacy. Take for instance unequal access to broadband internet service.[509] The "digital divide" disproportionately affects communities of color and low-income individuals as well as rural populations that lack the infrastructure that can make telehealth methods broadly available.[510] Most telehealth services are available only in English, though an increasing number of providers deliver care in Spanish, and people with visual or cognitive difficulties or other disabilities may have trouble interfacing via video.[511] The federal government could use its spending power, as it did over the course of the pandemic, to invest in the infrastructure that makes telemedicine work.[512] The ripple effects of doing so would benefit those seeking abortion via telehealth.

These efforts depend on state cooperation, however, and here the federal government would have to play an advocacy role in promoting permissive state telehealth policies.[513] During the pandemic, with the assistance of federal agencies like HHS, states began to recognize various modes of telehealth delivery, such as over the telephone for some services, thereby removing the requirement of a video link.[514] Also with federal

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509. See Betsy Lawton, COVID-19 Illustrates Need to Close the Digital Divide, *in* 2 COVID-19 Policy Playbook: Legal Recommendations for a Safer, More Equitable Future 198, 198 (Scott Burris, Sarah de Guia, Lance Gable, Donna E. Levin, Wendy E. Parmet & Nicolas P. Terry eds., 2021).

510. See Alexandra Thompson, Dipti Singh, Adrienne R. Ghorashi, Megan K. Donovan, Jenny Ma & Julie Rikelman, The Disproportionate Burdens of the Mifepristone REMS, 104 Contraception 16, 18 (2021).

511. Jorge A. Rodriguez, Altaf Saadi, Lee H. Schwamm, David W. Bates & Lipika Samal, Disparities in Telehealth Use Among California Patients With Limited English Proficiency, 40 Health Affs. 487, 490 (2021); Daniel Young & Elizabeth Edwards, Telehealth and Disability: Challenges and Opportunities for Care, Nat'l Health L. Program (May 6, 2020), https://healthlaw.org/telehealth-and-disability-challenges-and-opportunities-for-care/ [https://perma.cc/8ZPN-VKN8] ("A provider may be inclined to visually examine patients with a videoconference, but the movements and positioning often necessary for a physical exam may be hard for people with mobility and sensory disabilities to perform.").

512. See, e.g., Devin Coldewey, FCC Enacts $200M Telehealth Initiative to Ease COVID-19 Burden on Hospitals, TechCrunch (Apr. 2, 2020), https://techcrunch.com/2020/04/02/fcc-enacts-200m-telehealth-initiative-to-ease-covid-19-burden-on-hospitals/ [https://perma.cc/2L3X-UC5G] (discussing program to help "eligible health care providers purchase telecommunications services, information services, and devices necessary to provide critical connected care services" during the pandemic).

513. Cf. Hudson Worthy, The New Norm in Healthcare: Telehealth, 15 Charleston L. Rev. 549, 550, 555–58 (2020) (noting that with the pandemic "our country was forced to adopt telehealth" but that the currently governing regime suffers from a "lack of uniformity in the regulations and laws of each state").

514. See Kyle Y. Faget, Telehealth in the Wake of COVID-19, 22 J. Health Care Compliance 5, 7 (2020) (discussing federal and state action to expand available telehealth modalities, including through HHS efforts); Schmit et al., supra note 506, at 125–29 (discussing federal measures to recognize additional telehealth modalities and surveying states that have done so).

guidance, and with federal protection from liability, many states waived and some states repealed rules limiting the reach of telehealth, such as rules regulating how patient–provider relationships are established and rules limiting the ability of out-of-state providers to practice in state.[515] Many of these interventions stemmed from powers accorded to the Administration to declare a public health emergency. Although some have called for President Biden to declare a public health emergency in response to *Dobbs*, at the time of writing, the Administration has not taken this step but is evaluating statutes that grant the President such powers and considering the challenges that any public health declaration would certainly face in courts.[516]

Third, the federal government, along with supportive states, can work to improve the national distribution of abortion providers by making it easier to practice medicine across states. Over the past few years, an increasing number of states permitted physicians to treat out-of-state patients, using telemedicine, if providers were in good standing in their home jurisdiction and registered with state boards.[517] Although most pandemic-related waivers of state telehealth restrictions have expired,[518] the

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515. See Faget, supra note 514, at 7–9.

516. Associated Press, Biden Says He's Mulling Health Emergency for Abortion Access, Politico (July 10, 2022), https://www.politico.com/news/2022/07/10/biden-health-emergency-abortion-access-00044936 [https://perma.cc/F5MJ-DXEU]. Under this approach, the Biden Administration could declare a public health emergency under a statute like the Public Readiness and Emergency Preparedness (PREP) Act. See 42 U.S.C. § 247d-6d to -6e (2018). Under the PREP Act, the Secretary of HHS can issue a declaration that offers immunity from liability, except for willful misconduct, for "entities and individuals involved in the development, manufacture, testing, distribution, administration, and use of . . . countermeasures" to fight an epidemic or pandemic. Public Readiness and Emergency Preparedness (PREP) Act, HHS, https://aspr.hhs.gov/legal/PREPact/Pages/default.aspx (on file with the *Columbia Law Review*) (last visited Sept. 4, 2022). Countermeasures are approved products that assist in fighting an epidemic or pandemic, which can include material assistance and drugs. See 42 U.S.C. § 247d-6d(i)(1)(A), (i)(7). So, a declaration under the Act could "enable out-of-state prescribing and dispensing of medications for abortion for those in states with abortion bans." Nancy Northup, Opinion, Biden Must Declare a Public Health Emergency for Abortion—Immediately, Wash. Post (June 30, 2022), https://www.washingtonpost.com/opinions/2022/06/30/declare-abortion-public-health-emergency (on file with the *Columbia Law Review*). The Act does not define epidemic or pandemic, so application of the law would turn on making the case for why abortion bans and the abortion care shortage result in widespread and dire health consequences for many people. See Jennifer L. Piatt, Summer Ghaith & Madisyn Puchebner, The Network for Pub. Health L., Abortion Access: A Post-*Roe* Public Health Emergency 4 (2022), https://www.networkforphl.org/wp-content/uploads/2022/06/Western-Region-Memo-Abortion-and-Public-Health-Emergencies.pdf [https://perma.cc/83FW-XNAX].

517. See Kate Nelson, "To Infinity and Beyond": A Limitless Approach to Telemedicine Beyond State Borders, 85 Brook. L. Rev. 1017, 1024–27 (2020).

518. See Juan J. Andino, Ziwei Zhu, Mihir Surapaneni, Rodney L. Dunn & Chad Ellimoottil, Interstate Telehealth Use by Medicare Beneficiaries Before and After COVID-19 Licensure Waivers, 2017–20, 41 Health Affs. 838, 839 (2022); Katherine Fang & Rachel

growing acceptance of telehealth across state lines has prompted calls for uniform policy, particularly as related to physician licensure.[519] Thirty-four states are currently members of the Interstate Medical Licensure Compact (IMLC), which "offers a voluntary, expedited pathway to licensure for physicians who qualify."[520] Three additional states have legislation pending.[521] The IMLC utilizes a "mutual recognition" model that aims to increase access to healthcare for patients in rural and underserved areas.[522] The IMLC does not grant automatic cross-border licensure but makes the process of obtaining practice permission in another state easier.[523] Professionals obtaining licensure through the IMLC "still face in-state barriers because approval ultimately remains within the individual state medical board's discretion and physicians still need to retain a license in every state they practice in."[524] Reiterating a theme of this Article, polarized approaches to abortion regulation could undermine the emerging consensus among states—states across the political spectrum—that cross-state medical care should be promoted. As the shield laws and travel bans explored in Part II illustrate, the *Dobbs* era will be one marked by animosity between states rather than the cooperation that has informed telehealth expansion and licensure compacts.

Nevertheless, among abortion-permissive states, license compacts could improve interstate abortion provision, thus blunting the effect of state laws and state borders. For instance, a pool of providers across

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Perler, Comment, Abortion in the Time of COVID-19: Telemedicine Restrictions and the Undue Burden Test, 32 Yale J.L. & Feminism 134, 135 (2021); Kerri Pinchuk, Note, California Policy Recommendations for Realizing the Promise of Medication Abortion: How the COVID-19 Public Health Emergency Offers a Unique Lens for Catalyzing Change, 18 Hastings Race & Poverty L.J. 265, 277 (2021).

519. Nathaniel M. Lacktman, Alexis Finkelberg Bortniker, Thomas B. Ferrante, Aaron T. Maguregui & Jennifer J. Hennessy, Top 5 Telehealth Law Predictions for 2021, Nat'l L. Rev. (Jan. 12, 2021), https://www.natlawreview.com/article/top-5-telehealth-law-predictions-2021 [https://perma.cc/6G7G-XH22] ("The status quo (i.e., profession-specific interstate compacts and state-by-state patchwork legislative efforts) has left many digital health stakeholders unimpressed, frustrated, and increasingly searching for an alternate solution.").

520. A Faster Pathway to Physician Licensure, Interstate Med. Licensure Compact, https://www.imlcc.org/a-faster-pathway-to-physician-licensure/ [https://perma.cc/ZB3F-9KJF] (last visited Sept. 4, 2022); see also Eli Y. Adashi, I. Glenn Cohen & Winston L. McCormick, The Interstate Medical Licensure Compact: Attending to the Underserved, 325 J. Am. Med. Ass'n 1607, 1607–08 (2021) (discussing the benefits of the IMLC's overhaul of the interstate licensure process for telemedicine).

521. See Participating States, Interstate Med. Licensure Compact, https://www.imlcc.org/participating-states/ [https://perma.cc/6FS6-Q338] (last visited Sept. 4, 2022).

522. Nelson, supra note 517, at 1038.

523. See id. at 1037–38.

524. Id. at 1038. Additionally, only physicians belonging to the American Board of Medical Specialties or the American Osteopathic Association's Bureau of Osteopathic Specialists are eligible for IMLC. Id.

abortion-supportive states could better manage the demand in those states. This pooling of resources would reduce pressure on individual abortion providers, especially those in states immediately abutting antiabortion states, who will likely see more patients traveling from antiabortion states. Thus, if Illinois experiences an increase in patients due to its proximity to Kentucky (or other antiabortion states), providers in Maine with permission to practice in Illinois could offer early abortions by telemedicine to those in the first ten weeks, freeing Illinois-based providers to focus their attention on the procedural abortions after ten weeks. Licensure compacts will also improve flexibility. If abortion providers in Kentucky are now unable to perform abortions in Kentucky, they could become licensed in other states that permit telehealth for abortion and provide abortions to patients scattered throughout abortion-supportive states, even if they remain in Kentucky.[525]

In July 2022, the Uniform Law Commission (ULC) approved a model act on telehealth for states to adopt.[526] The model act creates a registration process for out-of-state practitioners seeking to practice telehealth in a patient's resident state. Under this process, registered out-of-state physicians would have the same privileges as in-state physicians, as would physicians who are subject to an interstate compact or who consult with a practitioner who has "a practitioner-patient relationship with the patient."[527] The scope of care is broadly defined under the draft act: "A practitioner may provide telehealth services to a patient located in this state if the services are consistent with the practitioner's scope of practice in this state, applicable professional practice standards in this state, and requirements and limitations of federal law and law of this state."[528]

A few aspects of the ULC's model act are noteworthy for the coming questions about how states might regulate telehealth for medication abortion by regulating telehealth services, licensure, and professional discipline generally. First, the model act tracks the currently governing standard of care in telehealth, which is to identify the controlling state law as the law where the patient is. As Part II noted, Massachusetts enacted a shield law that applies "regardless of the patient location"[529] and other

525. One risk, however, would be if Kentucky passed a law or issued a policy through its medical board that providing abortion services anywhere in the United States could subject the provider with a Kentucky license to disciplinary action. Section II.D and the remainder of this section discuss the ramifications of disciplinary actions for licensure and malpractice insurance.

526. Unif. Telehealth Act (Unif. L. Comm'n 2022).

527. Id. § 6(a)(3)(A). In addition, an out-of-state physician may provide telehealth services "pursuant to a previously established practitioner-patient relationship" so long as the services are provided within one year of the last time the doctor provided healthcare to the patient. Id. § 6(a)(3)(C). The commentary explains this provision allows out-of-state practitioners to provide "follow-up care" to patients through remote means. Id. § 6 cmt. 5.

528. Id. § 4(a).

529. See discussion supra section II.D.

jurisdictions may follow suit or define care as where the provider is. If care is defined as occurring where the provider was, at least in the abortion context, it would change what law governs. There is a catch, however, under the model act, which seeks to represent common practices and standards across states. The act includes an exception for state-banned healthcare, precluding "provision of health care otherwise regulated by federal law or law of this state."[530] Taken on its face, this would apply to abortion bans unless an exception for abortion was made or the relevant care is defined by the location of the provider. (And a further complication: Section 4 of the model act forbids any law treating telehealth differently than in-person care except for prescribing controlled substances, thus a carve out for telehealth for abortion may contradict the terms of section 4.)[531] In addition, the model act could exclude providers from interstate registration if they are subject to disciplinary investigation in any state. Without clarification, there could be a conflict with shield laws that seek to protect providers from in-state repercussions of disciplinary actions taken in other states.

There is a similar conflict between shield laws and the IMLC. The IMLC, when enacted by a state, currently requires that state to recognize and act on the disciplinary actions taken by other member states.[532] Although those provisions are currently under review by the IMLC Commission,[533] member states agree when becoming part of the IMLC

530. Unif. Telehealth Act § 4(b). A previous, now deleted, comment to this section listed abortion restrictions as a relevant example. The comment stated: "[S]tate statutes restricting or prohibiting the prescription of abortion-inducing medications or other controlled substances through telehealth will continue to apply." Unif. Telehealth Act § 4 cmt. (Unif. L. Comm'n, Draft June 28, 2021).

531. See Unif. Telehealth Act § 6 cmt. 5 (Unif. L. Comm'n 2022) ("Out-of-state practitioners must be mindful . . . that under section 4(a), any requirements with respect to the delivery of health care within this state will apply, including . . . limitations on the prescription of controlled substances.").

532. See Interstate Med. Licensure Compact §§ 8–10 (Interstate Med. Licensure Compact Comm'n 2015) (providing, for example, in Section 10(b) that "[i]f a license . . . in the state of principal license is revoked . . . then all [member board] licenses . . . shall automatically be placed, without further action necessary by any member board, on the same status").

533. Proposed amendments to the IMLC law would replace mandatory language with permissive language—language that allows, but does not require, a member medical board to act when the state of principal license or another member state has revoked, surrendered, suspended, or relinquished a license. See Interstate Med. Licensure Compact Comm'n, Rule on Coordinated Information System, Joint Investigations and Disciplinary Actions 7 (2022), https://www.imlcc.org/wp-content/uploads/2022/10/IMLCC-Rule-Chapter-6-Coordinated-Information-System-Joint-Investigations-and-Disciplinary-Actions-Adopted-November-16-2018-Rulemaking-Hearing-Draft-11-8-2022.pdf [https://perma.cc/3TER-WTAX] (featuring proposed language that a state "may terminate, reverse, or rescind such automatic action" as is triggered under § 10(b) or § 10(d) of the Compact whereby disciplinary action against a physician in one member state can automatically effect or authorize the same discipline in another member state). The American Medical Association requested that the IMLC Commission provide further amendments addressing potential

that "[a]ny disciplinary action taken by any member board against a physician licensed through the Compact shall be deemed unprofessional conduct which may be subject to discipline by other member boards . . . ."[534] Thus, providers with licenses under the IMLC open themselves up to discipline by all member states' boards. Reciprocity of disciplinary actions, of course, helps member states to police bad or negligent behavior of physicians who cross state lines. But whereas there has traditionally been alignment among state medical practice acts, after *Dobbs*, states vary widely on abortion's legality and on exceptions to abortion criminalization.[535] Medical boards in states that ban abortion might, under very broad language of what constitutes unethical conduct, seek to penalize a provider with an in-state license for care that is provided legally out of state.[536] Shield laws attempt to protect those providers, but the current provisions of the IMLC might undermine shield laws, especially when compacts seek to preempt conflicting state laws.

The ULC's model act and the IMLC spotlight the complexities inherent in mapping abortion care onto policies that govern telehealth, licensure, and discipline across the board. Shield laws target some of those complications, but a word of caution is worth repeating. Although providers' home state's laws may seek to protect them from penalties imposed by other states, shield laws may not be able to fully insulate them from all negative consequences, especially when professional discipline is involved.[537] And any travel outside the state may be high risk. For example, Kentucky courts could hear a civil suit and enter a default judgment against a provider, though evidence would be difficult to amass if the shield laws operate as expected and no one agrees to cooperate. For reasons discussed in Part II, pulling a nonresident provider into a state like Kentucky for criminal prosecution could be difficult. But if that person travels to Kentucky—even accidentally (e.g., their flight to California has an emergency landing there)—Kentucky could easily arrest them.

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conflicts among member states with differing abortion laws so "that each state has the authority over the practice of medicine within its borders and does not have the authority to regulate the practice of medicine in other states." Letter from James L. Madara, Chief Exec. Officer, Am. Med. Ass'n, to Marschall S. Smith, Exec. Dir., Interstate Med. Licensure Compact Comm'n 2 (Sept. 19, 2022), https://www.imlcc.org/wp-content/uploads/2022/09/Comments-Rule-Chapter-6-American-Medical-Association.pdf [https://perma.cc/H4BT-J2VG].

534. Interstate Med. Licensure Compact § 10(a).

535. See supra Part I.

536. Some states have provisions in their licensure laws that allow medical boards to discipline a provider for broad reasons and/or for actions in another state regardless of whether those actions are legal in the state in which they occurred. See, e.g., W. Va. Code Ann. § 11-1A-12.1.j (LexisNexis 2022) (providing grounds for discipline for "any act contrary to honesty, justice or good morals, whether the same is committed in the course of his or her practice or otherwise and whether committed within or without this State").

537. See supra section II.D.

Moreover, in the scenario where a provider has a default judgment or disciplinary proceeding against them in another state, three dilemmas arise. First, under the Full Faith and Credit Clause, only in some circumstances can a state decide to ignore a judgment entered against one of its residents in another state, even if that resident never stepped foot in the other state, but that state nonetheless established jurisdiction over the provider.[538] Second, providers' home states may have little power to stop creditors from attacking the assets of providers if unpaid money judgments from other states are not satisfied.[539] And, third, related to disciplinary action, the medical boards in other states in which a provider has a license but that do not have shield laws, assuming the home state has attempted to shield the person from disciplinary charges, can take account of legal sanctions anywhere in the country, with potential effects for the provider's good standing and malpractice insurance costs in that other state. Thus, even if supported by their home state, providers looking to engage in cross-border care would need to consider restricting future travel to avoid criminal prosecution and might still risk some civil and professional consequences.

Fourth, and finally, the federal government could expand access to medication abortion, and all abortion, by supporting interstate travelers, removing unnecessary abortion restrictions that create barriers to efficient care, and working to improve the rate and efficiency of reimbursement for insurance coverage of abortion, both private and public.[540] Senators Elizabeth Warren, Patti Murray, and many others urged the Administration in a June 2022 letter to secure material support for travel and related expenses: "Federal agencies could explore opportunities to provide vouchers for travel, child care services, and other forms of support for individuals seeking to access abortion care that is unavailable in their home state."[541] Because these measures do not fund abortion services, they fall outside of the Hyde Amendment's reach. Other resources, marshaled through federal agencies with varying powers and expertise, could be used to attempt to soften the material consequences for abortion patients after *Dobbs*.[542] Any efforts to streamline care, remove barriers, and increase the number of abortion providers will help all patients.

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538. See supra notes 259–264 and accompanying text.

539. See 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4467 n.14 (3d ed. 2022).

540. See David S. Cohen, Greer Donley & Rachel Rebouché, Opinion, States Want to Ban Abortions Beyond Their Borders. Here's What Pro-Choice States Can Do., N.Y. Times (Mar. 13, 2022), https://www.nytimes.com/2022/03/13/opinion/missouri-abortion-roe-v-wade.html (on file with the *Columbia Law Review*) (noting that "[a]bortion providers also will need protection from threats to their medical licenses and insurance status").

541. See Senate Letter, supra note 26, at 2.

542. For example, the Centers for Medicare & Medicaid Services could ensure, as a condition of participation, that Hyde-compliant abortions are performed at participating

The federal government, with state cooperation in some areas, can improve access to medication abortion and telehealth for abortion; doing so would have collateral effects in antiabortion states, regardless of their opposition. As early abortion access becomes more portable, it will be easier to obtain for everyone. Patients who travel from antiabortion states to obtain an abortion at a brick-and-mortar clinic will find providers with greater capacity. Others who cross state lines to access abortion will have an easier time doing so because they can use telemedicine just over the border or at a friend's house instead of being bound to the location of a clinic. In clinical spaces, facilities are emerging at locations that ease travel, such as near airports or land borders.[543] And yet others who want to remain in antiabortion states might find more options to explore, including mail forwarding and "doctors of conscience,"[544] if they are willing to take on the serious legal risks those measures include. As a result, the interjurisdictional conflicts described throughout this Article will intensify as antiabortion states' policies are thwarted by the efforts of the federal government and abortion-supportive states.

CONCLUSION

This Article identifies seismic shifts in abortion law and practice that are coming now that the Supreme Court has abandoned *Roe*. The future will be one of interjurisdictional conflict, in all the ways identified here (and in many ways yet to be considered). But within these identified conflicts lie opportunities to untether abortion access to the pronouncement of constitutional abortion rights. As discussed throughout this Article, these opportunities include shielding abortion providers in abortion-supportive states from out-of-state investigations, lawsuits, or prosecutions; preempting state laws that contradict federal laws and regulations; providing abortion services on federal land; further loosening federal restrictions on medication abortion; and advancing telabortion through licensure and telemedicine infrastructure.

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hospitals and other facilities in every state. Medicare Coverage Database: Abortion, Ctrs. for Medicare & Medicaid Servs., https://www.cms.gov/medicare-coverage-database/view/ncd.aspx?NCDId=127&ncdver=2&bc=AAAAgA [https://perma.cc/X3RS-AMDQ] (last visited Sept. 4, 2022) (stating that abortions are covered Medicare procedures in cases of rape or incest and when "a woman suffers from a physical disorder, physical injury, or physical illness . . . that would, as certified by a physician, place the woman in danger of death unless an abortion is performed").

543. Jamie Ducharme, New Abortion Clinics Are Opening Near Airports and State Borders, TIME (June 9, 2022), https://time.com/6185519/abortion-clinics-travel-state-borders/ [https://perma.cc/M23N-8KYA].

544. Carole Joffe, Doctors of Conscience: The Struggle to Provide Abortion Before and After *Roe v. Wade* (1995) (exploring the stories of "doctors of conscience"—physicians motivated by their conscience to perform or facilitate abortion care).

There is no guarantee that all, or even any, of these strategies will work, especially because some of them will rely on courts that might be hostile to abortion rights, especially the current Supreme Court;[545] other options involve risks and collateral consequences that people may not be willing to take. But thinking about interjurisdictional approaches to abortion access is important now more than ever because the abortion debate, and the conflicts it inspires, are in the process of fundamentally changing. For half a century, the antiabortion movement has thrown whatever it can muster against the wall, hoping something will stick and without fear of defeat. They have lost many of their battles over the years but have also had significant victories. They have learned lessons, relied on lower court and dissenting opinions, lobbied state legislators, influenced federal policy, and continued to press their novel, often legally tenuous, approaches. This steely headed approach, coupled with the luck of Supreme Court vacancies,[546] has put them in the position to usher in a post-*Roe* era. Without the protection of *Roe*, the abortion rights movement will be forced to emulate at least some parts of this approach and press their own novel strategies in the coming years[547]—strategies that will rely less on respecting borders and more on infiltrating them on federal land, preempting them with federal laws, or ignoring them altogether.

The coming interjurisdictional conflicts identified here clarify the stakes for the future of abortion access. But in those conflicts, there is also ample possibility for abortion advocates to reimagine law, policy, and activism in a post-*Roe* country. These coming battles will divide the nation and define this new abortion era but may eventually lead to abortion laws and practices that are built to last.

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545. If the Supreme Court is willing to overturn a half-century of precedent in *Dobbs*, the Court also might refuse to apply any of the precedent or doctrine discussed throughout this Article, no matter how well established.

546. See David S. Cohen, Chaos and the United States Supreme Court, LEX, 2021, at 35, https://issuu.com/drexelkline/docs/lex4_full_magazine_r6 (on file with the *Columbia Law Review*) (reviewing the randomness of Supreme Court vacancies).

547. See generally David S. Cohen, Greer Donley & Rachel Rebouché, Re-Thinking Strategy After *Dobbs*, 75 Stan. L. Rev. Online 1, 14 (2022) ("A model suited for 2022 and beyond will require a big tent that capitalizes on novel yet varied approaches from all of the existing organizations and welcomes newcomers into the fold, even if they disagree and even if there is no guarantee of success.").

NOTES

DOUBLING DOWN ON DUE PROCESS: TOWARD A GUARANTEED RIGHT TO LEGAL COUNSEL IN JAIL DISCIPLINARY PROCEEDINGS

*Nkechi N. Erondu**

Wolff v. McDonnell *is the seminal case outlining the due process rights due to incarcerated people in disciplinary hearings. The Court held that incarcerated people are entitled to the minimum procedures appropriate under the circumstances and required by the Due Process Clause but stopped short of adopting the full panoply of procedural safeguards. Namely, the Court found that incarcerated people have no due process right to confront and cross-examine adverse witnesses or to appointed or retained counsel, believing that extending such rights would undermine institutional safety and correctional goals.*

This Note advocates for a reexamination of the due process protections afforded to pretrial jail populations—specifically the right to counsel in jail disciplinary proceedings. It demonstrates that the Wolff *Court failed to adequately consider all the interests of an incarcerated person by refusing to impose the requirement of counsel in disciplinary hearings. Even further, this Note contends that in the era of COVID-19, where the harms of pretrial detention generally, and solitary confinement more specifically, are well-documented, an unlimited right to counsel is needed now more than ever in jail disciplinary hearings.*

INTRODUCTION 102
I. DISCIPLINARY HEARINGS AND DUE PROCESS 106
A. Minimum Protections Established Under *Wolff* 106
1. Advance Written Notice 108
2. Written Statement of Fact Findings 110
3. Call Witnesses and Present Documentary Evidence 113
B. The Unavailable Rights 115

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1. Confrontation and Cross-Examination 115
2. Retained or Appointed Counsel 117
II. WHAT THE SYSTEM STANDS TO GAIN: COUNSEL IN FURTHERANCE OF CONSTITUTIONAL AND PENOLOGICAL PRINCIPLES 119
A. Recalibrating the Balancing Test 119
B. Fair Trials and a Fairer Disciplinary System.............................. 121
C. The Right Not to Be Punished 126
III. A FRAMEWORK FOR A GUARANTEED RIGHT TO COUNSEL IN JAIL DISCIPLINARY PROCEEDINGS 131
A. Best Practices From the District of Columbia and State Systems: Leveraging What Works 131
B. Examining Other Practical Concerns Around Provision of Counsel 135
1. Human and Economic Burden... 135
2. Legitimizing the Use of Solitary Confinement 136
CONCLUSION 137

INTRODUCTION

The dehumanizing conditions of U.S. jails have been a topic of concern over the past few years, but the COVID-19 pandemic has laid bare the dire need for widespread reexamination of correctional policies and practices.[1] In jails, where social distancing is nearly impossible and overcrowding is persistent,[2] incarcerated people are facing deteriorating conditions, including rising violence, self-harm, severe illness, correctional officer use of force, and death.[3] Furthermore, correctional staff shortages,

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1. See Jonah E. Bromwich & Jan Ransom, 10 Deaths, Exhausted Guards, Rampant Violence: Why Rikers Is in Crisis, N.Y. Times (Nov. 8, 2021), https://www.nytimes.com/2021/09/15/nyregion/rikers-island-jail.html (on file with the *Columbia Law Review*) (explaining the history of dysfunction on Rikers Island and the more recent efforts to improve the facilities); Spencer S. Hsu & Paul Duggan, Unacceptable Conditions at D.C. Jail Lead to Plan to Transfer About 400 Inmates, Officials Say, Wash. Post (Nov. 2, 2021), https://www.washingtonpost.com/local/public-safety/dc-jail-inmates-transferred/2021/11/02/b5255388-3be8-11ec-bfad-8283439871ec_story.html (on file with the *Columbia Law Review*) ("The inspection, and the planned removal of federal prisoners, raises questions about the treatment of nonfederal inmates, who make up a vast majority of the jail's population.").

2. Though jails across the country released people at unprecedented rates at the beginning of the COVID-19 pandemic, jail numbers have begun to creep back up to pre-pandemic rates. See Jerry Iannelli, COVID-19 Is Spreading Faster Than Ever. Jail Populations Are Surging, Too, Appeal (Feb. 3, 2021), https://theappeal.org/covid-19-jail-populations-surging/ [https://perma.cc/EGX4-QRYS] ("But now, nearly one year later, COVID-19 is spreading at a higher rate, and the county jail population has instead risen once again.").

3. See Timothy G. Edgemon & Jody Clay-Warner, Inmate Mental Health and the Pains of Imprisonment, 9 Soc'y & Mental Health 33, 35–36 (2018) (finding that overcrowding and

coupled with the pandemic, have exacerbated tensions inside correctional facilities, resulting in overenforcement of disciplinary action, including excessive use of restrictive housing.[4] Though a dearth of research exists regarding the use of disciplinary action in jails, recent research has shown that jails employ restrictive housing as much as, if not more than, prisons.[5]

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punitiveness are correlated with depression and hostility); The Associated Press, New York's Rikers Island Jail Spirals Into Chaos Amid Covid Pandemic, Syracuse.com (Sept. 17, 2021), https://www.syracuse.com/state/2021/09/new-yorks-rikers-island-jail-spirals-into-chaos-amid-covid-pandemic.html [https://perma.cc/4QC2-BK5Y] ("The jail's federal monitor, Steve J. Martin, said in a letter to U.S. District Judge Laura Swain . . . that worsening conditions in the city's jails—rising violence, self-harm, death and use of force by guards—were tied directly to a spike in 'excessive and unchecked staff absences' . . . ."); Katie Rose Quandt & Alexi Jones, Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health, Prison Pol'y Initiative (May 13, 2021), https://www.prisonpolicy.org/blog/2021/05/13/mentalhealth impacts/ [https://perma.cc/FN8C-EHHA] ("Many jails and prisons throughout the country are overcrowded, which makes the inherently negative carceral environment even worse. Overcrowding often means more time in cell, less privacy, less access to mental and physical healthcare, and fewer opportunities to participate in programming and work assignments.").

4. See Christopher Blackwell, In Prison, Even Social Distancing Rules Get Weaponized, The Marshall Project (May 28, 2020), https://www.themarshallproject.org/2020/05/28/in-prison-even-social-distancing-rules-get-weaponized [https://perma.cc/G5NA-D2FB] (describing correctional officers' overuse of solitary confinement); Dana Gentry, Incarcerated Pay Price for Prison System Staffing Shortages, Nev. Current (Oct. 25, 2021), https://www.nevadacurrent.com/2021/10/25/incarcerated-pay-price-for-prison-system-staffing-shortages/ [https://perma.cc/NBC9-P8HF] ("Some inmates complain they've lost good time credits and seen their release dates pushed back because they say they're forced to 'act up' to get the attention of what they say is a bare-boned staff."); Katja Riddersbusch, COVID Precautions Put More Prisoners in Isolation. It Can Mean Long-Term Health Woes, NPR (Oct. 4, 2021), https://www.npr.org/sections/health-shots/2021/10/04/1043058599/rising-amid-covid-solitary-confinement-inflicts-lasting-harm-to-prisoner-health [https://perma.cc/E3C5-U4X9] ("[A]t the height of the pandemic last year, up to 300,000 incarcerated individuals were in solitary . . . ."); Emily Widra & Wanda Bertram, More States Need to Use Their "Good Time" Systems to Get People Out of Prison During COVID-19, Prison Pol'y Initiative (Jan. 12, 2021), https://www.prisonpolicy.org/blog/2021/01/12/good-time/ [https://perma.cc/3R5G-U76Y] ("Shockingly, despite clear evidence that solitary confinement is not a suitable replacement for medical isolation or quarantine, the use of solitary confinement has increased 500% during the pandemic.").

5. See Craig Haney, Joanna Weill, Shirin Bakhshay & Tiffany Lockett, Examining Jail Isolation: What We Don't Know Can Be Profoundly Harmful, 96 Prison J. 126, 131 (2016) ("There are several reasons to believe that solitary confinement . . . is used at least as frequently—if not more often—in jails as in the nation's prisons.").

Restrictive housing, or solitary confinement,[6] should be based on a finding—after a disciplinary hearing[7]—that an incarcerated person violated correctional agency rules or standards.[8] Aspects of disciplinary hearings vary greatly throughout the country.[9] In general, all incarcerated people are subject to disciplinary codes of conduct and may be subject to sanctions if they violate any of the rules.[10] If an incarcerated person is alleged to have violated a rule, a correctional staff member, typically called the reporting officer, will formally charge them by writing an incident report.[11] The charged person will face a hearing body, typically consisting of other correctional officers, and have an opportunity to plead their case.[12] After the presentation of all the evidence, the hearing body will deliberate and then deliver a decision.[13]

The disciplinary process was established in *Wolff v. McDonnell*.[14] Prior to this case, the imposition of punishment was remarkably arbitrary with

6. Restrictive housing usually involves limited interaction with other incarcerated people, limited programming opportunities, and reduced privileges. Disciplinary segregation, punitive segregation, administrative segregation (largely nonpunitive in nature), solitary confinement, Special Housing Units (SHUs), or Intensive Management Units are all terms used to describe restrictive housing. For the purposes of this Note, the terms restrictive housing, disciplinary segregation, and solitary confinement will be used interchangeably. See generally Allen J. Beck, Use of Restrictive Housing in U.S. Prisons and Jails, 2011–12 (2015), https://bjs.ojp.gov/content/pub/pdf/urhuspj1112.pdf [https://perma.cc/3GUK-S4HQ] (discussing the use of restrictive housing in U.S. prisons and jails).

7. Generally, movement of an incarcerated person to restrictive housing occurs after a due process hearing. Circumstances may, however, require the imposition of temporary restrictions on an incarcerated person prior to the due process hearing. This is typically called administrative segregation. While there is an argument to be made about the unconstitutionality of administrative segregation, namely the insidious ways that correctional facilities use administrative segregation as a way to avoid having to provide incarcerated people due process protections, it is not the topic of this Note. See Marie Gottschalk, Staying Alive: Reforming Solitary Confinement in U.S. Prisons and Jails, 125 Yale L.J. Forum 253, 257 (2016) (describing how many states impose no time limits on how long correctional officials can place someone in administrative segregation).

8. See Miranda Berge, Your Rights at Prison Disciplinary Proceedings, *in* A Jailhouse Lawyer's Manual 542, 544 (12th ed. 2021), https://jlm.law.columbia.edu/files/2017/05/30.-Ch.-18.pdf [https://perma.cc/UQ6M-HWGK] ("Prison officials in New York may put a prisoner in a Segregated Housing/Holding Unit (SHU) for a set period of time if they find that the prisoner broke a rule." (footnote omitted)).

9. See id. at 542 (noting that disciplinary proceedings may vary by state).

10. Correctional facilities are required to publish rules governing the conduct of incarcerated people. See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").

11. See infra sections I.A.1–.2.

12. See infra section I.A.3.

13. See infra section I.A.3.

14. 418 U.S. 539 (1974).

no guarantee of notice or a hearing.[15] *Wolff* defined the due process rights of incarcerated people who have been convicted of crimes, but the Court has clarified that its holdings are applicable to those confined in jails pretrial.[16] In *Wolff*, the Supreme Court held that incarcerated people are entitled to due process in disciplinary proceedings that can result in the loss of good-time credit[17] or in punitive segregation.[18] The Court declined to extend the right to counsel to incarcerated people in disciplinary proceedings, however.[19] In justifying its decision, the Court explained that inserting counsel into the disciplinary process would make proceedings more adversarial, undermine correctional goals, cause unnecessary delays, and create practical problems in sufficiently providing counsel at every disciplinary hearing.[20]

This Note will argue for a reexamination of the due process protections afforded to pretrial jail populations under the backdrop of the COVID-19 pandemic—specifically the right to counsel in jail disciplinary proceedings.[21] Part I describes the *Wolff* protections afforded to incarcerated people in disciplinary proceedings and explores how jurisdictions have applied the *Wolff* protections and restrictions. Part II asserts that denying a right to counsel in jail disciplinary proceedings contradicts critical constitutional and penological principles. Part III highlights various state and jurisdictional systems that provide counsel to incarcerated people in jail disciplinary proceedings and examines practical barriers to widespread provision of counsel.

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15. See William Babcock, Due Process in Prison Disciplinary Proceedings, 22 B.C. L. Rev. 1009, 1009 (1981).

16. See Bell v. Wolfish, 441 U.S. 520, 545 (1979) ("[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.").

17. Good-time credit or good time is a statutorily determined sentence reduction provided to incarcerated people who maintain good behavior while in prison or jail. A person can also lose good-time credit for committing disciplinary infractions while incarcerated. See Paul J. Larkin, Jr., Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release, 11 Geo. J.L. & Pub. Pol'y 1, 11 (2013).

18. *Wolff*, 418 U.S. at 539, 557–58, 571 n.19.

19. Id. at 570; see also Baxter v. Palmigiano, 425 U.S. 308, 315 (1976) ("We see no reason to alter our conclusion so recently made in *Wolff* that inmates do not 'have a right to either retained or appointed counsel in disciplinary hearings.'" (quoting *Wolff*, 418 U.S. at 570)).

20. *Wolff*, 418 U.S. at 570.

21. For the purposes of this Note, any reference to people confined in jails specifically refers to people detained pretrial—in other words, people awaiting trial and thus still legally innocent. Though some people held in local jails have been convicted, the large majority—over 80%—have not been convicted. See Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2022, Prison Pol'y Initiative (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/PR7J-ZFJC].

I. DISCIPLINARY HEARINGS AND DUE PROCESS

This Part summarizes the constitutional due process guarantees established under *Wolff*, discusses the Court's rationales for the due process restrictions, and explores the ways in which jurisdictions have applied the *Wolff* standards.

A. *Minimum Protections Established Under* Wolff

In *Wolff v. McDonnell*, Robert O. McDonnell, on behalf of himself and other similarly situated incarcerated people at the Nebraska Penal and Correctional Complex, challenged several of the prison's practices and regulations.[22] McDonnell argued that prison officials engaged in a pattern of retaliation against incarcerated people who petitioned the courts.[23] For example, McDonnell testified that a day after appearing in federal court, he was reassigned from being a clerk-typist in the reception center of the prison to a much less favorable work assignment in the soap factory.[24] McDonnell also challenged the procedure denying all people incarcerated in the Reformatory Unit—a unit designed for first-time nonviolent offenders—access to the law library.[25] Furthermore, McDonnell testified that he and other incarcerated people were reluctant to make use of legal assistants (i.e., incarcerated people who have general knowledge of legal procedure and are appointed by the complex to assist other incarcerated people who are in need of legal assistance) for fear that information provided to the legal assistant would be forwarded to prison administration.[26] And finally, plaintiffs stated that they lost good time for arbitrary reasons such as not wearing socks or failing to shave and that on occasion, when called before the disciplinary committee, McDonnell was not made aware of the charges against him until after he arrived before the committee.[27] McDonnell filed a class action under 42 U.S.C. § 1983 alleging, inter alia, that prison disciplinary proceedings were conducted without regard for procedural or substantive due process[28] in violation of the Due Process Clause of the Fourteenth Amendment.[29]

In resolving the case, the Supreme Court explained the procedural safeguards due to incarcerated people in disciplinary hearings. The Supreme Court held first that an incarcerated person's interest in

22. *Wolff*, 418 U.S. at 542.

23. McDonnell v. Wolff, 342 F. Supp. 616, 619 (D. Neb. 1972).

24. Id.

25. Id. at 620.

26. Id.

27. Id. at 619–20.

28. See Berge, supra note 8, at 542–43 ("Substantive due process means the government must treat people with 'fundamental fairness.' The government cannot interfere with these rights unless it is absolutely necessary for a more important public need." (footnote omitted)).

29. Wolff v. McDonnell, 418 U.S. 539, 542–43 (1974).

disciplinary proceedings is included in the Fourteenth Amendment's due process concept of "liberty."[30] Therefore, an incarcerated person is entitled to at least some minimum procedures appropriate under the circumstances, and the court is required by the Due Process Clause to ensure that the right to a fair hearing "is not arbitrarily abrogated."[31] These minimum procedural requirements were set forth in *Morrissey v. Brewer*, a parole case, and included written notice of the claimed violations of parole, disclosure to the person on parole of evidence against them, opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation), a "neutral and detached" hearing body such as a traditional parole board, and a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.[32]

After making this determination, the *Wolff* Court assessed which protections incarcerated people should receive in disciplinary proceedings. The Court was sure to underscore its view that due process does not require rigid procedures that are universally applicable to every conceivable situation.[33] In the tradition of *Goldberg v. Kelly,*[34] the *Wolff* Court employed a balancing test, weighing the competing interests of the parties to arrive at the minimum due process requirements necessary in prison disciplinary proceedings.[35] The *Wolff* Court placed a great deal of weight on the state's need to maintain order and discipline within a tightly controlled complex that houses people who have violated criminal laws, and it noted the very real potential for retaliation between incarcerated people.[36] The Court recognized that disciplinary hearings inherently involve confrontations between incarcerated people and correctional authorities as well as between incarcerated people who are being disciplined and those who would charge or furnish evidence against them; consequently, the safety of correctional staff and those incarcerated may be compromised.[37]

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30. Id. at 556–57 ("We also reject the assertion of the State that whatever may be true of the Due Process Clause in general or of other rights protected by that Clause against state infringement, the interest of prisoners in disciplinary procedures is not included in that 'liberty' protected by the Fourteenth Amendment.").

31. Id. at 557.

32. 408 U.S. 471, 489 (1972).

33. *Wolff*, 418 U.S. at 560 ("We have often repeated that '(t)he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961))).

34. 397 U.S. 254 (1970).

35. *Wolff*, 418 U.S. at 561–62.

36. Id.

37. Id. at 562 ("[D]isciplinary hearings . . . necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. . . . [T]he basic and unavoidable task of providing reasonable safety for guards and inmates may be at stake . . . .").

Acknowledging incarcerated people's interest in securing a just determination of charges to avoid further liberty deprivations, the Court held that incarcerated people charged with disciplinary violations should be afforded many due process protections.[38] But the Court also held that incarcerated people do not enjoy the full range of procedures outlined in *Morrissey*.[39] First, the Court held that incarcerated people were guaranteed at least twenty-four hours of written notice of charges prior to a disciplinary hearing.[40] Second, it mandated that at the conclusion of the hearing, incarcerated people must receive a written statement by the disciplinary committee of the evidence relied on in reaching its decision.[41] Third, the Court granted incarcerated people a qualified right to present evidence and call witnesses but only if doing so would not be harmful to institutional safety or correctional goals of retribution, rehabilitation, deterrence, and incapacitation.[42] The *Wolff* Court's holding applied to any cases involving the potential of punitive segregation or deprivation of good-time credit, but the Court declined to clarify whether the minimum protections would apply in situations involving lesser penalties such as loss of privileges, including not being allowed to watch television or go to the yard.[43]

1. *Advance Written Notice.* — *Wolff* guarantees incarcerated people the right to receive written notice of charges brought against them at least twenty-four hours before a disciplinary hearing is scheduled to begin.[44] Providing adequate and timely notice is a fundamental requirement of due process and arguably underpins all other due process safeguards.[45] The purpose of advance written notice is well-documented.[46] In the context of disciplinary proceedings, advance written notice may serve several purposes. First, written notice that contains the allegations against an incarcerated person allows the disciplinary board to effectively determine the facts of a

38. Id. at 539–40.

39. Id. at 539–40, 556.

40. Id. at 563–64.

41. Id. at 564–65.

42. Id. at 566.

43. Id. at 571 n.19.

44. Id. at 563–64.

45. See Cole v. Arkansas, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding . . . ."); Karla M. Gray, Note, The Fourteenth Amendment and Prisons: A New Look at Due Process for Prisoners, 26 Hastings L.J. 1277, 1285 (1975) ("It has been established that timely and adequate notice is not only essential to a factfinding inquiry, but is also a prerequisite to any other due process requirements.").

46. See, e.g., *Wolff*, 418 U.S. at 564 ("We hold that written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense."); In re Gault, 387 U.S. 1, 33 (1967) ("Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'") (quoting President's Comm'n on L. Enf't & Admin. of Just., The Challenge of Crime in a Free Society 87 (1967))).

case.[47] Oral notice, on the other hand, is insufficient because it tends to be less precise than written notice, and an incarcerated person cannot easily refer to it should they forget or misunderstand any allegations.[48] Second, written notice is necessary for people to comprehensively understand the charges brought against them. Lastly, written notice of the charges becomes part of the written documentation of the proceeding, which serves as a record for both the incarcerated person and correctional authorities if the hearing is formally reviewed.[49]

Some jurisdictions, such as New York and Washington, D.C., establish more stringent notice requirements than those articulated in *Wolff*. For example, they require that the written notice contain information such as the date, time, place, and nature of the allegation, as well as the housing unit and cell number where the alleged violation occurred.[50] Additionally, if more than one incarcerated person was involved in the incident, the specific role played by each must be included.[51] Furthermore, non-English speaking incarcerated people have the right to translations of the notice of the charges and statements of evidence and are also entitled to have a translator present at the disciplinary hearing.[52] Those who are illiterate, deaf, or hard of hearing have similar rights.[53]

Inserting counsel in the disciplinary process may help further the goals of providing advance written notice. After receiving notice, however, incarcerated people are expected to prepare their defenses without the aid of counsel. In some instances, incarcerated people may face several charges in one disciplinary proceeding and will be expected to establish a defense for each charge.[54] Incarcerated people may lack the experience and skills to sufficiently study and establish adequate defenses for various

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47. See Gray, supra note 45, at 1285 ("[T]he disciplinary committee or board cannot properly determine the facts if only one side of the facts is presented to it.").

48. See id.

49. See id. ("Further, written notice of the charges should become part of the written record of the proceeding, to protect both inmate and authorities on review of the hearing or at any other time an inmate's records are reviewed.").

50. See N.Y. Comp. Codes R. & Regs. tit. 7, § 253.6(a) (2022); Program Manual: Inmate Disciplinary & Admin. Hous. Hearing Procs., 5300.1I at 14 (D.C. Dep't of Corr. 2019); see also Howard v. Coughlin, 593 N.Y.S.2d 707, 708–09 (4th Dep't 1993) (finding notice insufficient when it provided the wrong date for when the alleged misconduct occurred).

51. N.Y. Comp. Codes R. & Regs. tit. 7, § 251–3.1(c).

52. Id. § 254.2.

53. Id.

54. For example, in one incident, an incarcerated person may be charged with possession of contraband, tampering with a witness or informant, lack of cooperation, and disrespect. The incarcerated person would need to prepare a defense for each of the alleged violations in twenty-four hours. See Benitez v. Wolff, 985 F.2d 662, 665 (2d Cir. 1993) (involving an incarcerated person who was charged with twelve offenses, given twenty-four hours to prepare a defense, and was only allowed to have written notice of the offenses against him for roughly thirty minutes per offense).

charges with the limited time and resources available to them.[55] Furthermore, though written notice of the charges must be clear enough to provide incarcerated people a meaningful opportunity to prepare a defense, *Wolff* does not require the notice to have any specific content.[56] Incarcerated people may be at a disadvantage if they are in jurisdictions with more lax notice requirements. Ultimately, where the written notice lacks critical information necessary to marshal facts and gather evidence in preparation for an adequate defense, incarcerated people may not be equipped with the advocacy strategies counsel effectively employ to help clients mitigate these types of issues.[57]

2. *Written Statement of Fact Findings.* — With certain exceptions, *Wolff* guarantees an incarcerated person the constitutional right to receive a written statement of the evidence being used against them and a statement detailing the reasons for the decision.[58] A written record of proceedings is required for several reasons: to protect incarcerated people against collateral consequences that may stem from a misunderstanding of the original proceeding,[59] to ensure that the disciplinary board acts fairly,[60] and to serve as a reference on examination of the hearing by other authorities and any other time an incarcerated person's records are reviewed.[61] Though due process does not require appellate review, a

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55. See Victor D. Quintanilla, Rachel A. Allen & Edward R. Hirt, The Signaling Effect of Pro Se Status, 42 Law & Soc. Inquiry 1091, 1093 (2017) (describing skills attorneys hold that are beneficial to incarcerated clients).

56. Wolff v. McDonnell, 418 U.S. 539, 563–65 (1974) (holding that due process requires advance written notice "of the charges against" the incarcerated person but failing to state what content or details are required for notice to satisfy due process); see also *Benitez*, 985 F.2d at 665 (finding that an incarcerated person was denied due process because he was only allowed to review the actual written charges five hours in advance of his hearing even though he was provided twenty hours of advance notice); Spellmon-Bey v. Lynaugh, 778 F. Supp. 338, 342 (E.D. Tex. 1991) (holding that notice was inadequate when the charge was given in writing because the specific acts that gave rise to the charge were unclear, making it impossible for the incarcerated person to prepare a defense because they did not know what conduct gave rise to the charge).

57. See Quintanilla et al., supra note 55, at 1093 ("Unrepresented claimants may also experience confusion with complex documents and procedures.").

58. *Wolff*, 418 U.S. at 565 ("It may be that there will be occasions when personal or institutional safety is so implicated that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission.").

59. Id.

60. Id. ("[T]he provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly.").

61. Gray, supra note 45, at 1285 ("Further, written notice of the charges should become part of the written record of the proceeding, to protect both inmate and authorities on review of the hearing or at any other time an inmate's records are reviewed.").

written statement of findings is critical in jurisdictions that do allow for administrative appeals of disciplinary proceeding decisions.[62]

The written statement standard is very low and varies across jurisdictions and correctional agencies. Some courts have held that the hearing record must include reasons for the decision, copies of any reports relied upon, and summaries of any interviews conducted.[63] However, the written statement need only provide *some* evidence supporting a disciplinary board's decision.[64] The written statement standard does not require hearing officers to produce evidence beyond a reasonable doubt, or even the lower standards of substantial evidence or a preponderance of evidence.[65] Furthermore, in *Baxter v. Palmigiano,* the Supreme Court held that even facts that come to light after disciplinary hearings may be included in the written record as they may help officials understand the incident and tailor penalties to further penological goals.[66]

Jurisdictions have adopted a wide array of standards clarifying what is required in the written statement. The D.C. Circuit, for example, has held that correctional agencies need not repeat any evidence already set out in an officer's investigative report in written statements of findings.[67] The D.C. Court of Appeals has also held that statements must be more than a reiteration of the evidence and prohibits findings that are simply "generalized, conclusory, or incomplete."[68] Similarly, New York standards effectively require a detailed written account of the alleged incident.[69] For

62. See Griffin v. Illinois, 351 U.S. 12, 18 (1956) (noting that, because appellate review is an integral part of the Illinois trial system, the state must ensure that the Due Process and Equal Protection guarantees are provided to appellants).

63. See N.Y. Comp. Codes R. & Regs. tit. 7, §§ 253.7(a)(2), 254.7(a)(2) (2022); McQueen v. Vincent, 384 N.Y.S.2d 475, 476–77 (App. Div. 1976) (remanding the case to determine whether due process requirements were met in light of an incomplete hearing record); see also Tolliver v. Fischer, 2 N.Y.S.3d 694, 695 (App. Div. 2015) (granting prisoner's petition due to an out of order transcript, portions of missing witness questionings, and a cut off petitioner statement); People ex rel. Lloyd v. Smith, 496 N.Y.S.2d 716, 717 (App. Div. 1985) (holding that failure to include a superintendent's proceeding minutes in the record made adequate review impossible, resulting in remand for review of the minutes).

64. See Berge, supra note 8, at 565 ("The only requirement is that some evidence support the hearing officer's final decision. This standard is very low. It does not require the hearing officer to produce substantial evidence or a preponderance of evidence against you.").

65. Id. There is no clear evidentiary standard of review for disciplinary proceedings.

66. 425 U.S. 308, 322 n.5 (1976) ("It would be unduly restrictive to require that such facts be excluded from consideration, inasmuch as they may provide valuable information with respect to the incident in question and may assist prison officials in tailoring penalties to enhance correctional goals.").

67. See Crosby-Bey v. District of Columbia, 786 F.2d 1182, 1185 (D.C. Cir. 1986) (explaining that the board is not required to repeat evidence already shown in an officer's charge or report).

68. See Kennedy v. District of Columbia, 654 A.2d 847, 853 (D.C. Cir. 1994); Newsweek Mag. v. D.C. Comm'n on Hum. Rts., 376 A.2d 777, 784 (D.C. Cir. 1977).

69. See People ex rel. Vega v. Smith, 485 N.E.2d 997, 1002 (N.Y. 1985) (observing that state regulations require that "inmates must be served with . . . a written misbehavior report, . . . describing with specificity the alleged incident and rule violated"); Tuitt v. Martuscello,

example, in a case where reports merely recited that all the incarcerated people in the dining hall were part of a disturbance without describing their specific misbehavior, the New York Court of Appeals found that the evidence was insufficient to support a disciplinary finding against them.[70] Jurisdictions also vary on when correctional agencies are required to provide incarcerated people with the written record of the findings.[71]

The goals undergirding the written statement standard suggest a need for counsel. Incarcerated people are expected to keep track of hard copies of their hearing records, many of which are dozens of pages long, so that they may refer to them when their records are reviewed for purposes such as transfer to another institution or in preparation for trial.[72] But the realities of jail conditions make it difficult for incarcerated people to keep track of their possessions, let alone pages of disciplinary proceeding records. Furthermore, overcrowding in jails causes high rates of transfers of incarcerated people, which has been exacerbated by the COVID-19 pandemic.[73] Excessive transfers not only make it challenging for incarcerated people to keep track of critical documentation but also for

965 N.Y.S.2d 669, 670 (App. Div. 2013) (holding that the "detailed misbehavior report provides substantial evidence supporting the determination of guilt"); James v. Strack, 625 N.Y.S.2d 265, 266 (App. Div. 1995) (holding that the misbehavior report was "sufficiently detailed, relevant and probative to constitute substantial evidence supporting the hearing officer's finding of guilt"); Nelson v. Coughlin, 619 N.Y.S.2d 298, 299 (App. Div. 1994) (holding that the misbehavior report provided sufficient evidence that the prisoner violated a rule prohibiting prisoners from making or possessing alcoholic beverages and that the officials were not required to chemically test the beverage for the presence of alcohol).

70. See Bryant v. Coughlin, 572 N.E.2d 23, 26–27 (N.Y. 1991) (concluding that misbehavior reports that did not specify the particulars of prisoner misconduct and only alleged a mass incident were insufficient).

71. Alaska provides that an incarcerated person is entitled to a written decision of the disciplinary board within five working days of the decision. See Alaska Admin. Code tit. 22, § 05.475(b) (1977). Washington, D.C., regulations require that agencies provide the written statement to the incarcerated person within two business days of the alleged misconduct. See Program Manual: Inmate Disciplinary & Admin. Hous. Hearing Procs., 5300.1I at 14–15 (D.C. Dep't of Corr. 2019). Massachusetts requires provision of the written statement within five days. See 103 Mass. Code Regs. § 430.17(1)(d) (2019). And New York requires that the written record be provided to the incarcerated person no later than twenty-four hours after the end of the hearing. See N.Y. Comp. Codes R. & Regs. tit. 7, §§ 253.7(a)(2), 254.7(a)(2) (2022).

72. See Gray, supra note 45, at 1296 (discussing the functions of a written statement in a fact-finding inquiry). In some situations where charges involve conduct punishable as a crime under state law, the written record of the fact-finding is critical in potential state court prosecutions.

73. See Victoria Law, "People Are at a Breaking Point" After Transfers From Rikers, Nation (Dec. 10, 2021), https://www.thenation.com/article/society/rikers-transfers-bedford/ (on file with the *Columbia Law Review*) ("[A]fter ongoing protests about the violence and abuse at Rikers Island[,] . . . New York Governor Kathy Hochul announced the transfers of approximately 230 women and trans people from the New York City complex to Bedford Hills Correctional Facility, a women's state prison 45 minutes north of the city.").

jail systems, which are plagued by incomplete data tracking.[74] Counsel, unlike jail staff and incarcerated people, are much better equipped to store the written records of their clients' disciplinary proceedings, furnish them for their clients in situations where they are being reviewed, and ultimately ensure that their clients' records are not lost in the system.[75] Furthermore, counsel also have the motivation and ethical duty to track their client's documents.

3. *Call Witnesses and Present Documentary Evidence.* — Finally, the *Wolff* Court confusingly articulated a constitutional guarantee to call witnesses during disciplinary proceedings but stated strict limits on the right, effectively rendering it toothless.[76] The Court specified that an incarcerated person should be allowed to call witnesses and present evidence in their defense but only as long as doing so would not create undue threats to institutional safety or correctional goals.[77] This limitation applies both to collecting and presenting documentary evidence and to calling witnesses during the hearing, which could create a risk of retaliation or undermine correctional authority.[78] Though the Court noted that it would be useful for disciplinary boards to provide a rationale for refusing to let the accused call witnesses, it ultimately did not make such explanations a requirement.[79] Subsequent cases have reiterated that such explanations are not required.[80]

The Court predicated the right to call witnesses and present documentary evidence upon the balancing of interests of correctional agencies and incarcerated people. It specifically expressed concern that

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74. See, e.g., Amanda Klonsky & Eric Reinhart, As Covid Surges Again, Decarceration Is More Necessary Than Ever, Nation (Dec. 22, 2021), https://www.thenation.com/article/society/covid-prisons-decarceration/ (on file with the *Columbia Law Review*) ("In Florida, both local jails and state prisons are bracing for a large backlog of incarcerated people awaiting transfer from overcrowded jails. The prisons to which these individuals will be transferred are grossly unprepared to receive them."); Conrad Wilson, Tony Schick, Austin Jenkins & Sydney Brownstone, Booked and Buried: Northwest Jails' Mounting Death Toll, OPB (Apr. 2, 2019), https://www.opb.org/news/article/jail-deaths-oregon-washington-data-tracking/ [https://perma.cc/JUY8-VNWC] (explaining that incomplete data tracking in local jails has caused "a crisis of rising death rates" that avoids the spotlight).

75. See Quintanilla et al., supra note 55, at 1093 (describing skills attorneys hold that are beneficial to incarcerated clients).

76. See Wolff v. McDonnell, 418 U.S. 539, 566 (1974) ("We are also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.").

77. Id.

78. Id. at 566–67.

79. Id. at 566 ("Although we do not prescribe it, it would be useful for the Committee to state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases.").

80. See, e.g., Ponte v. Real, 471 U.S. 491, 496 (1985) (concluding that the Due Process Clause of the Fourteenth Amendment does not require a disciplinary board to provide reasons for refusing to call witnesses).

granting incarcerated people an unrestricted right to call witnesses from the prison population would be disruptive and jeopardize correctional safety and goals.[81] Thus, the Court ultimately held that the right to call witnesses is subject to the discretion of correctional officials.[82] The discretion provided to correctional staff is not unlimited, however, and their decision to restrict the right cannot be arbitrary.[83] In Alaska, for example, the Department of Corrections requires that hearing officers provide incarcerated people a reasonable opportunity to interview witnesses, collect statements, or compile other evidence, but only if that action would not create a risk of reprisal or undermine security.[84] Washington, D.C., mandates that hearing officers document specific reasons for limiting witnesses in the hearing record.[85] New York similarly requires that prison officials provide some objective evidence supporting a decision to withhold testimony or information.[86]

Inserting counsel into the disciplinary process could bolster the right to call witnesses and present documentary evidence. The right to offer testimony of witnesses is the right to present the accused's and the accuser's version of the facts to the disciplinary board so that it may decide the truth of the matter.[87] Thus, suggesting that this due process safeguard is not essential by vesting complete discretion in correctional authorities undermines the fact-finding nature of disciplinary hearings.[88] Though inserting counsel in the disciplinary process would not necessarily address the fact that correctional agencies have undue discretion in determining whether witnesses may be called, counsel could potentially help to legitimize the process. In disciplinary proceedings, oftentimes the only evidence available is the statement of the accused; however, there is the added

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81. See *Wolff*, 418 U.S. at 566 ("[T]he right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries . . . potential for disruption [of] the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution.").

82. Id. ("Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence.").

83. See Sanchez v. Roth, 891 F. Supp. 452, 456–58 (N.D. Ill. 1995).

84. Alaska Admin. Code tit. 22, §§ 05.440, 05.445 (2022).

85. Program Manual: Inmate Disciplinary & Admin. Hous. Hearing Procs., 5300.1I at 25 (D.C. Dep't of Corr. 2019).

86. N.Y. Comp. Codes R. & Regs. tit. 7, §§ 253.5(a), 254.5(a) (2022); see also Moye v. Selsky, 826 F. Supp. 712, 716–17 (S.D.N.Y. 1993) (explaining that prison officials may have to give incarcerated people an explanation for excluding witnesses from disciplinary hearing).

87. See Washington v. Texas, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.").

88. See Gray, supra note 45, at 1286 ("To suggest that this due process protection is not essential in a prison disciplinary proceeding is to ignore the factfinding nature of that proceeding.").

problem of an "unreliable" accused,[89] whose statement is unlikely to be believed.[90] Correctional officers may be more inclined to believe statements coming from counsel, who likely do not trigger the same subconscious biases and hostilities associated with incarcerated people. The Court's concerns around retaliation are valid, but it is ultimately the duty of correctional authorities to protect testifying witnesses without unnecessarily interfering with the fairness and reliability of disciplinary hearings.[91]

B. *The Unavailable Rights*

In conducting the balancing of interests, the *Wolff* Court held that there was no constitutional right to confrontation and cross-examination or retained or appointed counsel, stopping short of adopting the full range of procedures suggested by *Morrissey* for people accused of violating parole.[92] The majority balanced McDonnell's interest in avoiding loss of good time against the needs of the prison and concluded that they must provide prison administrators with some amount of flexibility.[93] The Court ultimately found that the state's interest in maintaining security necessitated barring the right to confrontation and cross-examination and the requirement of counsel, fearing that extending such rights would increase the potential for havoc inside correctional facilities.[94]

1. *Confrontation and Cross-Examination.* — In balancing the interests of McDonnell and other parties with the correctional agency, the *Wolff* Court held that confrontation and cross-examination present serious hazards to institutional interests and thus are not constitutionally guaranteed.[95] The Court asserted that allowing confrontation and cross-examination of those furnishing evidence against an incarcerated person as a matter of course would lead to considerable potential for havoc inside the prison walls.[96] Furthermore, proceedings would inevitably be longer and tend toward unmanageability.[97] While the Court acknowledged that some states allow cross-examination at disciplinary proceedings, it concluded that the Constitution should not be read to compel the

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89. Clutchette v. Procunier, 497 F.2d 809, 818 (9th Cir. 1974).

90. Gray, supra note 45, at 1286–87 ("This right to offer evidence other than the statement of the accused is even more important where, as in prison disciplinary proceedings, there is the added problem of an 'unreliable' accused, whose own statement is not likely to be readily believed.").

91. See *Clutchette*, 497 F.2d at 819 (noting that procedural protections that address concerns of fundamental fairness should take priority over accommodations meant to protect testifying witnesses).

92. Wolff v. McDonnell, 418 U.S. 539, 561–62 (1974).

93. Id. at 566.

94. Id. at 567.

95. Id.

96. Id.

97. Id.

procedure and that sufficient bases for a decision in disciplinary cases can be reached without cross-examination.[98]

In arriving at its decision, the Court yet again tipped the balance of interests in favor of the state and vested a great deal of deference in correctional officials.[99] Though the Court recognized that there very well may be a narrow range of cases where interest balancing may dictate cross-examination, it decided that the best course of action, "in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons."[100] Like the right to call witnesses and present evidence, the Court *suggested* that it would be worthwhile for disciplinary boards to state their reasons for denying an incarcerated person the right to confront or cross-examine witnesses.[101] The Court, however, ultimately increased the possibility of administrative arbitrariness by refusing to *constitutionally require* disciplinary boards to provide incarcerated people with such a statement.[102]

Correctional authorities tend to argue against extending the right to confrontation and cross-examination to incarcerated people.[103] Correctional authorities have contended, and some courts have agreed,[104] that extending the right to cross-examine correctional staff would subvert the traditional relationship between correctional officials and incarcerated people and reduce correctional officials' authority.[105]

Fortunately, the notion that correctional officials have unlimited discretion in controlling the lives of those housed in correctional facilities is increasingly becoming antiquated, in large part due to community advocacy and judicial intervention.[106] In the past, correctional authorities exercised nearly absolute power in the operation of this nation's correctional facilities and had total discretion over the treatment of

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98. Id. at 568.

99. Id.

100. Id. at 569.

101. Id. at 566–67.

102. See Ponte v. Real, 471 U.S. 491, 496 (1985) (establishing that prison officials can state the reason for denying a prisoner's witness request either in the administrative record or later in court testimony when there is a dispute over the refusal to call a witness). But see Scarpa v. Ponte, 638 F. Supp. 1019, 1023 n.4 (D. Mass. 1986) (distinguishing *Ponte v. Real* because in that case, prison officials failing to provide reasons in the administrative record had an explanation related to safety or correctional goals, in contrast to the clear absence of threat to prison security in *Scarpa v. Ponte*).

103. See Gray, supra note 45, at 1288.

104. See, e.g., Nolan v. Scafati, 306 F. Supp. 1, 4 (D. Mass. 1969), vacated, 430 F.2d 548 (1st Cir. 1970) ("Cross-examination of a superintendent, a guard, or a fellow prisoner would . . . tend to place the prisoner on a level with the prison official . . . . [I]t is hardly likely that in the prison atmosphere discipline could be effectively maintained after an official has been cross-examined by a prisoner.").

105. See Michael A. Millemann, Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing, 31 Md. L. Rev. 27, 53 (1971).

106. See Gray, supra note 45, at 1289.

incarcerated people.[107] Recently, however, courts have recognized the need to scrutinize more closely the way in which incarcerated people are treated, and community advocates' demands to reduce jail populations have reached fever pitch in the height of the COVID-19 pandemic.[108] The COVID-19 pandemic has also catalyzed a resurgence of public concern regarding the conditions and treatment incarcerated people endure. Thus, in the current environment—where incarcerated people are facing serious harms at the hands of jail officials—incarcerated people's interest in a fair and impartial disciplinary hearing is paramount.

2. *Retained or Appointed Counsel.* — Finally, the *Wolff* Court held that incarcerated people generally do not have a right to either retained or appointed counsel in disciplinary proceedings.[109] In arriving at its decision, the Court cited as rationale that counsel would inevitably make the proceedings more adversarial and would undermine correctional goals.[110] According to the Court, the services that counsel provide in disciplinary hearings are not always enough to raise counsel to the level of an entitlement; rather, the right to counsel is only borne out of the potential that incarcerated people may make self-incriminatory statements at hearings that could later be used against them in criminal prosecutions.[111]

The Court also expressed efficiency concerns. Citing *Gagnon v. Scarpelli,*[112] it held that counsel would unduly delay the decisionmaking process and increase financial burdens on the state.[113] While it is true that practical difficulties may arise in providing sufficient counsel and paying for those services, these issues can be minimized by an effective program of providing such assistance that does not levy significant system costs.[114]

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107. See William D. Wick, Procedural Due Process in Prison Disciplinary Hearings: The Case for Specific Constitutional Requirements, 18 S.D. L. Rev. 309, 313 (1973) ("[I]n many prisons even such minimal procedures do not exist, or if they do, they are freely circumvented by the guards.").

108. See, e.g., Chad Flanders, COVID-19, Courts, and the "Realities of Prison Administration" Part II: The Realities of Litigation, 14 St. Louis U. J. Health L. & Pol'y 495, 497 (2021) (describing the various lawsuits being filed on behalf of incarcerated people requesting that incarcerated people be released, socially distanced, or transferred to safer facilities); Kelly Servick, Pandemic Inspires New Push to Shrink Jails and Prisons, Science (Sept. 17, 2020), https://www.science.org/content/article/pandemic-inspires-new-push-shrink-jails-and-prisons [https://perma.cc/6H7B-L4A9].

109. Wolff v. McDonnell, 418 U.S. 539, 570 (1974).

110. Id.; see also Baxter v. Palmigiano, 425 U.S. 308, 315 (1976) ("We see no reason to alter our conclusion so recently made in *Wolff* that inmates do not 'have a right to either retained or appointed counsel in disciplinary hearings.'" (quoting *Wolff*, 418 U.S. at 570)).

111. See *Baxter*, 425 U.S. at 315 (asserting that counsel is only necessary in situations where incarcerated people may make statements at hearings that could perhaps be used in later state court prosecutions for the same conduct).

112. 411 U.S. 778 (1973).

113. *Wolff*, 418 U.S. at 569–70 (citing *Gagnon*, 411 U.S. at 788). In *Gagnon v. Scarpelli*, the Court listed these burdens as being costs "for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review." 411 U.S. at 788.

114. See infra Part III for a discussion of a framework.

Moreover, efficiency is not the purpose of a disciplinary hearing and should not be a dispositive factor in balancing correctional agency interests and incarcerated people's interests.[115]

Though dicta, the Court carved out some situations in which an incarcerated person would be entitled to assistance.[116] An incarcerated person is permitted to seek substitute counsel, or assistance in the form of aid from correctional staff or from a fellow incarcerated person,[117] if they are illiterate or when the case or issue is so complex that it would be difficult for them to adequately represent themselves in a disciplinary proceeding.[118] In addition, the Court stated that there may be situations that trigger the need for counsel—namely, disciplinary proceedings that involve violations that prosecutors may also charge under state law.[119]

Many jurisdictions provide a much more expansive right to representation than the standard provided by *Wolff*. Alaska, California, Colorado, Kentucky, Massachusetts, Minnesota, New York,[120] Washington, and Washington, D.C., all provide for retained counsel in some form in disciplinary proceedings.[121] Some correctional agencies make such an allowance but have established that it is incarcerated people's responsibility to secure their own representation in disciplinary proceedings. In both Massachusetts and Washington, D.C., incarcerated people must complete a form requesting representation and coordinate their own

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115. See Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972) ("[T]he Constitution recognizes higher values than speed and efficiency.").

116. *Wolff*, 418 U.S. at 570.

117. See id. at 576 (citing Johnson v. Avery, 393 U.S. 483 (1969), which established the right of incarcerated people to render legal assistance to fellow incarcerated people where the state provided no alternative source of legal aid).

118. Id. at 570 (noting that "the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case").

119. See id. at 572 n.20 ("The Ninth Circuit, [in] *Clutchette v. Procunier*, . . . has determined that counsel must be provided where a prison rule violation may be punishable by state law.").

120. In March 2021, New York passed the Humane Alternatives to Long-Term Solitary Confinement (HALT) Act, which limits the use of segregated confinement for all incarcerated people to fifteen days, implements alternative rehabilitative measures, provides access to counsel in disciplinary hearings, and establishes guidelines for humane conditions in jails. The Act went into effect in April 2022. However, Mayor Eric Adams reinstated the use of solitary confinement in New York City jails. The fate of incarcerated people's right to counsel in disciplinary hearings in both the City and State of New York remains uncertain. See Erin Durkin, Adams' Solitary Confinement Stance Sets Up Fight With City Council, Politico (Jan. 7, 2022), https://www.politico.com/news/2022/01/13/adams-solitary-confinement-stance-sets-up-fight-with-city-council-527051 [https://perma.cc/M7VY-YZDV].

121. See Tahanee Dunn, Julia Solomons & Martha Grieco, Bronx Def. Staff, Comment Letter on Proposed Restrictive Housing Rule, https://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2017-Restrictive-Housing/2020-01-31-BOC-Restrictive-Housing-CommentsBRONX-DEFENDERS.pdf [https://perma.cc/75KM-YLSC] (last visited Sept. 5, 2022).

representation.[122] Kentucky permits incarcerated people to have an assigned legal aid present if they are unable to collect and present evidence themselves.[123]

The fact that many jurisdictions have adopted greater due process standards than those articulated in *Wolff* suggests that it may be time to recalibrate the balancing test invoked in the case. As the *Wolff* Court acknowledged, the problems of correctional institutions evolve, and correctional goals are constantly reshaped.[124] Consequently, new considerations must be included in the interest-balancing analysis.

II. WHAT THE SYSTEM STANDS TO GAIN: COUNSEL IN FURTHERANCE OF CONSTITUTIONAL AND PENOLOGICAL PRINCIPLES

This Part argues for an unlimited right to counsel in jail disciplinary proceedings. Guaranteeing representation of counsel for people jailed pretrial not only ensures that they receive assistance in furtherance of a fair trial but also facilitates fair and impartial administration of discipline to avoid unnecessary punishment. These critical considerations support the notion that people who are incarcerated pretrial should be entitled to the assistance of counsel in disciplinary proceedings and undermine the *Wolff* Court's arguments against extending the right.

A. *Recalibrating the Balancing Test*

In refusing to impose the requirement of counsel on disciplinary hearings, the *Wolff* Court weighed the protection of the integrity of the correctional system against McDonnell's interest in avoiding loss of good time.[125] In striking the balance that the Due Process Clause demands, the Court determined that the specific context of disciplinary hearings necessitated that some due process protections be withheld.[126] The Court took seriously the fact that prison disciplinary hearings occur in an environment comprised of people who have violated criminal law and who "have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life."[127] Thus, the Court held that the prison system's interest in furthering institutional safety, correctional goals, and efficiency eclipsed McDonnell's interest in avoiding loss of good time.[128]

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122. See 103 Mass. Code Regs. § 430.11(6) (2019) ("If an inmate wishes to be represented in accordance with the provisions of 103 CMR 430.12(1) and (2)[,] . . . the inmate shall complete the request for representation and witness form and submit it to the Disciplinary Officer within 24 hours of receipt.").

123. See 501 Ky. Admin. Regs. 6:020 § (II)(B)(3)(b)(2018).

124. See *Wolff*, 418 U.S. at 568.

125. See id. at 566–71.

126. See id. at 561.

127. Id. at 562.

128. See id. at 561.

The dire nature of the current correctional environment, however, suggests that the due process right to counsel in disciplinary hearings is needed now more than ever. In general, the state's interests in accurately determining the facts and in preventing arbitrary treatment coincide with those of the incarcerated people and thus appear consistent with the due process right to counsel requirement. Requiring assistance should be curtailed only if the state's other interests are of such magnitude as to override this necessity. The *Wolff* Court found this to be the case; however, when one compares the magnitude of the harms incarcerated people face *today* when denied the right to counsel in furtherance of a fair and accurate determination, the balance of interests comes out differently.

Jails and prisons are no longer the black box they were at the time *Wolff* was decided. The patterns of violence, overcrowding, correctional staff brutality, draconian conditions of solitary confinement, extreme heat, poor medical care, and intolerable living conditions that incarcerated people face are now well-documented largely due to community and policy advocacy.[129] And the COVID-19 pandemic has only further exacerbated the inhumane conditions that have plagued the country's jails for years.[130]

The excessive and inhumane use of solitary confinement, in particular, has been brought to light and interacts directly with disciplinary hearings.[131] In conducting the balancing test, the *Wolff* Court seemingly only considered McDonnell's interest in his good-time credits.[132] Puzzlingly, the majority made no mention of the fact that incarcerated people may face placement in solitary confinement if found guilty (wrongly or not) of violating correctional rules. And research has shown that solitary confinement causes serious and sometimes irreparable harm.[133] Thus, a reassessment of the balancing test that considers changed circumstances and known harms facing incarcerated people is warranted.

A recalibrated test must seriously weigh an incarcerated person's interest in avoiding increased restrictions on their liberty in the form of solitary confinement and thus would tip in favor of finding a right to counsel in disciplinary hearings. While correctional system's interest in maintaining order and safety and minimizing costs are still relevant, it is

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129. See, e.g., Prison & Jail Conditions, S. Ctr. for Hum. Rts., https://www.schr.org/mass-incarceration/prison-jail-conditions/ [https://perma.cc/8HEN-WB66] (last visited Sept. 5, 2022).

130. See, e.g., Nancy Harty, Advocates Demand Outside Oversight for Cook County Jail COVID Conditions, WBBM Newsradio (Mar. 29, 2021), https://www.audacy.com/wbbm780/news/local/advocates-want-outside-oversight-for-cook-county-jail [https://perma.cc/9WJ2-LNST].

131. See Vera Inst. of Just., Why Are People Sent to Solitary Confinement? The Reasons Might Surprise You 1–2 (2021), https://www.vera.org/downloads/publications/why-are-people-sent-to-solitary-confinement.pdf [https://perma.cc/J6FH-MHZV].

132. *Wolff*, 418 U.S. at 561.

133. See, e.g., N.Y. Campaign for Alts. to Isolated Confinement, The Walls Are Closing In on Me: Suicide and Self-Harm in New York State's Solitary Confinement Units, 2015–2019, at 6–7 (2020), http://nycaic.org/wp-content/uploads/2020/05/The-Walls-Are-Closing-In-On-Me_For-Distribution.pdf [https://perma.cc/59D2-STKG].

difficult to argue that they eclipse the well-documented harms that incarcerated people experience by being placed in solitary confinement. A due process right to counsel at disciplinary hearings may prevent incarcerated people from erroneously losing good-time credits or being placed and languishing in solitary confinement.

B. *Fair Trials and a Fairer Disciplinary System*

In addition to finding a due process right to counsel, a right to counsel in disciplinary proceedings may be available under the Sixth Amendment. The Sixth Amendment guarantees to criminal defendants assistance of counsel for their defense.[134] The Sixth Amendment guarantee of counsel is designed to ensure that people are not forced to stand alone against the state during criminal prosecution and applies to all "critical stages" in a criminal proceeding.[135] Over the decades, the Supreme Court has slowly delineated many events in cases as being critical stages, although it has never purported to have capped the list of events that may fall into this category. The critical stage events include, but are not limited to, custodial interrogations both before and after commencement of prosecution;[136] lineups at or after commencement of prosecution;[137] during plea negotiations and at the entry of a guilty plea;[138] arraignments;[139] the pretrial period between arraignment and the

134. U.S. Const. amend. VI.

135. See Rothgery v. Gillespie County, 554 U.S. 191, 211–12 (2008); United States v. Gouveia, 467 U.S. 180, 181 (1984).

136. See Brewer v. Williams, 430 U.S. 387, 401 (1977) (explaining how a person has a right to legal representation when the government interrogates him); Miranda v. Arizona, 384 U.S. 436, 442–44 (1966) (explaining the importance of constitutional protections during the interrogation process); Massiah v. United States, 377 U.S. 201, 204–06 (1964) (discussing the need for clear constitutional protections during interrogations).

137. See Moore v. Illinois, 434 U.S. 220, 227–28 (1977) (holding that the defendant's Sixth Amendment right to counsel was violated by a corporeal identification conducted after initiation of adversary judicial criminal proceedings and in the absence of counsel); United States v. Wade, 388 U.S. 218, 237 (1967) (holding that post-indictment lineup was a critical stage of prosecution at which the defendant was as much entitled to the aid of counsel as at trial itself).

138. See Lafler v. Cooper, 566 U.S. 156, 162 (2012) ("During plea negotiations defendants are 'entitled to the effective assistance of competent counsel.'" (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970))); Padilla v. Kentucky, 559 U.S. 356, 373 (2010) ("[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.").

139. See Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (holding that arraignment is so critical a stage of Alabama criminal procedure that the denial of counsel at arraignment required reversal of the conviction).

beginning of trial;[140] trials;[141] sentencing;[142] direct appeals as of right;[143] and, to some extent, probation revocation proceedings and parole revocation proceedings.[144] Though the Supreme Court has never identified disciplinary proceedings as a critical stage, the way in which the outcomes of disciplinary hearings affect trials suggests that they may rise to the level of a critical confrontation necessitating counsel.

In *United States v. Gouveia,* the Supreme Court held that both the language and purpose of the Sixth Amendment supported the conclusion that the right to counsel is only triggered at or after the start of an adversarial judicial proceeding against the defendant.[145] First, the majority established that a detained person is not accused until the initiation of formal adversarial proceedings.[146] This is because it is not until that point that the government actually has committed itself to prosecute the incarcerated person.[147] Second, the Court held that the purpose underlying the right to counsel is to guarantee to the accused the assistance of counsel "at critical confrontations with his adversary."[148]

The language in *Gouveia* supports the notion that incarcerated people should be entitled to the right to counsel in jail disciplinary hearings. The *Gouveia* Court noted that the right to counsel should be extended to pretrial proceedings in which the results of the proceeding might settle the incarcerated person's fate and render the trial meaningless.[149] This directly implicates jail disciplinary proceedings. Pretrial detention occurs in the vital interval preceding trial and what occurs during that time has significant downstream implications. Research shows that pretrial detention leads to worse outcomes for the people who are held in jail—both in their trials and in their lives—compared to similarly situated people who secure pretrial

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140. See *Brewer*, 430 U.S. at 398; Powell v. Alabama, 287 U.S. 45, 57 (1932).

141. See Alabama v. Shelton, 535 U.S. 654, 667 (2002); Argersinger v. Hamlin, 407 U.S. 25, 40 (1972); Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

142. See *Lafler*, 566 U.S. at 165; Wiggins v. Smith, 539 U.S. 510, 511 (2003); Mempa v. Rhay, 389 U.S. 128, 129 (1967).

143. See Halbert v. Michigan, 545 U.S. 605, 619 (2005); Douglas v. California, 372 U.S. 353, 357–58 (1963).

144. See Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (holding that people are entitled to minimal due process rights during parole revocation hearings but declining to decide whether a parolee is entitled to counsel at those hearings). But see Gagnon v. Scarpelli, 411 U.S. 778, 788–89 (1973) (holding that the state does not have a constitutional duty to provide counsel in probation or parole hearings but the decision as to the need of counsel may be made on a case-by-case basis).

145. 467 U.S. 180, 188 (1984).

146. Id.

147. Id. at 189.

148. Id.

149. Id. at 187–88; see also Johnson-El v. Schoemehl, 878 F.2d 1043, 1051 (8th Cir. 1989) (describing how restricting people who are incarcerated pretrial from accessing their attorneys may compromise fair adjudication of their eventual trial).

release.[150] This is because people who are released are able to maintain a clean record, engage in substance abuse treatment or anger management, or provide restitution—all preventative measures that lead to charges being dismissed and encourage more lenient treatment.[151] Detained people, by contrast, have essentially accumulated credits toward a final sentence and are thus more likely to accede to and receive sentences of imprisonment at trial.[152] If simply being detained in jail negatively impacts a person's trial, then being subject to disciplinary measures after being deprived of procedural tools essential to a meaningful defense only further exacerbates negative outcomes. When a person awaiting trial is accused of violating correctional rules, they are faced with the possibility of additional restraints on their liberty, including placement in solitary confinement, loss of privileges and good-time credits (i.e., more time in jail), or being held in handcuffs or other restraining devices. These disciplinary measures detrimentally affect an incarcerated person's mental and physical health.[153] And they very well may "settle the accused's fate and reduce the trial itself to a mere formality" by limiting an incarcerated person's ability to prepare for their case.[154] Additionally, an incarcerated person's jail disciplinary record may come in as evidence at trial and negatively affect the result.[155] Ultimately, disciplinary hearings have not been identified as a critical stage; however, providing incarcerated people the right to counsel may help prevent unfair outcomes in disciplinary hearings, and thereby also lessen negative trial outcomes.

Support for the position of a guaranteed right to counsel in jail disciplinary hearings is also evident in other Supreme Court decisions. In *United States v. Wade*, the Court held that it is critical to examine any pretrial confrontation to determine whether the insertion of counsel

150. Léon Digard & Elizabeth Swavola, Vera Inst. of Just., Justice Denied: The Harmful and Lasting Effects of Pretrial Detention 5 (2019), https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf [https://perma.cc/5BNY-NMDS].

151. See Paul Heaton, Sandra G. Mayson & Megan Stevenson, The Downstream Consequences of Misdemeanor Pretrial Detention, 69 Stan. L. Rev. 711, 747 (2017) (discussing the negative impacts of pretrial detention).

152. Id.

153. See, e.g., Chase Montagnet, Jennifer Peirce & David Pitts, Vera Inst. of Just., Mapping U.S. Jails' Use of Restrictive Housing: Trends, Disparities, and Other Forms of Lockdown 17 (2021), https://www.vera.org/downloads/publications/mapping-us-jails-use-of-restrictive-housing.pdf [https://perma.cc/7C75-XAQH] (describing how restrictive housing can decrease an individual's sense of belonging, self-control, self-esteem, and pro-social behavior).

154. *Gouveia*, 467 U.S. at 189; see also Digard & Swavola, supra note 150, at 5 ("Other explanations for the increased likelihood of conviction include the impact of detention in limiting people's ability to meet with their defense counsel and to assist in preparing a defense case." (footnote omitted)).

155. See, e.g., Rodriguez v. Quarterman, 204 F. App'x 489, 496 (5th Cir. 2006) (finding that the trial court properly admitted the defendant's jail disciplinary records under the business records exception to the general rule barring hearsay).

would be vital in protecting the defendant's right to a fair trial.[156] As mentioned, because jail disciplinary records may be deemed admissible during a trial and affect the outcome, disciplinary hearings are certainly the type of pretrial confrontation where the insertion of counsel would further fair trials.[157] Moreover, the *Wade* Court found that the Sixth Amendment guarantees the assistance of counsel "*whenever* necessary" to guarantee a meaningful defense.[158] Entitling incarcerated people to counsel that have the skills and experience to advocate for them would facilitate the fact-finding process of collecting documentary evidence and calling witnesses.[159] Furthermore, in *United States v. Ash,* the Court developed a test to determine when a right to counsel should be triggered.[160] The test required an examination of the event to determine whether the incarcerated person required aid in addressing critical legal problems implicated in the case.[161]

Other cases have emphasized that to protect people's rights from prejudice, a person is entitled to representation at any interrogation that becomes accusatory rather than investigatory.[162] The purpose of disciplinary proceedings is to elucidate the facts of an incident; however, the practical realities of jail, where tensions are particularly high between correctional authorities and incarcerated people, reduce the utility of disciplinary proceedings as a fact-finding mechanism.[163] Put simply, people detained in

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156. 388 U.S. 218, 227 (1967) (noting that it is important to "scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial"); see also Coleman v. Alabama, 399 U.S. 1, 7 (1970) (considering whether the petitioners were entitled to appointed counsel during a preliminary hearing).

To analyze when a specific situation requires the presence of counsel, the *Wade* Court focused on two issues: (1) whether the particular confrontation could substantially prejudice the defendant's rights, and (2) whether the presence of counsel would reduce that prejudice and facilitate a fair trial. *Wade*, 388 U.S. at 227; see also *Coleman*, 399 U.S. at 9.

157. See, e.g., *Rodriguez*, 204 F. App'x at 496 (finding that the trial court properly admitted the defendant's jail disciplinary records under the business records exception to the general rule barring hearsay).

158. *Wade*, 388 U.S. at 225 (emphasis added).

159. See Deborah L. Yalowitz, Sixth Amendment—Right to Counsel of Prisoners Isolated in Administrative Detention, 75 J. Crim. L. & Criminology 779, 797 (1984) ("[T]he Court has concluded that the presence of counsel when a suspect is being investigated 'enhances the integrity of the fact-finding' procedure." (quoting Miranda v. Arizona, 384 U.S. 436, 466 (1966))).

160. See 413 U.S. 300, 313 (1973).

161. Id.

162. See Escobedo v. Illinois, 378 U.S. 478, 492 (1964) (concluding that when an interrogation shifts from investigatory to accusatory, the accused is entitled to the assistance of counsel based on the Sixth Amendment); see also *Miranda*, 384 U.S. at 470 (holding that a suspect is guaranteed the assistance of an attorney during custodial interrogation to reduce the possibility of prejudice resulting from abuse of the interrogation process).

163. Gray, supra note 45, at 1295 (describing the subconscious prejudices and antipathies of disciplinary committees toward incarcerated people).

jails face an almost insurmountable presumption of guilt.[164] Allowing incarcerated people to have an attorney during the disciplinary process could reduce the possibility of prejudice not only in the disciplinary hearings themselves but also, importantly, in criminal prosecutions.

A guaranteed right to counsel in jail disciplinary proceedings also aligns with the Court's articulation of the purpose of the Sixth Amendment: to equip incarcerated people with the fundamental tools necessary for the presentation of a meaningful defense against their adversaries.[165] Disciplinary proceedings are inherently adversarial. Incarcerated people face a panel of correctional officers in such proceedings. This panel is tasked with determining whether an incarcerated person is guilty of the alleged misconduct that violates correctional rules.[166] Correctional officers overseeing hearings must be impartial, but they do not have to meet the high standard of impartiality that applies to judges.[167] Correctional agency members handle every aspect of the process, from writing up the initial disciplinary infraction and the investigation process, to conducting the hearing and then making a determination. In essence, the disciplinary system requires that correctional officers serve as judge, jury, and prosecutor.[168] The disciplinary hearing structure unfairly burdens incarcerated people by forcing them to be both the subject of fact-finding inquiries and their

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164. See Tracey Meares & Arthur Rizer, The Square One Project, The "Radical" Notion of the Presumption of Innocence 21 (2020), https://squareonejustice.org/wp-content/uploads/2020/05/CJLJ8161-Square-One-Presumption-of-Innocence-Paper-200519-WEB.pdf [https://perma.cc/9BXC-AJUD].

165. See United States v. Wade, 388 U.S. 218, 224–25 (1967) (asserting that the Sixth Amendment guarantees the assistance of counsel "whenever necessary to assure a meaningful 'defence'").

166. Gray, supra note 45, at 1292–93.

167. See Allen v. Cuomo, 100 F.3d 253, 259 (2d Cir. 1996) ("The degree of impartiality required of prison officials does not rise to the level of that required of judges generally. It is well recognized that prison disciplinary hearing officers are not held to the same standard of neutrality as adjudicators in other contexts."); Sloane v. Borawski, 64 F. Supp. 3d 473, 488 (W.D.N.Y. 2014) ("A hearing officer may satisfy the standard of impartiality if there is 'some evidence in the record' to support the findings of the hearing." (quoting Superintendent v. Hill, 472 U.S. 445, 454 (1985))); Moore v. Selsky, 900 F. Supp. 670, 676 (S.D.N.Y. 1995) (finding that a hearing officer may be allowed to have a biased view that a scientific test for evidence is reliable, so long as the hearing officer would be willing to consider whether he may be mistaken in his view impartially).

Some scholars and practitioners have noted the biased nature of disciplinary boards and are advocating for "mixed" boards—those consisting of "outsiders" (i.e., volunteers from the community) and correctional officers. Gray, supra note 45, at 1295–96. They contend that "mixed" boards would better achieve the impartiality as is constitutionally required and might well increase incarcerated people's confidence in the disciplinary process by removing from prison officials the total discretion customarily enjoyed by them in determining the facts. Id.

168. See Gray, supra note 45, at 1295 ("It is unrealistic to contend that those who promulgate the rules and regulations, who daily enforce them, and who view enforcement as an important goal can possibly be objective in this setting.").

own advocate in an incredibly hostile environment.[169] Juggling these dual roles inhibits incarcerated peoples' capacity to objectively analyze the allegations made against them.[170] It is also reasonable that an incarcerated person would have difficulty presenting their own version of a disputed set of facts, particularly where the presentation requires examining witnesses or offering or dissecting complex documentary evidence.[171] On the other hand, legal counsel could take a more objective view of the factual statements and allegations; put together a more accurate picture of the particular incident by interviewing witnesses; determine whether the testimony of a particular witness would be helpful to the defense, thus saving time; and ensure that their clients understand the charges against them, thus avoiding the necessity of repetitive notice.[172] Inserting counsel into the disciplinary process would not only ease the process of mounting a viable defense but would also aid the disciplinary board in reaching a fair decision.[173]

C. *The Right Not to Be Punished*

Bell v. Wolfish clarified that the most important difference between people incarcerated pretrial and those incarcerated following conviction is that pretrial detainees cannot be punished.[174] Nonetheless, incarcerated people who have not been convicted of crimes clearly do not enjoy the full range of freedoms guaranteed to people who are not incarcerated. This limitation of freedom is to ensure the presence of people at trial,[175] either in

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169. See Mark A. Seff, Note, Right to Counsel at Prison Disciplinary Hearings, 2 U. Balt. L. Rev. 263, 279 (1973) ("His dual role of advocate and subject of the inquiry leaves him in a position from which he would not be able to make an objective analysis of the impact and significance of the charges made by his accuser.").

170. Id.

171. See United States v. Gouveia, 467 U.S. 180, 189 (1984) (reasoning that "the average defendant does not have the professional legal skill to protect himself" when confronted with the complexities of criminal law and the experience of a government prosecutor (internal quotation marks omitted) (quoting Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938))); Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973) (describing the difficulty that probationers and parolees face in preparing and presenting their case without the aid of counsel).

172. See Seff, supra note 169, at 279 (imagining a role for legal counsel to aid in disciplinary hearings by helping with interviews, obtaining documents, evaluating potential witnesses, and helping incarcerated people understand the charges brought against them).

173. See id. at 276 ("The role of counsel in this setting is not to challenge the role of correctional officers, but to develop facts which aid in reaching a fair decision.").

174. 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

175. See id. at 539–40. If the government could limit the liberty of detainees only to the degree necessary to ensure their presence at trial, "house arrest would in the end be the only constitutionally justified form of detention." Id. at 540 (internal quotation marks omitted) (quoting Campbell v. McGruder, 580 F.2d 521, 529 (D.C. Cir. 1978)); see also James Brian Boyle, Comment, Constitutional Law—Pretrial Detention—Due Process—*Bell v. Wolfish*, 26 N.Y. L. Sch. L. Rev. 341, 353 (1981) ("[T]he *Bell* Court adopted the 'deference'

cases where they are accused of a capital crime or, more frequently (and unlawfully), where they cannot afford the bail set for them.[176] Put simply, the justification for pretrial custody is only to guarantee that people attend trial; any jail policies or measures that are so excessive that they effectively entail punishment of the incarcerated person will be deemed impermissible.

In examining whether jail policies or disciplinary measures are excessive so as to violate due process by constituting a punishment, the *Wolfish* Court stated that courts should grant correctional authorities a great deal of deference for their judgments about what practices are needed to maintain order and security in a detention facility.[177] Excessively harsh restrictions, however, will be deemed violative of incarcerated people's due process rights. For example, when a person awaiting trial was kept in restrictive housing for nine months for no apparent reason, the Second Circuit determined that such treatment "smacks of punishment."[178] The Eighth Circuit held that chaining and handcuffing pretrial people for over twelve hours and depriving them of access to toilets after a failed escape attempt would violate due process if the jury found that the restraints were not a reasonable method of preventing incarcerated people from escaping again or if less punitive methods could have been used.[179] Moreover, a significant restriction of pretrial detainees' out-of-cell time may signal punitive intent and constitute punishment, even when dealing with incarcerated people who are determined to be prone to attempt escapes or to assault correctional staff or other incarcerated people or who are likely to need protection from other incarcerated people.[180]

Although people held pretrial have the right to be free from punishment, the brutal realities of jail draw into question whether this due process guarantee is truly actualized.[181] Living conditions in jails tend to

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rationale when it stated that impositions on detainees need not only be directed toward ensuring their presence in court . . . .").

176. Boyle, supra note 175, at 347.

177. *Wolfish*, 441 U.S. at 540–41 & n.23 ("In determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order . . . , courts 'should ordinarily defer to [correctional officials'] expert judgment in such matters.'" (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974))).

178. Covino v. Vt. Dep't of Corr., 933 F.2d 128, 130 (2d Cir. 1991).

179. See Putman v. Gerloff, 639 F.2d 415, 420 (8th Cir. 1981) (finding that the correctional agency unconstitutionally punished pretrial detainees and deprived them of their liberty without due process by chaining them overnight).

180. See Cal. Code Regs. tit. 15, § 1053 (2022) ("Administrative segregation shall consist of separate and secure housing but shall not involve any other deprivation of privileges than is necessary to obtain the objective of protecting the inmates and staff."); see also Pierce v. County of Orange, 526 F.3d 1190, 1196 n.3, 1208 (9th Cir. 2008) (holding that pretrial detainees must be given adequate time out of their cells to exercise and observe their religions).

181. Perhaps the most well-known tragedy illustrating the inhumanity of pretrial detention is that of Kalief Browder.

In May 2010, Kalief Browder, a 16-year-old from the Bronx, was arrested and charged with robbery. The allegation was that he and a friend had stolen a man's backpack. The

be substantially worse than conditions in state prisons.[182] This is because while prisons are designed for longer-term incarceration, jails hold more transient populations, resulting in less developed and less maintained facilities as well as less programming. Overcrowding in jails is extremely common and can lead to lack of overall cleanliness; overburdened maintenance such as plumbing, heating, cooling, and ventilation; and inadequate food services.[183]

People incarcerated pretrial can be disciplined for misconduct that occurs while awaiting trial,[184] but it is questionable whether the current jail disciplinary system truly furthers correctional goals or whether it functions merely to subjugate incarcerated people to constitutionally impermissible punishment. In other words, jail discipline is often excessive and baseless, meaning that people awaiting trial are being punished in violation of the

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judge who presided over his arraignment ordered him held unless someone paid $3,000 in bail to secure his release. He was sent to Rikers Island. Seventy-four days after his arrest, a grand jury voted to indict him. This triggered a violation on an open probation case, and Browder was remanded without bail. He remained at Rikers for over three years. He was placed in solitary confinement repeatedly, for a near-continuous stretch of seventeen months. He was assaulted by a corrections officer and by other incarcerated people. He was ultimately released, after refusing multiple plea offers, because prosecutors dismissed the charges against him. Two years after his release from Rikers Island, Kalief Browder died by suicide. His death came after several previous suicide attempts, beginning while he was in solitary. Vaidya Gullapalli, Bail Reform Is About Safety and Well-Being, Appeal (Feb. 10, 2020), https://theappeal.org/bail-reform-is-about-safety-and-well-being/ [https://perma.cc/NR3X-ACKC].

182. See, e.g., David C. May, Brandon K. Applegate, Rick Ruddell & Peter B. Wood, Going to Jail Sucks (and It Really Doesn't Matter Who You Ask), 39 Am. J. Crim. Just. 250, 250–66 (2014) (using survey results to demonstrate that average people would be willing to do a longer sentence in prison if that meant they would avoid time in a local jail); Abbie Vansickle & Manuel Villa, California's Jails Are So Bad Some Inmates Beg to Go to Prison Instead, L.A. Times (May 23, 2019), https://www.latimes.com/local/lanow/la-me-california-jails-inmates-20190523-story.html (on file with the *Columbia Law Review*).

183. In overcrowded jails, people may be double- or triple-bunked in a single cell; forced to sleep dormitory style in dayrooms, classrooms, or gymnasiums; housed in ad hoc structures like tents or mobile homes set up adjacent to a facility; or made to sleep on mattresses or "boats"—plastic temporary beds described as "casket-like"—on the floor. Overcrowding can also overtax the operational systems in a facility—such as plumbing, ventilation, heating, and cooling, as well as food and health services systems—in ways that can result in environmental or health hazards that directly impinge on the well-being of both staff and incarcerated people. Chris Mai, Mikelina Belaineh, Ram Subramanian & Jacob Kang-Brown, Vera Inst. of Just., Broken Ground: Why America Keeps Building More Jails and What It Can Do Instead 11–12 (2019), https://www.vera.org/downloads/publications/broken-ground-jail-construction.pdf [https://perma.cc/X9ED-6ZXY].

184. See Rapier v. Harris, 172 F.3d 999, 1003 (7th Cir. 1999) (noting that though a pretrial detainee cannot be punished for the underlying crime that he has been accused of committing, he "can be punished for misconduct that occurs while he is awaiting trial"); Mitchell v. Dupnik, 75 F.3d 517, 524 (9th Cir. 1996) ("[P]retrial detainees are [not] free to violate jail rules with impunity."); Collazo-Leon v. U.S. Bureau of Prisons, 51 F.3d 315, 318 (1st Cir. 1995) (holding that reasonable punishment may be imposed to enforce prison requirements, but not to punish the unproven criminal allegations).

Due Process Clause.[185] Because jails are typically unable to tailor housing placements for incarcerated people, correctional staff are more likely to abuse disciplinary measures, such as restrictive housing, as a means to monitor and control.[186] People housed in jails also generally have fewer privileges than those in prison.[187] Consequently, as a response to misconduct, withholding programming or privileges is often not available as a punitive response, and restrictive housing may be the easiest and most readily available option.[188]

Since the start of the COVID-19 pandemic, jails have seen an alarming uptick in the use of restrictive housing.[189] For example, people incarcerated at New York City's notorious Rikers Island jail complex spent more time in solitary confinement in the first six months of 2020 than in the previous three years.[190] Incarcerated people at Rikers Island have reported that when they show up for their disciplinary hearings, hearing officers threaten them with more time in restrictive housing if they go through with the proceeding.[191] They have also reported being placed in restrictive housing without a hearing.[192] Incarcerated people at the D.C. Central Detention Facility have also experienced similar patterns of due process

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185. See supra note 4 and accompanying text.

186. Montagnet et al., supra note 153, at 12.

187. Id.

188. Id.

189. See supra note 4 and accompanying text.

190. See Jan Ransom, As N.Y.C. Jails Become More Violent, Solitary Confinement Persists, N.Y. Times (Oct. 12, 2020), https://www.nytimes.com/2020/10/12/nyregion/rikers-solitary-confinement.html (on file with the *Columbia Law Review*) ("In the first six months of 2020, about 13 percent of 7,200 people detained on Rikers Island spent time in solitary confinement, a much higher percentage so far this year than during the previous three years."); see also Lauren Teichner, Zakya Warkeno, Martha Grieco, Tahanee Dunn & Julia Solomons, Bronx Defs. Staff, Comment Letter on Proposed Restrictive Housing Rule 1, https://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2021-Restrictive-Housing/the-bronx-defenders-written-comment-on-the-proposed-restrictive-housing-rule.pdf [https://perma.cc/S4R6-T953] (last visited Sept. 5, 2022). Furthermore, Daquan Carrasco's experience at Rikers Island illustrates how the Department of Correction's (DOC) current disciplinary system in city jails responds with punishment rather than support. In 2020, Mr. Carrasco experienced his first mental health crisis while awaiting trial on Rikers Island. His mental health deteriorated quickly under the stress of his pending criminal case, the dangerous conditions in jail, and the isolation of incarceration—all magnified exponentially by the COVID-19 pandemic. At the time of this first mental health crisis, Mr. Carrasco was housed in General Population, and the DOC saw his behavior as violent and aggressive. As a result, he was placed in disciplinary segregation, followed by a prolonged stay in solitary confinement. Mr. Carrasco's story is typical of how DOC disciplinary systems function throughout the country. Lauren Teichner, Zakya Warkeno, Martha Grieco, Tahanee Dunn & Julia Solomons, Bronx Defs. Staff, Comment Letter on Proposed Restrictive Housing Rule 1, https://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2021-Restrictive-Housing/the-bronx-defenders-written-comment-on-the-proposed-restrictivehousing-rule.pdf [https://perma.cc/S4R6-T953] (last visited Sept. 6, 2022).

191. See Dunn et al., supra note 121.

192. See id.

rights deprivations in disciplinary proceedings.[193] Furthermore, it is not uncommon for correctional officers to make dubious allegations that lack any evidence or support, because it is ultimately only an officer's word against an incarcerated person's.[194] And far too often, incarcerated peoples' perspectives of events are not valued or heard. Depriving incarcerated people of the aid of counsel during the disciplinary process—a process that can be capricious and cruel—only further supports the notion that they are being punished for simply being in jail.[195] Because correctional staff are inclined to overuse disciplinary measures, counsel could help ensure that incarcerated people are not subjected to overly excessive or wholly unfounded liberty deprivations and lessen the probability that people are unconstitutionally punished.

Pretrial detention *inherently* abuses and punishes people presumed innocent. Thus, each additional deprivation beyond confinement itself must be balanced against the rights of incarcerated people.[196] As jails throughout the country spiral into chaos amid the COVID-19 pandemic, the failures of the disciplinary proceeding process have been exposed.[197] And as the disciplinary system overloads, the risk of lowering of standards and undue punishment increases.[198] Guaranteeing a right to counsel in disciplinary hearings not only has the potential to prevent correctional authorities from impermissibly punishing people but also to ensure that incarcerated people are consistently provided the full panoply of due process protections afforded to them under *Wolff*. Providing full access to counsel is a direct way to ensure due process in disciplinary proceedings and is critical in fostering a disciplinary system that is at worst comprehensible and consistent and at best impartial and fair.[199]

193. The Adjustment Board at the D.C. jail has disallowed incarcerated people from furnishing evidence or calling witnesses despite D.C. law guaranteeing those rights. See Memorandum from the Prisoner and Reentry Legal Services Program of the Public Defender Services for the District of Columbia on DOC Disciplinary Hearings: Expectations, Issues, and Goals 2–3 (Nov. 10, 2021) (on file with the *Columbia Law Review*).

194. See Teichner et al., supra note 190.

195. See id.

196. See Boyle, supra note 175, at 363.

197. See supra note 1 and accompanying text.

198. See Dunn et al., supra note 121 ("The more the disciplinary system is overloaded, the greater the temptation to lower standards.").

199. See Ann Marie Rocheleau, An Exploratory Examination of a Prison Disciplinary Process: Assessing Staff and Prisoner' Perceptions of Fairness [sic], J. Qualitative Crim. Just. & Criminology, Apr. 1, 2014, at 1, 23, https://www.qualitativecriminology.com/pub/v2i1p5/release/1 [https://perma.cc/82NM-5R4K] ("If prisoners gauge staff and disciplinary processes to be unfair, it reduces the legitimacy of the disciplinary process regime and may be counterproductive to prison administrators' goals of reducing serious prison misbehavior and violence.").

III. A FRAMEWORK FOR A GUARANTEED RIGHT TO COUNSEL IN JAIL DISCIPLINARY PROCEEDINGS

Parts I and II demonstrated that provision of counsel should be a constitutional right guaranteed to jail populations. Section III.A of this Part will highlight how various state systems are effectively providing counsel to incarcerated people in disciplinary proceedings and therefore undermining the *Wolff* Court's reservations. Section III.B will address practical concerns around instituting a right to counsel.

A. *Best Practices From the District of Columbia and State Systems: Leveraging What Works*

When *Wolff* was decided, there were practically no jail systems that guaranteed a right to counsel in disciplinary proceedings.[200] Today, even though there is still no constitutional right to an attorney in disciplinary proceedings, eight states and Washington, D.C., all afford incarcerated people facing a disciplinary board the right to have an attorney present at the hearing.[201] And with the renewed attention on jail conditions prompted by the COVID-19 pandemic, it is reasonable to expect that other jurisdictions may follow suit.

Elements of various jurisdictions' programs demonstrate the feasibility of a counsel provision in disciplinary hearings. For example, the Prisoner Legal Assistance Project at Harvard Law School provides access to counsel in disciplinary proceedings for incarcerated people in Massachusetts.[202] The project has a hotline that incarcerated people can call directly to request representation in an upcoming hearing.[203] Several New York legal aid organizations provide incarcerated people with assistance, including the Legal Aid Society through its Prisoners' Rights Society,[204] Prisoner's Legal Services of New York,[205] and the Bronx Defenders.[206]

Some public defender programs are proving that the criminal defense system may be more equipped to take on widespread provision of counsel

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200. See Seff, supra note 169, at 263 (exploring and analyzing the effects of the "budding trend" to require legal counsel at prison disciplinary hearings).

201. See supra note 121 and accompanying text.

202. See Disciplinary Hearings, Prisoners' Legal Servs. of Mass., https://plsma.org/find-help/d-hearings/ [https://perma.cc/N577-N5HX] (last visited Sept. 6, 2022).

203. Id.

204. See The Prisoners' Rights Project, Legal Aid Soc'y, https://legalaidnyc.org/programs-projects-units/the-prisoners-rights-project/ [https://perma.cc/H8YK-WV5Z] (last visited Sept. 6, 2022).

205. See The Second Look Project, CUNY Sch. of L., https://www.law.cuny.edu/academics/clinics/defenders/initiatives/ [https://perma.cc/7JQH-7XZH] (last visited Sept. 6, 2022) ("In partnership with Prisoner's Legal Services, student defenders represent NY State inmates who have received disciplinary violations and are serving lengthy sentences in solitary confinement.").

206. See Dunn et al., supra note 121; Teichner et al., supra note 190.

in disciplinary proceedings than the *Wolff* majority anticipated. The *Wolff* Court specifically expressed concern that there would be practical issues in providing counsel in sufficient numbers at hearings.[207] Fortunately, every person awaiting their trial in jail already has an attorney available to represent them in a disciplinary proceeding.[208] For example, in Kentucky, an incarcerated person who is represented by the Kentucky Department of Public Advocacy (Kentucky's public defense system) may request that their attorney represent them in a disciplinary hearing.[209] The Bronx Defenders is currently advocating to employ a similar model for their clients.[210] In many public defender offices throughout the country, particularly ones that employ holistic defense models,[211] attorneys already assist and represent their clients in various ancillary hearings.[212] Simply allowing attorneys to represent their clients in the collateral process of disciplinary hearings would dispel the idea that such a provision would be too inefficient.

The Public Defender Service for the District of Columbia (PDS) is a model program when it comes to extensive and efficient provision of counsel in jail disciplinary proceedings. In Washington, D.C., whenever someone is written up for a Class 1 disciplinary infraction,[213] the

207. Wolff v. McDonnell, 418 U.S. 539, 570 (1974) ("There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held. At this stage[,] . . . we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings.").

208. See Dunn et al., supra note 121; see also Alabama v. Shelton, 535 U.S. 654, 674 (2002) (holding that the defendant "is entitled to appointed counsel at the critical stage when his guilt or innocence of the charged crime is decided and his vulnerability to imprisonment is determined"); Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) ("[W]hen the trial of a misdemeanor starts[,] . . . no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel."); In re Gault, 387 U.S. 1, 41 (1967) (holding that juveniles are also entitled to legal representation); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (holding that the right to counsel is fundamental).

209. See 501 Ky. Admin. Regs. 6:020 § (II)(B)(3)(b) (2018) ("Staff counsel or an assigned legal aide shall be appointed if it appears that an inmate is not capable of collecting and presenting evidence on his behalf.").

210. See Holistic Defense, Defined, The Bronx Defs., https://www.bronxdefenders.org/holistic-defense/ [https://perma.cc/VW8F-2ZLT] (last visited Sept. 6, 2022) (describing holistic defense as recognizing clients' needs and meeting those needs in a meaningful manner).

211. Id.

212. Some examples include DMV hearings, OATH (Office of Administrative Trials and Hearings) proceedings, and custody hearings. See Mission and Story, The Bronx Defs., https://www.bronxdefenders.org/who-we-are/ [https://perma.cc/3ABN-DPXR] (last visited Oct. 3, 2022) (noting that its various teams support clients in drug charges that give rise to deportation hearings and housing cases that lead to child welfare cases).

213. A Class 1 offense is the most serious disciplinary infraction an incarcerated person can commit and carries the harshest penalties. See Program Manual: Inmate Disciplinary & Admin. Hous. Hearing Procs., 5300.1I at 37 (D.C. Dep't of Corr. 2019). Many jurisdictions similarly delineate tiers of offenses.

Department of Corrections provides the person in custody a form in which they can request that PDS represent them at the hearing.[214] The Department then emails PDS a notification of the hearing at least twenty-four hours before it occurs.[215] PDS completes a conflict check[216] and then staffs someone to represent the incarcerated person in the hearing.[217] Hearings must occur within a week of the incident and always occur at the same time.[218] Surveillance video and stills are frequently marked "for attorney's eyes only" to accommodate security regulations.[219] Attorneys speak with their clients, either in person or over the phone. Sometimes they meet with witnesses in interview rooms and obtain affidavits for submission at hearings.[220] A disciplinary committee consisting of three correctional officers, known as the Adjustment Board, presides over the hearing and

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One of the many questions left unanswered by *Wolff* is whether an incarcerated person charged with a minor violation for which they could only receive a minor penalty has any guaranteed due process protections. Babcock, supra note 15, at 1022. The Supreme Court had the opportunity to clarify the lesser penalties question in *Baxter v. Palmigiano*, 425 U.S. 308 (1976). In *Baxter*, the Supreme Court reversed the Ninth Circuit in concluding that the issue should not have been reached in that case because each named plaintiff had received penalties consisting of suspension of privileges such as loss of good time or punitive segregation. *Baxter*, 425 U.S. at 323–24. The Court held that because plaintiffs had not committed minor violations and thus had not received minor penalties, the Court was not in a position to address the issue. Id. Though the question of whether due process is required for the imposition of fewer penalties is largely unanswered, *Baxter* did establish that *Wolff* standards are required wherever a major penalty could potentially be imposed. Id. at 324.

Some jurisdictions extend the right to counsel based on the severity of the offense. Washington, D.C., for example, only allows incarcerated people with Class 1 offenses to obtain counsel, whereas those charged with lower-level Class 2 offenses may only seek staff representatives for assistance. Program Manual: Inmate Disciplinary & Admin. Hous. Hearing Procs., 5300.1I at 20 (D.C. Dep't of Corr. 2019). Similarly, Minnesota's Department of Corrections does not allow an attorney to represent a resident at Minor Discipline Hearings; however, attorneys may be present for Major Discipline Hearings. Mn. Dep't of Corr § 303.010 (G)(2), (H)(2) (2021). But if the resident is unable to understand the discipline process, they are always entitled to representation. Id. § 303.010 (D)(2)(c). Alaska permits a resident legal representation in disciplinary proceedings only when the district attorney has filed a criminal complaint. Alaska Admin. Code tit. 22, § 05.440 (1977).

214. See Dunn et al., supra note 121.

215. Id.

216. A conflict check is a process by which an attorney ensures their representation of one client does not adversely affect another client. In the context of disciplinary proceedings, this typically requires that an attorney ensure that they are not representing two people implicated in an incident. For example, if two incarcerated individuals are accused of assaulting one another, an attorney will be unable to represent both in their separate disciplinary hearings.

217. The chief judge of the District of Columbia issued an administrative practice order to allow law students to represent incarcerated people at these hearings under PDS attorneys' supervision. Administrative Order 07-20 (D.C. Super. Ct. Aug. 16, 2007), https://www.dccourts.gov/sites/default/files/2017-03/07-20.pdf [https://perma.cc/SA92-RTEU].

218. Id.

219. Id.

220. Id.

renders a decision almost immediately.[221] Interestingly, much of what is contested are procedural violations, such as claims that the officer who investigated the case and obtained statements from other officers was also involved in the incident, chain of custody issues for possession of contraband, or failing to provide notice to the person in custody.[222]

Washington, D.C.'s program showcases how providing counsel in disciplinary hearings does not, as the *Wolff* Court said, "reduce their utility as a means to further correctional goals."[223] A concern expressed by the *Wolff* majority was that counsel would delay the decisionmaking process.[224] As mentioned, however, the Adjustment Board delivers their decision fairly quickly, suggesting that inserting counsel does not prolong the decisionmaking process significantly.[225] In fact, counsel could potentially accelerate the deliberation process, as they may more readily spot procedural violations that will automatically result in a not guilty verdict. Furthermore, one unique aspect of PDS's program is that staff meet regularly with the Department of Corrections commissioner to discuss issues and concerns with respect to the disciplinary process.[226] Keeping the commissioner abreast of patterns of due process violations as they arise ensures that ameliorative measures are taken more swiftly.

Though Washington, D.C.'s program is impressive, an exemplary model should incorporate a few modifications. Washington, D.C., only allows incarcerated people to have counsel for the most serious violations.[227] This is likely because these violations carry the most severe penalties, namely solitary confinement.[228] Equally concerning, however, are violations that result in loss of good-time credit, which essentially extends someone's sentence, and loss of privileges. Incarcerated people face these penalties for almost any type of minor violation.[229] Because any type of liberty deprivation has detrimental effects on not only the physical and mental health of

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221. Id.

222. Id.

223. Wolff v. McDonnell, 418 U.S. 539, 570 (1974).

224. Id. at 570 ("Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial." (quoting Gagnon v. Scarpelli, 411 U.S. 778, 788 (1972))).

225. See supra note 221 and accompanying text.

226. Interview with Chiquisha Robinson, Deputy Chief, Prisoner and Reentry Legal Servs. Program, in Washington, D.C. (Nov. 5, 2021) (on file with author).

227. Program Manual: Inmate Disciplinary & Admin. Hous. Hearing Procs., 5300.1I at 20 (D.C. Dep't of Corr. 2019).

228. Id. at 37–38.

229. See id. at 37–46; see also Rocheleau, supra note 199, at 4 ("[Prison disciplinary] processes have enormous consequences both for individual prisoners and prison systems alike and can result in sanctions that range from the revocation of privileges (e.g., visits, use of the phone, loss of personal items) to extended periods in segregation along with the loss of good time.").

incarcerated people but also on the outcome of their case,[230] counsel should be provided in all disciplinary hearings. Additionally, incarcerated people should not be required to request counsel. Rather, counsel should be automatically provided, and incarcerated people should have the ability to opt out. This ensures that people are not deprived of the right to counsel due to human or clerical error.

B. *Examining Other Practical Concerns Around Provision of Counsel*

1. *Human and Economic Burden.* — Guaranteeing a right to counsel in disciplinary hearings could pose both financial burdens on the state and stretch already overworked attorneys even thinner.[231] Furthermore, the sheer frequency of disciplinary proceedings may make it difficult to staff an attorney to attend every hearing, particularly because public defenders already juggle extremely high caseloads.[232] Private attorneys who may be interested in representing incarcerated people at disciplinary hearings may be disincentivized by the fact that, unlike guaranteed fees in court-appointed criminal cases or the possibility of court awarded fees if they prevail in a civil rights suit, they have no guarantee that they will ever be paid for representing incarcerated people in disciplinary hearings.[233]

While there is no panacea for this concern, several viable solutions exist. One workaround could be to dedicate specific staff members to exclusively handle disciplinary proceedings to ensure that other attorneys do not take on more work than they can handle. Also, allowing law students under the supervision of attorneys to represent incarcerated people in disciplinary hearings could alleviate the cost and human burden associated with providing counsel.[234] Finally, law firms could create pro bono projects dedicated to providing counsel to incarcerated people at disciplinary hearings.

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230. See supra notes 150–154 and accompanying text.

231. See Wolff v. McDonnell, 418 U.S. 539, 570 (1974) (noting the financial and practical infeasibility of providing counsel in disciplinary hearings).

232. See Norman Lefstein, Excessive Public Defense Workloads: Are ABA Standards for Criminal Justice Adequate, 38 Hastings Const. L.Q. 949, 951 & n.6 (2011) (discussing the enormous caseloads of public defenders); Richard A. Oppel, Jr. & Jugal K. Patel, One Lawyer, 194 Felony Cases, and No Time, N.Y. Times (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html (on file with the *Columbia Law Review*) (discussing public defenders' massive caseloads).

233. A. Mechele Dickerson, A Reevaluation of Inmates' Fifth and Sixth Amendment Rights at Disciplinary Hearings Which Precede Criminal Prosecutions, 32 How. L.J. 427, 432 (1989); see also Webb v. Dyer Cnty. Bd. of Educ., 471 U.S. 234, 243–44 (1985) (holding that attorneys, under the Civil Rights Attorneys Fees Act, cannot be compensated for fees incurred in optional state administrative proceedings that relate to the incident giving rise to the civil rights suit).

234. See supra note 217 and accompanying text.

It is worth mentioning that instituting any due process protection will come with a certain degree of costs, hence the need for a balancing test.[235] The Supreme Court has made clear, however, that "[p]rocedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person . . . ."[236] Furthermore, local governments spend over twenty-five billion dollars on jails despite falling crime rates and fewer people being admitted to jail—a powerful indicator of priorities.[237] Finding a constitutional right to counsel in disciplinary proceedings would force local governments to reallocate resources to ensure that people awaiting trial are afforded representation, thus precluding them from denying counsel provision on mere cost or efficiency grounds.

2. *Legitimizing the Use of Solitary Confinement.* — Another valid concern around guaranteeing counsel in disciplinary proceedings is that doing so would legitimize the inhumane use of solitary confinement. Abolitionist scholars have demonstrated the limits of procedural justice (the fairness of processes used by those in positions of authority to reach specific outcomes or decisions) to redress serious concerns about violent systems and their concentrated effect on poor, Black, and brown communities.[238] One major critique of procedural justice is that it centers criminal justice system actor legitimacy and citizen compliance as the goals of reform.[239] Thus, any efforts in procedural justice reform arguably aid in legitimizing systems that ultimately should be disrupted or dismantled. Nonetheless, the dire conditions of jails necessitate swift action in the form of increased safeguards. Even with the minimum *Wolff* safeguards in place, the disciplinary hearing process is failing to honor the humanity of people confined in jails.[240] And when incarcerated people view staff and disciplinary processes as unfair, it not only reduces the validity of the disciplinary process regime but also is counterproductive to correctional authorities' goals of reducing violence.[241] The mere presence of counsel

235. See generally Mathews v. Eldridge, 424 U.S. 319 (1976) (deciding whether due process under the Fifth Amendment applies to social security disability benefits); Goldberg v. Kelly, 397 U.S. 254 (1970) (discussing whether due process under the Fifth Amendment applies to public assistance aid).

236. Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972).

237. Local Spending on Jails Tops $25 Billion in Latest Nationwide Data, The Pew Charitable Trs. (Jan. 29, 2021), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/01/local-spending-on-jails-tops-$25-billion-in-latest-nationwide-data [https://perma.cc/RFB6-88UP].

238. See, e.g., Amna A. Akbar, An Abolitionist Horizon for (Police) Reform, 108 Calif. L. Rev. 1781, 1807 (2020) ("Scholars in law and beyond have demonstrated the limits of procedural justice to redress serious concerns about police violence and its concentration in poor, Black, and brown communities."); Monica C. Bell, Safety, Friendship, and Dreams, 54 Harv. C.R.-C.L. L. Rev. 703, 716–22 (2019).

239. Akbar, supra note 238, at 1809.

240. See supra notes 1–3 and accompanying text.

241. Rocheleau, supra note 199, at 23.

in disciplinary proceedings may make correctional officers more likely to adhere to *Wolff* standards. Allowing counsel into the disciplinary process would add a level of consistency into the disciplinary process and create a system of checks and balances ensuring that incarcerated people are provided the full extent of their due process protections.

By no means is this Note intending to assert that guaranteeing a right to counsel to incarcerated people in jail disciplinary hearings is the end-all, be-all. It is critical that jails also revise disciplinary policies and practices to emphasize proportional sanctions to minimize the use of restrictive housing for disciplinary infractions in facilities. They should also substantially reduce the number of violations that can result in disciplinary hearings. And finally, correctional agencies should develop additional, alternative sanctions to disciplinary segregation and encourage their staff to use them more often. Ultimately, one of the most, if not the most, direct measures to ensure that people are extended the full array of due process rights is to not incarcerate them at all. The harmful consequences of pretrial detention cannot be overstated. Thus, it is essential that correctional systems significantly reduce the number of people who cycle in and out of jail.

CONCLUSION

Underpinning Justice William O. Douglas's dissent in *Wolff* was a concern that allowing prison officials to wield largely unchecked discretion in authority would cause incarcerated people to feel that prison officials were authoritarian and capricious and ultimately result in a crisis of legitimacy.[242] Almost fifty years after the ruling and under the backdrop of a global pandemic, Justice Douglas's concern has unquestionably come to pass. Depriving incarcerated people of access to counsel in disciplinary practice undermines any sense of faith in the system overall. In acknowledgement of the potential for future changes in the disciplinary process, the *Wolff* Court declared that their conclusions were "not graven in stone," and that circumstances may arise that require the Court to take on further consideration and reflection.[243] As jail conditions deteriorate and due process abuses go unchecked, the time is nigh for a reexamination of the *Wolff* standards.

Access to counsel in disciplinary hearings is necessary, straightforward, and attainable. Jurisdictions that guarantee access to counsel in jail disciplinary proceedings demonstrate how inserting advocates into in the disciplinary system has the potential to create a system of accountability and to ensure that all other procedural safeguards, both constitutional and discretionary alike (e.g., notice, calling witnesses, presenting evidence, and confrontation and cross-

242. Wolff v. McDonnell, 418 U.S. 539, 599–601 (1974) (Douglas, J., dissenting).
243. Id. at 571–72 (majority opinion).

examination), are upheld. The right to counsel is "the most precious right a defendant has, because it is his attorney who will fight for the other rights the defendant enjoys."[244] Guaranteeing a right to counsel in jail disciplinary proceedings would reify each incarcerated person's dignity and worth, insert accountability into a system largely devoid of it, and ultimately ensure a more just and reliable disciplinary process.

244. Kaley v. United States, 571 U.S. 320, 344 (2014) (Roberts, C.J., dissenting).

INVESTORS TAKE NOTE: COMPLEXITY AND DISCLOSURE EFFICACY CONCERNS AMID A STRUCTURED NOTES RENAISSANCE

*Jacob Freund**

This Note examines how increasing complexity fueled by financial innovations can impair mandatory disclosure as an investor-protection mechanism. It focuses on structured notes, a type of debt security that has transformed significantly since the global financial crisis. This Note highlights several financial innovations that have fueled an unprecedented increase in structured note issuance volume by expanding access and catering to more idiosyncratic investor preferences, such as the proliferation of digital platforms and proprietary indexes. It considers how these innovations have made structured notes more complex and how increased complexity might make crucial information more expensive and more difficult for issuers to express and for investors and regulators to understand through disclosure documents. In addition to discussing the potential effects of increasing complexity, this Note conducts a brief analysis of the readability of a novel data set of structured note prospectuses filed with the Securities and Exchange Commission and shows that structured note disclosure has become more difficult to read over time. This Note argues that mandatory disclosure rules may not be enough to protect investors as structured notes continue to grow in popularity and evolve in substance, and it suggests several improvements to the current disclosure regime, such as interactive digital calculators, to combat informational hurdles that investors in increasingly complex structured notes might face in the years ahead.

INTRODUCTION 140
I. THE REGULATION OF STRUCTURED NOTES 145
A. Structured Note, Explained 145
B. Mandatory Disclosure 148
1. Registration Statements and Prospectuses 149
2. Substance Requirements 152
3. Plain English 154

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4. Intermediary Obligations 155
II. INNOVATION, COMPLEXITY, AND INFORMATION LOSS IN TODAY'S MARKET 156
A. A Market Transformed 156
B. Innovation, Complexity, and Information Loss 160
1. Innovation 160
2. Complexity 162
3. Information Loss 163
C. Challenges to Structured Note Disclosure 164
1. Overwhelming Issuance Volumes 165
2. Accuracy and Completeness 166
3. Information Overload 167
4. Investor Comprehension 169
III. TOWARD LESS READABLE DISCLOSURE 171
A. Methodology 171
1. Data Set Compilation and Readability Calculation 172
2. Limitations 173
B. Findings 173
1. Readability by Year 173
2. Readability by Issuer 174
IV. SOLVING THE INFORMATION PROBLEM 175
A. The Benefits and Drawbacks of an Ex Ante Approach to Regulation 175
B. Enhancing Disclosure 178
C. Strengthening Oversight 179
CONCLUSION 181
APPENDIX: NOVEL DATA SET 182

INTRODUCTION

Today, regulation of securities offerings in the capital markets arguably faces no greater threat than increasing complexity and information loss.[1] Yet, after decades of technology-driven financial

1. See, e.g., Kathryn Judge, Fragmentation Nodes: A Study in Financial Innovation, Complexity, and Systemic Risk, 64 Stan. L. Rev. 657, 658, 661–63 (2012) [hereinafter Judge, Fragmentation Nodes] (finding that complexity can—and, in the 2007 to 2009 financial crisis, did—give rise to a "pervasive loss of information" that in turn "contribute[s] to

innovation,[2] financial regulation continues to rely primarily on the mandatory disclosure of information to investors.[3] This Note examines the effectiveness of disclosure in the context of the complexity and information loss threats through the lens of a financial instrument currently undergoing a profound transformation—structured notes.

The regulatory environment around securities offerings is ripe for reevaluation. The global financial crisis (GFC) that spanned 2007 to 2009 kicked off a "rulemaking frenzy" that culminated in the 2010 passage of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank).[4] Dodd–Frank required "eleven different federal

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systemic risk"); Steven L. Schwarcz, Protecting Financial Markets: Lessons From the Subprime Mortgage Meltdown, 93 Minn. L. Rev. 373, 405 (2008) [hereinafter Schwarcz, Protecting Financial Markets] ("Solving problems of financial complexity may well be the ultimate twenty-first century market goal.").

2. See Douglas W. Arner, Jànos Barberis & Ross P. Buckley, FinTech, RegTech, and the Reconceptualization of Financial Regulation, 37 Nw. J. Int'l L. & Bus. 371, 373 (2017) ("[T]echnological developments are changing the nature of financial markets, services, and institutions in ways completely unexpected prior to the 2008 Global Financial Crisis . . . ."); Kathryn Judge, Investor-Driven Financial Innovation, 8 Harv. Bus. L. Rev. 291, 292 (2017) [hereinafter Judge, Investor-Driven Financial Innovation] ("The current excitement around 'fintech' is merely the most recent iteration of an ongoing process of innovation that has fundamentally transformed the structure of the financial system.").

3. See What We Do, SEC, https://www.sec.gov/about/what-we-do#section1 [https://perma.cc/7X32-8H82] [hereinafter SEC, What We Do] (last modified Nov. 22, 2021) ("[The SEC] require[s] public companies, fund and asset managers, investment professionals, and other market participants to regularly disclose significant financial and other information so investors have the timely, accurate, and complete information they need to make confident and informed decisions about when or where to invest.").

4. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C. and 15 U.S.C.); see also Dan Awrey & Kathryn Judge, Why Financial Regulation Keeps Falling Short, 61 B.C. L. Rev. 2295, 2296 (2020); Tamar Frankel, The Failure of Investor Protection Disclosure, 81 U. Cin. L. Rev. 421, 422 (2012). One of the GFC's proximate causes was the U.S. subprime mortgage crisis. Housing prices precipitously declined after the collapse of the U.S. housing bubble in 2006 and 2007. As home values dropped, adjustable-rate mortgages on those homes began to reset at significantly higher interest rates. Unable to afford their higher monthly payments, homeowners, especially subprime borrowers, began to default on their mortgages. As defaults rose, mortgage-backed securities (MBSs)—bonds secured by pools of mortgages—and collateralized debt obligations (CDOs)—many of which derived income from MBSs—cratered in value. See Schwarcz, Protecting Financial Markets, supra note 1, at 378–79.

The GFC laid waste to the U.S. economy. Americans lost nearly ten trillion dollars in wealth, the stock market lost almost eight trillion dollars in value, and the number of unemployed Americans doubled. See Renae Merle, A Guide to the Financial Crisis—10 Years Later, Wash. Post (Sept. 10, 2018), https://www.washingtonpost.com/business/economy/a-guide-to-the-financial-crisis–10-years-later/2018/09/10/114b76ba-

agencies . . . to undertake 243 separate rulemaking processes and conduct sixty-seven studies,"[5] and many of its reforms persist today.[6] But much has changed in the twelve years since Dodd–Frank. Financial innovations—in particular, innovations in financial technology (fintech) and the rapid proliferation of fintech firms—have since disrupted established financial institutions, diffused financial markets, and diversified the array of financial instruments to which retail investors have access.[7] The resulting landscape, as the Financial Stability Oversight Counsel (FSOC) found, is one of elevated uncertainty, volatility, and widening gaps in market data.[8] Accordingly, concerns abound about the continued ability of mandatory disclosure to protect investors.[9]

Structured notes, debt securities sold by financial institutions to raise capital,[10] are one such instrument class that has transformed in scope and substance since the GFC. The emergence of digital structured notes platforms has "lower[ed] costs, [sped up] execution times and increased price transparency,"[11] and advancements in modeling and methodological capabilities have allowed notes to cater to more idiosyncratic investment

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af10-11e8-a20b-5f4f84429666_story.html [https://perma.cc/W4VY-MFE9]; Civilian Unemployment Rate, U.S. Bureau of Lab. Stat., https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm [https://perma.cc/2TBD-W4LV] (last visited Nov. 5, 2021). The effects are still felt today. See John W. Schoen, Financial Crisis of 2008 Is Still Taking a Bite Out of Your Paycheck 10 Years Later, CNBC (Sept. 12, 2018), https://www.cnbc.com/2018/09/11/financial-crisis-of-2008-still-taking-bite-out-of-your-paycheck-report.html [https://perma.cc/EP6P-5RG2] (describing the GFC's lasting impact on national gross domestic product and household income).

5. Awrey & Judge, supra note 4, at 2297.

6. See, e.g., Dodd–Frank Wall Street Reform and Consumer Protection Act § 165(i), 124 Stat. at 1430–31 (requiring stress-testing of financial institutions); id. § 913(g), 124 Stat. at 1828–30 (updating standards of conduct for industry professionals); id. § 942(b), 124 Stat. at 1897 (enhancing oversight of the capital markets).

7. See infra notes 85–95 and accompanying text.

8. See Fin. Stability Oversight Council, 2021 Annual Report 10, 16–17 (2021), https://home.treasury.gov/system/files/261/FSOC2021AnnualReport.pdf [https://perma.cc/2PD5-SWQ7].

9. See, e.g., William Magnuson, Financial Regulation in the Bitcoin Era, 23 Stan. J.L. Bus. & Fin. 159, 161–63 (2018) (arguing that recent innovations in financial technology "render the conventional tools of financial regulators largely ineffective by increasing the cost of identifying, monitoring and sanctioning market participants").

10. See Stephen A. Ross, Randolph W. Westerfield & Bradford D. Jordan, Fundamentals of Corporate Finance 216 (12th ed. 2018). For a more detailed description of structured notes, see infra section I.A.

11. Carolina Wilson, Electronic Note Services Proliferate in the U.S., Structured Notes: Technology Issue (Bloomberg LP, New York, N.Y.), Apr. 2017, at 5, 5, https://www.bbhub.io/brief/sites/4/2017/04/04-2017_STN_Quarterly.pdf [https://perma.cc/VM3Q-P29C].

preferences.[12] Dovetailing these innovations is a record of explosive growth. After declining by almost 30% during the GFC,[13] the market for structured notes "bounced back with ferocity."[14] Less than a decade later, the global structured notes market surpassed two trillion dollars,[15] and the U.S. market alone reached seventy-two billion dollars, a 100% increase from 2009.[16] And these trends show no signs of slowing. Monthly U.S. sales reached decade highs during the 2020 COVID-19-induced stock market crash,[17] digital note platforms ended 2021 with record business,[18] and U.S. sales continued to increase in the first quarter of 2022.[19] This renaissance

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12. See, e.g., infra note 106 and accompanying text.

13. Matthew Goldstein, Insight-Structured Notes Start to Overcome the Lehman Taint, Reuters (Mar. 29, 2010), https://www.reuters.com/article/structurednotes/insight-structured-notes-start-to-overcome-the-lehman-taint-idUSN2925219720100329 [https://perma.cc/T7RP-W6LC] (noting a decline in U.S. sales of structured notes in the first two years of the GFC from around fifty billion to thirty-five billion dollars).

14. Luis A. Aguilar, Comm'r, SEC, Regulators Working Together to Serve Investors (Apr. 14, 2015), https://www.sec.gov/news/speech/regulators-working-together-to-serve-investors.html [https://perma.cc/G3RS-ZA74].

15. See Structured Notes Infographic, Halo Investing (Aug. 31, 2022), https://haloinvesting.com/blog/what-is-a-structured-note-infographic/ [https://perma.cc/LPD2-MZUC].

16. See Aguilar, supra note 14 (noting thirty-four billion dollars in structured note sales in 2009); Evie Liu, Structured Notes Saw Record Demand in a Volatile 2020. Investors Should Mind the Fine Print., Barron's (Feb. 24, 2021), https://www.barrons.com/articles/structured-notes-saw-record-demand-in-a-volatile-2020-investors-should-mind-the-fine-print-51614124699 (on file with the *Columbia Law Review*) (noting seventy-two billion dollars in total structured note sales in 2020, more than twice the 2009 figure).

17. See Gunjan Banerji & Julia-Ambra Verlaine, The Reach for Yield Survives Coronavirus Market Shock, Wall St. J. (Apr. 27, 2020), https://www.wsj.com/articles/the-reach-for-yield-survives-coronavirus-market-shock-11587979802 (on file with the *Columbia Law Review*) ("[S]ales of so-called structured products geared toward individual investors—including bets on stocks repackaged into bonds—hit a decade high in March [2020]."). Between February 12 and March 23, 2020, the Dow Jones Industrial Average dropped 37%. This period included the three worst single-day market drops in history. See Liz Frazier, The Coronavirus Crash of 2020, and the Investing Lesson It Taught Us, Forbes (Feb. 11, 2021), https://www.forbes.com/sites/lizfrazierpeck/2021/02/11/the-coronavirus-crash-of-2020-and-the-investing-lesson-it-taught-us/?sh=326b235346cf (on file with the *Columbia Law Review*).

18. Amélie Labbe, SRP in Brief: Ending on a High, SRP (Nov. 29, 2021), https://www.structuredretailproducts.com/news/details/77770 [https://perma.cc/HHN3-89LE] ("US platform Simon has announced record increases in its structured investment broker-dealer volumes . . . . Simon distributed just over 3100 structured products . . . in 2021 to-date worth US$11 billion.").

19. Spotlight On . . . Top Issuers in the US (Q1 2022), SRPInsight, May/June 2022, at 13, 13 ("Some US$26.6 billion was collected from 8,561 structured products (an average of US$3.1 per product) in [Q1] 2022—a slight increase from Q1 2021 (US$26.3 billion from 8,085 products). Sales and issuance were also up compared to Q4 2021 when US$24.6 billion was collected from 8,054 products.").

is poised to test the limits of the legacy disclosure scheme in the years ahead and, accordingly, warrants renewed scrutiny.[20]

This Note's core assertion is that increasing complexity and information loss in the structured notes market may impair the efficacy of disclosure as an investor-protection mechanism. Specifically, this Note highlights several trends and innovations that may increase complexity in the structured notes market and the securities themselves. Increased complexity heightens the informational burden placed on parties that engage in structured note transactions. This heightened burden could, in turn, impair the construction and comprehension of disclosure, reducing the efficacy of disclosure as a means of informing and protecting investors.

This Note progresses in four Parts. Part I explains the mechanics of structured notes as investment securities and details the disclosure regime that regulates the public offering of structured notes to investors. Part II details the conceptual framework shaped by a number of legal scholars following the GFC that links financial innovation, complexity, and information loss.[21] It then situates today's structured notes landscape

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20. The market's transformation has produced a spirited discussion among market participants about the merits of structured notes as investments. Some describe structured notes as "a robust investment and asset allocation strategy," Structured Products, HSBC, https://www.gbm.hsbc.com/solutions/markets/structured-products [https://perma.cc/6ZRE-BR6F] (last visited Oct. 31, 2021), and "the missing piece of your portfolio," Evan J. Mayer, Why Structured Notes Are One of the Most Innovative Options to Come Out Since the Mutual Fund, Worth (Nov. 19, 2020), https://www.worth.com/structured-notes-innovative-option-mutual-fund-investing/ [https://perma.cc/7ZMP-KVY7]. Others warn that structured notes "spring from the dead to devour investor dollars," John F. Wasik, Why You Should Avoid Zombie Structured Notes, Forbes (Oct. 24, 2014), https://www.forbes.com/sites/johnwasik/2014/10/24/why-you-should-avoid-zombie-structured-notes/ [https://perma.cc/45RN-7T8U], and that investors should "take a pass," Amy C. Arnott, A 13% Yield: What Could Go Wrong?, Morningstar (June 1, 2020), https://www.morningstar.com/articles/986847/a-13-yield-what-could-go-wrong [https://perma.cc/TA5Y-27Y2]. This Note does not wade into this debate.

21. See, e.g., Dan Awrey, Complexity, Innovation, and the Regulation of Modern Financial Markets, 2 Harv. Bus. L. Rev. 235 (2012) (arguing that the post-GFC regulatory regimes governing derivatives markets disregard the regulatory challenges generated by financial innovation); Judge, Fragmentation Nodes, supra note 1 (showing how the complexity of fragmentation nodes gives rise to two phenomenon—information loss and stickiness—that in turn may give rise to systemic risk); Steven L. Schwarcz, Regulating Complexity in Financial Markets, 87 Wash. U. L. Rev. 211 (2009) [hereinafter Schwarcz, Regulating Complexity] (examining how complexities of investment securities and of modern financial markets can lead to and exacerbate failures of investing standards and financial-market practices). This Note relies on several other strands of post-GFC scholarship. One strand analyzes regulatory challenges specific to structured notes; another strand debates the merits of mandatory disclosure in financial regulation. Compare Michael Bennet, Complexity and Its Discontents: Recurring Legal Concerns With Structured Products, 7 N.Y.U. J.L. & Bus. 811, 813 (2011) (examining "two of the key legal issues

within that framework by identifying several potential sources of complexity that may fuel information loss in the creation and comprehension of structured note disclosure documents. Part III conducts a brief empirical analysis of the readability of structured note disclosure documents. This Part recognizes the limitations inherent in the theoretical framework discussed in Part II and attempts to measure disclosure efficacy through the proxy of readability over the course of the recent structured notes renaissance. Part IV asserts that the recent innovations in the structured notes market warrant the reevaluation by financial regulators of the disclosure rules that are designed to communicate information to investors. It then highlights some potential ex ante reforms that may help to ameliorate the informational issues of disclosure in the coming years.

I. The Regulation of Structured Notes

This Part introduces the subject of this Note's disclosure analysis: structured notes. The following overview shows that structured notes can be customized to suit idiosyncratic investor objectives through unique combinations of underlying components and interacting features. This Part also introduces the mandatory disclosure rules and requirements that govern the public offering of structured notes in the U.S. capital markets.

A. *Structured Note, Explained*

Structured notes are debt securities sold by financial institutions, or issuers, to raise capital.[22] Generally, an investor in a structured note lends

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relevant to the structured products market: investor suitability and conflicts of interest"), and Ann Morales Olazábal & Howard Marmorstein, Structured Products for the Retail Market: The Regulatory Implications of Investor Innumeracy and Consumer Information Processing, 52 Ariz. L. Rev. 623, 627 (2010) (arguing that the use of numerical examples to illustrate possible investment returns in structured notes "encourages issuer abuse of investors' known cognitive biases"), with Robert P. Bartlett, III, Inefficiencies in the Information Thicket: A Case Study of Derivative Disclosures During the Financial Crisis, 36 J. Corp. L. 1, 57 (2010) ("[T]he results of this study indicate that the traditional disclosure model aimed at simply disseminating information to the public domain is unlikely to have significant efficacy when it comes to disclosures pertaining to complex credit derivatives."), and Henry T.C. Hu, Too Complex to Depict? Innovation, "Pure Information," and the SEC Disclosure Paradigm, 90 Tex. L. Rev. 1601, 1713 (2012) (showing that "current depiction tools cannot capture the risk–return characteristics of [asset-backed securities]" and that "[s]imilar depiction problems afflict the disclosures of major financial institutions").

22. A debt security is a negotiable financial instrument that evidences a promise by a borrower, here the issuer, to repay money loaned by a lender, here the investor. Like equity securities, debt securities can be traded between investors. Unlike equity securities, debt securities do not provide investors ownership interest in the issuers or any other company, and

an amount of money—this original investment is called the principal—to the note's issuer for a predetermined, fixed period of time.[23] In exchange for the principal, the issuer promises to pay the investor an amount of money in the future—the return on the note—that will be determined pursuant to a series of terms outlined in the note. The lifecycle of the note concludes at the note's maturity date, at which point the issuer's final obligation to repay the investor comes due.

More specifically, a structured note is a wrapper, or vehicle, that combines the terms of several component securities.[24] The issuer in a typical structured note uses the principal investment to purchase a bond component and an embedded derivative component.[25] The bond component supplies the note's fixed maturity date and the funds to return the investor's principal, and the options package provides a set of unique, customizable features that determine the note's return.[26]

Principal among these features is that the return on a structured note is a function of the performance of one or more underlying reference assets (underliers).[27] Stated differently, the payoff on a structured note depends on whether the underliers to which it links—the underliers referenced in the note's terms—increase or decrease in value.[28] In effect,

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outstanding payments on debt securities are liabilities of the issuing financial institution. Treasury securities or bonds are common examples of debt securities. See Ross et al., supra note 10, at 206; Practical L. Corp. & Sec., Debt Securities: Overview, Westlaw Practical Law 4-383-2634 [hereinafter Debt Securities Practice Note] (last visited Nov. 20, 2022).

23. See Debt Securities Practice Note, supra note 22.

24. See Under the Hood: How Structured Notes Work, Halo J. (Feb. 3, 2021), https://journal.haloinvesting.com/under-the-hood-how-structured-notes-work/ [https://perma.cc/AKF7-YVLK].

25. Investor Bulletin: Structured Notes, SEC (Jan. 12, 2015), https://www.sec.gov/oiea/investor-alerts-bulletins/ib_structurednotes.html [https://perma.cc/8U6Z-SAXU] [hereinafter SEC, Investor Bulletin]; see also Bennet, supra note 21, at 814 (describing the two core components of a simple structured product). The embedded derivative component is an options package. See Under the Hood: How Structured Notes Work, supra note 24 ("While the majority of a structured note consists of a zero-coupon bond, the remainder is an options package which determines the payout/participation and protection levels.").

26. See SEC, Investor Bulletin, supra note 25.

27. Id. A note's return is also a function of the arrangement of its underliers. A note with one underlier is entirely dependent on that underlier for its return. But other notes may link to a group or basket of underliers that may be assigned equal or unequal weight in determining the note's return. See, e.g., Goldman Sachs Grp., Inc., Basket-Linked Trigger GEARS Due 2030 (Form 424(b)(2)), at S-3 (Mar. 31, 2020), https://www.sec.gov/Archives/edgar/data/0001419828/000156459020014349/gs-424b2.htm [https://perma.cc/F9ED-GCDD] (linking to a basket of six unequally weighted equity indexes).

28. See, e.g., Goldman Sachs Grp., Inc., Leveraged Buffered S&P 500 Index-Linked Notes Due 2022 (Form 424(b)(2)), at PS-1 (Oct. 8, 2021), https://www.sec.gov/Archives/

a note can link to any asset to which an investor wants exposure. The most common classes of underliers are equity indexes like the S&P 500, equity securities like Apple's common stock, and exchange-traded funds (ETFs).[29] More exotic underliers can include commodities, the spread between interest rate swaps, and proprietary indexes comprised of complicated methodologies. In concert with recent trends, issuers have even begun offering notes linked to companies with large cryptocurrency holdings and to special-purpose acquisition companies.[30]

Distinct from a note's underliers is the structure that determines the payoff it delivers to investors.[31] Among the myriad terms that comprise a note's payoff structure, one of the most common is principal protection, or a promise to repay part or all of an investor's principal if the investor holds the note to maturity.[32] This promise of full or partial principal

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edgar/data/0001419828/000156459021050537/gs-424b2.htm [https://perma.cc/G6MU-7FYB] ("The amount that you will be paid on your notes on the stated maturity date . . . is based on the performance of the S&P 500 Index . . . .").

29. In 2020, over 70% of structured notes linked to either one or a basket of equity indexes. Among these notes, nearly 25% linked to just the S&P 500, and around 15% linked to a combination of the S&P 500, the Russell 2000, the Dow Jones Industrial Average, and the Nasdaq 100. Around 23% of structured notes linked to either one or a basket of equity securities. See USA 2020 Market Overview: Highest Ever Annual Growth, SRPInsight, Jan. 2021, at 20, 23.

30. Goldman Offers SPAC-Linked Structured Notes, SRPInsight, Nov./Dec. 2021, at 15, 15 (on file with the *Columbia Law Review*) (reporting on the private offering of some SPAC-linked notes to capitalize on heightened market activity); Stephen Alpher, JPMorgan Structured Note to Offer Clients Crypto Exposure, Seeking Alpha (Mar. 9, 2021), https://seekingalpha.com/news/3670886-jpmorgan-structured-note-to-offer-clients-crypto-exposure (on file with the *Columbia Law Review*) (noting the motivation of investors to acquire exposure to cryptocurrencies without themselves owning cryptocurrency).

31. See SEC, Investor Bulletin, supra note 25 ("Determining the performance of each note can be complex and this calculation can vary significantly from note to note depending on the structure. Notes can be structured in a wide variety of ways.").

32. A note offering full principal protection essentially exempts the principal from the influence of the performance of its underliers. See Structured Notes With Principal Protection: Note the Terms of Your Investment, SEC (June 1, 2011), https://www.sec.gov/investor/alerts/structurednotes.htm [https://perma.cc/G7DK-6F7G] [hereinafter SEC, Structured Notes With Principal Protection]. A note offering partial principal protection subjects only a portion of the principal to the performance of the note's underliers. One example is a hard buffer, or a "minimum percentage decline in the underlier before which the investor is not subject to loss, and thereafter, loss is incurred on a 1:1 basis." Christopher S. Schell, Yan Zhang & Derek Walters, The Structured Products Law Review: USA, The L. Revs. (Nov. 8, 2021), https://thelawreviews.co.uk/title/the-structured-products-law-review/usa (on file with the *Columbia Law Review*). Note, however, that "any guarantee that [an investor's] principal will be protected—whether in whole or in part—is only as good as the financial strength of the company that makes that promise. In other words, the principal

protection serves to "allow investors to participate in the upside of a sector or asset class, while limiting downside exposure."[33] Another term may be a participation rate, a "minimum payoff of the principal invested plus an additional payoff to [the investor] based on multiplying any increase in the reference asset or index by a fixed percentage."[34] For example, a participation rate of 200% of an underlier's return promises to pay an investor 2% for every 1% the underlier increases. A note's payoff may also be affected by a redemption or call feature. When a note is redeemed, whether automatically or at the issuer's discretion, it immediately matures and the investor receives the principal and any additional redemption-related payments bargained for in the note's terms.[35] Understanding how these features work and interact to provide the payoff on a note is of central importance to investors in assessing a note as an investment.

B. *Mandatory Disclosure*

The fundamental principle that governs the public offering of structured notes is simple: Disclosure of material information enables the investing public to make informed investment decisions and deters issuers from intentionally misleading investors.[36] It is presumed that, by requiring issuers to convey information pertinent to the structured notes they offer, investors will utilize that information when deciding whether or not to invest.[37] Accordingly, mandatory disclosure in the structured notes offering process is effectuated by two federal securities laws, the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange

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guarantee is subject to the creditworthiness of the guarantor . . . ." SEC, Structured Notes With Principal Protection, supra.

33. Steve Skancke, The Benefits of Structured Notes, Wall St. J. (Sept. 11, 2016), https://www.wsj.com/articles/the-benefits-of-structured-notes-1473645602 (on file with the *Columbia Law Review*).

34. SEC, Investor Bulletin, supra note 25 ("A participation rate determines how much of the increase in the reference asset or index will be paid to investors of the structured note.").

35. The automatic redemption of notes is typically triggered by an underlier breaching a predetermined threshold, often referred to as the call level or price, on a specific date. See Geng Deng, Joshua Mallett & Craig McCann, Modeling Autocallable Structured Products, 17 J. Derivatives & Hedge Funds 326, 327 (2011) (noting that a continuous autocallable structured product can be automatically called if the underlier meets a certain "call price" threshold).

36. Frankel, supra note 4, at 426.

37. See Allison Herren Lee, Comm'r, SEC, Living in a Material World: Myths and Misconceptions About "Materiality" (May 24, 2021), https://www.sec.gov/news/speech/lee-living-material-world-052421# [https://perma.cc/T5F7-6LQS].

Act),[38] and by regulations promulgated by the Securities and Exchange Commission (SEC), the principal U.S. capital markets regulator.[39]

1. *Registration Statements and Prospectuses.* — Section 5 of the Securities Act prohibits the sale of structured notes without first filing an effective registration statement with the SEC.[40] To meet this requirement, structured note issuers typically file "shelf" registration statements using Form S-3.[41] An effective "shelf" registration statement permits issuers to register multiple structured note offerings for sale "either on a continuous or delayed basis, although a portion of the securities may be offered immediately."[42] Form S-3 provides additional benefits to structured note

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38. Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77mm (2018)); Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78kk). Both statutes define "security" to include "any note." See Securities Act § 2(a)(1), 48 Stat. at 74; Securities Exchange Act § 3(a)(10), 48 Stat. at 883–84. In *Reves v. Ernst & Young*, the Supreme Court held that "any note" is presumed to be a "security," a presumption rebuttable only by showing that a note more closely resembles something delivered in a non-investment situation, like a note "delivered in consumer financing" or "which simply formalizes an open-account debt incurred in the ordinary course of business." 494 U.S. 56, 65–66 (1990) (internal quotation marks omitted) (quoting Exch. Nat'l Bank of Chi. v. Touche Ross & Co., 544 F.2d 1126, 1138 (1976)).

39. See Securities Exchange Act § 4, 48 Stat. at 885 (establishing the SEC and defining the scope of its power). The SEC's mandate is threefold: (1) protect investors; (2) facilitate capital formation; and (3) maintain fair, orderly, and efficient markets. SEC, What We Do, supra note 3. The SEC is aided by the Financial Industry Regulatory Authority (FINRA), a self-regulatory organization created during the GFC to oversee securities brokers and dealers. Press Release, SEC, SEC Gives Regulatory Approval for NASD and NYSE Consolidation (July 26, 2007), https://www.sec.gov/news/press/2007/2007-151.htm [https://perma.cc/K59M-7RJ6] (describing FINRA as a consolidation of the overlapping member firm regulatory functions of the National Association of Securities Dealers and a subsidiary of the New York Stock Exchange).

40. See Securities Act § 5(a), 48 Stat. at 77.

41. See 17 C.F.R. § 230.415(a)(1)(x) (2022). To be eligible to use Form S-3, issuers must, inter alia, (1) have "a class of securities registered pursuant to Section 12(b) of the . . . Exchange Act"; (2) be "subject to the [reporting] requirements of Section 12 or 15(d) of the Exchange Act . . . [for] at least twelve calendar months immediately preceding the filing of the [Form S-3] registration statement"; and (3) not have "failed to pay any dividend" or "defaulted . . . on any installment . . . on indebtedness for borrowed money." SEC, Form S-3: Registration Statement Under the Securities Act of 1933, at 2–3 (2021), https://www.sec.gov/files/forms-3.pdf [https://perma.cc/75FJ-32WW].

42. Lloyd S. Harmetz & Bradley Berman, Morrison & Foerster LLP, Frequently Asked Questions About Shelf Offerings 1 (2017), https://media2.mofo.com/documents/faqshelfofferings.pdf [https://perma.cc/8WFZ-WNTY] ("An effective shelf registration statement enables an issuer to access the capital markets quickly when needed or when market conditions are optimal. The primary advantages of a shelf registration statement are timing and certainty.").

issuers who qualify as well-known seasoned issuers (WKSIs).[43] WKSI Form S-3 registration statements become effective automatically upon filing without any prior SEC review or comment and can be used to "register . . . an unspecified amount of securities to be offered."[44]

To satisfy Form S-3's disclosure requirements,[45] issuers must also file a "base" prospectus describing the general structured note programs to be registered and furnishing general information about the issuer.[46] Information in this prospectus is inherently general because, at the time of filing, issuers have not yet built, marketed, and sold structured notes to investors. Accordingly, Rule 430A permits issuers to omit note-specific information from this prospectus, including "the public offering price, underwriting syndicate[,] . . . underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices and other items dependent upon the offering price, delivery dates, and terms of the securities dependent upon the offering date."[47] Under Rule 430B, WKSIs that file automatic shelf registration statements may also omit any other "information that is unknown or not reasonably available to the issuer."[48]

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43. WKSIs are issuers who: (1) meet all Form S-3 registration requirements and (2) have a worldwide market value of 700 million dollars or more in outstanding non-affiliate-held common equity or one billion dollars in primary offerings for cash registered under the Securities Act. See 17 C.F.R. § 230.405 (defining well-known seasoned issuers). For an example of a WKSI Form S-3 filing, see Goldman Sachs Grp., Inc., Registration Statement Under the Securities Act of 1933 (Form S-3) (July 1, 2020), https://www.sec.gov/Archives/edgar/data/0000886982/000119312520185203/d948755ds3asr.htm [https://perma.cc/XM7B-NUK8] (registering seven different securities programs).

44. Securities Offering Reform, 70 Fed. Reg. 44,722, 44,726 n.40, 44,779 (Aug. 3, 2005) (codified in scattered parts of 17 C.F.R.) (describing automatic shelf registration as a "streamlined . . . process" to provide WKSIs "greater flexibility"); see also Harmetz & Berman, supra note 42, at 8 (noting that there is "no delay in effectiveness" for shelf registration statements).

45. The full list of information required in a registration statement is provided in Schedule A of the Securities Act. See 15 U.S.C. § 77aa (2018).

46. See Securities Offering Reform, 70 Fed. Reg. at 44,779; Schell et al., supra note 32 ("[An issuer's] annual, quarterly and other periodic reports [are] typically incorporated by reference into the base prospectus.").

47. 17 C.F.R. § 230.430A(a). Omitting this information from the form prospectus will not affect the information that an investor will ultimately receive related to the terms of a specific offering. See Securities Offering Reform, 70 Fed. Reg. at 44,778; infra notes 53–57 and accompanying text.

48. 17 C.F.R. § 230.430B(a).

This base prospectus satisfies Section 10 of the Securities Act[49] for the purposes of Section 5(b)(1) of the Securities Act[50] and can be used by the issuer and broker-dealers to *offer* structured notes to investors.[51] But it does not yet satisfy Section 10(a) for the purposes of Section 5(b)(2), which relates specifically to the sale or delivery after sale of a security.[52] Accordingly, to satisfy Section 10(a), the issuer must file a "prospectus supplement," governed by Rule 424(b)(2), for each individual note offering that includes the information previously omitted from the base prospectus.[53] Under Rule 424(b)(2),[54] prospectus supplements describing the terms of an offering—also often referred to as "pricing supplements"—must be filed with the SEC within two business days of the trade date.[55] Prospectus supplements filed pursuant to Rule 424(b)(2) are "deemed part of, and included in, the registration statement containing the base prospectus to which the prospectus supplement relates."[56] And, like shelf registration statements,

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49. 15 U.S.C. § 77j(b) ("[T]he Commission shall by rules or regulations . . . permit the use of a prospectus for the purposes of [Securities Act Section 5(b)(1),] which omits in part or summarizes information in the [base] prospectus . . . .").

50. Id. § 77e(b)(1) ("It shall be unlawful for any person, directly or indirectly . . . to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of [Securities Act Section 10] . . . ."); Securities Offering Reform, 70 Fed. Reg. at 44,771 n.443 ("Rule [430B] codifies that such a [base] prospectus will satisfy the requirements of Securities Act Section 10 for purpose of Securities Act Section 10(b)(1).").

51. See Harmetz & Berman, supra note 42, at 5.

52. See 15 U.S.C. § 77e(b)(2) ("It shall be unlawful for any person, directly or indirectly . . . to carry or cause to be carried . . . such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of [Securities Act Section 10(a)]."); Securities Offering Reform, 70 Fed. Reg. at 44,771 ("A base prospectus that omits statutorily required information is not a Securities Act Section 10(a) final prospectus . . . ."); Harmetz & Berman, supra note 42, at 6.

53. See 17 C.F.R. §§ 230.430A(a)(3), 230.430B(d)(2).

54. Rule 424(b) covers prospectus supplements for "securities registered for issuance on a delayed basis . . . [that] disclose[] the public offering price, description of securities or similar matters, and . . . information previously omitted from the prospectus filed as part of an effective registration statement in reliance on Rule 430B." 17 C.F.R. § 230.424(b)(2).

55. See id. § 230.424(b)(1) (setting the filing deadline at two business days after "determination of the offering price"). In practice, issuers often file intermediary prospectus supplements—more specific than the base prospectus but less specific than a pricing supplement—to provide additional disclosure about a certain payoff structure or underlier. See, e.g., JPMorgan Chase & Co., Airbag Autocallable Yield Optimization Notes (Form 424(b)(2)) (Feb. 28, 2013), https://www.sec.gov/Archives/edgar/data/19617/000089109213001766/e52355_424b2.htm [https://perma.cc/9BUS-EH7H].

56. Harmetz & Berman, supra note 42, at 5; see also 17 C.F.R. § 230.430A(b) ("The information omitted . . . from the form of prospectus filed as part of an effective registration statement, and contained in the form of prospectus filed . . . pursuant to Rule 424(b) . . . shall be deemed to be a part of the registration statement as of the time it was declared

pricing supplements are deemed effective and incorporated absent any SEC review or input.[57] In effect, Rule 424(b)(2) pricing supplements are the final and most detailed piece of the package of disclosure documents distributed to investors of structured notes.

2. *Substance Requirements.* — Mandatory disclosure rules generally impose three overlapping layers of requirements on what must be disclosed and when. One layer consists of SEC rules establishing core information that must always be disclosed. Regulation S-K Rule 501 requires that prospectus supplement covers identify the issuers and underwriters, titles, principal amounts, offering prices, and filing dates.[58] Debt security prospectuses must include information related to maturity, interest, and redemption.[59] Factors that pose particular risks in an offering must also be disclosed.[60] Some of these rules are fairly general and stop short of expressly dictating how or when the core information must be disclosed. This reflects the SEC's principles-based approach of "encourag[ing] registrants to provide . . . disclosure that is more precisely calibrated to their particular circumstances and therefore more meaningful to investors."[61]

Another layer embodies the "fundamental proposition" of securities laws: materiality.[62] Rule 408 requires issuers to include in the registration statement, "[i]n addition to the information expressly required to be included," "such further *material* information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading."[63] Section 11 of the Securities Act exposes issuers to strict civil liability if "any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to

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effective."); id. § 230.430B(e) ("Information omitted from a form of prospectus that is part of an effective registration statement . . . [and] required to be filed . . . pursuant to Rule 424(b) . . . shall be deemed part of and included in the registration statement as of the date such form of filed prospectus is first used after effectiveness.").

57. See Securities Offering Reform, 70 Fed. Reg. at 44,768; Filing Review Process, SEC, https://www.sec.gov/divisions/corpfin/cffilingreview.htm [https://perma.cc/H76L-HQDX] [hereinafter SEC, Filing Review Process] (last modified Sept. 27, 2019) (noting the SEC's selective review occurs after filing and "does not evaluate the merits of any transaction").

58. 17 C.F.R. § 229.501(b)(1)–(3), (8), (9).

59. See id. § 229.202(b).

60. See id. § 229.105(a).

61. E.g., FAST Act Modernization and Simplification of Regulation S-K, 84 Fed. Reg. 12,674, 12,689 (Apr. 2, 2019) (citing a principles-based approach as the reason for eliminating specific risk factor examples in Rule 105).

62. See Lee, supra note 37.

63. 17 C.F.R. § 230.408(a) (emphasis added).

be stated therein or necessary to make the statements therein not misleading."[64] Issuers can even be criminally liable for violating Rule 10b-5 by "mak[ing] any untrue statement of a material fact or . . . omit[ting] to state a material fact necessary in order to make the statements made . . . not misleading . . . in connection with the purchase or sale of any security."[65] To satisfy these provisions, issuers must judge whether a reasonable investor would view the nondisclosure of a given fact as "having significantly altered the 'total mix' of information made available," and, if so, disclose that fact.[66]

The third layer consists of SEC guidance specific to structured note disclosure. The most significant guidance in this category came in 2012: After reviewing an array of pricing supplements, the SEC issued guidance regarding how to disclose the pricing and estimated values of their notes.[67] More specifically, the SEC sent comment letters to issuers with a list of suggestions to improve disclosure, including more accurate and balanced titles and the disclosure of the "difference between the [note's] public offering price . . . and the issuer['s] . . . estimate of the [note's] fair value."[68] The SEC provided more specific guidance in additional exchanges with issuers.[69] Beyond these letters, however, a dearth of note-

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64. Securities Act of 1933 § 11, 15 U.S.C. § 77k(a) (2018).

65. See 17 C.F.R. § 240.10b-5(b)–(c).

66. See TSC Indus. v. Northway, 426 U.S. 438, 449 (1977); see also Basic v. Levinson, 485 U.S. 224, 240 (1988) ("[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information."). Issuers do not have an "affirmative duty to disclose any and all material information." See, e.g., Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 44 (2011).

67. See Amy M. Starr, Chief, Off. of Cap. Mkt. Trends, SEC, Structured Products—Complexity and Disclosure—Do Retail Investors Really Understand What They Are Buying and What the Risks Are? (May 14, 2015), https://www.sec.gov/news/speech/speech-amy-starr-structured-products-.html [https://perma.cc/6UX2-BE5Z] [hereinafter Starr, Structured Products Speech].

68. Sample Letter Sent to Financial Institutions Regarding Their Structured Note Offerings Disclosure in Their Prospectus Supplements and Exchange Act Reports, Deloitte, https://dart.deloitte.com/USDART/home/accounting/sec/sec-material-supplement/sample-letter-sent-financial-institutions-regarding [https://perma.cc/KSV9-VFEP] [hereinafter SEC, Street Sweep Letter] (last modified Apr. 13, 2012). Other suggestions included disclosing usage of different values in estimating a product's fair value and revising disclosure to be consistent with the standard that issuers may not disclaim liability for information regarding underlying reference assets. See id.

69. See, e.g., Letter from Amy Starr, Chief, Off. of Cap. Mkt. Trends, SEC, to Anthony J. Horan, Corp. Sec'y, JPMorgan Chase & Co. 2 (Feb. 21, 2013), https://www.sec.gov/Archives/edgar/data/19617/000000000013009966/filename1.pdf [https://perma.cc/PTG9-JFEK] (explaining that issuers "may use narrative disclosure to explain how [they] derive [their] valuation of . . . structured note[s]" and listing potentially relevant pricing and valuation-related risk factors, but noting that relevance still depended on facts unique to each offering).

specific guidance has left issuers to fill in the blanks themselves by analogizing to SEC guidance related to other securities. For example, when structured notes link to indexes with only a few components,[70] issuers must determine whether any single component is significant enough to require its own individual disclosure.[71] Despite the frequency with which this issue arises, the SEC has never provided note-specific guidance on the matter.[72] Left to their own devices, issuers look to a no-action letter the SEC sent to Morgan Stanley in 1996, which addressed a similar question but concerned an entirely different security.[73]

3. *Plain English.* — Mandatory disclosure rules also generally govern how an issuer expresses disclosed information. Recognizing that investors do not receive the investor protection of full and fair disclosure if a prospectus fails to communicate information clearly, the SEC promulgated several rules governing the language used in prospectuses.[74] Rule 421(b) requires issuers to present information in a "clear, concise, and understandable manner" by using "short, explanatory sentences" whenever possible.[75] Rule 421(d) elaborates that "[t]o enhance the readability of the prospectus, [issuers] must use plain English principles."[76] These principles include: "(i) Short sentences; (ii) Definite, concrete, everyday words; (iii) Active voice; (iv) Tabular presentation or bullet lists for complex material, whenever possible; (v) No legal jargon or highly technical business terms; and (vi) No multiple negatives."[77] And to

70. This is not a concern with broad-based equity indexes that track the shares of many companies.

71. See Starr, Structured Products Speech, supra note 67.

72. In a 2015 speech, Amy Starr stated that the SEC requests disclosure of concentrated exposures of 20% or more and cited rules related to asset-backed securities. See id. Structured notes, however, do not qualify as "asset-backed securities" under those rules. See, e.g., 17 C.F.R. § 229.1101(c)(1) (2022) (defining an asset-backed security as "a security that is primarily serviced by the cash flows of a discrete pool of receivables or other financial assets"). This appears to be an implicit acknowledgment and endorsement of the regulation-by-analogy paradigm.

73. See Morgan Stanley & Co., Inc., SEC Staff No-Action Letter, 1996 WL 347869, at *1 (June 24, 1996) (addressing "disclosure issues relating to registered offerings of securities that are exchangeable . . . for the equity securities"); The 1996 Morgan Stanley Letter: Re-Imagined at the Age of 18, Structured Thoughts (Morrison & Foerster LLP, New York, N.Y.), June 25, 2014, at 1, 1, https://www.lexology.com/library/document.ashx?g=81f1e45f-02d1-4aca-b47f-f67e37d059d9 [https://perma.cc/K83Q-2TQY] (noting that the letter's "provisions are often consulted in considering the permissibility of registered notes linked to a single stock, basket of two or more stocks, and even equity indices").

74. E.g., 17 C.F.R. §§ 230.421, 240.13a-20.

75. Id. § 230.421(b)(1).

76. Id. § 230.421(d)(1)–(2).

77. Id. § 230.421(d)(2)(i)–(vi).

help issuers draft disclosure documents that adhere to these principles and clearly communicate information, the SEC published and distributed a plain English handbook.[78]

4. *Intermediary Obligations.* — Broker-dealers engaged in the distribution of structured notes are also subject to some mandatory disclosure requirements.[79] Under Regulation Best Interest (Reg BI), broker-dealers must "act in the best interest of the retail customer" when "making a recommendation of any securities transaction or investment

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78. See Off. of Investor Educ. & Assistance, SEC, A Plain English Handbook: How to Create Clear SEC Disclosure Documents 8–9, 17, app. A (1998), https://www.sec.gov/pdf/handbook.pdf [https://perma.cc/A7P5-8Q3Z] [hereinafter SEC, Plain English Handbook] (summarizing the plain English requirements and providing disclosure language recommendations).

79. The Exchange Act defines a broker as "any person engaged in the business of effecting transactions in securities for the account of others" and a dealer as "any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise." 15 U.S.C. § 78(c)(4)(A)–(5)(A) (2018). Broker-dealers are required to register with FINRA before "effect[ing] any transactions" or "induc[ing] . . . the purchase or sale of, any security." Id. § 78o(a)(1); see also Guide to Broker-Dealer Registration, SEC (Apr. 2008), https://www.sec.gov/reportspubs/investor-publications/divisionsmarketregbdguidehtm.html [https://perma.cc/2Z7P-XTVR].

Broker-dealers play an intricate role in the distribution of structured notes. They frequently enter into underwriter agreements with issuers to distribute structured notes to investors or to third-party broker-dealers. See Off. of Compliance Inspections & Examinations, SEC, Broker-Dealer Controls Regarding Retail Sales of Structured Securities Products 1 (2015), https://www.sec.gov/about/offices/ocie/risk-alert-bd-controls-structured-securities-products.pdf [https://perma.cc/6AAH-8D7G]; Structured Notes Offered on an Agency Basis, Structured Thoughts (Morrison & Foerster LLP, New York, N.Y.), May 31, 2016, at 1, 2, https://www.lexology.com/library/document.ashx?g=fc4cd2db-7784-4f16-945a-eca91cedb9a4 [https://perma.cc/N97A-CUV2] (describing multilayer distribution chains). Some are even affiliates of issuers. See Off. of Compliance Inspections & Examinations, SEC, Staff Summary Report on Issues Identified in Examinations of Certain Structured Securities Products Sold to Retail Investors 3 (2011), https://www.sec.gov/news/studies/2011/ssp-study.pdf [https://perma.cc/5ZWM-KMU2] [hereinafter OCIE Report]. Registered Investment Advisors (RIAs) are also actively engaged in structured note distribution but are not often the focus of regulators. Under the Investment Advisors Act of 1940, RIAs owe fiduciary duties of care and loyalty to their customers that broker-dealers do not owe. See Commission Interpretation Regarding Standard of Conduct for Investment Advisors, Investment Advisors Act Release No. 5248, 84 Fed. Reg. 33,669, 33,670 (July 12, 2019); see also Sec. & Exch. Comm'n v. Cap. Gains Rsch. Bureau, Inc., 375 U.S. 180, 191–92 (1963) ("The Investment Advisors Act of 1940 thus reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship' . . . ." (quoting 2 Louis Loss, Securities Regulation 1412 (2d ed. 1961))). RIAs and broker-dealers also have "different types of relationships with investors, offer different services, and have different compensation models." Standard of Conduct for Investment Advisors, 84 Fed. Reg. at 33,669.

strategy involving securities" to that retail customer.[80] To satisfy the best interest obligation, broker-dealers are under a disclosure subobligation to provide "in writing, full and fair disclosure of . . . [a]ll material facts relating to the scope and terms of the relationship with the retail customer," including "any material limitations on the securities or investment strategies involving securities that may be recommended to the retail customer."[81] This obligation is critically important when broker-dealers "recommend securities and investment strategies that are complex or risky."[82] Accordingly, broker-dealers must "apply heightened scrutiny" to understand and communicate to investors the "terms, features, and risks" relevant to structured notes they recommend.[83]

II. Innovation, Complexity, and Information Loss in Today's Market

Part II examines an issue left unaddressed by the legal requirements of mandatory disclosure discussed in Part I: the extent to which disclosed information reaches investors who then understand and internalize it when investing in a structured note. Disclosed information must be understood by investors to serve an investor-protection function,[84] but oftentimes disclosed information fails to fully fulfill that role. This Part synthesizes the theoretical framework linking financial innovations with sources of complexity that may fuel information loss and impair disclosure and analyzes today's structured notes market within that framework.

A. *A Market Transformed*

Today's structured notes market is radically different than the market that existed in the wake of the GFC. In 2011, U.S. sales in structured notes totaled around forty-five billion dollars across 9,631 individual structured

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80. 17 C.F.R. § 240.15l-1(a)(1). Reg BI came in response to a post-GFC SEC investigation that found that broker-dealers often recommended products that were unsuitable to retail investors. See OCIE Report, supra note 79, at 3. This issue remains a concern today. See, e.g., FINRA, 2019 Report on FINRA Examination Findings and Observations 4 (2019), https://www.finra.org/sites/default/files/2019-10/2019-exam-findings-and-observations.pdf [https://perma.cc/S3QS-VS4Q] ("Some firms did not have adequate systems of supervision to review that recommendations were suitable in light of a customer's individual financial situation[,] . . . investment experience, risk tolerance, [and] time horizon . . . .").

81. 17 C.F.R. § 240.15l-1(a)(2)(i). Broker-dealers must also satisfy care, conflict of interest, and compliance sub-obligations. Id. § 240.15l-1(a)(2)(ii)–(iv).

82. See Regulation Best Interest, 84 Fed. Reg. 33,318, 33,376 (July 12, 2019).

83. See id.

84. See id. at 33,365.

notes.[85] Just ten years later, the market ended 2021 with total sales exceeding 100 billion dollars over 31,553 individual structured notes.[86] In other words, total sales and volume of structured notes sold in the U.S. market increased by over 100% and around 227%, respectively, in just ten years. Preferences for underliers and payoff structures have also shifted. For example, baskets of diverse indexes have overtaken single indexes as the most popular underlier option.[87]

Driving this transformation, at least in part, is a combination of favorable economic and demographic trends. In the decade following the GFC, fixed-income investments offered historically low interest rates and returns.[88] Hungry for yield, retail investors turned to alternative investments like structured notes,[89] attracted by the ability to customize underliers and payoff structures to fit idiosyncratic investment objectives.[90] Furthermore, a core investor demographic in structured notes—investors in or nearing retirement—has grown rapidly since the GFC.[91] Investors with shorter time horizons tend to shift toward less volatile, fixed-income options like structured notes.[92] As this population increases, so too does the demand for structured notes.[93]

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85. U.S.: Structured Products Through the Decade, SRPInsight, Mar./Apr. 2022, at 10, 10.

86. Id.

87. Id. at 10–11.

88. See John Weinberg, The Great Recession and Its Aftermath, Fed. Rsrv. Hist. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-recession-and-its-aftermath [https://perma.cc/VJN6-JHYR] (noting that low interest rates resulted, in part, from a low federal funds rate that placed indirect downward pressure on the interest rates on longer-term loans and investments).

89. See Margarida Abreu & Victor Mendes, The Investor in Structured Retail Products: Advice Driven or Gambling Oriented?, 17 J. Behav. & Experimental Fin. 1, 1 (2018).

90. See Alberto Burchi & Paola Musile Tanzi, Are Structured Products a Sustainable Financial Innovation? A Lesson From the European Markets, 2 J. Fin. Persps. 145, 149 (2014).

91. See Press Release, U.S. Census Bureau, 65 and Older Population Grows Rapidly as Baby Boomers Age (June 25, 2020), https://www.census.gov/newsroom/press-releases/2020/65-older-population-grows.html [https://perma.cc/TY9T-33AE] (noting the rapid growth of the nation's sixty-five-and-older population by over a third, or 34.2%, during the past decade).

92. See Jennifer E. Bethel & Allen Ferrell, Policy Issues Raised by Structured Products, *in* New Financial Instruments and Institutions: Opportunities and Policy Challenges 167, 184 (Yasuyuki Fuchita & Robert E. Litan eds., 2007).

93. Cf. id. ("[E]lderly investors who need current income . . . make easy prey for unscrupulous brokers."). This trend will almost certainly continue. One-fifth of Americans are expected to reach retirement age by 2030. See Jonathan Vespa, Lauren Medina & David M. Armstrong, U.S. Census Bureau, Demographic Turning Points for the United States: Population Projections for 2020 to 2060, at 1 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p25-1144.pdf [https://perma.cc/5MWE-48RP].

New financial technologies also fueled this post-GFC transformation. Advances in digital investing technology have "driven an increase in investment options for retail investors . . . and changes in the channels through which retail investors purchase and sell securities, including complex products."[94] "Where once it was nearly impossible for a retail investor to trade without the aid of a registered representative or investment adviser," retail investors can now purchase structured notes and other complex securities directly.[95] This effectively circumvents "the required protections that apply when they receive recommendations or advice from a broker . . . who must understand [them]."[96]

Perhaps the most significant innovations specific to the structured notes market are the proliferation of digital platforms and the evolution of proprietary indexes.[97] First, digital platforms simplify, streamline, and reduce the cost involved in the structured note trade process by offering users centralized marketplaces and automated services such as post-trade lifecycle management.[98] To issuers, these platforms are key avenues for

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94. Jay Clayton, Dalia Blass, William Hinman & Brett Redfearn, Joint Statement Regarding Complex Financial Products and Retail Investors, SEC (Oct. 28, 2020), https://www.sec.gov/news/public-statement/clayton-blass-hinman-redfearn-complex-financial-products-2020-10-28 [https://perma.cc/ESQ3-WSAE]; Kara M. Stein, Comm'r, SEC, Increasing Product Complexity: What's at Stake? (Feb. 23, 2018), https://www.sec.gov/news/speech/stein-sec-speaks-increasing-product-complexity [https://perma.cc/H2CM-UV24] ("In today's world, virtually anyone—retail investors alongside financial processionals—has access to any number of different products, services, strategies, and exposures. And if they can't get direct access, there's sure to be a vehicle that gets them there indirectly.").

95. Clayton et al., supra note 94; see also, e.g., Akane Otani & Sebastian Pellejero, 'Bankrupt in Just Two Weeks'—Individual Investors Get Burned by Collapse of Complex Securities, Wall St. J. (June 1, 2020), https://www.wsj.com/articles/bankrupt-in-just-two-weeksindividual-investors-get-burned-by-collapse-of-complex-securities-11591020059 (on file with the *Columbia Law Review*) (describing retail investors who purchased a leveraged exchange-traded note that bet on companies that invest in the mortgage market on a free mobile trading app); Structured Products, Fidelity, https://www.fidelity.com/fixed-income-bonds/structured-products [https://perma.cc/MAD9-3KK4] (last visited Jan. 10, 2022) (providing retail customers direct access to structured notes).

96. Clayton et al., supra note 94.

97. E.g., About Luma Financial Technologies: Our Mission, Luma Fin. Techs., https://lumafintech.com/about-luma-financial-technologies/ [https://perma.cc/CXH9-9RRX] (last visited Nov. 1, 2021) (catering to private bank clients); Who We Are, SIMON, https://simon.io/about/ [https://perma.cc/3HSF-8EJT] (last visited Nov. 1, 2021) (catering to independent broker-dealers).

98. Natasha Rega-Jones, Platforms Bring Structured Products to the Masses, Risk.net (May 2, 2022), https://www.risk.net/derivatives/7947241/platforms-bring-structured-products-to-the-masses (on file with the *Columbia Law Review*).

future sales and customer growth.[99] In fact, issuers themselves are some of the largest investors in these platforms[100] and offer their notes across multiple platforms.[101] To broker-dealers and financial advisors, they offer unprecedented access, functionality, and resources to purchase and track structured notes for clients.[102] Above all, these platforms can support the trading of both bespoke payoff structures as well as "pre-packaged generic trades that structured product issuers offer to the market every month," "further democratising the market as trading size is no longer a barrier to entry for new players."[103] Second, issuers have innovated with increasingly diverse and targeted proprietary indexes.[104] Proprietary indexes are indexes created by issuers themselves—either by an internal group or an affiliate—or third-party sponsors with whom issuers contract.[105] By creating their own indexes, issuers can offer structured notes that cater to increasingly diverse and idiosyncratic investment preferences.[106] Proprietary indexes also help issuers avoid the commoditization of their offerings: Indexes with more

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99. See id.

100. E.g., Who We Are, supra note 97 (listing as investors Barclays, Credit Suisse, Goldman Sachs, JPMorgan, and Wells Fargo); see also Daisy Maxey, Advisers Gain Access to Complex Structured Products, Wall St. J. (Mar. 13, 2013), https://www.wsj.com/articles/SB10001424127887323393304578358413092621452 (on file with the *Columbia Law Review*); Danielle Andrus, Fidelity Partners With Morningstar, Goldman, CAIS to Bring Alts to Advisors, ThinkAdvisor (Oct. 28, 2013), https://www.thinkadvisor.com/2013/10/28/fidelity-partners-with-morningstar-goldman-cais-to-bring-alts-to-advisors/ [https://perma.cc/TCN9-QMN9].

101. See Rega-Jones, supra note 98.

102. Id.

103. Id. (noting that the average trading size of a structured note has dropped significantly, reflecting the fact that platforms "allow[] end-investors to pick their own deal terms and customise the trade however they would like").

104. FSMA Bans 12 Structured Products, Detects KID Shortcomings, SRPInsight, July/Aug. 2021, at 5, 5 ("The trend to use proprietary indices has been visible since 2013 (with the exception of 2018 and 2019) and in 2020 was even sharper: [B]y sales volume, approximately half of the structured products issued was linked to a proprietary index in Q4 2020."); Starr, Structured Products Speech, supra note 67 ("[W]e have observed . . . the increasing use of complex or proprietary indices or non-security assets.").

105. See Bradley Berman, Remmelt Reigersman & Patrick Scholl, Mayer Brown, Proprietary Indices, US and European Considerations 3–4 (2021), https://www.mayerbrown.com/-/media/files/perspectives-events/events/2021/02/reverseinquiries-workshopproprietary-indices-us-considerations-and-european-considerations.pdf [https://perma.cc/X77F-FLAN].

106. See Yakob Peterseil, How Wall Street Finds New Ways to Sell Old, Opaque Products to Retail Investors, Bloomberg (Jan. 21, 2016), https://www.bloomberg.com/news/articles/2016-01-21/how-wall-street-finds-new-ways-to-sell-old-opaque-products-to-retail-investors (on file with the *Columbia Law Review*) (describing how specialized indexes allow "products that regulators have questioned for their complexity, fees and actual returns" to be sold "in places those regulators don't reach").

intricate methodologies or asset allocations can help issuers maintain a competitive advantage in the ever-crowded market.

B. *Innovation, Complexity, and Information Loss*

The causal connection between certain financial innovations, the proliferation of sources of complexity, and the rise of the problematic phenomenon of information loss is well established.[107] In perhaps the seminal piece on this topic, *Fragmentation Nodes*, Professor Kathryn Judge provided evidence from the GFC showing that mortgage-backed security (MBS) and collateralized debt obligation (CBO) transactions contributed to systemic risk through information loss with disastrous consequences.[108] More specifically, Professor Judge demonstrated that the financial innovation of securitization created "fragmentation nodes," or new points of contractual arrangements,[109] that introduced several new sources of complexity in MBS or CDO transactions.[110] The spread of fragmentation nodes in turn led to "a pervasive loss of information about the quality of the underlying home loans and the value of MBS and CDO securities backed by them," which Professor Judge concluded "contributed to the paralyzing uncertainty" and fueled a "feedback loop" of sinking home prices, rising mortgage defaults, and rising foreclosures.[111]

1. *Innovation.* — Financial innovations are both an "important driver of the dynamism of modern finance"[112] and a "natural outcome of a competitive economy."[113] They include new theoretical insights, technological advancements, and the advent of new financial markets, institutions, and instruments.[114] In recent years, for example, innovations

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107. E.g., Awrey, supra note 21, at 238 ("[C]omplexity and innovation can be observed . . . at almost every significant step along the road to the GFC."); Judge, Fragmentation Nodes, supra note 1, at 663.

108. Judge, Fragmentation Nodes, supra note 1, at 690 ("[E]vidence from the 2007–2009 financial crisis show[s] that MBS and CDO transactions did contribute to systemic risk through information loss and stickiness . . . .").

109. Id. at 659 ("Securitization entails the pooling of a group of cash-producing assets, like home loans, into a newly created entity against which multiple classes of securities are issued."). It arose as a way for financial institutions to escape regulatory burdens by shifting financing activities out of regulated banks and into the capital markets. See id.

110. Id. at 661.

111. Id. at 661–62.

112. Awrey & Judge, supra note 4, at 2305.

113. Stephen A. Lumpkin, Regulatory Issues Related to Financial Innovation, 2009 OECD J.: Fin. Mkt. Trends 91, 92 ("[Financial innovations] are neither inherently good nor inherently bad.").

114. Awrey & Judge, supra note 4, at 2305–06 (attributing the rise of shadow banking after the GFC to technological innovations including "creative new uses of legal structures,

in distributed ledger and blockchain, high-frequency trading, and the use of algorithms and artificial intelligence have captured national attention.[115] And financial innovations can arise both as a demand-side response to market imperfections and as a supply-side response to market incentives.[116] On one side, market imperfections such as regulation, taxes, high transaction costs, and information asymmetries "generate demand for financial innovations, which promise, among other things, greater choice, lower costs, enhanced liquidity and more effective risk management."[117] On the other, financial institutions and intermediaries may drive innovations in response to profit opportunities, genuine market demand, or external regulatory requirements.[118]

That financial innovations have benefited market participation and the economy writ large is indisputable.[119] Some have even argued that financial regulation assumes "that financial innovation is by definition beneficial, since market discipline will winnow out any unnecessary or value destructive innovations."[120] But financial innovations also have a remarkable potential for destruction. By definition, they can "undermin[e] . . . assumptions, chang[e] relationships, denatur[e] products and markets, and seep[] around regulatory definitions and

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new modeling techniques, and massive increases in computing power that allowed the collection and analysis of vast amounts of data about creditor and asset quality"); see also Fin. Innovation Working Grp., Fin. Rsch. Advisory Comm., Financial Innovation Survey of FRAC Members 4–9 (2017), https://www.financialresearch.gov/frac/files/OFR_FRAC-meeting_working-group_Finan-Innov_02-23-2017.pdf [https://perma.cc/MX6H-VYVH] [hereinafter FRAC Innovation Survey] (noting as a proposed definition of "financial innovation" "[t]he sudden appearance of a new kind of financial contract, or sudden increase in the size of the market for a new kind of financial contract").

115. See FRAC Innovation Survey, supra note 114, at 5.

116. See Awrey, supra note 21, at 260–67.

117. Id. at 260. For example, investor demand for lowering the cost of diversification and restraining the potential uses of investor principal sparked the birth of mutual funds and ETFs. See id. at 262; Judge, Investor-Driven Financial Innovation, supra note 2, at 326–27.

118. See Awrey, supra note 21, at 263.

119. See FRAC Innovation Survey, supra note 114, at 2 ("These innovations can reduce costs and contribute to growth in the industry."); Lumpkin, supra note 113, at 94 ("[A] valid case can probably be made that the effect of innovations for the global economy has, on net, been positive over the longer term.").

120. E.g., Cristie Ford, Principles-Based Securities Regulation in the Wake of the Global Financial Crisis, 55 McGill L.J. 257, 294 (2010) (internal quotation marks omitted) (quoting Fin. Servs. Auth., The Turner Review: A Regulatory Response to the Global Banking Crisis 49 (2009), http://www.actuaries.org/CTTEES_TFRISKCRISIS/Documents/turner_review.pdf [https://perma.cc/6Y8P-JCMQ]).

boundaries."[121] As the GFC demonstrated, the rise of new innovations often precedes periods of heightened market fragility and financial crises.[122] Even more unnerving is the fact that innovation can occur incrementally, obfuscating the ability of market participants and regulators to observe these negative effects spreading in real time.[123] Accordingly, private sector innovation represents a "profound challenge that regulators must confront."[124]

2. *Complexity*. — Complexity defines features of securities or financial markets that are "hard to understand or deal with."[125] It can be understood as the function of two variables: (1) the costs incurred by actors in searching for, acquiring, analyzing, and understanding information; and (2) the "cognitive and temporal constraints" on actors' abilities to process such information.[126] In this sense, financial innovations can lead to more complex securities and financial markets anywhere information becomes more expensive or more difficult to acquire and understand. Professor Dan Awrey identified six related and common sources of complexity across the financial system: (1) advances in technology; (2) opacity, defined as both the nonavailability of information and the "information thicket" generated by an overwhelming volume of data; (3) greater integration of financial markets and institutions; (4) more fragmented, or attenuated, informational and economic relationships between counterparties; (5) denser regulatory requirements; and (6) the perpetual need to incur more information costs as prior advancements in understanding alter market dynamics.[127]

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121. Cristie Ford, A Regulatory Roadmap for Financial Innovation, *in* Routledge Handbook of Financial Technology and Law 62, 62 (Iris H-Y Chiu & Gudula Deipenbrock eds., 2021) [hereinafter Ford, Regulatory Roadmap].

122. See FRAC Innovation Survey, supra note 114, at 2.

123. See Judge, Fragmentation Nodes, supra note 1, at 687, 723 (noting that the "incremental nature of the processes through which financial innovations become highly complex" "may result in market participants and regulators alike becoming overly accepting of innovations").

124. Ford, Regulatory Roadmap, supra note 121, at 62.

125. Complexity, Black's Law Dictionary (11th ed. 2019); see also Schwarcz, Regulating Complexity, supra note 21, at 214 ("Complexity in this sense derives from the intricate combining of parts, creating complications that increase the likelihood that failures will occur and diminish the ability of investors and other market participants to anticipate and avoid these failures.").

126. See Awrey, supra note 21, at 241.

127. See id. at 245–58. Professor Judge similarly identified four sources of complexity inherent in fragmentation nodes: "(1) fragmentation, (2) the creation of contingent and dynamic economic interests, (3) a latent competitive tendency among the tranches, and (4) the lengthening of the chain separating investor and investment." Judge, Fragmentation Nodes, supra note 1, at 690.

3. *Information Loss.* — As the previous section explained, complexity increases the informational burden that parties to a securities transaction face. This is not intrinsically harmful. Inherent in every securities transaction is an information imbalance: the party selling the security possesses more information about the security than the purchaser does.[128] Because of this asymmetry, a certain amount of "information is lost in every transaction."[129] Complexity does become a problem, however, when the "nature and magnitude of [this] information loss"[130] becomes sufficiently great that it can lead to failures of investing standards and financial market practices.[131]

One such failure can occur when complexities of securities impair disclosure.[132] "[C]omplexity increases the pool of potentially pertinent information and the costs of acquiring that information . . . ."[133] This can "deprive investors and other market participants of the understanding needed for markets to operate effectively."[134] For example, in the face of this informational burden, investors are more likely to inaccurately assess securities prices,[135] leading them to pay more for securities than the worth of the corresponding risks while simultaneously being less able to "withstand the associated losses should the risk become manifest."[136] In fact, even if "all information about a complex structure is disclosed," the higher informational and cost burden might preclude investors from truly

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128. Judge, Fragmentation Nodes, supra note 1, at 690 (citing Bernard S. Black, Information Asymmetry, the Internet, and Securities Offerings, 2 J. Small & Emerging Bus. L. 91, 92 (1998)). To secure the sale, a seller must "convey sufficient information to a potential investor to convince the investor that the expected returns justify the price being asked." Id. Conveying information as a seller and processing information as an investor are both resource intensive, and both parties bear the costs of the transaction that allows the information asymmetry to persist. Id.

129. Id.

130. Id. Information asymmetries can "prevent otherwise efficient transfers." Kathryn Judge, Information Gaps and Shadow Banking, 103 Va. L. Rev. 411, 417 (2017) [hereinafter Judge, Information Gaps] (citing George A. Akerlof, The Market for "Lemons": Quality Uncertainty and the Market Mechanism, 84 Q.J. Econ. 488, 495–96 (1970)).

131. See Schwarcz, Regulating Complexity, supra note 21, at 220.

132. Id. at 221.

133. See Judge, Information Gaps, supra note 130, at 419.

134. Schwarcz, Regulating Complexity, supra note 21, at 221.

135. See id. at 214, 222.

136. See Judge, Fragmentation Nodes, supra note 1, at 692, 696 (explaining that, because investors did not completely understand information pertinent to the MBSs and CDOs they acquired, the rapid spread of fragmentation nodes backed by home loans fueled an equally rapid and systematic loss of information about the quality of the underlying loans and the securities backed by them).

appreciating the underlying structure.[137] This failure was at the root of the GFC. Even though "virtually all of the risks giving rise to the collapse of the market for [MBSs] appear to have been disclosed," the complexity of MBSs made the risks difficult to understand.[138]

Another failure can occur when complexities of securities obfuscate consequences. The "parties reviewing, or even structuring," a highly complex security might fail to appreciate and properly disclose all relevant considerations or risks associated with the security.[139] Similarly, investors and issuers alike might fail to comprehend the mechanics of a complex security's payoff structure when the payoff is not "linearly" related to the prices of its underlying assets.[140] Consequences may be even more obfuscated when the heightened informational burden arises from introducing complexities that are fundamentally new in substance.[141]

C. *Challenges to Structured Note Disclosure*

This section identifies several ways that increasing complexity in today's structured notes market could impair the mandatory disclosure regime's investor-protection function. In particular, it focuses on the innovations and demographic trends highlighted in section II.A that have "generate[d] new questions and render[ed] old assumptions obsolete"[142] in a market where, according to regulators, "[c]omplexities abound."[143]

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137. See Schwarcz, Regulating Complexity, supra note 21, at 221.

138. See id. at 222. In 2010, the SEC alleged that Goldman Sachs designed a mortgage-backed synthetic CDO "to fail" so "one of its clients[] could profit from their short positions on the reference portfolio." Bennet, supra note 21, at 829. This surprised the industry because the conflict "had in fact been disclosed" in offering materials given to investors. Id. at 830–31; see also Goldman Sachs, ABACUS 2007-AC1: $2 Billion Synthetic CDO 8 (2007), https://www.math.nyu.edu/~avellane/ABACUS.pdf [https://perma.cc/67FA-T2U3].

139. See Schwarcz, Regulating Complexity, supra note 21, at 223–24.

140. Id. at 224. The CDOs that helped cause the GFC were, for example, backed by diverse underlying assets, but there existed an "underlying correlation in the subprime mortgage loans backing" the securities that went unnoticed by market participants. See id. at 223 (internal quotation marks omitted) (quoting Schwarcz, Protecting Financial Markets, supra note 1, at 403).

141. See Judge, Fragmentation Nodes, supra note 1, at 691 (writing that no party may be adequately incentivized to fully understand new information).

142. Donald C. Langevoort, The SEC as a Lawmaker: Choices About Investor Protection in the Face of Uncertainty, 84 Wash. U. L. Rev. 1591, 1606–07 (2006) ("[C]onstant innovation in the form of new financial products and market mechanisms, coupled with fluctuations in exogenous economic conditions and emergent generations of new investors, persistently generate new questions and render old assumptions obsolete.").

143. Stein, supra note 94.

1. *Overwhelming Issuance Volumes.* — The quality of structured note disclosure is a product of the attention and resources that issuers are able to commit to its drafting. The unprecedented volume of unique structured note transactions in today's market—over 20,000 more annual issuances in 2021 than 2011[144]—has forced issuers to balance a wildly popular source of funding with internal time, personnel, and resource constraints. A recent incident involving Barclays may serve as a warning. In March 2022, Barclays announced that the structured notes it offered and sold under its shelf registration statement in the period of just one year exceeded the aggregate amount for which it registered by over fifteen billion dollars.[145] In other words, Barclays illegally sold over fifteen billion dollars in structured notes that it is now required to offer to repurchase at their original prices. More concerning than the sheer size of the misstep, arguably, is the fact that no one at Barclays realized it met and exceeded its shelf registration amount for a whole year.[146] This systematic failure to track the structured notes that it sold is a warning about the byproducts of unprecedented issuance volumes. In 2021, Barclays made 5,468 Rule 424(b)(2) filings on EDGAR, up 330% from the 1,649 Rule 424(b)(2) filings it made in 2011.[147] It is not a far leap to conclude from this incident that, amid the issuance volume increase, Barclays devoted less time and attention to the quality of disclosure in those filings.

The Barclays incident is also an indictment of the SEC, which failed to realize that the issuer had been illegally selling structured notes for a whole year.[148] The SEC enforces mandatory disclosure rules in two main ways: (1) It proactively reviews disclosure documents; and (2) it brings enforcement actions against issuers and broker-dealers on behalf of investors for alleged

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144. See supra notes 85–86 and accompanying text.

145. Matt Levine, Opinion, Barclays Sold Too Many Notes, Bloomberg (Mar. 28, 2022), https://www.bloomberg.com/opinion/articles/2022-03-28/barclays-sold-too-many-notes (on file with the *Columbia Law Review*) ("In August 2019, [Barclays] registered US$20.8bn in maximum aggregate offering price of securities (the 'Registered Amount') and has exceeded the Registered Amount by approximately US$15.2bn." (internal quotation marks omitted) (quoting Barclays, Impact of Over-Issuance Under BBPLC US Shelf 1 n.1 (2022), https://home.barclays/content/dam/home-barclays/documents/investor-relations/IRNewsPresentations/2022News/20220328-Impact-of%20over-issuance-under-BBPLC-US-Shelf.pdf [https://perma.cc/2M6P-CLUV])).

146. See id.

147. See EDGAR Indexes: Full and Quarterly, SEC, https://www.sec.gov/Archives/edgar/full-index/ [https://perma.cc/TMW5-2668] (last modified Sept. 2, 2022) (providing, in downloadable data files, indexes with identifying information corresponding to all 424(b)(2) issuer filings between 2011 to 2021).

148. See Levine, supra note 145.

disclosure violations.[149] The potency of both approaches is at risk. First, the SEC's Division of Corporate Finance only "selectively reviews filings" to "monitor and enhance compliance with applicable disclosure . . . requirements."[150] The market's unprecedented growth increasingly strains the SEC's ability to review filings apace. Furthermore, the extent of innovation in underliers and payoff structures means that the disclosures the SEC periodically reviews may be unrepresentative or unhelpful by the time the SEC distributes comments to issuers.[151] Second, the "retailization" of structured notes directly increases the potential pool of disclosure-related legal claims. The SEC likely does not have the resources and personnel to investigate an expanding body of claims, especially if, as a result of the "longest ever bull market for stocks"[152] that followed the GFC, the SEC has focused its limited resources elsewhere.[153]

2. *Accuracy and Completeness.* — Increasing complexity can fuel information loss by increasing the amount of information that issuers must analyze, understand, and express.[154] One source of information loss might be what Professor Henry T.C. Hu called "true misunderstandings."[155] According to Professor Hu, mandatory disclosure is an "intermediary depiction model" in which an issuer stands between an objective reality—here, the reality would consist of the terms and relevant considerations of

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149. See, e.g., Press Release, SEC, UBS to Pay $19.5 Million Settlement Involving Notes Linked to Currency Index (Oct. 13, 2015), https://www.sec.gov/news/pressrelease/2015-238.html [https://perma.cc/A6HK-X6FJ] (announcing a $19.5 million settlement with UBS related to misstatements in structured note prospectuses). For the order instituting the action and settlement, see UBS AG, Order Instituting Cease and Desist Proceedings, Securities Act Release No. 9961, at 5–6 (Oct. 13, 2015), https://www.sec.gov/litigation/admin/2015/33-9961.pdf [https://perma.cc/D96V-ZBMQ].

150. See SEC, Filing Review Process, supra note 57 (noting that the Division concentrates specifically on disclosure that appears to be "materially deficient in explanation or clarity" or that "conflict[s] with Commission rules").

151. Cf. Awrey, supra note 21, at 289 ("[T]he sheer volume of information available . . . combined with the rapid pace of change . . . can overwhelm the powerful incentives of even the most sophisticated market participants. Regulators, likewise, have struggled with what is, in effect, information overload."); Awrey & Judge, supra note 4, at 2311 ("[T]he incredible complexity and dynamism of finance, together with the finite resources from regulators, [impose] high information and other costs . . . .").

152. See Akane Otani, Bull Market Faces Tough Test as It Turns 11, Wall St. J. (Mar. 8, 2020), https://www.wsj.com/articles/bull-market-faces-tough-test-as-it-turns-11-11583609961 (on file with the *Columbia Law Review*).

153. Cf. Steven L. Schwarcz, Controlling Financial Chaos: The Power and Limits of Law, 2012 Wis. L. Rev. 815, 822 ("[D]uring periods of relative economic stability . . . market participants may under-assess the risk of low-probability adverse market events.").

154. See Hu, supra note 21, at 1609 ("[E]ven a well-intentioned intermediary may not truly understand . . . the objective reality.").

155. See id.

a structured note—and the investor.[156] The issuer must assemble, interpret, understand, depict, and transmit that reality to investors via disclosure.[157] But increasing complexity in the underlying mechanics of the reality increases the likelihood that issuers will misunderstand and inaccurately depict that reality.

This risk is particularly present when structured notes link to proprietary indexes.[158] Proprietary indexes "use highly complex formulas to determine how the index is valued, including fees and costs that are embedded into the index performance."[159] In-house or outside counsel, to whom the duty of drafting disclosure falls, may lack sufficient expertise to completely understand and accurately depict these methodologically complex indexes. Information may be lost merely by virtue of distilling these methodologies into the short and simple sentences of plain English.[160] Accelerating issuance volumes also place heightened pressure on lawyers who must draft and finalize disclosure documents to satisfy both internal issuer and regulatory timelines.[161]

3. *Information Overload.* — Paradoxically, disclosure may also be impaired at the creation stage when issuers provide too much information. As structured notes feature more varied payoff structures and underlier combinations, issuers may be incentivized to overdisclose information that is neither relevant nor useful for investors.[162] The resulting "information thicket" is more costly for investors to navigate.[163] Over-disclosing could, for example, be a strategy for avoiding the civil and criminal liability that

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156. See id. at 1608.

157. See id.

158. See supra notes 106–111 and accompanying text.

159. Starr, supra note 67.

160. See Hu, supra note 21, at 1637 ("The limits of the English language can prevent even the most careful and talented lawyer from coming close to the mathematical concept . . . ."); Starr, supra note 67 ("I've heard even learned counsel say that they find certain indices or notes hard to describe narratively . . . .").

161. See Hu, supra note 21, at 1637.

162. See Basic, Inc. v. Levinson, 485 U.S. 224, 231 (1988) ("[A]n overabundance of information . . . [might] lead management 'simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking.'" (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448–49 (1976))); cf. Omri Ben-Shahar & Carl E. Schneider, The Failure of Mandated Disclosure, 159 U. Pa. L. Rev. 647, 692–93 (2011) ("When a mandate is stated broadly, disclosers might think that duty requires—or prudence demands—disclosing *everything*.").

163. See Bartlett, supra note 21, at 57 ("[S]imply disseminating information to the public domain is unlikely to have significant efficacy . . . .").

arises from misstating or omitting material information from prospectuses.[164] This strategy could become particularly appealing as the informational demands associated with structured note volumes begin to exceed issuers' financial and personnel limits.

Once again, proprietary index-linked notes are a prime candidate. More complex methodologies consist of additional considerations, such as automatically adjusting underlier weights, multilayered payoff formulas, and more nuanced investment objectives and risk factors, that require new and longer disclosure. Consider, for example, two structured notes issued by Goldman Sachs: one that links only to the S&P 500® Index[165] and one that links to Goldman Sachs's proprietary Momentum Builder Multi-Asset 5S ER Index (MOBU).[166] In the S&P 500-linked note, index-specific disclosure spans only a few paragraphs in the pricing supplement[167] and just three pages in an additional underlier-specific prospectus supplement.[168] MOBU, on the other hand, exists in a different methodological universe, and the difference is apparent in disclosure documents. MOBU tracks the weighted return of fourteen underlying ETFs and rebalances each ETF's respective weight in the index on every "index business day" using a proprietary "methodology algorithm."[169] To capture the full extent of its complexities, index-specific disclosure spans over twenty pages in the

164. See supra notes 62–66 and accompanying text.

165. See Goldman Sachs Grp., Inc., Leveraged Buffered Index-Linked Notes Due 2013 (Form 424(b)(2)), at PS-11 (Oct. 29, 2010), https://www.sec.gov/Archives/edgar/data/886982/000095012310099464/c07670e424b2.htm [https://perma.cc/92RG-ZCSU] [hereinafter Goldman Sachs, Leveraged Buffered Index-Linked Notes].

166. See Goldman Sachs Grp., Inc., GS Momentum Builder Multi-Asset 5S ER Index-Linked Notes Due 2024 (Form 424(b)(2)), at PS-5 (July 2, 2019), https://www.sec.gov/Archives/edgar/data/886982/000156459019024348/gs-424b2.htm [https://perma.cc/2DHP-82EA] [hereinafter Goldman Sachs, Momentum Builder Index-Linked Notes].

167. See Goldman Sachs, Leveraged Buffered Index-Linked Notes, supra note 165, at PS-11 to PS-12.

168. See Goldman Sachs Grp., Inc., Non-Principal Protected Underlier-Linked Notes (Form 424(b)(2)), at A-1 to A-4 (June 21, 2010), https://www.sec.gov/Archives/edgar/data/886982/000119312510142991/d424b2.htm [https://perma.cc/L2Y2-Z3S7].

169. See Solactive, GS Momentum Builder Multi-Asset 5S ER Index 1 (2022), https://www.solactive.com/wp-content/uploads/solactiveip/en/Factcard_DE000SLA1Y87.pdf [https://perma.cc/HJV2-M6EM]; Solactive, GS Momentum Builder Multi-Asset 5S ER Index: Methodology 1–3 (2018), https://www.solactive.com/wp-content/uploads/2018/03/GSMBMA5S-Index-Methodology-Final-180301-Clean.pdf [https://perma.cc/FMF8-6BZP].

pricing supplement[170] and over 100 pages in an accompanying underlier-specific prospectus supplement.[171]

4. *Investor Comprehension.* — Complexity can hinder an investor's efforts to understand the mechanics of a structured note's payoff through disclosure by increasing both the amount and cost of information that they must analyze and understand. Investor tolerance for complexity is limited by "bounded rationality," or the "cognitive and temporal constraints on an actor's ability to process . . . information."[172] Beyond a certain threshold—what Professor Awrey calls "the complexity frontier"—the costs of understanding a structured note become so high that they "render full comprehension impossible."[173] Moreover, beyond the "complexity frontier," investors also become increasingly reliant on heuristics—simplifying rules or principles—to understand structured notes, which can sometimes lead to severe and systematic errors.[174] For example, in a study of complex payoff scenario disclosure through the lens of consumer information processing, Professors Ann Morales Olazábal and Howard Marmorstein found that it is "highly likely that a significant portion of [investors] . . . will arrive at an unwarranted conclusion about [a note's] expected return and the desirability of its inclusion in their portfolios."[175]

Consider the following example from the GFC. Between 2007 and 2008, as housing prices fell and mortgage defaults rose, Lehman Brothers (Lehman)—then the fourth-largest U.S. investment bank—sold retail investors over $1.24 billion in structured notes that offered full or partial principal protection.[176] Investors with shorter time horizons and lower risk

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170. See Goldman Sachs, Momentum Builder Index-Linked Notes, supra note 166, at PS-3 to PS-10, PS-29 to PS-48.

171. See Goldman Sachs Grp., Inc., MOBU 5S ER Index Supplement No. 6 (Form 424(b)(2)), at S-3 to S-107 (June 19, 2019), https://www.sec.gov/Archives/edgar/data/886982/000156459019022875/gs-424b2.htm [https://perma.cc/N9AS-6JV5].

172. Awrey, supra note 21, at 243.

173. See id. at 245. Retail investors have a particularly difficult time understanding complex financial information. In 2012, the SEC found that U.S. retail investors generally lack basic financial literacy. See Off. of Inv. Educ. & Advoc., SEC, Study Regarding Financial Literacy Among Investors, at iii (2012), https://www.sec.gov/news/studies/2012/917-financial-literacy-study-part1.pdf [https://perma.cc/EJV5-2HSZ].

174. See Olazábal & Marmorstein, supra note 21, at 633, 635.

175. Id. at 627–28.

176. See Third Amended Class Action Complaint for Violations of the Federal Securities Laws at 37, In re Lehman Bros. Sec. & ERISA Litig., 799 F. Supp. 2d 258 (S.D.N.Y. 2011) (Nos. 08 Civ. 5523 (LAK), 09 MC 2017), 2010 WL 10838817 [hereinafter Third Amended Complaint]. At this time, Lehman's structured note footprint significantly exceeded $1.24 billion. See Geng Deng, Guohua Li & Craig McCann, Sec. Litig. & Consulting Grp., Structured Products in the Aftermath of Lehman Brothers 2 n.6 (2009), https://www.slcg.com/pdf/workingpapers/Structured%20Products%20in%20the%20Aftermath%20of%20Lehman%20

tolerances, particularly those in or nearing retirement, poured into these structured notes in an unprecedentedly volatile and uncertain market.[177] When Lehman filed for bankruptcy on September 15, 2008,[178] the notes—as unsecured, subordinated debt—became effectively worthless.[179] The resultant lawsuit suggests that investors erroneously believed that Lehman's promise of principal protection as expressed through disclosure was a guarantee of absolute safety and failed to internalize the underlying importance of Lehman's credit risk.

A more recent example suggests that complexity obfuscates investors' ability to understand interactions between structured note features. In 2018, structured notes linked to one or more "FANG" stocks—Facebook, Amazon, Netflix, and Google parent company Alphabet—and containing a monthly autocallable redemption feature exploded in popularity.[180] Some of these notes attracted "mom-and-pop investors" by offering potential fixed payouts of up to 25% per annum.[181] But rapid rises in FANG stock prices triggered many of the notes' redemption features, "often . . . in less than a year, and sometimes in as little as a month."[182] In many cases, the upfront fees that investors paid exceeded their total returns.[183] It is not a far leap to infer that investors would have opted for notes with less frequent call periods had they recognized upfront that positive FANG performance could trigger redemption so early that the notes' fees would exceed their returns.

Brothers.pdf [https://perma.cc/LU4G-HJD7] [hereinafter Deng et al., Structured Products] ("Of the $18.6 billion [in Lehman-issued structured products], $8.1 billion was issued in U.S. dollar-denominated notes."); Goldstein, supra note 13 (discussing Lehman's guarantee of around forty billion dollars of principal-protected notes).

177. See Third Amended Complaint, supra note 176, at app. B (listing titles of structured notes that investor claimed misled them).

178. See Andrew Ross Sorkin, Lehman Files for Bankruptcy; Merrill Is Sold, N.Y. Times (Sept. 14, 2008), https://www.nytimes.com/2008/09/15/business/15lehman.html (on file with the *Columbia Law Review*).

179. See Eleanor Laise, Another 'Safe' Bet Leaves Many Burned, Wall St. J. (Nov. 11, 2008), https://www.wsj.com/articles/SB122636312365215727 [https://perma.cc/238Z-FYKH] (noting that some Lehman products were "trading for less than 10 cents on the dollar").

180. See Ben Eisen, New Way to Play FANG Stocks Falls Short for Some Investors, Wall St. J. (Sept. 11, 2018), https://www.wsj.com/articles/new-way-to-play-fang-stocks-falls-short-for-some-investors-1536658200 (on file with the *Columbia Law Review*).

181. Id.

182. Id.

183. Id.

III. TOWARD LESS READABLE DISCLOSURE

Beyond the theoretical framework discussed in Part II, there is little data demonstrating how effective structured note disclosure actually is at adequately informing investors. This Part leverages a simple methodology to "shed[] new light on this empirical darkness."[184] As *A Plain English Handbook* reiterates, "Investors need to read and understand disclosure documents to benefit fully from the protections offered by our federal securities laws."[185] Accordingly, this Part assesses the readability of a novel data set of 1,001 structured note pricing supplements filed using Form 424(b)(2) on the SEC's EDGAR database from 2010 to 2020. It finds that pricing supplements have become less readable over time and vary significantly between issuers, which suggests that structured note disclosure documents may have become less effective at fulfilling their fundamental investor protection function.

A. *Methodology*

Readability aims to capture the difficulty of reading written text by measuring variables that impact how readers engage with and understand the text. This data can help a given text's author gauge the text's clarity and conciseness. Accordingly, readability has become an increasingly popular empirical tool in disciplines that critically rely on transmitting information.[186] Among the formulas that assess readability, the Flesch-Kincaid (FK) Grade Level is an influential, commonly used, and easily understandable option.[187] It calculates readability based on the average number of words per sentence and the average number of syllables per

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184. Ryan Whalen, Judicial Gobbledygook: The Readability of Supreme Court Writing, 125 Yale L.J. Forum 200, 200 (2015) (analyzing the readability of Supreme Court opinions).

185. SEC, Plain English Handbook, supra note 78, at 3.

186. See, e.g., John Aloysius Cogan, Jr., Readability, Contracts of Recurring Use, and the Problem of Ex Post Judicial Governance of Health Insurance Policies, 15 Roger Williams U. L. Rev. 93, 100 (2010) (analyzing the readability of health insurance contracts); Tim Loughran & Bill McDonald, Measuring Readability in Financial Disclosures, 69 J. Fin. 1643, 1644 (2014) (analyzing the readability of annual financial statements); Whalen, supra note 184, at 200 (analyzing the readability of Supreme Court opinions).

187. See J. Peter Kincaid, Robert P. Fishburne, Jr., Richard L. Rogers & Brad S. Chissom, Naval Tech. Training Command, DOD, Rsch. Branch Rep. No. 8-75, Derivation of New Readability Formulas (Automated Readability Index, Fog Count and Flesch Reading Ease Formula) for Navy Enlisted Personnel 14 (1975), https://apps.dtic.mil/sti/pdfs/ADA006655.pdf [https://perma.cc/WT9R-2RG9] (redefining the Flesch Reading Ease formula); Flesch Reading Ease and the Flesch Kincaid Grade Level, Readable, https://readable.com/readability/flesch-reading-ease-flesch-kincaid-grade-level/ [https://perma.cc/9T9M-74JS] (last visited Nov. 1, 2021) ("The Flesch Kincaid Grade Level is a widely used readability formula which assesses the approximate reading grade level of a text.").

word.[188] This metric is particularly suitable for this analysis because SEC regulations explicitly require that structured note disclosure documents express information in accordance with variables captured by the formula: short sentences, short words, and simpler word choice.[189]

1. *Data Set Compilation and Readability Calculation.* — The novel structured note prospectus data set was assembled by compiling a central index of all Form 424(b)(2) EDGAR filings between 2010 and 2020, assigning each filing a unique identifier using a random number generator, and randomizing the index by identifier.[190] This yielded a randomized index of 309,651 filings. Prospectuses for the first 2,037 filings were individually reviewed and any non-final or non-structured note filings were discarded,[191] leaving a data set of 1,001 structured note filings.[192] Then, to calculate readability, all 1,001 prospectuses were converted into text and fed through a web-based program that measured the number of words, sentences, and syllables per word in each document. The resulting figure corresponds to the grade level in the U.S. education system that must generally be reached to understand the text.[193]

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188. The official formula is:

$$\text{Grade Level} = .39\left(\frac{\text{number of words}}{\text{number of sentences}}\right) + 11.8\left(\frac{\text{number of syllables}}{\text{number of words}}\right) - 15.59$$

See Flesch Reading Ease and the Flesch Kincaid Grade Level, supra note 187.

189. See SEC, Plain English Handbook, supra note 78, at 28–31.

190. The SEC publishes indexes of filings by form type. Each index contains identifying information for each filing, including the filing entity, filing date, a central index key, and a file name. The indexes used to assemble this data set can be found at supra note 147. Each random identifier was generated using the Excel formula "=RAND()" and then hardcoded to each filing.

191. While not explicitly required by securities laws or regulations, issuers often file preliminary prospectuses with tentative terms to market notes to investors. When a sale is made, the issuer then files a final pricing supplement. Accordingly, because preliminary prospectuses do not reflect notes actually sold, they were excluded from the data set. See, e.g., JPMorgan Chase & Co., Contingent Digital Buffered Notes Linked to the S&P 500 Index Due March 31, 2021 (Form 424(b)(2)), at PS-1 (Mar. 11, 2020), https://www.sec.gov/Archives/edgar/data/1665650/000089109220002867/e8788-424b2.htm [https://perma.cc/XY5U-JWEM] (filing a "preliminary pricing supplement" and noting that "[t]he information in this preliminary pricing supplement is not complete and may be changed"). Non-structured note filings include filings for commercial mortgage trusts, exchange-traded note addendums, underlier supplements, and plain-vanilla securities. For this analysis, reverse-convertible notes, inconsistently included in the definition of structured notes, were also excluded from the data set due to their unique equity-convertible feature and their decreased issuance since the GFC.

192. See infra Appendix for a detailed depiction of the data set compilation process.

193. See Flesch Reading Ease and the Flesch Kincaid Grade Level, supra note 187. Text intended for the general public is estimated to register an FK Grade Level of around eight.

2. *Limitations.* — This analysis is limited in several respects. First, no readability formula considers a text's actual substance, which certainly influences readability.[194] The data set is also limited. Form 424(b)(2) prospectuses are only one piece of a disclosure regime on which investors may rely. This Part does not assess readability of, for example, financial statements incorporated by reference into registration statements.[195] Despite these limitations, this analysis remains an informative metric for the quality of structured note disclosure, particularly in concert with a review of disclosure substance.

B. *Findings*

1. *Readability by Year.* — Structured note pricing supplements have become more difficult to read over time. As the solid horizontal line in Figure 1 demonstrates, the FK Grade Level of structured notes in the data set steadily increased from 2010 to 2020.[196] The capped bars extending above and below the FK Grade Level line at each year reflect a confidence interval of 95%, suggesting support for the accuracy of the results.[197]

This negative trend in readability is likely the result of several factors. More complicated payoff structures and underliers likely entail more complicated risk factors and hypothetical scenarios to accurately and fully describe.[198] Increasingly complex structured notes also approach limitations inherent in plain English's ability to precisely express complex realities.[199] In other words, the distillation of intricate economic realities into simple language may inadvertently lead to less readable text. Volume and time may also be relevant factors. As firms issue more structured notes,

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See id. This Note is concerned with the relative FK Grade Level readability of structured note disclosure over time and across issuers, rather than the absolute readability of disclosure documents.

194. See SEC, Plain English Handbook, supra note 78, at 57 ("No formula takes into account the content of the document being evaluated.").

195. See supra note 46 and accompanying text (mentioning financial statements incorporated by reference).

196. To ensure that this finding is not merely the result of the FK Grade Level formula, readability was also measured using two alternative formulas: the Gunning Fog (FOG) Index and the Simple Measure of Gobbledygook (SMOG) Index. FOG examines total words and sentences, as well as complex words. See The Gunning Fog Index, Readable, https://readable.com/readability/gunning-fog-index/ [https://perma.cc/C85D-3X5C] (last visited Oct. 19, 2022). SMOG examines the number of polysyllabic words, or words with three or more syllables. See The SMOG Index, Readable, https://readable.com/readability/smog-index/ [https://perma.cc/8KLJ-UEWL] (last visited Oct. 15, 2022). These formulas corroborate the results.

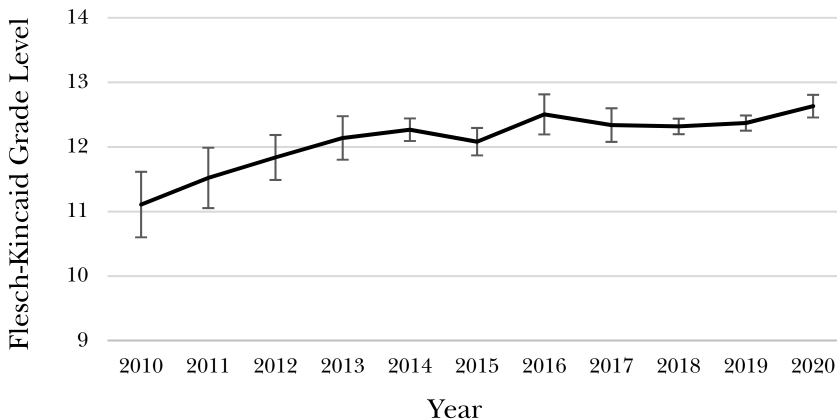
197. This confidence interval represents 95% certainty in the calculation's reliability.

198. See supra notes 125–127 and accompanying text.

199. See Plain English Disclosure, 63 Fed. Reg. 6370, 6370 (Feb. 6, 1998) (noting that complex transactions exacerbate the information problem).

they come under increasing resource and personnel constraints to maintain the same level of readability. If firms do not dedicate commensurate resources and personnel, the quality of disclosure almost certainly falls. Alternatively, the SEC's resource constraints and reduced attention to the structured notes space may further disincentivize issuer diligence in drafting disclosures.

FIGURE 1: READABILITY BY YEAR, 2010–2020



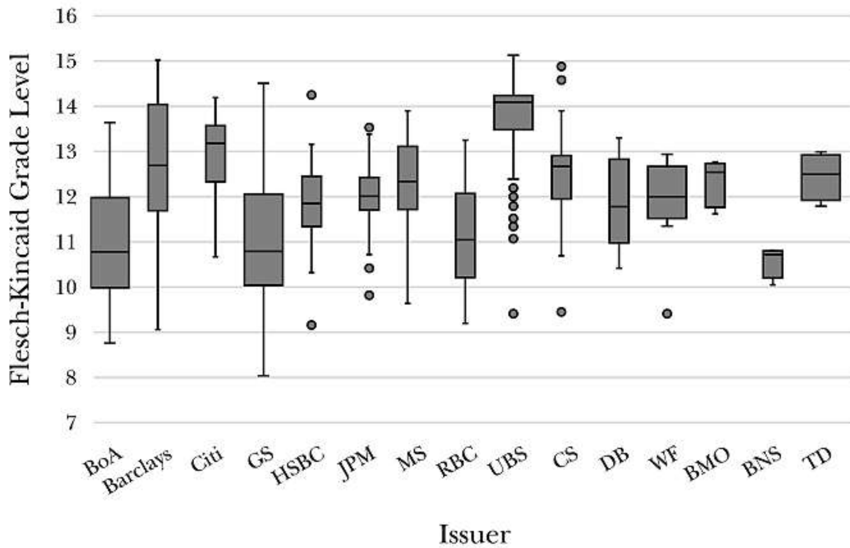
2. *Readability by Issuer.* — Readability also varies in prospectuses both across and within issuers. The standard deviation for all FK Grade Level scores in the data set was 1.29. Figure 2 demonstrates, however, that scores ranged from as low as 8 to as high as 15, even within a single issuer. Moreover, the data set's median FK Grade Level was 12.35, but issuers' median scores over the analyzed period ranged from under 11 to above 14. The five largest issuers in the data set—JPMorgan, UBS, Goldman Sachs, Morgan Stanley, and Credit Suisse—had some of the most significant overall variations in readability.

The finding that issuer readability scores vary significantly likely reflects the different approaches that each issuer takes when structuring prospectuses. After all, the mandatory disclosure rules leave issuers a fair bit of breathing room to portray information in different ways,[200] and some issuers are almost certainly more effective at it than others. The fact that some issuers offer more diverse portfolios of structured notes than others is also a likely factor. Nonetheless, given the material information and language constraints common in structured notes across issuers, this

200. See supra section I.B.

finding raises concerns that investors may not be able to shop for and compare structured notes that vary widely across issuers.

FIGURE 2: READABILITY BY ISSUER[201]



IV. SOLVING THE INFORMATION PROBLEM

When considered together, Parts II and III demonstrate that structured note disclosure documents may not be able to adequately inform and protect investors in an increasingly innovative and complex market. Part IV proceeds to discuss several reforms to the structured note mandatory disclosure regime that may help allay the negative effects of increased complexity and information loss in the future.

A. *The Benefits and Drawbacks of an Ex Ante Approach to Regulation*

Mandatory disclosure is an ex ante approach to financial regulation: It aims to enable investors to make informed investment decisions and to deter issuers from intentionally misleading investors by forcing issuers to

201. Issuers on the x-axis are abbreviated as follows: Bank of America (BoA); Citibank (Citi); Goldman Sachs (GS); JPMorgan (JPM); Morgan Stanley (MS); Royal Bank of Canada (RBC); Credit Suisse (CS); Deutsche Bank (DB); Wells Fargo (WF); Bank of Montreal (BMO); Bank of Nova Scotia (BNS); and TD Bank (TD).

preemptively disclose material information.[202] Mandatory disclosure is accompanied by ex post enforcement actions and judicial remedies that aim to respond to and mitigate harms caused by failures of the ex ante approach.[203] In a perfect world, ex ante regulations are superior to ex post efforts because preventing harm outright is more preferable than taking action only after investors have realized harm.[204] Both practical and political considerations, however, constrain the ex ante approach to regulation in the structured notes market.

The structured notes market's dynamism and the incentives of issuers to innovate may render ex ante regulations ineffective by the time they are implemented. In other words, ex ante regulations risk becoming outdated and ineffective due to new innovations, especially if the rate at which structured notes become more complex outpaces the rate at which ex ante regulations are updated to keep pace with issues caused by such increasing complexity.[205] Similarly, ex ante regulations may induce regulatory arbitrage. Regulatory arbitrage is an entirely legal practice whereby financial institutions evade the costs of regulatory compliance by shifting practices or activities out of heavily regulated jurisdictions and into more lightly regulated jurisdictions.[206] Regulatory arbitrage, for example, is among the driving forces behind the rising import of the shadow banking system and the declining import of the regulated banking system as "providers of money claims and . . . of capital for productive undertakings" in the United States.[207]

Ex ante regulations also require a "costly, complex, and lengthy" regulatory process.[208] Absent a clear market failure or harm to target, the burdens of this process create a bias toward the status quo and away from

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202. See Steven L. Schwarcz, Ex Ante Versus Ex Post Approaches to Financial Regulation, 15 Chap. L. Rev. 257, 258 (2011) (discussing ex ante and ex post approaches to financial regulation).

203. See id. at 258–59.

204. See id.

205. See id. at 260; see also Awrey & Judge, supra note 4, at 2310–11 ("The financial system has crossed a threshold of complexity where the system is evolving faster than regulators and regulations can keep pace." (quoting Simon A. Levin & Andrew W. Lo, Opinion, A New Approach to Financial Regulation, 112 PNAS 12,543, 12,543 (2015))).

206. See Judge, Fragmentation Nodes, supra note 1, at 688 ("If a regulation makes it more expensive for financial institutions to hold *X*-type assets than *Y*-type assets . . . financial institutions will find ways to make *X*s look like *Y*s for purposes of the regulation.").

207. Judge, Information Gaps, supra note 130, at 437; see also Judge, Fragmentation Nodes, supra note 1, at 688 ("Much of the demand for AAA-rated assets came from investors who faced regulatory or other constraints that required or made it less costly for them to hold such assets.").

208. Awrey & Judge, supra note 4, at 2320.

tinkering with preventative reforms.[209] The elaborate requirements of the mandatory disclosure regime almost certainly fuel a certain degree of inertia toward the status quo both by regulators and market participants. Moreover, the resource-intensive regulatory process is not politically attractive. Professors William Bratton and Adam Levitin observed this in the nature of regulations promulgated in the mortgage and structured finance markets after the GFC.[210] Each market played a central role in the GFC, but only in the mortgage market did regulators absolutely prohibit giving a mortgage without considering a borrower's willingness to pay.[211] Regulations promulgated in the structured finance market contained no absolute prohibitions whatsoever.[212] Bratton and Levitin attribute this difference to the fact that the mortgage market is more consumer facing and, in turn, more subject to political pressures: "[M]ore intense political pressure for reform in the consumer markets means that Congress and regulators are more likely to focus . . . on consumer markets than on capital markets."[213] Despite the explosion in popularity of structured notes among retail investors, the debt securities markets and the capital markets writ large most certainly do not garner as much political attention for reforms as does the ubiquitous home mortgage market.

Despite these limitations, discussing and considering potential updates and improvements to the mandatory disclosure regime is still worthwhile. It is widely accepted that innovations can produce new, significant, and hidden market risks.[214] Failing to reconsider assumptions underlying the disclosure regime's requirements to account for new innovations and risks is tantamount to waiting for something bad to happen to investors, and "the difficulty of anticipating the unknown does not relieve [the SEC] of [its] responsibility to be proactive."[215] As the GFC made clear, the costs of allowing complexity and information loss to proliferate may eventually exceed the costs incurred by proactive reform efforts.[216]

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209. See id. at 2321.

210. See William W. Bratton & Adam J. Levitin, A Tale of Two Markets: Regulation and Innovation in Post-Crisis Mortgage and Structured Finance Markets, 2020 U. Ill. L. Rev. 47, 117.

211. See id.

212. See id.

213. Id.

214. See supra notes 112–124 and accompanying text.

215. Caroline A. Crenshaw, Comm'r, SEC, Assessing the Unknown (Sept. 24, 2021), https://www.sec.gov/news/speech/crenshaw-2021-09-24 [https://perma.cc/2RX4-7FLZ].

216. See Awrey & Judge, supra note 4, at 2321 (warning that new and complex interconnections in today's financial markets have been met with regulatory silence).

B. *Enhancing Disclosure*

Parts II and III suggest that text disclosure as a means of informing investors may be inadequate. The English language has a limited ability to capture complex mathematical methodologies and concepts.[217] This inherently limits text disclosure and its readability.[218] In this respect, it is less useful for nearly all investors: Investors in or nearing retirement—the largest structured note investor demographic—are the most susceptible to information loss,[219] and younger investors are less likely to examine text disclosure at all.[220]

Even though technological innovations may be the source of the information challenges of disclosure, technology may also offer the best solution.[221] More specifically, web-based digital disclosure tools may serve to combat information loss resulting from more complex structured notes. Choice engines are one such tool. Investors could input their unique risk–reward profiles and investment objectives into a choice engine and the engine would return targeted, interactive disclosure for prospective and suitable investments.[222] Proof of this concept already exists: The Financial Industry Regulatory Authority (FINRA) currently offers a similar tool that allows investors to analyze and compare various types of investment funds.[223] Interactive digital calculators are another potentially helpful tool. Digital calculators could allow investors to test the consequences of their underlying assumptions about how the payoff structures of specific

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217. See supra notes 159–161 and accompanying text.

218. See supra note 199 and accompanying text.

219. See Olazábal & Marmorstein, supra note 21, at 627 ("The older target market for these structured notes is prone to be the least numerate class of investors, that is, those least likely to possess the complex . . . skills necessary to evaluate structured products, even though they may have years of investing experience.").

220. Mike Boese, Opinion, Advisors Must Meet the Digital Demands of Young Investors, CNBC (Apr. 19, 2021), https://www.cnbc.com/2021/04/19/op-ed-advisors-must-meet-the-digital-demands-of-young-investors.html [https://perma.cc/NV4Y-E5T6] (noting that younger investors "expect to interact and learn digitally").

221. See Hu, supra note 21, at 1610.

222. See Nat'l Sci. & Tech. Council, Exec. Off. of the President, Smart Disclosure and Consumer Decision Making: Report of the Task Force on Smart Disclosure 7 (2013), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/report_of_the_task_force_on_smart_disclosure.pdf [https://perma.cc/47UB-MZHG] ("'Choice engines' . . . help consumers make informed decisions in the marketplace through platforms such as product-comparison websites, mobile shopping applications, and government information platforms.").

223. Fund Analyzer, FINRA, https://tools.finra.org/fund_analyzer/ [https://perma.cc/ZNY4-54WC] (last visited Dec. 23, 2021).

structured notes operate.[224] This could demonstrate to an investor, for example, how a structured note's return is affected by underlier performance, the presence of a participation rate or a redemption feature, and even macroeconomic forces.[225] Digital calculators are also already in use: "[T]he CFPB has begun offering online calculators to help citizens shop for and understand consumer loans."[226]

Regulators might also consider working with issuers to standardize the presentation of information in disclosure documents. Updating the standards by which information should be expressed in disclosure documents could reduce the costs imposed on investors when comparing structured notes.[227]

C. *Strengthening Oversight*

Beyond leveraging technology to modernize disclosure, improving regulatory oversight over the offering process helps protect structured note investors. Currently, the SEC and FINRA oversee distinct parts of the structured notes market.[228] This dichotomy reflects a "categorization of different species of markets and institutions" by which each entity pursues its regulatory mandate with a "deeply engrained path dependence."[229] This path dependance may lead the SEC and FINRA to overlook problematic market dynamics and trends, particularly proliferating systemic risk.[230] As a result, the SEC may not be properly equipped or prepared to protect investors or promote stability in the capital markets.[231]

Giving another regulatory entity the responsibility to oversee the structured notes market but with a particular eye toward systemic risk concerns could be one solution. FSOC, for example, has a broad, holistic

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224. See Erik F. Gerding, Disclosure 2.0: Can Technology Solve Overload, Complexity, and Other Information Failures?, 90 Tul. L. Rev. 1143, 1174 (2016) (noting that interactive disclosure "might enable investors to change particular assumptions behind certain financial presentations and then see how the results would change").

225. See id.

226. Id.

227. See id. at 1156 ("[C]ertain patterns of contractual provisions can form standardized agreements . . . and certain patterns of agreements can form standardized transactions . . . .").

228. See supra note 39 and accompanying text.

229. See Awrey & Judge, supra note 4, at 2351.

230. Id. at 2351 n.264 (providing as a prominent example the SEC's failure to "adequately consider the broader systemic implications of their approach toward the design and supervision of capital rules for large investment banks" before the GFC).

231. But see Hilary J. Allen, The SEC as Financial Stability Regulator, 43 J. Corp. L. 715, 728–29 (2018) (arguing that the SEC has an unspecified mandate to promote financial stability).

statutory mandate to "identify risks to . . . financial stability," "promote market discipline," and "respond to emerging threats to the stability of the [U.S.] financial system."[232] Giving an FSOC-like body oversight and rulemaking responsibility could add a dynamic and valuable complement to the SEC.

More frequent oversight over the structured notes that issuers are selling might also be a solution. The ability of disclosure to inform and protect investors is a product of how effectively disclosure rules are governed.[233] There is a concerning lack of data about just how complex the structured notes that end up in the hands of retail investors are and how those retail investors acquire them. One potential safeguard could be specialized or enhanced regulatory requirements for structured notes above a certain level of complexity. Some have proposed per se unsuitability designations for notes that are sufficiently complex. In other words, notes that exceed a complexity threshold determined by considering a note's underliers, payoff structure, or some combination, would be considered too intrinsically complex and thus per se unsuitable for retail investors.[234] Some European countries have gone this route, which effectively bans the sale of some notes to retail investors.[235]

Another iteration that some have proposed is a system of mandatory government licensing of complex financial products whereby "financial institutions [would need] to make an affirmative showing that each complex financial product they intend to market meets" several predetermined "statutory tests."[236] Both of these proposals have significant drawbacks. A complete ban would likely inadvertently ban beneficial transactions and run afoul of the SEC's mandate to facilitate capital formation.[237] Mandatory government licensing would likely face the same issue and would almost certainly buckle under the SEC's limited

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232. See 12 U.S.C. § 5322(a)(1) (2018) (defining FSOC's general purposes).

233. See Niamh Moloney, Regulating the Retail Markets: Law, Policy, and the Financial Crisis, 63 Current Legal Probs. 375, 383 (2010) ("The achievement of good investor protection outcomes depends . . . on how investor protection rules are, on a day-to-day basis, supervised.").

234. See, e.g., Gerding, supra note 225, at 1176–77 ("[I]f the risks of an issuer indeed cause information overload and are 'too complex to depict,' then perhaps that issuer's securities are too complex to sell."); cf. Deng et al., Structured Products, supra note 176, at 2 (concluding that notes sold to investors that were dominated by other readily available instruments should have been recognized as per se unsuitable for any investor).

235. See, e.g., FSMA Bans 12 Structured Products, Detects KID Shortcomings, supra note 104, at 5 (describing Belgium's moratorium on complex structured products for retail investors, including proprietary indexes with overly complex calculation formulas).

236. E.g., Saule T. Omarova, License to Deal: Mandatory Approval of Complex Financial Products, 90 Wash. U. L. Rev. 63, 67 (2012) (proposing three tests examining: (1) economic purpose; (2) institutional capacity; and (3) systemic effects).

237. See Schwarcz, Regulating Complexity, supra note 21, at 239.

institutional capacity. A more feasible approach might be to require issuers to make additional disclosures for structured notes above a certain complexity threshold to ensure that intermediaries and retail investors fundamentally understand the investments. Private-sector certifications, akin to credit agency ratings, of the complexity of a note or the quality of disclosure could also serve to protect investors.[238]

CONCLUSION

While the global financial crisis fades in the rear view mirror, the extent to which investors are protected from the next crisis relies on how the regulatory landscape adapts to the challenges ahead. This Note examined how complexity arising from financial innovations may lead to information loss that impairs the creation, comprehension, and enforcement of mandatory disclosure, and it supplemented this discussion with a brief empirical study of disclosure readability. By assessing mandatory disclosure rules in the context of structured notes, this Note adds to the body of work focused on protecting retail investors amid a growing, innovating, and increasingly popular complex security.

238. See id. at 242.

APPENDIX: NOVEL DATA SET

Year	# Total Filings 424(b)(2)	% Total Filings 424(b)(2)	# Reviewed	# Removed	# Data Set	% Data Set
2010	8,869	2.86%	57	35	22	2.20%
2011	12,391	4.00%	95	51	44	4.40%
2012	13,762	4.44%	81	41	40	4.00%
2013	13,937	4.50%	95	53	42	4.20%
2014	15,513	5.01%	103	47	56	5.59%
2015	16,771	5.42%	109	47	62	6.19%
2016	24,654	7.96%	146	79	67	6.69%
2017	37,462	12.10%	245	129	116	11.59%
2018	46,817	15.12%	312	169	143	14.29%
2019	51,858	16.75%	338	169	169	16.88%
2020	67,616	21.84%	456	216	240	23.98%
	309,650	-	*2,037*	*1036*	*1,001*	-

ESSAY

FLEEING THE LAND OF THE FREE

*Jayesh Rathod**

This Essay is the first scholarly intervention, from any discipline, to examine the number and nature of asylum claims made by U.S. citizens, and to explore the broader implications of this phenomenon. While the United States continues to be a preeminent destination for persons seeking humanitarian protection, U.S. citizens have fled the country in significant numbers, filing approximately 14,000 asylum claims since 2000. By formally seeking refuge elsewhere, these applicants have calculated that the risks of remaining in the United States outweigh the bundle of rights that accompany U.S. citizenship. Given the United States' recent flirtation with authoritarianism, and the widening fissures in the nation's social fabric, a closer study of asylum seeking is warranted—and indeed, prudent—should future political conditions generate a larger exodus of U.S. citizens.

This Essay opens with a quantitative overview of claims, drawing on data from the United Nations High Commissioner for Refugees and from countries that are the U.S. citizen asylum seekers' destinations. Following that statistical summary, this Essay presents a typology of claims that U.S. citizens have lodged, extracting from public sources the applicants' motivations for seeking asylum and how foreign government authorities have received those claims. Among the classes of U.S. citizens who have sought protection overseas are war resisters, political dissidents, whistleblowers, fugitives, members of minority groups, domestic violence survivors, and the U.S. citizen children of noncitizen parents. This Essay concludes by exploring the relevance of this trend to scholarly debates about asylum adjudication, international relations, forced migration, and citizenship.

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INTRODUCTION 184
I. U.S. CITIZEN ASYLUM SEEKERS: A STATISTICAL OVERVIEW 187
A. Data on Asylum Applications Made 188
B. Recognition Rates and Forms of Protection 192
II. TYPOLOGY OF ASYLUM CLAIMS FILED BY U.S. CITIZENS 194
A. War Resisters 195
1. Vietnam War Draft Dodgers and Deserters 196
2. Military Deserters During the Iraq War 198
B. Whistleblowers, Political Dissidents, and Fugitives 208
C. Defectors 214
D. Domestic Violence Survivors 217
E. Members of Minority Groups 220
1. Claims Filed by Racial Minorities 221
2. Claims Filed by Sexual Minorities 224
3. Other Minority-Based Claims and General Trends 226
F. U.S. Citizen Children of Noncitizen Parents 227
III. OBSERVATIONS AND AVENUES FOR FUTURE RESEARCH 231
A. Geopolitical Context and Bilateral Relations 232
B. Other Independent Variables Informing Asylum Outcomes 233
C. Strategic Use of the Asylum Process by Applicants 235
D. Reliance on Other Types of Protection 236
E. Implications for U.S. Citizenship 238
CONCLUSION 240

INTRODUCTION

In 1997, Chere Lyn Tomayko fled her country of origin, accompanied by her daughters, Chandler and Alexandria.[1] Tomayko sought to escape an abusive relationship with Alexandria's father, Roger Cyprian, as tensions were continuing to escalate in the household.[2] Fearing that somebody might lose their life if she remained within Cyprian's reach, Tomayko traveled to Costa Rica, where, like myriad other domestic violence survivors around the globe, she sought protection in another country in the form of refugee status.[3] After a protracted and complex

1. Gillian Gillers, Fugitive Rocks U.S.-Costa Rica Relations, Tico Times (Aug. 1, 2008), https://ticotimes.net/2008/08/01/fugitive-rocks-u-s-costa-rica-relations [https://perma.cc/BN6P-XVL5].

2. Id.

3. Id.

legal process, the government of Costa Rica approved Tomayko's refugee claim in 2008, citing the human rights concerns implicated in the case.[4]

On the surface, the case resembles many requests for refugee protection from recent times but for one distinguishing feature: Tomayko is a citizen of the United States of America.[5] In seeking asylum overseas as a U.S. citizen, Tomayko was part of a sizeable group, as data from the United Nations High Commissioner for Refugees (UNHCR) reveal that U.S. citizens have lodged approximately 14,000 asylum claims since 2000.[6] This Essay is the first scholarly intervention to distill the number and nature of refugee claims made by U.S. citizens and to explore the broader implications of this phenomenon.

Tomayko's case encapsulates many of the complicated dynamics that surround protection claims made by U.S. citizens, including the nature of the bilateral relationship between the United States and the destination country, along with social and political forces in the destination country that might buoy the asylum claim or foretell its defeat. These cases also reflect the strategic choices made by asylum seekers who, by virtue of their citizenship and access to a U.S. passport, have relatively unfettered access to many parts of the world.[7] For some of these claimants, the asylum process and its promise of lasting protection serve as a shield against criminal or other legal proceedings in the United States.[8] Notwithstanding the instrumental motives underlying some cases, many applicants genuinely believe that the United States is simply not a safe place for their families to live and have made the choice to flee the proverbial land of the free.[9]

The stories of these U.S. citizen asylum seekers also invite deeper reflection about how U.S. citizenship is valued in the current political moment. To be sure, the United States continues to be a preeminent destination for persons seeking humanitarian protection, receiving tens of thousands of asylum claims annually.[10] Nevertheless, a significant number of U.S. citizens have decided that the perceived risks of remaining in the

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4. LADB Staff, Univ. of N.M., Costa Rica Grants Asylum to U.S. Citizen Fleeing Persecution and Denial of Human Rights 1–2 (2008), https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=10629&context=noticen [https://perma.cc/Z4EE-CU8F].

5. Id.

6. See infra section I.A.

7. See Henley & Partners, The Henley Passport Index: Q3 2022 Global Ranking, https://cdn.henleyglobal.com/storage/app/media/HPI/HENLEY_PASSPORT_INDEX_2022_Q3_INFOGRAPHIC_GLOBAL_RANKING_220705_1.pdf [https://perma.cc/3U57-Y3XQ] (last visited Sept. 16, 2022) (noting that U.S. passports allow visa-free travel to 186 countries).

8. See infra section II.B.

9. See infra section II.E.

10. Kira Monin, Jeanne Batalova & Tianjian Lai, Refugees and Asylees in the United States, Migration Pol'y Inst. (May 13, 2021), https://www.migrationpolicy.org/article/refugees-and-asylees-united-states-2021 [https://perma.cc/DF4W-WKQ7].

country outweigh the bundle of rights and protections that accompanies their citizenship. Abandonment of U.S. citizenship is not a new phenomenon, of course, as thousands renounce their U.S. citizenship each year, typically for tax-related reasons.[11] Yet the country's recent flirtation with authoritarianism, widening fissures in its social fabric, and growing environmental risks suggest that a closer study of asylum seeking is warranted—and indeed, prudent—should conditions generate even greater outflows of U.S. citizens.[12]

The Essay opens in Part I with a quantitative overview of claims, drawing from data provided by the UNHCR and destination countries. Following that statistical summary, Part II of the Essay presents a typology of claims that U.S. citizens have lodged, extracting from publicly available sources the applicants' motivations for seeking asylum and assessing how foreign government authorities have received those claims. Part III of this Essay explores the broader implications of this phenomenon. As a preliminary scholarly intervention into the topic, this Essay does not endeavor to answer the complicated array of legal questions embedded in U.S. citizen asylum claims, nor does it exhaustively tackle the range of theoretical questions—across multiple disciplines—that underlie this phenomenon. Rather, by offering a set of initial observations and theories, the Essay invites additional scholarly treatment of the matter and provides a baseline for empirical inquiry.

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11. See Jo Craven McGinty, More Americans Are Renouncing Their Citizenship, Wall St. J. (Oct. 16, 2020), https://www.wsj.com/articles/more-americans-are-renouncing-their-citizenship-11602840602 (on file with the *Columbia Law Review*) (reporting that nearly 37,000 U.S. citizens expatriated from 2010 to 2020, typically for tax-related or other financial reasons).

12. Indeed, various commentators have penned opinion pieces in recent years about their actual or contemplated departure from the United States, given the challenging social and political conditions. See, e.g., Tiffanie Drayton, Opinion, I'm a Black American. I Had to Get Out., N.Y. Times (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/black-america-racism-refugee.html (on file with the *Columbia Law Review*); Wajahat Ali, Opinion, Is It Time for Me to Leave America?, Daily Beast (June 4, 2022), https://www.thedailybeast.com/is-it-time-for-me-to-leave-america [https://perma.cc/S5RW-U6BT] (last updated June 7, 2022) (advocating for "person[s] of color" to "have an exit plan" because of the "political and cultural landscape" in the United States). Several media outlets have also reported on this phenomenon. See Kim Hjelmgaard, 'I'm Leaving, and I'm Just Not Coming Back': Fed Up With Racism, Black Americans Head Overseas, USA Today (June 26, 2020), https://www.usatoday.com/story/news/world/2020/06/26/blaxit-black-americans-leave-us-escape-racism-build-lives-abroad/3234129001 [https://perma.cc/T5HL-Q4VT] (last updated July 1, 2020); Emily Wax-Thibodeaux, Weary From Political Strife and a Pandemic, Some Americans Are Fleeing the Country, Wash. Post (Nov. 2, 2020), https://www.washingtonpost.com/national/weary-from-political-strife-and-a-pandemic-some-americans-are-fleeing-the-country/2020/11/02/ee66038c-f840-11ea-89e3-4b9efa36dc64_story.html (on file with the *Columbia Law Review*) (averring that Americans are leaving the United States in record numbers due to politics, racial strife, and the pandemic).

I. U.S. CITIZEN ASYLUM SEEKERS: A STATISTICAL OVERVIEW

Granular data on refugee and asylum claims is difficult to obtain, given the confidentiality protocols that typically apply under international or domestic law.[13] For example, statistics regarding the nature of the asylum claims made, or the likelihood of success of particular types of U.S. citizen asylum claims, simply do not exist in aggregate form. Nevertheless, data from UNHCR and from national governments shed light on the number of claims, the countries where they are lodged, and their overall success rate. Of these sources, the UNHCR, with its publicly accessible database of international asylum statistics, is more comprehensive. To verify the UNHCR data and to provide the most accurate numbers, the author obtained available information about U.S. citizen asylum seekers from countries of asylum and adjusted the numbers reported by UNHCR to match the information provided by individual countries.[14]

UNHCR maintains specific data on asylum seekers (including claims made and recognized) from 2000 to the present.[15] The agency also maintains data from 1951 to the present on persons in "refugee" status in given countries, along with their country of origin. In many legal regimes, "asylum-seeker" and "refugee" have nearly identical substantive definitions but simply refer to different stages in the adjudicative process.[16] Accordingly, one would assume that the UNCHR data on "refugees" would bear some correlation to the data set on asylum claims. But owing to idiosyncrasies of reporting by the country-specific offices of UNCHR, the numbers reported under the category of "refugee" can include persons granted other forms of "complementary" protection, such as protection under the United Nations Convention Against Torture.[17]

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13. See, e.g., 8 C.F.R. § 208.6 (2020) (protecting the confidentiality of asylum-related information); UNHCR, Procedural Standards for Refugee Status Determination Under UNHCR's Mandate 20–31 (2020), https://www.unhcr.org/4317223c9.pdf [https://perma.cc/D796-PYZ6] (detailing UNHCR's confidentiality and data-protection protocols for refugee status determinations); Directive 2013/32, of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection, art. 48, 2013 O.J. (L 180) 60 (requiring national authorities to follow the principle of confidentiality when considering requests for international protection).

14. Cf. Barbara Harrell-Bond & Eftihia Voutira, In Search of 'Invisible' Actors: Barriers to Access in Refugee Research, 20 J. Refugee Stud. 281, 285–87 (2007) (describing some of the barriers that researchers encounter in gathering data about refugee populations).

15. The data from this section were drawn primarily from the website of UNHCR. Refugee Data Finder, UNHCR, https://www.unhcr.org/refugee-statistics/download [https://perma.cc/556F-58ZC] (last visited Sept. 8, 2022).

16. UNCHR, UNHCR Global Report 2005: Glossary, at 441, 444, https://www.unhcr.org/449267670.pdf [https://perma.cc/G4P4-DQGW] (clarifying that an "asylum-seeker is someone whose claim has not yet been finally decided" and that "every refugee was initially an asylum-seeker").

17. Specifically, the statistics can include persons in a "refugee-like situation" and "others of concern." Who Is Included in UNHCR Statistics?, UNHCR, https://www.unhcr.org/refugee-

The UNHCR data have additional limitations. First, although the agency has attempted to standardize data collection across nearly 200 countries, some variations remain in how countries report data. For example, although most countries share data that reflects the total number of individual claimants, some countries—most notably, Australia and the United States—report data by "cases," which may include family units comprised of multiple individuals.[18] Moreover, since 2020, UNHCR has, for confidentiality reasons, begun rounding certain data on asylum seekers and asylum decisions to the nearest five.[19] This means that the numbers reported in publicly available UNHCR data often provide only an approximation of the total number of claims. For purposes of this research study, however, UNHCR provided the author with a partially unredacted dataset, containing more precise information about the numbers of asylum applications lodged by U.S. citizens from 2000 to the present.[20]

The section that follows presents data regarding asylum claims filed by U.S. citizens over the last twenty-one years, noting the number of claims, the most popular destination countries, and trends in asylum seeking over the years. The following section examines the recognition rate for asylum claims for U.S. citizens, outlining factors that might shape decisionmaking and identifying a disparity in UNHCR data between asylum recognition rates and refugee numbers. As explained below, this disparity might suggest that U.S. citizens are receiving other types of status in some countries of destination, short of full-fledged refugee protection.

A. *Data on Asylum Applications Made*

UNHCR and country-specific data reveal that from 2000 to the end of 2021, U.S. citizens filed 13,857 asylum claims in ninety-one different

statistics/methodology/definition [https://perma.cc/WJB2-NX29] (last visited Sept. 8, 2022). This disparity between "asylum seeker" and "refugee" data was confirmed by a UNHCR Information Officer. Telephone Interview with Noha Khalifa, UNHCR (July 2, 2021) (on file with the *Columbia Law Review*).

18. Refugee Data Finder: Asylum Applications in Australia, UNHCR, https://www.unhcr.org/refugee-statistics/download/?url=f62vI4 [https://perma.cc/8XY4-9QXG] (last visited Sept. 8, 2022) (reporting asylum applications made in Australia by "Cases" and not "Persons"); Refugee Data Finder: Asylum Applications in the United States, UNHCR, https://www.unhcr.org/refugee-statistics/download/?url=sA929q [https://perma.cc/3D6Q-3Q6C] (last visited Sept. 8, 2022) (reporting asylum applications made in the United States by "Cases" and not "Persons").

19. Data Content and Structure, UNHCR, https://www.unhcr.org/refugee-statistics/methodology/data-content [https://perma.cc/C3RE-CUVU] (last visited Sept. 8, 2022) ("Small numbers less than five are rounded to the nearest multiple of five. Additionally data relating to asylum decisions is rounded between five and ten.").

20. E-mail from Edgar Scrase, UNHCR, to author (July 1, 2022, 07:46 EST) (on file with the *Columbia Law Review*).

countries.[21] Notably, in seventy-five of these ninety-one countries, government authorities received fewer than fifty U.S. citizen asylum claims during that period. In other words, U.S. citizen asylum claims are concentrated in a relatively small number of countries, with an overwhelming proportion of claims being filed in Canada. Table 1 below captures those countries that have registered fifty or more applications for asylum by U.S. citizens between 2000 and 2021.

21. These countries are: Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Belarus, Belgium, Belize, Bolivia, Bosnia & Herzegovina, Brazil, Bulgaria, Canada, Cayman Islands, Chile, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Guatemala, Guyana, Honduras, Hong Kong SAR, Hungary, Iceland, India, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Latvia, Libya, Lichtenstein, Lithuania, Luxembourg, Malaysia, Malta, Mauritania, Mexico, Morocco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Papua New Guinea, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Kitts and Nevis, Serbia, Slovakia, Slovenia, Somalia, South Africa, Spain, Sweden, Switzerland, Syrian Arab Republic, Tanzania, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela, and Zambia. Id.

This list of countries, the total of 13,857, and the data presented in Tables 1 and 2 below, were computed using the UNHCR dataset, adjusted for variations reflected in data reported by the following destination countries: Finland, Mexico, Norway, Sweden, and the United Kingdom. See Asylum Applications, Finnish Immigr. Serv., https://statistik.migri.fi/#applications/23330/49 [https://perma.cc/HF7W-QHQP] (last updated Aug. 15, 2022); Comisión Mexicana de Ayuda a Refugiados [Mexican Commission for Refugee Assistance], Estadísticas (2017), https://www.gob.mx/cms/uploads/attachment/file/290340/ESTADISTICAS_2013_A_4TO_TRIMESTRE_2017.pdf [https://perma.cc/5J2N-E5TV]; Statistics on Immigration, UDI [The Norwegian Directorate of Immigration], https://www.udi.no/en/statistics-and-analysis/statistics [https://perma.cc/DVR9-AGQK] (last visited Sept. 8, 2022); Asylum, Migrationsverkert [Swedish Migration Agency], https://www.migrationsverket.se/English/About-the-Migration-Agency/Statistics/Asylum.html [https://perma.cc/86JC-BTMQ] (last updated Sept. 1, 2022); Asylum and Resettlement Datasets, Gov.UK (Aug. 22, 2019), https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets (on file with the *Columbia Law Review*) (last updated Sept. 23, 2022).

TABLE 1: COUNTRIES RECEIVING THE HIGHEST NUMBERS OF ASYLUM APPLICATIONS FROM U.S. CITIZENS (2000–2021)

Country	**Total Number of Claims**	**Proportion of Total**
Canada	10,355	74.73%
United Kingdom	757	5.46%
Mexico	362	2.61%
Sweden	325	2.35%
Australia	271	1.96%
Spain	224	1.62%
Germany	184	1.33%
Netherlands	162	1.17%
Switzerland	100	0.72%
Costa Rica	99	0.71%
Ireland	81	0.58%
France	73	0.53%
Norway	69	0.50%
Finland	67	0.48%
Belgium	65	0.47%
Brazil	62	0.45%

Examining the data on asylum applicants across the years also reveals some interesting trends. As reflected in Table 2 below, asylum applications filed by U.S. citizens spiked in 2007 and 2008 and again from 2017 to 2019. As discussed more fully below, these increases likely reflect claims filed by service members in the context of the Iraq War and claims broadly linked to policies promulgated by the Trump Administration. While the more recent increases are visible across several countries, the increases in 2007 and 2008 were largely concentrated in applications filed in Canada. In each year from 2000 to the present, Canada has registered more U.S. citizen asylum seekers than any other country.

TABLE 2: TOTAL NUMBER OF ASYLUM APPLICATIONS FILED BY U.S. CITIZENS, ACROSS ALL COUNTRIES (2000–2021)

Year	Total
2000	138
2001	139
2002	259
2003	406
2004	311
2005	288
2006	449
2007	1021
2008	1048
2009	565
2010	481
2011	435
2012	340
2013	214
2014	338
2015	370
2016	343
2017	2466
2018	1617
2019	1471
2020	651
2021	507

B. *Recognition Rates and Forms of Protection*

Since 2000, fewer than 400 asylum claims filed by U.S. citizens have been granted by the immigration or political authorities of another country.[22] This represents less than 3% of the applications—a rather small fraction of the overall pool.[23] When compared to asylum approval rates generally in countries where U.S. citizens have tended to file claims—including Canada, the United Kingdom, Mexico, and Sweden—U.S. citizens' claims are recognized (that is, approved) at a consistently lower rate. For example, in recent years, the asylum approval rate in Canada has ranged from around 65% to 71%,[24] though UNHCR data reveals that only 131 of the thousands of U.S. citizen asylum claims lodged since 2015 were recognized.[25] Along these lines, the Migration Observatory at the University of Oxford has calculated that 59% of asylum applications filed in the United Kingdom from 2017 to 2019 were ultimately approved,[26] while only a handful of U.S. citizen claims were recognized during that same period.[27]

As explored more fully in Part II below, a combination of factors, including both geopolitical and legal considerations, likely explains the high denial rates. National governments are loath to invoke the ire of the U.S. government by granting protection to a U.S. national, and the many hurdles inherent in the definition of a "refugee" likewise lead to denials.[28]

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22. Refugee Data Finder: U.S. Citizen Asylum Decisions in All Countries, UNHCR, https://www.unhcr.org/refugee-statistics/download/?url=ONr29u [https://perma.cc/4DJ4-KUBV] [hereinafter U.S. Citizen Asylum Decisions] (last visited Sept. 8, 2022) (reporting that 361 asylum applications filed by U.S. citizens from 2000 to 2021 were recognized).

23. See supra note 21 and accompanying text (noting that 13,857 asylum claims were filed by U.S. citizens from 2000 to 2021).

24. See Refugee Protection Claims (New System) Statistics, Immigr. & Refugee Bd. of Can., https://irb.gc.ca/en/statistics/protection/Pages/RPDStat.aspx (on file with the *Columbia Law Review*) (last updated Sept. 6, 2022) (reporting acceptance rates of 71.3% in 2021, 67.7% in 2020, and 64.6% in 2019, not counting abandoned or withdrawn claims).

25. Refugee Data Finder: U.S. Citizen Asylum Decisions in Canada, UNHCR, https://www.unhcr.org/refugee-statistics/download/?url=SjT0D3 [https://perma.cc/9U6V-XR3S] (last visited Sept. 29, 2022).

26. Peter William Walsh, The Migration Observatory at the Univ. of Oxford, Briefing: Asylum and Refugee Resettlement in the UK 10 (2022), https://migrationobservatory.ox.ac.uk/wp-content/uploads/2022/08/MigObs-Briefing-Asylum-and-refugee-resettlement-in-the-UK.pdf [https://perma.cc/DT9S-LGJ3].

27. Asylum and Resettlement Datasets, supra note 21 (finding that fewer than 20% of the U.S. citizens who applied for asylum in the UK between 2018 and 2019 were recognized).

28. One of the most formidable hurdles that U.S. citizen asylum seekers may face is the counterargument that they could safely relocate in another part of the country. While the 1951 Geneva Refugee Convention "does not require or even suggest that the fear of being persecuted need always extend to the whole territory of the refugee's country of origin," the possibility of internal relocation is considered by adjudicators in refugee status determinations. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection: Under the 1951 Convention and the 1967 Protocol Relating to the

In particular, courts are reluctant to frame the United States as a country where the rule of law is insufficiently strong to offer meaningful protection to those at risk.[29] To do so would upend a longstanding narrative that positions the U.S. legal system at the top of a global hierarchy of worthiness and integrity.[30] Relatively few adjudicators are willing to ascribe this kind of critical flaw to U.S. government and society.

Although a grant of asylum has profound legal significance and, oftentimes, equally weighty political importance, the asylum denial statistics do not tell the full story of countries' handling of protection claims by U.S. citizens. As explained above, UNHCR maintains statistics for both asylum claims lodged by U.S. citizens, along with the number of U.S. citizens given refugee protection in particular countries. Interestingly, the asylum and refugee statistics do not always match; for some countries, refugee statistics for U.S. citizens for specific years far outpace asylum grant rates. For example, UNHCR statistics indicate that in 2006, Germany classified 349 U.S. citizens in some kind of refugee-like status, with only 87 such classifications registered for the previous year.[31] The following year, German data reported via UNCHR reflect 604 U.S. citizens in that category; yet UNHCR data on asylum seekers indicate that Germany did not recognize any U.S. citizen asylum claims during those years.[32] Similar disparities exist with respect to Canada, the United Kingdom, and, to a lesser extent, Sweden.[33]

UNHCR officials acknowledge this disparity and suggest the difference may be attributable to various causes, including the subsequent

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Status of Refugees 108–09 (2019), https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html [https://perma.cc/C5EF-Y3DD] [hereinafter UNHCR Handbook].

29. See infra notes 324–326 and accompanying text.

30. See, e.g., Francesca Bignami, Cooperative Legalism and the Non-Americanization of European Regulatory Styles: The Case of Data Privacy, 59 Am. J. Compar. L. 411, 460 (2011) ("The American legal system is a highly salient model and it is generally regarded as a major source of legal export to the rest of the world . . . . [T]he American legal system is considered more advanced than others and therefore as the model towards which other countries will gravitate.").

31. Refugee Data Finder: U.S. Refugees in Germany, UNHCR, https://www.unhcr.org/refugee-statistics/download/?url=4h0qEY [https://perma.cc/3EWT-QDX5] (last visited Sept. 29, 2022).

32. Compare id. (showing 87, 349, and 604 persons from the United States classified as refugees in Germany in 2005, 2006, and 2007, respectively), with Refugee Data Finder: U.S. Citizen Asylum Decisions in Germany, UNHCR, https://www.unhcr.org/refugee-statistics/download/?url=X7f0kL [https://perma.cc/VL7Z-H6W6] (last visited Sept. 8, 2022) (showing no asylum applications granted to any U.S. citizens in Germany during those years).

33. Compare Refugee Data Finder: U.S. Refugees, UNHCR, https://www.unhcr.org/refugee-statistics/download/?url=Cdtv32 [https://perma.cc/GK8W-WCT4] (last visited Sept. 8, 2022) (showing the "refugee" population in all countries comprised of persons originating from the United States), with U.S. Citizen Asylum Decisions, supra note 22 (reporting the number of recognized applications filed by U.S. citizens from 2000 to 2021).

inclusion of derivative family members in the refugee numbers, dual citizenship scenarios, or even errors in the database.[34] Another explanation that UNHCR deems plausible: Countries are finding other ways to offer protection or status to U.S. citizens, short of formally conferring refugee status.[35] Germany, for example, offers "subsidiary protection" to persons facing "serious harm caused by human rights violations," even if such harm does not rise to the level of persecution as contemplated by the 1951 Geneva Refugee Convention.[36] Along these lines, Canadian law provides for a "person in need of protection" status that encompasses persons beyond those who qualify as "refugees" under Canadian law, including persons facing the risk of torture or of certain circumstances of cruel and unusual treatment or punishment.[37] Canadian law also allows conferral of permanent residence on "humanitarian and compassionate considerations" in exceptional cases.[38] In other words, domestic law may provide other categories of protection for state authorities to use in lieu of formal designation as a refugee.

II. TYPOLOGY OF ASYLUM CLAIMS FILED BY U.S. CITIZENS

Persons residing in what is now United States territory have sought refuge in other countries since at least the eighteenth century. During the American Revolution and its immediate aftermath, loyalists fled to Canada, seeking an environment more hospitable to their political views.[39] In the eighteenth and nineteenth centuries, Canada also received enslaved persons from the United States who had escaped via the Underground Railroad.[40] While the categories below relate primarily to claims advanced from the twentieth century to the present, the threats of political persecution and racialized oppression continue to animate some asylum claims lodged by U.S. citizens.

Broadly speaking, asylum claims filed by U.S. citizens can be classified into the following six categories: (1) war resisters (including draft dodgers and military deserters); (2) whistleblowers, political dissidents, and fugitives; (3) defectors; (4) racial, religious, and sexual minorities; (5)

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34. E-mail from Chris Melzer, UNHCR, to author (July 7, 2022, 03:23 EST) (on file with the *Columbia Law Review*); E-mail from Edgar Scrase, supra note 20.

35. E-mail from Chris Melzer, supra note 34.

36. Forms of Asylum and Refugee Protection, UNHCR Germany, https://help.unhcr.org/germany/asylum-in-germany/forms-of-asylum-and-refugee-protection [https://perma.cc/2ND2-P5WD] (last visited Sept. 8, 2022).

37. Immigration and Refugee Protection Act, S.C. 2001, c 27, § 97(1) (Can.).

38. Id. § 25; Humanitarian and Compassionate Grounds, Gov't of Can., https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/claim-protection-inside-canada/after-apply-next-steps/refusal-options/humanitarian-compassionate-grounds.html [https://perma.cc/84P7-JRN8] (last modified Sept. 13, 2017).

39. See infra notes 150–153 and accompanying text.

40. See infra notes 246–249 and accompanying text.

domestic violence survivors; and (6) U.S. citizen minors applying along with their noncitizen parents for protection in other countries. For this sixth category, many of the noncitizen parents had previously resided in the United States but departed and sought protection elsewhere as the Trump Administration upended humanitarian immigration policies.[41]

As explored via the narratives below, these categories are not mutually exclusive: Members of the U.S. military have left the service because of their experience as sexual minorities; victims of private violence have also been wanted as fugitives; defectors have abandoned their military posts; and so on. Asylum applicants may also advance claims that assert multiple grounds for protection.[42] Nevertheless, these categories roughly mirror the types of claims that U.S. citizens have presented. Critically, within each of these categories are numerous individual claimants, whose particular motivations and stories escape facile essentialization. By exploring these accounts, one begins to see patterns in the circumstances that give rise to the claims and that allow them to gain traction in the destination country. These cases also reveal how foreign governments have approached the delicate task of reviewing claims that, by their very nature, critique a world superpower.

A. *War Resisters*

Although precise data is not available, one of the largest identifiable groups of U.S. citizens who have applied for asylum overseas consists of "war resisters"—current or prospective members of the U.S. military who fled the country to avoid service they found objectionable.[43] During the Vietnam War, tens of thousands of war resisters traveled northward to Canada, where progressive Prime Minister Pierre Trudeau welcomed them,[44] while many other U.S. citizens found refuge in Sweden.[45] More recently, members of the U.S. military have sought protection in Canada and other countries when they could no longer justify their involvement in the Iraq War.[46] As described below, the more recent wave of war resisters

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41. Teresa Wright, A Growing Number of People Seeking Asylum in Canada Are Americans, Statistics Show, Globe & Mail (Nov. 15, 2018), https://www.theglobeandmail.com/canada/article-a-growing-number-of-people-seeking-asylum-in-canada-are-americans (on file with the *Columbia Law Review*) [hereinafter Wright, Asylum Statistics].

42. Dree K. Collopy, AILA's Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure 129 (7th ed. 2015).

43. See Jessica Squires, Building Sanctuary: The Movement to Support Vietnam War Resisters in Canada, 1965–73, at ix (2013) (describing "war resister" as a "more inclusive" term that includes draft dodgers, deserters, and others).

44. See infra section II.A.1.

45. Carl-Gustaf Scott, Swedish Sanctuary of American Deserters During the Vietnam War: A Facet of Social Democratic Domestic Politics, 26 Scandinavian J. Hist. 123, 123 (2001).

46. See infra section II.A.2.

encountered formidable legal and political hurdles while seeking protection in Canada.[47]

1. *Vietnam War Draft Dodgers and Deserters.* — Approximately 50,000 young U.S. citizens traveled to Canada in opposition to the United States' involvement in the Vietnam War.[48] Of the men who migrated, some were military deserters, but the overwhelming majority were persons seeking to escape the draft.[49] At first, the Canadian government had a policy of not admitting deserters who lacked proof of discharge, but this ended in January of 1968.[50] Facing pressure from the public and in an effort to curb biased decisionmaking by immigration officials, in 1969 the Canadian government instructed immigration officials that asking about the military status of persons seeking immigration protection at the border was prohibited.[51]

Vietnam War resisters describe a simple process of arriving at the border and declaring an intent to immigrate to Canada due to refusal to serve in Vietnam: The would-be migrants filled out an application on the spot and would receive their permanent resident card only a few weeks later.[52] This straightforward process was enabled by a progressive Canadian government, then led by Trudeau, who reportedly referred to Canada as "a refuge from militarism," in a thinly veiled critique of the United States' involvement in Southeast Asia.[53]

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47. See infra section II.A.2.

48. John Hagan, Northern Passage: American Vietnam War Resisters in Canada 3 (2001).

49. John Hagan, Class and Crime in War-Time: Lessons of the American Vietnam War Resistance in Canada, 37 Crime L. & Soc. Change 137, 141 (2002) (estimating that about three-fourths of the migrating men were draft resisters).

50. See House of Commons Debates, 28th Parl., 1st Sess., Vol. 8, at 8930 (May 22, 1969) (statement of Hon. Allan J. MacEachen) ("Our basic position is that the question of an individual's membership or potential membership in the armed services of his own country is a matter to be settled between the individual and his government, and is not a matter in which we should become involved.").

51. Valerie Knowles, Forging Our Legacy: Canadian Citizenship and Immigration, 1900–1977, at 90 (2000); see also Nicholas Keung, Iraq War Resisters Meet Cool Reception in Canada, Toronto Star (Aug. 20, 2010), https://www.thestar.com/news/insight/2010/08/20/iraq_war_resisters_meet_cool_reception_in_canada.html (on file with the *Columbia Law Review*) ("On May 22, 1969, [Canada] announced that immigration officials would not and could not ask about immigration applicants' military status if they showed up at the border seeking permanent residence in Canada.").

52. Under laws existing at the time, the deserter or draft evader would seek "landed immigrant status," meaning the individual had been granted the right to live in Canada permanently by immigration authorities. Jonathan M. Engram, Conscientious Objection to Military Service: A Report to the United Nations Division of Human Rights, 12 Ga. J. Int'l & Compar. L. 359, 386 n.165 (1982); Ben Ehrenreich, War Dodgers, N.Y. Times Mag. (Mar. 23, 2008), https://www.nytimes.com/2008/03/23/magazine/23wwln-essay-t.html (on file with the *Columbia Law Review*).

53. Ehrenreich, supra note 52. While Trudeau's support of the war resisters was clear, some have argued that this precise phrase was misattributed to Trudeau. Sarah J.

Public opinion toward the war—and toward those who had fled—ultimately shifted in the United States. Soon after taking office on January 21, 1977, President Jimmy Carter issued a "full, complete, and unconditional" pardon to hundreds of thousands of men who had either failed to register or fled the country to avoid the Vietnam War draft.[54] The pardon did not apply, however, to those who had engaged in acts of violence or to military deserters.[55] Estimates on the number of U.S. citizens (including family members of war resisters) who chose to remain in Canada vary greatly, with estimates as divergent as 25,000 and 50,000.[56]

Although Canada was the primary destination for war resisters during this era, approximately 800 U.S. citizens traveled to Sweden, where they were likewise received by a government that was openly critical of the U.S. war effort in Vietnam.[57] Most of the war resisters who sought refuge in Sweden were already serving in the U.S. military;[58] the first group to capture public attention were the Intrepid Four, a group of sailors who had deserted in Japan and ultimately made their way to Sweden, where they received humanitarian asylum.[59] Domestic political considerations shaped the Swedish government's policies, as the ruling Social Democrats were actively courting the anti-war youth vote.[60] At the same time, however, authorities remained mindful of the impact on relations with the United States.[61] For this reason, U.S. war resisters received only humanitarian asylum—a status comparable to that conferred upon economic refugees—as opposed to full-fledged political asylum, which included more robust protections and benefits.[62]

Grünendahl, Refuge From or Safe Haven for Militarism? U.S. War Resisters' Diverging Experiences of Building New Lives in Canada, 85 Canadian Stud. 97, 97 (2018).

54. Proclamation No. 4483, 42 Fed. Reg. 4391, 4391 (Jan. 24, 1977); Andrew Glass, Carter Pardons Draft Dodgers Jan. 21, 1977, Politico (Jan. 21, 2008), https://www.politico.com/story/2008/01/carter-pardons-draft-dodgers-jan-21-1977-007974 [https://perma.cc/WTH4-LLRU].

55. Proclamation No. 4483, 42 Fed. Reg. at 4391. President Carter issued an executive order to facilitate the implementation of the pardon proclamation. Exec. Order No. 11,967, 42 Fed. Reg. 4393 (Jan. 24, 1977).

56. Alison Mountz, Seeking Status, Forging Refuge: U.S. War Resister Migrations to Canada, 36 Refuge 97, 98 n.2 (2020) ("While it is believed that more than 100,000 people migrated temporarily during this time, the census records approximately 50,000 who regularized their status and remained in Canada after the war ended."); Tamara Jones, Over the Border, Two Generations Meet, Wash. Post, Mar. 17, 2008, at C1 (on file with the *Columbia Law Review*) [hereinafter Jones, Over the Border] (reporting that about 25,000 draft evaders "stayed behind" after the United States granted amnesty).

57. Scott, supra note 45, at 123.

58. Id. at 123 n.1.

59. Id. at 124.

60. Id. at 124, 130.

61. Id. at 126–27.

62. Id. at 132 n.52, 134.

The overall experience of the Vietnam War resisters captures how questions of foreign policy, bilateral relations, and domestic politics can powerfully inform the experience of U.S. citizens seeking refuge in other countries. Moreover, as reflected in the Canadian and Swedish cases, states need not limit themselves to the formal apparatus of asylum but can use other tools under domestic immigration laws to provide avenues for protection.

2. *Military Deserters During the Iraq War.* — During the 2000s, hundreds of U.S. service members fled to Canada to avoid deployment or redeployment to Iraq.[63] Many of these persons sought formal refugee status in Canada,[64] others undoubtedly stayed under the radar, and a handful sought humanitarian protection in other countries.[65] While the backgrounds of these persons vary, all shared a common theme of disillusionment with the U.S. presence in the Middle East.[66] Many hailed from underprivileged backgrounds and had joined the military to stabilize their earnings and ultimately receive higher education.[67] Also, unlike many of the Vietnam-era predecessors who had never actually served, a substantial number of the persons who sought protection in the context of the Iraq War had already served tours of duty in the Middle East.[68]

Jeremy Hinzman was the first U.S. citizen to seek asylum in connection with the Iraq War.[69] Hinzman had served one tour in Afghanistan and after finding the emphasis on killing intolerable, he

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63. See Tamara Jones, Deserters Find an Uncertain Haven in Canada, Ledger (Mar. 18, 2008), https://www.theledger.com/story/news/2008/03/18/deserters-find-an-uncertain-haven-in-canada/25862015007/ [https://perma.cc/EZE9-AZ9W] [hereinafter Jones, Deserters] (estimating that 200 Iraq War deserters had fled to Canada as of March 2008).

64. One article from 2009 put this number in the "dozens." Sarah Lazare, Canadian Government Continues Ouster of US War Resisters, Common Dreams (Feb. 15, 2009), https://www.commondreams.org/views/2009/02/15/canadian-government-continues-ouster-us-war-resisters [https://perma.cc/23SF-PTF4].

65. See, e.g., Andreas Buerger, US Army Deserter Seeks Asylum in Germany Over Iraq, Reuters (Nov. 27, 2008), https://www.reuters.com/article/idUSLR714461 [https://perma.cc/2X23-TC4N] ("A U.S. soldier who deserted his unit to avoid returning to Iraq has applied for asylum in Germany, saying the Iraq war was illegal and that he could not support the 'heinous acts' taking place." (quoting André Shepherd)).

66. Megan Feldman, Military Deserters Once Again Flock to Canada, Dall. Observer (Mar. 12, 2009), https://www.dallasobserver.com/news/military-deserters-once-again-flock-to-canada-6419885 [https://perma.cc/5CTG-X6TJ].

67. Id.

68. To be sure, others were younger and less experienced, "enlisted in haste, and became disillusioned as their political ideas shifted." Wil S. Hylton, American Deserter: Why AWOL U.S. Soldiers Are Most at Risk in Canada, N.Y. Mag. (Feb. 25, 2015), https://nymag.com/intelligencer/2015/02/american-military-deserters-canada.html [https://perma.cc/NA2G-K4X6].

69. Feldman, supra note 66.

unsuccessfully applied for conscientious objector status.[70] Facing deployment to Iraq, Hinzman fled with his wife and young child to Canada in early 2004, just days before he was set to depart.[71] Like Hinzman, Phil McDowell had spent four years in the U.S. military and even spent one year in Iraq before receiving an honorable discharge.[72] But when troop shortages led to the implementation of the "stop-loss" program, the U.S. government rescinded McDowell's discharge, and he received orders to return to active duty.[73] During his initial tour in Iraq, McDowell had lost faith in the war effort. As he observed, "It's a hard personal realization to join the Army out of patriotism and accept your country was wrong."[74] McDowell, like Hinzman, opted to flee to Canada.[75]

Joshua Key's journey northward mirrors that of Hinzman and McDowell. Key was deployed to Iraq in 2003, chose to flee to another part of the United States while on furlough in 2005, and eventually made his way to Canada.[76] Key later recounted his experience in Iraq in a co-authored book, *The Deserter's Tale,* wherein he described the U.S. military's abusive and inhumane treatment of Iraqi civilians during the conflict.[77] Among other things, Key described participating in raids of countless Iraqi homes in which he and other soldiers would ransack properties, and even steal items, but would find no evidence of insurgency.[78] Key, like many

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70. Anne McIlroy, Flight From the Fight, Guardian (Apr. 12, 2004), https://www.theguardian.com/world/2004/apr/13/law.iraq [https://perma.cc/228D-EAP7].

71. McIlroy, supra note 70; Marty Logan, Politics: U.S. Soldiers Seek Asylum in Canada, Inter Press Serv. (Dec. 2, 2004), http://www.ipsnews.net/2004/12/politics-us-soldiers-seek-asylum-in-canada [https://perma.cc/T6JT-SZ57].

72. Jones, Deserters, supra note 63.

73. Id. The Stop Loss program is a Department of Defense "force management program" that requires service members to involuntarily continue their service beyond their previously agreed-upon separation date. Charles A. Henning, Cong. Rsch. Serv., R40121, U.S. Military Stop Loss Program: Key Questions and Answers 1 (2009). During the Iraq War, the Army consistently maintained thousands of service members through use of the program. See id. at 1, 15–16.

74. Jones, Over the Border, supra note 56.

75. Id.

76. Ashifa Kassam, Iraq War Resisters Who Fled to Canada Ask Justin Trudeau to Allow Them to Stay, Guardian (Aug. 2, 2016), https://www.theguardian.com/world/2016/aug/02/iraq-war-resisters-canada-trudeau-us-military [https://perma.cc/8NKZ-KGLR]; Patty Winsa, More U.S. Soldiers Could Be Sent Back for Court Martial on Desertion Charges, Toronto Star (Feb. 8, 2015), https://www.thestar.com/news/gta/2015/02/08/more-us-soldiers-could-be-sent-back-for-court-martial-on-desertion-charges.html [https://perma.cc/LFF5-WLCE] (last updated Feb. 9, 2015).

77. See Joshua Key as told to Lawrence Hill, The Deserter's Tale: The Story of an Ordinary American Soldier 105–06, 137–38 (2007) (detailing how members of the U.S. military mutilated bodies and assaulted and raped civilian women); see also Winsa, supra note 76 (explaining Key's and other deserters' decision to flee to Canada instead of continuing to serve in the Iraq War).

78. Key & Hill, supra note 77, at 66–74; Feldman, supra note 66.

others, had joined the military to escape poverty, obtain health insurance, and to pursue higher education at some point in the future.[79]

Among the war resisters of this era, Kimberly Rivera garnered significant attention as the first female service member from the United States to flee to Canada to avoid fighting in Iraq.[80] Rivera also joined the military to gain access to stable earnings and important benefits.[81] Unfortunately, Rivera was horrified by what she witnessed during her first tour in Iraq.[82] When faced with orders to deploy again, she fled to Canada in 2007.[83] In the Canadian news media, Rivera later described how the U.S. military in Iraq used "violence and intimidation against innocent civilians," and she admitted that "[w]e raided their houses without cause."[84]

Some of these U.S. citizen asylum seekers sought protection before actually serving in the Middle East. Brandon Hughey had signed up for the Army at age seventeen in the hopes of ultimately receiving a college education.[85] While in basic training, Hughey learned more about the war effort in Iraq, grew uncomfortable with the mission, and even contemplated suicide.[86] Hughey fled to Canada just before he was set to deploy to the Middle East.[87] Like Hughey, Ross Spears fled to Canada as a teenager after his experience in basic training raised concerns.[88] According to Spears, his training involved shooting at "practice targets shaped like women in burqas with bazookas on their shoulders," and the basic training was laced with dehumanizing rhetoric about killing people in Iraq.[89]

In seeking protection in Canada, these U.S. military members advanced a range of legal arguments. The Immigration and Refugee Board (IRB) of Canada, the administrative body which adjudicates requests for asylum, initially dismissed most of the claims on the grounds that the applicants did not meet the elements of a refugee as outlined in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee*

79. Key & Hill, supra note 77, at 33, 36.

80. Feldman, supra note 66.

81. Id. ("After several years of living with relatives and struggling to save for their own apartment, Rivera saw the Army as the only way out. Through the military, she could make more than $10.50 an hour, plus get health insurance and higher education.").

82. Id.

83. Female War Resister Loses Fight to Stay in Canada, CBC News (Aug. 30, 2012), https://www.cbc.ca/news/canada/toronto/female-war-resister-loses-fight-to-stay-in-canada-1.1127356# [https://perma.cc/Y59W-KMG8] [hereinafter Female War Resister].

84. Winsa, supra note 76.

85. McIlroy, supra note 70.

86. Id.

87. Id.

88. Teenage U.S. Deserter Flees to Ottawa Before Iraq Posting, CBC News (July 6, 2007), https://www.cbc.ca/news/canada/ottawa/teenage-u-s-deserter-flees-to-ottawa-before-iraq-posting-1.689809# [https://perma.cc/72GG-MZDK].

89. Id.

Status.[90] IRB officers relied in particular on paragraphs 170 and 171 of the UNHCR *Handbook*, which discuss desertion and draft evasion.[91] These provisions clarify that refusal to perform military service can, in limited circumstances, justify refugee protection. Mere disagreement with the political justifications for the action, however, is not enough. Rather, per paragraph 171, the "military action, with which an individual does not wish to be associated" must be "condemned by the international community as contrary to basic rules of human conduct."[92] Only then will punishment for desertion or draft evasion "be regarded as persecution."[93]

Cognizant of this language in the UNHCR *Handbook*, applicants like Hinzman and Key relied on the potential illegality of the Iraq War as a basis for their request for refugee status. They argued that their refusal to participate in an unlawful war justified international humanitarian protection.[94] Along these lines, Hughey argued that he would be compelled by superior officers to participate in a war that violated international law.[95] Another applicant, James Corey Glass, asserted that asylum as a U.S. military deserter was justified; he had been required to summarize field reports in Iraq and came to believe that war crimes were occurring.[96]

Canadian authorities consistently asserted that the issue of the legality of the Iraq War was irrelevant as the courts were not in a position to assess the foreign policies of the United States.[97] For example, in denying Hinzman's claim, Canada's IRB observed that its "authority does not include making judgments about US foreign policy."[98] Canadian authorities also reasoned that lower-level officers like Hinzman could not argue the illegality of the Iraq War in invoking paragraph 171 of the UNHCR *Handbook*. In the courts' view, that kind of "military action" (that is, an initial act of aggression) could be linked only to higher-level officials.[99] When presented with arguments that lower-level officers might

90. UNHCR Handbook, supra note 28, at 17–41; Patrick J. Glen, Judicial Judgment of the Iraq War: United States Armed Forces Deserters and the Issue of Refugee Status, 26 Wis. Int'l L.J. 965, 982–1020 (2009) (discussing, in detail, the denial of claims lodged by U.S. war resisters in Canada).

91. Glen, supra note 90, at 973–75 ("Paragraphs 170 and 171 . . . have been the central focus of the IRB and Canadian courts regarding U.S. military deserters and whether they are eligible for refugee status.").

92. Id. at 975 (internal quotation marks omitted) (quoting UNHCR Handbook, supra note 28, at 39).

93. Id.

94. J.H. (Re), 2005 CanLII 56991, para. 50–51 (Can. Ont.); Key v. Canada (Citizenship and Immigration), 2008 FC 838, paras. 5–6 (Can. Ont.).

95. McIlroy, supra note 70.

96. Hylton, supra note 68.

97. See Glen, supra note 90, at 985 n.95, 997, 1005.

98. *J.H.*, 2005 CanLII 56991, at para. 17.

99. See Hinzman v. Canada (Citizenship and Immigration), 2006 FC 420, paras. 141–42, 152–60 (Can. Ont.); Feldman, supra note 66.

be compelled to engage in humanitarian law violations during the war itself, adjudicators declined to find that the U.S. service members were definitively violating the laws of war or reasoned that the U.S. military had taken appropriate remedial action in response to isolated instances.[100]

Furthermore, the Canadian courts found in many cases that the applicants generally had not exhausted domestic legal remedies, given that the United States had a robust framework in place to deal with cases involving military deserters.[101] According to some observers, these individuals could have stayed in the military and pursued other options, such as conscientious objector status, or even a discharge.[102] At first, Canadian courts reviewing the IRB's denials were reluctant to find that the treatment of deported deserters might amount to persecution. The Federal Court of Appeal noted, in Hinzman's case, that the "United States is a democratic country with a system of checks and balances among its three branches of government, including an independent judiciary and constitutional guarantees of due process."[103] The Federal Court reached a similar conclusion in the case of Dale Landry, a veteran of the Afghanistan conflict who fled to Canada in July 2007 after a friend returned from Iraq with significant trauma and later committed suicide.[104] In *Landry v. Canada*, the Federal Court affirmed the existence of fair procedures and due process protections in the United States.[105]

Over time, as applicants amassed more evidence regarding court-martial proceedings in the United States and the treatment of deserters upon return, Canadian courts began to reason, at a minimum, that the cases deserved another look. In one high-profile case, the Federal Court

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100. See *Hinzman*, 2006 FC 420, at paras. 168–176; Hughey v. Canada (Citizenship and Immigration), 2006 FC 421, para. 71 (Can. Ont.) (acknowledging instances of humanitarian law violations but noting that "the military had investigated [the incidents], and had taken disciplinary action, where appropriate"); *J.H.*, 2005 CanLII 56991, at para. 121 ("[Hinzman] has not shown that the US has, either as a matter of deliberate policy or official indifference, required or allowed its combatants to engage in widespread actions in violation of humanitarian law.").

101. See Glen, supra note 90, at 986, 1002–03, 1013 (emphasizing opportunities to apply for conscientious objector status and the due process protections inherent in the U.S. judicial system and Uniform Code of Military Justice).

102. See, e.g., Mark Larabee, Soldiers Still Go Over the Hill Even in an All-Volunteer Army, Oregonian (July 17, 2008), https://www.oregonlive.com/oregonianextra/2008/07/soldiers_still_go_over_the_hil.html [https://perma.cc/C96P-WHGP].

103. Hinzman v. Canada (Citizenship and Immigration), 2007 FCA 171, para. 46 (Can. Ont.). The Federal Court of Appeal in Canada specifically emphasized Hinzman's failures to pursue domestic remedies, noting that "[r]ather than attempt to take advantage of the protections potentially available to them in the United States, the appellants came to Canada and claimed refugee status." Id. at para. 52.

104. Parkdale War Resister Stuck in Limbo, Bloor W. Villager (Apr. 7, 2009) (on file with the *Columbia Law Review*).

105. See Landry v. Canada (Citizenship and Immigration), 2009 FC 594, paras. 23–28 (Can. Ont.).

remanded a matter to the IRB to consider evidence regarding the impartiality of court-martial processes in the United States.[106] Similarly, in reviewing a request for a stay of deportation filed by Glass, the Federal Court judge found that it could "reasonably be argued that state protection does not exist in the U.S. to shelter these persons from [degrading] treatment" and remanded the case back to the agency.[107]

Other members of the U.S. military offered creative variations on these legal arguments but, like their peers, were ultimately unsuccessful. Peter Jemley, an Arabic linguist with a top security clearance, feared that he would be asked to participate in interrogations of persons suspected of terrorism and, in so doing, would be forced to violate international law.[108] Jemley cited the widespread reportage of torture of suspects by U.S. officials and argued that he would likely be asked to be involved, given his unique credentials.[109] Linjamin Mull, a social worker from New York City, had joined the military because of the educational benefits it offered.[110] After enlisting in the Army, Mull realized that he would likely be heading to Iraq and "didn't want that blood on [his] hands," so he fled north to Canada.[111] In making his case for humanitarian protection, Mull emphasized that the U.S. military recruits from marginalized communities and "preys on people that are less fortunate."[112] Mull's request for refugee protection was denied.[113]

According to press accounts, since 2008, Canadian federal courts sided with war resisters eleven different times.[114] In some instances, as in

106. See Tindungan v. Canada (Citizenship and Immigration), 2013 FC 115, paras. 74, 178, 180 (Can. Ont.). Joshua Key also successfully obtained a remand from the Federal Court on the issue of whether the state would adequately protect him. See Key v. Canada (Citizenship and Immigration), 2008 FC 838, paras. 34–36 (Can. Ont.).

107. Glass v. Canada (Citizenship and Immigration), 2008 FC 881, para. 34 (Can. Ont.). The Federal Court added the following embellishment regarding the U.S. war effort:

> There has been no official declaration of war by the U.S. against Iraq and it is a notorious fact that the U.S. Congress has not officially authorized such war. The applicant reported human rights abuses committed by American Forces against Iraq's civilian population which revolted him and prevented him from returning there.

Id. at para 36.

108. Michelle Shephard, U.S. Deserter Feared Torture Orders, Toronto Star (Sept. 6, 2008), https://www.thestar.com/news/canada/2008/09/06/us_deserter_feared_torture_orders.html [https://perma.cc/64EF-5CNX].

109. Id. Along these lines, Brad McCall, another member of the U.S. military, also left for Canada because he did not want to commit "war crimes" in Iraq. See Charlie Smith, U.S. Soldier Refuses to Kill, Geor. Straight (Oct. 3, 2007), https://www.straight.com/article-112621/u-s-soldier-refuses-to-kill [https://perma.cc/FSZ7-T4MK].

110. Jones, Over the Border, supra note 56.

111. Id.

112. Id.

113. Id.

114. Winsa, supra note 76.

the case of Kimberly Rivera, the Federal Court remanded cases for consideration of additional arguments and evidence.[115] In other cases, the remands ordered consideration of the political and moral beliefs of the applicants, which are criteria relevant to a request to remain on humanitarian and compassionate grounds.[116] This remedy is available to persons who are not able to qualify as refugees and who otherwise do not qualify for permanent residence in Canada.[117] Although much touted in the media, such victories proved fleeting: The historical record reveals that none of these Iraq War deserters ever received resident status in Canada because of their opposition to the conflict.

The debate regarding the Iraq War deserters also played out in other branches of the Canadian government. By 2008, the conservative government of Prime Minister Stephen Harper, which had consistently opposed the U.S. military deserters,[118] started issuing deportation orders to U.S. service members who had been unsuccessful with their claims.[119] Jason Kenney, the Canadian Minister for Citizenship, Immigration, and Multiculturalism under Harper, referred to these U.S. war resisters as "bogus refugee claimants."[120] Meanwhile, the House of Commons of the Canadian Parliament had issued a non-binding resolution in 2008 encouraging the government to allow U.S. war resisters to stay in Canada.[121] The resolution recommended that conscientious objectors "who have refused or left military service related to a war not sanctioned by the United Nations and do not have a criminal record" be allowed to apply for permanent resident status in Canada "and that the government should immediately cease any removal or deportation actions that may have already commenced against such individuals."[122] The House of Commons approved the resolution again in March 2009, following the commencement of a new legislative session.[123]

Additionally, in 2009, legislators in the House of Commons introduced Bill C-440, which would have allowed U.S. war resisters to

115. Rivera v. Canada (Citizenship and Immigration), 2009 FC 814, para. 102 (Can. Ont.).

116. See, e.g., Hinzman et al. v. Canada (Citizenship and Immigration), 2010 FCA 177, paras. 26, 40 (Can. Ont.); see also supra note 38 and accompanying text (providing the factors and rules for this type of request).

117. Humanitarian and Compassionate Grounds, supra note 38.

118. Hylton, supra note 68.

119. Lazare, supra note 64.

120. Id.

121. House of Commons, Standing Committee on Citizenship and Immigration, Third Report, 39th Parl., 2d Sess. (June 3, 2008). Interestingly, the Conservative Party of Canada appended a dissenting opinion to this resolution, noting that the Canadian government was in compliance with its international obligations, and that the creation of a special program was not necessary. Id.

122. Id.

123. House of Commons, Standing Committee on Citizenship and Immigration, Second Report, 40th Parl., 2d Sess. (March 30, 2009).

obtain permanent residence and remain in Canada.[124] The bill applied to persons who had left the armed forces or who had refused to serve based on a "moral, political or religious objection" to participate in "an armed conflict not sanctioned by the United Nations."[125] It applied even more broadly to persons subject to stop-loss orders or those who might otherwise be compelled to return to service.[126] In a vote held in September 2010, the bill was defeated by a mere seven votes in Parliament, 143-136.[127]

To discourage adjudicators from granting claims of war resisters, in 2010, the Harper government issued Operational Bulletin 202. This instruction emphasized that because desertion is a crime that carries a hefty sentence under Canadian law, U.S. service members who desert might be treated as inadmissible under sections 36(1)(b) or 36(1)(c) of Canada's Immigration and Refugee Protection Act.[128] Under these provisions, a person would be inadmissible if they had been convicted of, or even if they had simply "committed," an act outside of Canada which, had it occurred in Canada, could have resulted in a prison term of at least ten years.[129] The Operational Bulletin also called upon adjudicators to notify the Case Management Branch of Citizenship and Immigration Canada with any updates regarding these claims, in accordance with existing "guidelines on processing high profile, contentious and sensitive cases."[130]

As late as 2015, Canadian government officials continued to openly express skepticism about the validity of these claims. A spokesperson for Citizenship and Immigration Canada, Nancy Caron, opined that U.S. military deserters "are not genuine refugees under the internationally accepted meaning of the term" and that their "unfounded claims clog up our system for genuine refugees who are actually fleeing persecution."[131] The election of Prime Minister Justin Trudeau in 2016, however, raised hopes that the Canadian government would create a pathway to legal status for the U.S. war resisters who continued to argue their cases.[132] This

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124. House of Commons, Bill C-440, An Act to Amend the Immigration and Refugee Protection Act (War Resisters), 40th Parl., 2d Sess. (Sept. 17, 2009).

125. Id.

126. Id.

127. Vote #95 on September 29th, 2010, Open Parliament, https://openparliament.ca/votes/40-3/95 [https://perma.cc/U7LD-3MDN] (last visited Sept. 9, 2022).

128. Immigration, Refugees & Citizenship Canada, Operational Bulletin 202, Gov't of Can. (July 22, 2010) (on file with the *Columbia Law Review*) [hereinafter Operational Bulletin 202] (last modified July 23, 2010).

129. Immigration and Refugee Protection Act, S.C. 2001, c 27, §§ 36(1)(b)–(c) (Can.).

130. Operational Bulletin 202, supra note 128.

131. Carolyn Thompson, Unlike in Sixties, Canada Provides No Sanctuary for Soldiers Avoiding War, Wash. Post (July 12, 2015), https://www.washingtonpost.com/world/unlike-in-sixties-canada-provides-no-sanctuary-for-soldiers-avoiding-war/2015/07/12/1a02c352-28dc-11e5-a5ea-cf74396e59ec_story.html (on file with the *Columbia Law Review*) (internal quotation marks omitted).

132. Kassam, supra note 76.

optimism was justified as during the campaign, Trudeau had told a crowd of supporters that "[he was] supportive of the principle of allowing conscientious objectors to stay."[133] In May 2016, Trudeau indicated that the Canadian government was "looking into" the issue.[134] Notably, however, the Trudeau administration has been largely silent on the issue and has maintained Operational Bulletin 202. In September 2016, the Canadian government circulated a modified version of the Bulletin, effectively the same in substance, that omits specific reference to claims from the United States.[135]

In 2016, one news agency estimated the number of known U.S. Iraq War resisters still in Canada to be only fifteen.[136] Many returned to the United States and voluntarily surrendered to the military. Rivera was ordered to be deported in August 2012,[137] turned herself in at the border, and was transferred to U.S. Army custody. She ultimately pled guilty to desertion and served ten months in a U.S. military jail.[138] Robin Long, another Iraq War resister who unsuccessfully applied for refugee status in Canada,[139] was deported to the United States, faced a military court-martial, and was sentenced to fifteen months of confinement.[140]

Not all of the unsuccessful claimants simply accepted their fate and returned to the United States. After the Canadian government ordered him to depart the country, Rodney Watson sought sanctuary inside the First United Church in downtown Vancouver.[141] Like many others, Watson fled to Canada after he was asked to redeploy just months after a disillusioning first experience.[142] Watson, facing financial difficulties, had

133. Id.

134. Colin Perkel, Trudeau Looking Into Whether U.S. War-Dodgers Can Stay in Canada, Toronto Star (May 6, 2016), https://www.thestar.com/news/canada/2016/05/06/trudeau-looking-into-whether-us-war-dodgers-can-stay-in-canada.html (on file with the *Columbia Law Review*).

135. Immigration, Refugees & Citizenship Canada, Operational Bulletin 202 (modified), Gov't of Can. (Sept. 2, 2016), https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/bulletins-2010/202-modified-september-2-2016.html (on file with the *Columbia Law Review*).

136. Kassam, supra note 76.

137. Female War Resister, supra note 83.

138. Winsa, supra note 76.

139. Lazare, supra note 64.

140. Petti Fong, U.S. Army Deserter First to Be Deported, Toronto Star (July 16, 2008), https://www.thestar.com/news/canada/2008/07/16/us_army_deserter_first_to_be_deported.html (on file with the *Columbia Law Review*); Lazare, supra note 64.

141. Hylton, supra note 68; Estefania Duran, Iraq War Resister in Vancouver Seeks Government Help to Stay in Canada, Glob. News (July 16, 2016), https://globalnews.ca/news/2829294/iraq-war-resister-in-vancouver-seeks-government-help-to-stay-in-canada [https://perma.cc/N8NP-S56M] (last updated July 17, 2016).

142. Rodney Watson, Opinion, Why a Resister Chose Canada Over the War in Iraq, Toronto Star (Dec. 24, 2009), https://www.thestar.com/opinion/2009/12/24/why_a_resister_chose_canada_over_the_war_in_iraq.html (on file with the *Columbia Law Review*).

signed up to be a chef for the Army but, once in Iraq, was asked to perform a range of tasks, including searching for explosives.[143] In a 2009 op-ed in the *Toronto Star*, Watson explained that while in Iraq, he "witnessed racism and physical abuse from soldiers towards the civilians" and described an incident where a soldier beat and insulted an unarmed civilian and then "threw his Qur'an on the ground and spat on it."[144] Watson called upon the Canadian government "to honour [Canada's] great traditions of being a place of refuge from militarism and a place that respects human rights" by supporting war resisters such as himself.[145]

Notably, not all of the Iraq War resisters sought protection in Canada. André Shepherd sought asylum in Germany, the country where he was stationed, after learning that he would be required to deploy for a second tour in Iraq.[146] Shepherd's legal theory centered on his fear of being required to commit war crimes.[147] Although he received a favorable ruling from the European Court of Human Rights after an initial denial in Germany, on remand a German court denied his claim once again, arguing that he had not exhausted all available options before choosing to desert his assigned base in 2007.[148] As of April 2021, Shepherd was still residing in Germany, pursuing administrative appeals with the German courts.[149]

The experiences of these various Iraq War deserters underscore the legal and political complexity of asylum claims advanced by U.S. citizens. Given the highly sensitive subject matter, Canada's IRB was reluctant to grant protection and instead justified denials with diverse legal rationales. The Canadian federal courts, when reviewing these claims, generally showed more concern, offering carefully worded critiques of the U.S. war effort, or at least acknowledging possible weaknesses in the rule of law in the United States. These claims also became vehicles for both conservative and progressive politicians in Canada to take a public stand about the (im)propriety of the Iraq War and the worthiness of these refugee claims. Some of the applicants strategically inserted themselves in these debates, attempting to marshal public opinion in their favor. Ultimately, however, these efforts to generate sympathy were unsuccessful in achieving the desired legal outcome.

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143. Id.

144. Id.

145. Id.

146. German Court Rejects US Soldier's Asylum Application, Deutsche Welle (Nov. 17, 2016), https://www.dw.com/en/german-court-rejects-us-soldiers-asylum-application/a-36428165 [https://perma.cc/HFE4-AXPG].

147. Id.

148. Id.

149. Michael Weiser, Alone Against the Strongest Army in the World: This Is What Deserter André Shepherd Is Doing in Achenmühle, OVB Online (Apr. 6, 2021), https://www.ovb-online.de/rosenheim/rosenheim-land/allein-gegen-die-staerkste-armee-der-welt-so-geht-es-deserteur-andre-shepherd-in-achenmuehle-90315453.html (on file with the *Columbia Law Review*).

B. *Whistleblowers, Political Dissidents, and Fugitives*

Some of the most well-known U.S. citizen asylum seekers fled the country because they feared retaliation due to public disagreements with the U.S. government. In many cases, the individual had publicly defied the U.S. government—via an act of whistleblowing or another action directly contrary to U.S. policy. Others in this category are criminal fugitives, fleeing high-profile prosecutions in the United States. Regardless of the precise circumstances, tensions with U.S. government authorities precipitated their flight to another country. The cases described below span a broad historical range, with several from the Cold War era, and others more recent, including a claim filed by a U.S. citizen who participated in the January 6, 2021, attack on the U.S. Capitol.

Although the focus of this section is on individuals who have applied for asylum from the mid-twentieth century to the present, there are deeper historical antecedents of persons on U.S. territory seeking refuge overseas for political reasons. During the Revolutionary War, for example, an estimated 60,000 loyalists from the American colonies fled the country,[150] with many heading to the colony of New Brunswick within British Nova Scotia, which had become a haven for American loyalists.[151] Among these loyalists was Massachusetts resident Thomas Robie, who fled with his family to Canada after facing violent attacks for resisting the boycott of British-made goods.[152] Given threats of this kind, organized evacuations facilitated the loyalists' departure from the American colonies. In 1783, as the Revolutionary War ended, an estimated 30,000 loyalists evacuated to Canada, according to ship logs.[153]

Across the twentieth century and through the present, a number of U.S. citizens have sought asylum in other countries after finding themselves at odds with federal or state authorities. Although Edward Snowden has dominated more recent headlines, perhaps the most prominent whistleblower from the twentieth century was Philip Agee. Agee had worked for twelve years at the Central Intelligence Agency (CIA), mostly in Latin America and, in 1974, he published an exposé of the agency's practices

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150. Maya Jasanoff, Liberty's Exiles: American Loyalists in the Revolutionary World 9 (2011).

151. See Ann Gorman Condon, The Loyalist Dream for New Brunswick: The Envy of the American States 2 (1984) (noting that approximately one-fourth of exiled loyalists settled in New Brunswick).

152. G. Patrick O'Brien, Hoda Muthana Wants to Come Home From Syria—Just Like Many Loyalist Women Who Fled to Canada During the American Revolution, Conversation (Mar. 6, 2019), https://theconversation.com/hoda-muthana-wants-to-come-home-from-syria-just-like-many-loyalist-women-who-fled-to-canada-during-the-american-revolution-112799 [https://perma.cc/YME3-KTKD].

153. See Loyalist Ships, United Empire Loyalists Ass'n of Can., http://www.uelac.org/Loyalist-Ships/Loyalist-Ships.php [https://perma.cc/FD8M-S24P] (last visited Sept. 18, 2022).

entitled *Inside the Company: CIA Diary*.[154] The appendix to this book includes names of hundreds of undercover CIA agents.[155] In a later interview, Agee explained that the U.S. government's support of repressive Latin American regimes was a motivating factor for his whistleblowing.[156] Agee unsuccessfully sought status in France, Italy, the Netherlands, Norway, and the United Kingdom, before ultimately receiving asylum in West Germany, where his wife was a ballerina.[157] He went to live in Grenada in 1980, where a left-leaning government led by Prime Minister Maurice Bishop granted him a passport and protection until that government fell in 1983.[158] Agee later sought refuge in Cuba and spent his time between Hamburg and Havana until his death in Havana in 2008.[159] In addition to Agee, Cuba has welcomed many other U.S. dissidents and fugitives over the years, including several prominent Black liberationists.[160]

Another high-profile fugitive who sought asylum in other countries was Bobby Fischer, the New York-born chess champion. In 1992, Fischer violated U.S. Treasury Department sanctions by playing a for-profit chess match in Yugoslavia.[161] He fled to various other countries rather than face arrest. Fischer spent many years in Japan, and even sought protection there, but was ultimately arrested in July 2004 when he attempted to fly to Manila.[162] While Fischer was in legal limbo in Japan and facing the possibility of extradition to the United States, the government of Iceland offered asylum to Fischer—in the form of a conferral of citizenship—in recognition for the attention he had brought to Iceland via a 1972 chess

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154. See William Blum, The All-Time Whistleblower: Philip Agee, LA Progressive (June 27, 2013), https://www.laprogressive.com/whistleblower-philip-agee [https://perma.cc/M4RQ-7KUK].

155. Id. See generally Philip Agee, Inside the Company: CIA Diary (1975) (detailing his experience in the CIA and the secrets of the agency during his tenure).

156. Anthony Boadle, CIA Whistle-Blower Philip Agee Dies in Cuba, Reuters (Jan. 9, 2008), https://www.reuters.com/article/us-cuba-usa-spy/cia-whistle-blower-philip-agee-dies-in-cuba-idUSN0959077820080109 [https://perma.cc/LQG4-ABCU].

157. Blum, supra note 154.

158. Boadle, supra note 156.

159. Id.

160. Jon Lee Anderson, The American Fugitives of Havana, New Yorker (Aug. 31, 2016), https://www.newyorker.com/news/daily-comment/the-american-fugitives-of-havana [https://perma.cc/4EP4-3C93]; see also infra notes 257–260 and accompanying text.

161. Joseph G. Ponterotto & Jason D. Reynolds, The "Genius" and "Madness" of Bobby Fischer: His Life From Three Psychobiographical Lenses, 17 Rev. Gen. Psych. 384, 387 (2013).

162. See Anthony Faiola & Sachiko Sakamaki, Iceland Offers Asylum to Jailed Fischer, Wash. Post (Dec. 17, 2004), https://www.washingtonpost.com/archive/politics/2004/12/17/iceland-offers-asylum-to-jailed-fischer/8e0b6ddf-140b-405f-88fb-caec460242f2 (on file with the *Columbia Law Review*).

match held there.[163] The Japanese government opted not to extradite and sent Fischer to Iceland instead, where he died in 2008.[164]

More recently, in November 2017, Christopher Mark Doyon (also known as "Commander X"), a member of the Anonymous hacking collective, sought asylum in Mexico on the grounds that he would face persecution at the hands of the U.S. government.[165] In December 2010, Doyon coordinated an attack on servers belonging to the city of Santa Cruz, California, shutting down those servers for approximately thirty minutes.[166] A few weeks later, federal agents found Doyon and sequestered him for questioning but eventually released him while retaining his laptop.[167] Doyon continued hacking various other sites and in September 2011 he was arrested and charged "with causing intentional damage to a protected computer."[168] After securing release on bond, Doyon fled the country—first to Canada, where he spent several years in exile, and then eventually to Mexico.[169]

In an open letter to the Mexican government, Doyon described the possibility of unjust imprisonment, prolonged and inhumane incarceration, as well as physical harm and death if required to return to the United

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163. Justin McCurry, Japan to Snub US and Send Fischer to Iceland, Guardian (Mar. 24, 2005), https://www.theguardian.com/world/2005/mar/24/japan.usa [https://perma.cc/HL4R-PNZB]; see also Ponterotto & Reynolds, supra note 161, at 391 (relaying that Fischer became an Icelandic citizen via asylum).

164. See McCurry, supra note 163 ("The Japanese justice ministry's decision to deport the grandmaster to Iceland, rather than to the US to face allegations that he violated UN sanctions against the former Yugoslavia, came two days after the Icelandic parliament granted him citizenship."); Bruce Weber, Bobby Fischer, Chess Master, Dies at 64, N.Y. Times (Jan. 18, 2008), https://www.nytimes.com/2008/01/18/obituaries/18cnd-fischer.html (on file with the *Columbia Law Review*).

165. Ms. Smith, Homeless, Fugitive Hacker Seeks Asylum in Mexico, CSO (Nov. 6, 2017), https://www.csoonline.com/article/3235915/homeless-fugitive-hacker-seeks-asylum-in-mexico.html [https://perma.cc/6BPG-3K88]. For more information about the hacker collective Anonymous, see generally Gabriella Coleman, Hacker Hoaxer Whistleblower Spy—The Many Faces of Anonymous (2014) (explaining the background and headline-grabbing actions of the collective).

166. See David Kushner, The Masked Avengers, New Yorker (Sept. 1, 2014), https://www.newyorker.com/magazine/2014/09/08/masked-avengers# (on file with the *Columbia Law Review*) ("On December 16, 2010, Doyon, as Commander X, sent an e-mail to several reporters. 'At exactly noon local time tomorrow, . . . Anonymous will remove from the Internet the Web site of the Santa Cruz County government,' he wrote. 'And exactly 30 minutes later, we will return it to normal function.'").

167. Id.

168. Id.; Press Release, U.S. Att'y's Off., N.D. Cal., Former Mountain View Resident Christopher Doyon Apprehended in Mexico and Returned to the United States (June 15, 2021), http://justice.gov/usao-ndca/pr/former-mountain-view-resident-christopher-doyon-apprehended-mexico-and-returned-united [https://perma.cc/8TK8-LU8T].

169. Ms. Smith, supra note 165; see also Kushner, supra note 166.

States.[170] According to a press release from the Anonymous collective, Doyon chose Mexico because of its familiarity "with the tyranny and imperialism of its despotic northern neighbor."[171] By deploying this narrative, Doyon sought to align himself with Mexicans who might share his distaste for the U.S. government and its policies. While awaiting a decision on his request for asylum, however, Doyon was arrested in Mexico in June 2021 and returned to the United States to face federal criminal charges.[172]

Perhaps the most prominent whistleblower-fugitive in recent memory is Snowden, a former CIA employee and contractor with the U.S. National Security Agency (NSA) who leaked U.S. intelligence information to the media in 2013.[173] These leaks resulted in articles published in the *Guardian* and other news outlets, asserting that the U.S. and U.K. governments were engaged in widespread surveillance of the public.[174] By the time the articles were published, however, Snowden was already outside of the United States

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170. See Commander X, An Open Letter to the People and Government of Mexico and the World, Pastebin (Nov. 5, 2017), https://pastebin.com/Z0CLGwd2 [https://perma.cc/QDP6-KTUN] ("To the Mexican Government: . . . I am in imminent danger of physical harm and death. I request immediate refugee status as a political dissident.").

171. Press Release, Anonymous, Anonymous Operation Golden Eagle (Nov. 5, 2017), https://pastebin.com/5sPsxw7f [https://perma.cc/PDB6-2XQU].

172. See U.S. Att'y's Off., N.D. Cal., supra note 168. On June 28, 2022, Doyon was sentenced after pleading guilty to the charges against him, receiving one year of probation and a special assessment of $100. Criminal Minutes at 1–2, United States v. Doyon, Nos. 5:11-cr-00683-BLF-1, 5:12-cr-00426-BLF-1, 5:22-cr-00099-BLF-1 (N.D. Cal. June 28, 2022), ECF No. 28 (documenting Doyon's combined sentence including special assessments); Judgment in a Criminal Case at 1–7, United States v. Doyon, No. CR-12-00426-001 BLF (N.D. Cal. June 28, 2022), ECF No. 29 (documenting Doyon's guilty plea under one indictment); Judgment in a Criminal Case at 1–6, United States v. Doyon, No. CR-11-00683-001 BLF (N.D. Cal. June 28, 2022), ECF No. 132 (same); Consent to Transfer of Case for Plea and Sentence at 1, United States v. Doyon, No. 6:13-cr-00049-RBD-LRH (M.D. Fla. Mar. 9, 2022), ECF No. 13 (same).

Another recent asylum seeker from the United States is John Robles, who sought asylum in Russia. Robles claims that the revocation of his passport due to owing child support in California rendered him stateless and prompted the asylum request. Kathy Lally, Snowden Could Follow Path of U.S. Asylum-Seekers Who Led Unhappy Lives in Russia, Wash. Post (July 19, 2013), https://www.washingtonpost.com/world/europe/us-asylum seekers-unhappy-in-russia/2013/07/18/ced32748-eee8-11e2-bed3-b9b6fe264871_story.html (on file with the *Columbia Law Review*).

173. See Jens Branum & Jonathan Charteris-Black, The Edward Snowden Affair: A Corpus Study of the British Press, 9 Discourse & Commc'n 199, 199–200 (2015); Press Release, DOJ, United States Obtains Final Judgment and Permanent Injunction Against Edward Snowden (Oct. 1, 2020), https://www.justice.gov/opa/pr/united-states-obtains-final-judgment-and-permanent-injunction-against-edward-snowden [https://perma.cc/XF7U-HRXD].

174. Branum & Charteris-Black, supra note 173, at 199–200; Mark Mazzetti & Michael S. Schmidt, Ex-Worker at C.I.A. Says He Leaked Data on Surveillance, N.Y. Times (June 9, 2013), https://www.nytimes.com/2013/06/10/us/former-cia-worker-says-he-leaked-surveillance-data.html (on file with the *Columbia Law Review*).

in Hong Kong.[175] That same month, federal prosecutors in the United States charged Snowden with theft and two counts under the 1917 Espionage Act.[176] Facing the possibility of extradition, Snowden fled to Moscow.[177] After seeking asylum from over twenty different countries, in August 2013 Snowden obtained temporary asylum in Russia,[178] and, in 2014 and 2017, he received three-year extensions on his permission to remain in Russia.[179] In 2020, Snowden received permanent residency for an indefinite period of time.[180] Russian President Vladimir Putin has occasionally spoken publicly about Snowden, declining to label him a traitor and suggesting he was right to do what he did given the U.S. government's surveillance practices.[181] In September 2022, Putin issued a public decree granting Russian citizenship to Snowden and other foreign nationals.[182]

More recently, Evan Neumann, one of the participants in the storming of the U.S. Capitol on January 6, 2021, fled to Belarus and ultimately applied for asylum there.[183] Neumann had been accused of using a metal barricade to assault multiple police officers during the attack, and he was indicted on fourteen criminal counts, leading to his flight from the United States.[184] He first traveled from his home in California to Italy, made his way to Ukraine, and then crossed the border

175. Jacob Stafford, Gimme Shelter: International Political Asylum in the Information Age, 47 Vand. J. Transnat'l L. 1167, 1169 (2014).

176. Specifically, prosecutors charged Snowden with "theft, unauthorized communication of national defense information" and "willful communication of classified communications intelligence information to an unauthorized person." Peter Finn & Sari Horwitz, U.S. Charges Snowden With Espionage, Wash. Post (June 21, 2013), https://www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc_story.html (on file with the *Columbia Law Review*).

177. Stafford, supra note 175, at 1169.

178. Id.

179. Joel Williams & Konstantin Toropin, Russia Extends Edward Snowden's Asylum to 2020, CNN (Apr. 4, 2017), https://www.cnn.com/2017/01/18/europe/russia-snowden-asylum-extension/index.html [https://perma.cc/YTS8-RXJT].

180. Anton Troianovski, Edward Snowden, in Russia Since 2013, Is Granted Permanent Residency, N.Y. Times (Oct. 23, 2020), https://www.nytimes.com/2020/10/23/world/europe/russia-putin-snowden-resident.html (on file with the *Columbia Law Review*).

181. Reuters Staff, Putin Says Snowden Was Wrong to Leak Secrets, but Is No Traitor, Reuters (June 2, 2017), https://www.reuters.com/article/us-russia-putin-snowden/putin-says-snowden-was-wrong-to-leak-secrets-but-is-no-traitor-idUSKBN18T1T4 [https://perma.cc/GYH3-CS48].

182. Alan Yuhas, Edward Snowden Is Granted Russian Citizenship, N.Y. Times (Sept. 26, 2022), https://www.nytimes.com/2022/09/26/world/europe/edward-snowden-russia-citizenship.html (on file with the *Columbia Law Review*).

183. Tommy Taylor & Melissa Koenig, Bay Area Man Who Fled to Belarus After Attacking Cops During January 6 Riot Is Hit With 14 Criminal Charges in His Absence, Daily Mail (Dec. 12, 2021), https://www.dailymail.co.uk/news/article-10301497/Capitol-rioter-fled-Belarus-facing-14-criminal-charges.html [https://perma.cc/KNU4-HMTJ].

184. Id.

into Belarus.[185] Neumann has given media interviews in Belarus, asserting that he is a victim of "political persecution" and that law and order no longer prevails in the United States.[186] He expressed a fear of being tortured by U.S. government authorities, if forced to return.[187] In late March 2022, a state-owned media agency confirmed that Neumann had been granted refugee status in Belarus.[188]

A final case involving a U.S. fugitive—one that is less well-known—is that of Denise Harvey, who received asylum in Canada after being convicted of a sex offense in Florida in 2008.[189] Harvey had been convicted of five counts of unlawful sexual activity with a minor—a sixteen-year-old who played on her son's baseball team—and was sentenced to a thirty-year jail sentence.[190] In 2010, while Harvey was still out on bail and pursuing an appeal of the conviction, she and her husband fled to Canada.[191] The gist of Harvey's protection claim was that her lengthy sentence constituted cruel and unusual punishment, entitling her to "person in need of protection" status under Canada's Immigration and Refugee Protection Act.[192] Under Canadian law, Harvey's acts would not constitute a crime, as sixteen-year-olds *can* consent to sex with an adult in most circumstances.[193] Given that

185. Id.

186. Id.

187. Thomas Colson, A Capitol Riot Suspect Who Fled to Belarus Seeking Asylum Said He Was Afraid the US Would Torture Him, Bus. Insider (Nov. 12, 2021), https://www.businessinsider.com/capitol-riot-suspect-evan-neumann-fled-belarus-claims-us-torture-2021-11 [https://perma.cc/5TGT-KN3V].

188. U.S. Citizen Granted Refugee Status in Belarus, BelTA (Mar. 22, 2022), https://eng.belta.by/society/view/us-citizen-granted-refugee-status-in-belarus-148853-2022 [https://perma.cc/9DAD-MNKF]; see also Isabella Kwai & Valeriya Safronova, California Man Accused in Capitol Riot Granted Asylum in Belarus, N.Y. Times (Mar. 23, 2022), https://www.nytimes.com/2022/03/23/world/europe/evan-neumann-capitol-riot-belarus.html (on file with the *Columbia Law Review*).

189. Florida Sex Offender Granted Asylum in Canada, CBC News (May 16, 2014), https://www.cbc.ca/news/canada/saskatchewan/florida-sex-offender-granted-asylum-in-canada-1.2646061 [https://perma.cc/V2CH-4TQT] (last updated May 17, 2014).

190. Katrina Clarke, Florida Sex-Offender Who Had Relations With 16-Year-Old Granted Refugee Status in Canada, Nat'l Post (May 15, 2014), https://nationalpost.com/news/canada/florida-sex-offender-who-had-relations-with-16-year-old-granted-refugee-status-in-canada [https://perma.cc/9PA7-ZSGN]; Working the System: American Refugees in Canada, Foreign Worker Can.: Canadian Immigr. Blog (June 11, 2014), https://www.canadianimmigration.net/news-articles/11062014-working-system-american-refugees-canada [https://perma.cc/74SJ-4ERL] [hereinafter Canadian Immigration Blog].

191. Canadian Immigration Blog, supra note 190.

192. Immigration and Refugee Protection Act, S.C. 2001, c 27, §§ 97(1)–(2) (Can.).

193. See Criminal Code, R.S.C. 1985, c C-46, §§ 153(1)–(2) (Can.) (specifying that persons sixteen years of age or older may consent).

Harvey's specific actions were not illegal per Canadian law, the Canadian government could not extradite Harvey on grounds of criminality.[194]

Canada's IRB granted Harvey protected person status,[195] which, as noted above, is given to individuals who establish that removal to their home country or country of residence "would subject them personally to a danger . . . of torture . . . or to a risk to their life or to a risk of cruel and unusual treatment or punishment."[196] Notably, the Canadian Minister of Citizenship and Immigration twice sought review of the favorable ruling, but Canadian courts upheld the decision.[197] Then-Minister Chris Alexander expressed frustration and disdain at the ruling, offering that he found it "mind-boggling that individuals from the United States . . . think it is acceptable to file asylum claims in Canada."[198] Alexander added that these U.S. citizens "have no understanding of what true persecution is, and what it means to be a genuine refugee."[199]

These cases involving political dissidents, whistleblowers, and other fugitives illustrate the strategic choices that asylum seekers make—including the country of asylum and the messaging around their need for protection. Agee, Doyon, Snowden, and Neumann all sought to invoke the sympathies of foreign governments that have openly expressed disagreements with the United States. Several of these asylum seekers attempted to generate public support for their claims by deploying rhetoric critical of the United States and by questioning the integrity of the U.S. government. In other cases, as exemplified by Denise Harvey's experience in Canada, small but significant differences in law provided a pathway to protection, even when higher-level foreign government officials were disinclined to grant relief.

C. *Defectors*

Since the Founding of the nation, numerous U.S. citizens have defected to a hostile foreign power, often after having colluded with that country's government. Some of these defections were transactional, with refuge being the reward bestowed upon U.S. military members, government officials, or civilian spies who shared sensitive information, often during the Cold War era. In other cases, the U.S. citizen, disillusioned with government policies or the state of American society, simply sought an ideologically and politically hospitable environment in another country. In many instances, the historical record is unclear as to

194. See Tackling Violent Crime Act, S.C. 2008, c 6, § 13 (Can.) (raising the age of consent from fourteen to sixteen); Canadian Immigration Blog, supra note 190.

195. Clarke, supra note 190.

196. Immigration and Refugee Protection Act § 97(1) (Can.).

197. Florida Sex Offender Granted Asylum in Canada, supra note 189.

198. Id.

199. Id.

the precise status the defector received in their country of destination—whether it was asylum, permanent residence, or another option available under domestic law.

Martin James Monti holds the ignominious distinction of being the only U.S. soldier known to have defected to Germany during World War II.[200] In late 1944, Monti made his way from his original posting in Karachi to an airfield near Naples, where he flew a plane into German-occupied Milan and surrendered to the Nazis.[201] Monti helped the Germans produce English-language propaganda, and at the end of the war, the U.S. Army apprehended him in Milan.[202] Following his return to the United States, Monti ultimately pled guilty to treason before a U.S. district court and served over a decade in prison before his release on parole in 1960.[203] Although Monti's defection predated the establishment of the international refugee law regime,[204] his experience foretold similar acts that would transpire following the end of World War II.

Beginning in the late 1940s, a number of U.S. citizens defected, at times temporarily, to countries beyond the Iron Curtain. Perhaps the most notorious among these was Lee Harvey Oswald, who defected to the Soviet Union from 1959 to 1962.[205] Another prominent defector, Noel Field, had worked for the U.S. government, spied for the Soviets, and eventually sought political asylum in Hungary.[206] As noted above, historical accounts do not always specify whether these defectors received asylum, but a subset of them appear to have. Among those are two NSA employees, William Hamilton Martin and Bernon F. Mitchell, who departed the United States in 1960 and made their way to the Soviet Union, where they defected, were granted asylum, and ultimately became Soviet citizens.[207] Martin and

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200. Blake Stilwell, Here's the Only American Soldier to Defect to the Nazis in World War II, Military.com, https://www.military.com/history/heres-only-american-soldier-defect-nazis-world-war-ii.html [https://perma.cc/PC5Q-2CM2] (last visited Sept. 9, 2022).

201. Fred L. Borch, A Deserter and a Traitor: The Story of Lieutenant Martin J. Monti, Jr., Army Air Corps, Army Law., Feb. 2018 (Special Edition), at 31–32 (on file with the *Columbia Law Review*).

202. Id. at 32.

203. Id. at 32–33.

204. The international refugee law system that exists today was formally established in 1951. See UNHCR Handbook, supra note 28, at 13 (describing the 1951 Convention as adopting a "general definition of who was to be considered a refugee").

205. See Peter Savodnik, The Interloper: Lee Harvey Oswald Inside the Soviet Union, at xi (2013).

206. See Mária Schmidt, Noel Field—The American Communist at the Center of Stalin's East European Purge: From the Hungarian Archives, 3 Am. Communist Hist. 215, 228, 240 (2004) (discussing Field's spying for the Soviet Union, tenure with the State Department, and decision to seek asylum in Hungary).

207. Rick Anderson, Before Edward Snowden: "Sexual Deviates" and the NSA, Salon (July 1, 2013), https://www.salon.com/2013/07/01/before_edward_snowden_sexual_deviates_and_the_nsa [https://perma.cc/NAB6-J4VG].

Mitchell's work at the NSA had involved encoding and deciphering communiques, and after defecting they expressed that they hoped to expose U.S. government lies.[208] Martin and Mitchell lived out the remainder of their lives outside of the United States.[209] A study on defectors prepared by the U.S. House of Representatives in 1979 suggests that a few other U.S. citizens—including Morris and Mollie Block and Vladimir Sloboda—sought Soviet asylum in the 1950s and 1960s.[210]

Similar defections occurred during the 1980s, as the Cold War dragged on. Edward Howard, who had worked at the CIA from 1981 to 1983, defected to the Soviet Union in the mid-1980s, apparently after selling information to the rival power.[211] In August 1986, the Soviet Union acknowledged that it had granted asylum to Howard based on "humanitarian considerations."[212] According to the press release from the Soviet news agency *Tass*, Howard had sought asylum "to hide from the U.S. secret services, which were persecuting him without foundation."[213]

Along these lines, Glenn Michael Souther, a naval reservist who had worked on satellite intelligence, also defected to the Soviet Union in 1986 and acknowledged in 1988 that he had received political asylum there.[214] In a televised interview carried by the Soviet news agency, Souther explained that he had defected after facing questioning and "harassment" by the FBI, which had begun to suspect Souther of treasonous conduct.[215] Not long thereafter, in June 1989, Souther died by apparent suicide.[216]

The Soviet Union was not the sole destination for U.S. citizen defectors in the 1980s. In 1982, while stationed in the Korean Demilitarized Zone as a member of the U.S. Army, Joseph White

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208. Id. As the defections occurred soon after the "Lavender Scare" and the height of McCarthyism, U.S. government officials attempted to smear Martin and Mitchell by suggesting they were homosexual, despite the lack of any concrete evidence to support that assertion. Id.

209. Id. Martin left Russia for Tijuana, Mexico in January 1987 and died there within the month. Mitchell died in 2001 in St. Petersburg, Russia.

210. Staff of H. Select Comm. on Assassinations, 95th Cong., The Defector Study paras. 16, 78 (2d Sess. 1979).

211. Philip Taubman, Ex-C.I.A. Agent Given Asylum in Soviet Union, N.Y. Times (Aug. 8, 1986), https://www.nytimes.com/1986/08/08/world/ex-cia-agent-given-asylum-in-soviet-union.html (on file with the *Columbia Law Review*).

212. Id.

213. Id.

214. Esther B. Fein, Defector to Moscow Is Dead; Work for K.G.B. Is Lauded, N.Y. Times (June 28, 1989), https://www.nytimes.com/1989/06/28/world/defector-to-moscow-is-dead-work-for-kgb-is-lauded.html (on file with the *Columbia Law Review*).

215. Id.

216. Id. Nigel West has compiled a list of U.S. defectors to the Soviet Union. See Nigel West, Cold War Intelligence Defectors, *in* Handbook of Intelligence Studies 226, 234 (Loch K. Johnson ed., 2006).

surrendered to North Korean authorities and sought political asylum.[217] Although his precise motivations were unknown, White later confirmed in a letter to his parents that he had defected voluntarily.[218] A few years later, in 1984, Jeffrey Carney, an Air Force intelligence specialist who had been sharing information with the East German security agency, sought permanent refuge in that country.[219] After the fall of the Berlin Wall, U.S. authorities apprehended Carney, and he eventually served a prison sentence in the United States.[220]

These cases involving U.S. citizen defectors reveal how the asylum system has been used as a blunt political instrument by the country of defection, which seeks to benefit from the presence of the defector and use the conferral of status to publicly humiliate the United States. Multiple factors underlie the defectors' decisions to leave the United States, including disillusionment, a desire to evade investigation and prosecution, and even a greater sense of allegiance to the rival power. Some defectors, of course, also relished the opportunity to criticize the United States via the act of defection and the media coverage that inevitably followed. Interestingly, most of these cases were concentrated during the decades of the Cold War. In more recent times, as illustrated in the previous section, whistleblowers and political dissidents in the United States have similarly gravitated toward hostile powers, but have stopped short of formally aligning themselves with, or declaring allegiance, to those powers.

D. *Domestic Violence Survivors*

Asylum adjudicators in the United States routinely encounter claims of women who are fleeing domestic abuse and feel that state authorities simply cannot protect them.[221] In at least two cases, adjudicators overseas have granted asylum to U.S. citizen women who fled the country with their children to escape intimate partner violence. Both of these women successfully obtained asylum, notwithstanding pending criminal charges

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217. North Korea Says G.I. Seeks Asylum, N.Y. Times (Aug. 29, 1982), https://www.nytimes.com/1982/08/29/world/no-headline-116435.html [https://perma.cc/S5XZ-KHMX].

218. Paul Hendrickson, Alleged Defector to North Korea Writes Parents, Wash. Post (Feb. 14, 1983), https://www.washingtonpost.com/archive/politics/1983/02/14/alleged-defector-to-north-korea-writes-parents/96512f57-eadc-49f5-9037-ea8f49c90633 [https://perma.cc/Q72P-YTPT].

219. Alison Gee, Jeff Carney: The Lonely US Airman Turned Stasi Spy, BBC World Serv. (Sept. 19, 2013), https://www.bbc.com/news/magazine-23978501 [https://perma.cc/V66C-9NUA].

220. Id.

221. See Sarah Hinger, Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims, 19 Colum. J. Gender & L. 367, 367 (2010) ("Within the United States and globally, gender and sexual orientation form the basis of an increasing number of rights claims and protections. Both grounds . . . have been incorporated into United States asylum law with varying success.").

in the United States for kidnapping their children. This subset of asylum seekers overlaps with fugitives, but the gender-based nature of the claims adds a unique and resonant dimension.

One of these women, Holly Ann Collins, fled the United States in 1994 along with her three children: Zachary, Jennifer, and Christopher.[222] Holly had had a rocky, five-year marriage with Mark Collins, who, according to Holly, "beat, threatened, and raped her on numerous occasions."[223] Holly later obtained a protective order against Mark and after they formally divorced in 1990, Holly received full physical custody of Zachary and Jennifer; Mark received visitation rights.[224] Over the years that followed, battles regarding custody and visitation ensued, with ongoing claims made regarding Mark's abusive behavior toward both Holly and the children.[225] In late 1992, a judge reversed the custody decision, granting full physical custody of the children to Mark.[226] And in June 1994, the two older kids left their father's residence and met up with Holly, who fled with all three children.[227] Holly ultimately decided to leave the country. During a layover in the Netherlands, after being threatened with removal by Dutch authorities due to lack of proper paperwork, she requested asylum.[228] The Netherlands granted Holly refugee status in 1997 based on the abuse that she and her children suffered at the hands of Mark.[229] Her flight from the United States triggered both federal and local criminal charges, including kidnapping,[230] but prosecutors dropped most of these charges in 2007.[231] After prosecutors dropped the charges, the family returned to the United States in 2008.[232]

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222. Alison Bowen, U.S. Mom in Dutch Haven Told Face Trial, Cede Kids, Women's eNews (July 7, 2008), https://womensenews.org/2008/07/us-mom-in-dutch-haven-told-face-trial-cede-kids [https://perma.cc/4H9M-E2NY]; Jennifer Collins, American Family Receives Asylum in Europe, Am. Child. Underground, http://americanchildrenunderground.blogspot.com [https://perma.cc/P2S9-2MM9] (last visited Sept. 9, 2022).

223. Beth Walton, Battered Woman Becomes American Refugee in Amsterdam, City Pages (July 30, 2008) (on file with the *Columbia Law Review*).

224. Id.

225. See id. ("Fearing for their safety, Holly at times defied the court and refused to let the children go to Mark's house. They came home with stories of how their father had hit and kicked them, she remembers. There was at least one incident where Zachary required medical care.").

226. Id.

227. Id.

228. Id.

229. Id.

230. Bowen, supra note 222.

231. Adam Taylor, Can an American Become a Refugee? Yes, and Some Already Have, Wash. Post (Jan. 20, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/01/20/can-an-american-become-a-refugee-yes-and-some-already-have/ (on file with the *Columbia Law Review*).

232. Id.

A similar case is that of Chere Lyn Tomayko, who, as noted in the Introduction, fled to Costa Rica. Tomayko was in a tumultuous relationship with Roger Cyprian, who, according to Tomayko, was abusive toward her, their daughter Alexandria, and Chandler, Tomayko's older daughter from a previous relationship.[233] In 1996, a state court judge in Texas granted joint custody to Tomayko and Cyprian but ordered Tomayko to keep Alexandria in Tarrant County, Texas.[234] Five months later, Tomayko fled to Costa Rica with her two daughters, prompting federal charges for international parental kidnapping.[235] In September 2007, Costa Rican authorities arrested Tomayko and detained her in a Costa Rican women's prison.[236] Although Tomayko unsuccessfully applied for asylum twice, in July 2008, the Constitutional Chamber of the Supreme Court of Costa Rica accepted an appeal.[237] Less than a week later, the Costa Rican Public Security Ministry, citing Tomayko's fear of persecution, granted refugee status to her and reversed the immigration agency's decision.[238] In rendering this decision, Minister Janina del Vecchio noted the following: "To ignore domestic violence as a cause for granting refuge implies ignoring the basic doctrine of the international rights of refugees."[239]

In defending the grant of asylum, then-president of Costa Rica Oscar Arias echoed del Vecchio, emphasizing that Costa Rica "is a sovereign country, and we have the right and obligation to make decisions that we think are fitting. In this case, we tried to protect human rights."[240] The decision prompted the U.S. government to issue a public statement "expressing disappointment in the Minister's decision, defending U.S. commitment to human rights, and raising concern about the implications of the legal precedent being set."[241] The U.S. Embassy in Costa Rica also circulated a diplomatic cable to the U.S. Department of Justice and entities within the U.S. Department of State, summarizing what had transpired

233. Gillers, supra note 1.

234. Id.

235. Id.

236. LADB Staff, supra note 4, at 1.

237. Gillers, supra note 1.

238. LADB Staff, supra note 4, at 2.

239. Id. (internal quotation marks omitted).

240. Id. at 3 (internal quotation marks omitted).

241. Costa Rica Grants Refugee Status to Chere Lyn Tomayko; May Set Precedent for Future Claims, WikiLeaks (Aug. 26, 2008), https://wikileaks.org/plusd/cables/08SANJOSE695_a.html [https://perma.cc/MJC9-MSRE] [hereinafter Costa Rica Grants Refugee Status to Chere Lyn Tomayko] (providing the text of a leaked U.S. Department of State diplomatic cable from the U.S. ambassador in Costa Rica); see also Allison Hugi, A New Weight on the Scale: Strengthening International Human Rights Law by Relying on Treaties in US Asylum Cases, 17 Santa Clara J. Int'l L. 1, 18 (2019).

and suggesting, once again, that the Minister's decision had set a problematic precedent.[242]

The Costa Rican government arguably used the case to gently shame the United States while boosting its own human rights credentials. Minister del Vecchio observed, in the context of Tomayko's case, that persons who flee their countries in search of protection elsewhere do so "because . . . their human rights are at risk."[243] In other words, the United States had failed to adequately protect the rights of one of its own citizens. President Arias offered a similarly oblique critique of the United States when describing the Tomayko decision as a "very small thing" compared to larger human rights deficits of the United States, including the country's failure to sign the Kyoto Protocol or to accept the jurisdiction of the International Criminal Court.[244] The Tomayko case also allowed Costa Rica to burnish its human rights reputation, which was tarnished after receiving criticisms for how the Central American Free Trade Agreement would affect indigenous communities in the country.[245]

The Collins and Tomayko cases underscore the possibility, however remote, of obtaining asylum as a U.S. citizen based on harm that one fears at the hands of a nonstate actor in the United States. In both decisions, foreign adjudicators confirmed, whether subtly or explicitly, that U.S. authorities failed to sufficiently protect the applicants. These cases also highlight the interplay between claims for relief and extradition processes, particularly in the context of politically charged requests for humanitarian status. Although these decisions might be seen as outliers, it is not necessarily the case that the diplomatic power and legal maneuvering of the U.S. government will override the asylum process in another country. Indeed, as reflected in the trajectory of Tomayko's case, foreign governments may use the asylum process quite intentionally to scold the United States or to advance their own domestic objectives.

E. *Members of Minority Groups*

At its core, refugee law aims to protect individuals, typically members of minority groups, who face the threat of persecution in their country of nationality because of an immutable identity characteristic or group membership. Although the United States is often described in popular discourse as having enough legal and societal safeguards to protect its minority populations, the lived experience of many U.S. citizens, since the very founding of the nation, reveals significant gaps in protection. Whether this failure of protection is pervasive enough to warrant a grant of asylum is debatable. Objectively speaking, however, it should be no surprise that the concept of asylum would appeal to U.S. citizens who have

242. Costa Rica Grants Refugee Status to Chere Lyn Tomayko, supra note 241.

243. LADB Staff, supra note 4, at 3.

244. Id.

245. Id. at 4.

experienced identity-based harms. Indeed, the historical record confirms that racial, religious, and sexual minorities in the United States have fled the land of the free in search of less oppressive environments.

1. *Claims Filed by Racial Minorities.* — Racial subjugation and the assertion of white supremacy have been defining threads in U.S. history. There is, therefore, a correspondingly long history of racial minorities fleeing the United States to seek refuge elsewhere. In the decades preceding the Civil War, Canada was popularized in the imagination of enslaved Americans as a type of promised land, free from the oppressive conditions of the United States.[246] An estimated 30,000 fugitive enslaved persons fled northward via the Underground Railroad,[247] which included several Canadian stations.[248] The largest settlement was in Ontario, but other destinations included New Brunswick, Montreal, and Vancouver Island.[249]

Nearly a century later, conditions in the United States led Ollie Harrington, a prominent African American cartoonist, to seek asylum in East Germany. Harrington was a cartoonist for *People's Voice*, one of two leading African American newspapers in New York City in the 1940s.[250] Harrington's work tackled the African American experience, World War II, Nazism, and other topics, with incisive and acerbic wit.[251] As the United States sunk deeper into the Cold War, Harrington moved to Paris in 1951, where he formed part of a community of expatriate Black artists and activists, which included author Richard Wright.[252] Wright died in Paris in November 1960 at the age of fifty-two,[253] and Harrington believed that the U.S. government was responsible for his murder given Wright's leftist allegiances.[254] The following year, Harrington successfully obtained

246. Renford Reese, Canada: The Promised Land for U.S. Slaves, 35 W.J. Black Stud. 208, 209–10 (2011).

247. Underground Railroad, CBC, https://www.cbc.ca/history/EPCONTENTS E1EP8CH1PA3LE.html [https://perma.cc/TDY7-PKM6] (last visited Sept. 24, 2022).

248. See Reese, supra note 246, at 210–11, 214.

249. See Abigail B. Bakan, Reconsidering the Underground Railroad: Slavery and Racialization in the Making of the Canadian State, 4 Socialist Stud. 3, 10 (2008); Michael Wayne, The Black Population of Canada West on the Eve of the American Civil War: A Reassessment Based on the Manuscript Census of 1861, 28 Soc. Hist. 465, 466 (1995) (arguing that estimates of fugitive enslaved persons in Canada West, now the province of Ontario, were overstated).

250. James Smethurst & Rachel Rubin, The Cartoons of Ollie Harrington, the Black Left, and the African American Press During the Jim Crow Era, 59 Am. Stud. 121, 121 (2020).

251. See id. at 123 (explaining that Harrington won over his audience with his "humor, recognizable landscapes and personalities, and sharp social criticism").

252. Id. at 127.

253. Richard Wright, Encyc. Britannica, https://www.britannica.com/biography/Richard-Wright-American-writer [https://perma.cc/8H3T-NCQM] (last updated Aug. 31, 2022).

254. Smethurst & Rubin, supra note 250, at 127.

political asylum in the German Democratic Republic and lived in Berlin for four decades, until his death.[255] It is fitting that Harrington once quipped, "Black people are all refugees, unless they are African people living in Africa."[256]

In the same year that Harrington received asylum in East Germany, prominent African American radicals began seeking refuge in Cuba. Mabel and Robert Williams, who had organized a Black gun club to defend against white supremacist violence, and who subsequently faced federal criminal charges, made their way to Cuba, where they received both a warm welcome from Prime Minister Fidel Castro and asylum.[257] Along these lines, Eldridge Cleaver, Minister of Information for the Black Panther Party, sought refuge in Cuba in 1968 while facing criminal charges that would likely have resulted in a return to prison.[258] Among the most prominent U.S. exiles still living in Cuba is Assata Shakur, a former Black Panther and member of the Black Liberation Army, who escaped from criminal confinement in New Jersey in 1979.[259] Shakur surfaced in Havana several years later, having received political asylum.[260]

More recently, in the midst of growing public attention and scrutiny of police killings of African American men, a new subtype of asylum claim has emerged. Kyle Canty, an African American U.S. citizen, applied for asylum in Canada based on the harassment and targeting he experienced as a Black man in various U.S. states.[261] In the evidence submitted to Canada's IRB, Canty included multiple video recordings of his interactions with the police.[262] Canty had been charged in the United States with crimes including jaywalking and disorderly conduct—a criminal history which, according to Canty, was premised on false arrests and which exemplifies how police in the United States disproportionately target people of color.[263] The IRB ultimately denied Canty's claim, finding that he had not established a well-founded fear of persecution, nor had he demonstrated that he was personally at risk of suffering cruel and unusual

255. Id.

256. Id. at 131.

257. See Teishan A. Latner, "Assata Shakur Is Welcome Here": Havana, Black Freedom Struggle, and U.S.–Cuba Relations, 19 Souls 455, 460 (2017).

258. See Ruth Reitan, Cuba, the Black Panther Party and the US Black Movement in the 1960s: Issues of Security, 21 New Pol. Sci. 217, 217, 227 (1999).

259. See Latner, supra note 257, at 455–56.

260. Id. at 456.

261. Janell Ross, A Black American Is Applying for Refugee Status in Canada, Citing Police Racism. Don't Laugh., Wash. Post (Nov. 2, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/11/02/a-black-man-is-applying-for-refugee-status-in-canada-citing-police-racism-dont-laugh (on file with the *Columbia Law Review*).

262. Id.

263. Id.

treatment or punishment.[264] While the IRB acknowledged that Black Americans are subject to disproportionate police stops, they noted that harassment does not equate with persecution and that Canty himself had not had interactions with the police that "resulted in assault, excessive detention or lack of due process."[265]

Just prior to Canty's decision to apply for asylum, lawyer and law professor Raha Jorjani penned an opinion editorial in the *Washington Post*, suggesting that Black people in the United States might qualify as refugees.[266] Jorjani emphasized that the types of mistreatment that Black Americans have experienced at the hands of police—including "unjust imprisonment, rape, assault, beatings and confinement"—have been found by courts to constitute "persecution" under refugee law.[267] Jorjani argued that the voluminous evidence of mistreatment based on race—including both intentional acts and structural racism—strengthen the case for a refugee claim.[268]

Although Canty's case received significant media attention, he is not alone in seeking asylum based on his experience as a person of color in the contemporary United States. In an interview posted to YouTube, an African American man named Sean describes himself as the first African American to seek refugee status in the Dominican Republic.[269] Sean, a veteran of the U.S. Navy, describes an encounter with the Metropolitan Police Department in Washington, D.C. that left him bloodied.[270] He explains that he filed for refugee status in the Dominican Republic, citing police violence in the United States, and was given permission to stay for eighteen months.[271] When invited to give advice to viewers, Sean offered the following:

> We don't have to take it . . . . The way my country is set up, we've begun to accept so many things as the status quo, as the norm, the new norm. And it's not required. Here, I don't have to raise my son or my daughter to fear police violence. I don't have

264. Black U.S. Citizen Kyle Canty Denied Refugee Status in Canada, CBC News (Jan. 8, 2016), https://www.cbc.ca/news/canada/british-columbia/black-us-citizen-kyle-lydell-canty-denied-refugee-status-in-canada-1.3396511 [https://perma.cc/PP27-RCB4] (last updated Jan. 9, 2016).

265. Id. (internal quotation marks omitted).

266. Raha Jorjani, Opinion, Could Black People in the U.S. Qualify as Refugees?, Wash. Post (Aug. 14, 2015), https://www.washingtonpost.com/opinions/could-black-people-in-the-us-qualify-as-refugees/2015/08/14/b97a628a-406c-11e5-bfe3-ff1d8549bfd2_story.html [https://perma.cc/2BA8-85EZ].

267. Id.

268. See id.

269. Educated Traveler, Meet the First African American to Obtain Refugee Citizenship in DR—Here's Why . . . , YouTube, at 00:11–00:24 (Oct. 18, 2020), https://www.youtube.com/watch?v=g2EIYcT-5_E (on file with the *Columbia Law Review*).

270. Id. at 00:51–01:04.

271. Id. at 01:54–02:20.

> to have that talk that every Black man, every Black family in America has to have with their child about how not to die from the police, from the people who are supposed to serve you and protect me. I've grown tired of contributing my tax dollars and contributing my efforts to a cause that is trying to kill me.[272]

For Sean, therefore, the daily indignities of life as an African American man had simply become too much to bear and outweighed the benefits of his membership in U.S. society.[273]

2. *Claims Filed by Sexual Minorities.* — In addition to African Americans, sexual minorities in the United States have sought asylum overseas due to mistreatment they have endured and their fear of future harm. One such case, which also involves an act of military desertion, is that of Skyler James (a/k/a Bethany Smith), a lesbian who served in the U.S. Army under the "Don't Ask, Don't Tell" (DADT) policy, which was later rescinded by President Barack Obama.[274] James had been outed as a lesbian by a fellow soldier and expected that she would be discharged under DADT; that discharge never happened, and instead, James reported that she experienced "harassment and persecution," including "hate letters and death threats."[275] James alleged that she received anonymous hate mail, including a letter warning that she would be suffocated in her sleep.[276] As the mistreatment continued, James and a fellow soldier decided to go absent without leave (AWOL) and fled to Canada.[277] James's petition before Canada's IRB was denied in 2008, and with the assistance of her

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272. Id. at 03:34–04:25.

273. Note that white Americans have also sought asylum overseas, arguing that their racial identity puts them at a disadvantage. In a reported decision from Australia, a family sought refugee status, arguing that the U.S. government would not provide them support and that "[w]hite American middle aged citizens are not offered equal opportunity against minorities and immigrants, both legal and illegal." 1608643 (Refugee) [2018] AATA 3630 (27 August 2018) 4 (Austl.) (Lamont, J., Member). In affirming a prior denial, the adjudicator concluded that they were "unable to find any country information showing that white people in the United States are persecuted or discriminated against due to their race." Id. at 9.

274. Jesse Lee, The President Signs Repeal of "Don't Ask, Don't Tell": "Out of Many We Are One," The White House of President Barack Obama: Blog (Dec. 22, 2010), https://obamawhitehouse.archives.gov/blog/2010/12/22/president-signs-repeal-dont-ask-dont-tell-out-many-we-are-one [https://perma.cc/UUJ8-JEAK].

275. Natalie, Lesbian Soldier Denied DADT Discharge Now Seeking Canadian Asylum: Autostraddle Interviews Pte. Skyler James, Autostraddle (Oct. 8, 2009), https://www.autostraddle.com/lesbian-soldier-denied-dadt-discharge-now-seeking-canadian-asylum-autostraddle-interviews-pte-skyler-james-16167 [https://perma.cc/WW74-N87Y] [hereinafter Natalie, Lesbian Soldier Denied DADT Discharge].

276. Queerty Staff, Pte. Bethany Smith Fled to Canada to Avoid Soldiers' Death Threats. Will They Let Her Stay?, Queerty (Sept. 9, 2009), https://www.queerty.com/pte-bethany-smith-fled-to-canada-to-avoid-soldiers-death-threats-will-they-let-her-stay-20090909 [https://perma.cc/HC9P-8MVN].

277. Natalie, Lesbian Soldier Denied DADT Discharge, supra note 275.

attorneys, she pursued appeals and other forms of protection.[278] Although James did win one appeal, requiring the IRB to reconsider her case,[279] the DADT policy was repealed while her case was pending.[280] She ultimately elected to surrender herself at Fort Campbell, the base she had deserted, in May 2012.[281] James was permitted to complete a discharge form instead of being court-martialed and was released.[282]

More recently, a Seattle-based transgender rights activist, Danni Askini, sought asylum in Sweden after experiencing threats and harassment in the United States.[283] Askini had been at the forefront of the fight for transgender rights, including helping to lead a challenge against the Trump Administration's transgender military ban and combating proposed legislation in the state of Washington that would limit transgender persons' access to bathrooms.[284] After waging these battles, the threats and hostility—including 12,000 hate emails in a two-week period—began to pour in.[285] Askini's mother and brother received death threats, and once while driving, Askini was run off the road by another vehicle, whose occupants yelled at Askini about her transgender status.[286] Askini contends that she sought help from federal authorities, who declined to intervene.[287]

Fearing for her life, Askini decided to travel to Sweden, where her ex-husband resides.[288] In the process of obtaining a U.S. passport, Askini

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278. Id.

279. Natalie, Lesbian Soldier Skyler James Won Her Appeal: The Follow-Up Interview, Autostraddle (Jan. 14, 2010), https://www.autostraddle.com/skyler-james-follow-up-27465 [https://perma.cc/GKY4-VTLK]. Specifically, the Canadian Federal Court agreed that this denial was unreasonable based on the previous death of a soldier and known discrimination against LGBTQ+ soldiers at Fort Campbell. Smith v. Canada (Citizenship and Immigration), 2009 FC 1194, at para. 87 (Can. Ont.). The Court allowed another board member to review the case, but the IRB denied James's claim once again, and a subsequent appeal to the Federal Court was unsuccessful. Shauna Labman & Catherine Dauvergne, Evaluating Canada's Approach to Gender-Related Persecution: Revisiting and Re-Embracing 'Refugee Women and the Imperative of Categories,' *in* Gender in Refugee Law: From the Margins to the Centre 264, 277 (2014) (Efrat Arbel, Catherine Dauvergne & Jenni Millbank eds., 2014).

280. Lee, supra note 274.

281. Bob Meola, The Journey of War Resister Skyler James, Courage to Resist (Sept. 28, 2012), https://couragetoresist.org/skyler-james-journey [https://perma.cc/2QS9-QWQR].

282. Id.

283. Melissa Hellmann, Danni Askini Seeks Asylum in Sweden, Seattle Wkly. (Nov. 22, 2018), https://www.seattleweekly.com/news/danni-askini-seeks-asylum-in-sweden [https://perma.cc/QU7W-V36K].

284. Id.

285. Id.

286. Rupa Shenoy, A US Transgender Activist Is Stuck in Sweden. The UN Wants to Investigate., World (Jan. 21, 2019), https://theworld.org/stories/2019-01-21/us-transgender-activist-stuck-sweden-un-wants-investigate [https://perma.cc/WHV2-TDNZ].

287. Id.

288. Id.

claims that officials alleged she had fraudulently obtained a prior passport by failing to include information about her gender at birth—an allegation which, in Askini's eyes, was motivated by anti-transgender bias.[289] Askini was ultimately able to receive a temporary passport and, once in Sweden, applied for asylum, fearing both the threats that led her to flee, as well as the possibility of legal proceedings relating to the passport.[290] As Askini put it, "I am a Trump refugee."[291] In a media interview, she added that "[f]iling for asylum in Sweden was absolutely the right thing to do . . . . I can be myself in Sweden without fear of violence or discrimination."[292] Askini acknowledged, however, that her chances of being granted asylum were slim, given Sweden's perception of the United States as a "functioning democracy."[293] According to Askini's Twitter account, she was ultimately deported from Sweden.[294]

3. *Other Minority-Based Claims and General Trends.* — In addition to racial and sexual minorities, religious minorities—including Muslims who alleged human rights abuses in the United States—are among the U.S. citizens who have sought asylum in other countries.[295] When examining this corpus of claims advanced by minorities in the United States, a few distinct trends emerge. First, the decision to seek asylum appears to be at least partially motivated by a genuine fear of state violence, or of the state's unwillingness to offer meaningful protection. Canty and Sean had themselves experienced the force of the state through their interactions with police.[296] James argued that the persecution was unavoidable, even when directly serving the U.S. government as a member of the military.[297] In many of these cases, the citizen's lack of confidence in the country's ability to fulfill its basic obligations is palpable.

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289. Hellmann, supra note 283.

290. Id.

291. Id.

292. Pauline Park, Trump's First Trans Refugee Seeking Asylum in Sweden, Wash. Blade (Nov. 23, 2018), https://www.washingtonblade.com/2018/11/23/trumps-first-trans-refugee-seeking-asylum-in-sweden [https://perma.cc/LS94-FSMV].

293. Id.

294. Danni Askini (@danniaskini), Twitter (Sept. 30, 2020, 5:02 PM), https://twitter.com/danniaskini/status/1311411105500221440 (on file with the *Columbia Law Review*).

295. McIlroy, supra note 70. In another reported decision, a Mennonite family from the United States sought asylum in Canada, in part because of feared mistreatment on account of their religious beliefs. Canada (Citizenship and Immigration) v. Hund, 2009 FC 121, paras. 33–41 (Can. Que.).

296. See supra notes 261–265 and accompanying text.

297. See Smith v. Canada (Citizenship and Immigration), 2009 FC 1194, para. 82 (Can. Ont.) ("[T]he heart of the applicant's claim is that she is a lesbian member of the U.S. Army, who was harassed and threatened at the same base where a gay member of the Army was beaten to death, and who feels she could not rely on her superiors [for] protection."); supra notes 273–282 and accompanying text.

These cases also illustrate that the decision to seek asylum is embedded within a complex web of considerations, including a genuine assessment of risk, weighing of other difficulties in the individual's life (including the possibility of facing legal proceedings), and consideration of other pathways for remaining outside of the United States. For many of the applicants, applying for asylum provided an off-ramp for the dignitary deprivations they experienced in the United States. Some of these applicants, including Canty and Askini, vociferously announced their pursuit of asylum via the media, presumably to garner public support and possibly to influence decisionmakers in the destination country.[298] In some instances, as reflected in the Cuban cases of the 1960s and 1970s, foreign authorities warmly embraced the asylum seekers and the accompanying opportunity to advance Cuba's own strategic interests.[299]

Ultimately, however, several of these U.S. citizen asylum applicants were unsuccessful in their pursuit of protection overseas, particularly in more recent times. Although adjudicators have been willing to acknowledge the existence of an inhospitable environment for certain minority groups in the United States, they are reluctant to characterize the rule of law in a way that would permit a grant of asylum. Such hesitance in the context of a bilateral relationship is not surprising, especially given the socially sensitive nature of the claims, and the likelihood that destination states themselves are struggling with complaints about discrimination and structural inequality.

F. *U.S. Citizen Children of Noncitizen Parents*

A final category of U.S. citizen asylum seekers consists of the minor children of noncitizens who are accompanying their parents in seeking humanitarian protection outside of the United States. When the noncitizen parent(s) pursue asylum claims, their U.S. citizen children are listed as part of the family unit seeking asylum, forcing adjudicators to grapple with a unique type of claim. While this phenomenon has likely arisen in various countries, it captured media attention during the Trump Administration, as noncitizens facing upheaval by U.S. government policies fled northward to Canada, with their U.S. citizen children in tow.

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298. See supra notes 261–268 and accompanying text (referencing three news articles discussing Canty's desire for asylum); supra notes 283–294 and accompanying text (noting three news articles, and Askini's own Twitter posts, discussing Askini's pursuit of asylum).

299. Latner, supra note 257, at 457 (positing that Cuba's asylum grants to African American radicals showed support for freedom struggles "while simultaneously advancing its project of anti-imperialism vis-à-vis Washington" and "deploy[ing] scathing critiques of Washington's claims to moral superiority in the arena of human rights").

According to UNHCR data, in 2017, U.S. citizens lodged 2,097 asylum claims in Canada.[300] This total represented an enormous increase from the previous year, when Canada registered only 128 claims by U.S. citizens.[301] Canadian immigration authorities confirmed that the majority of these applicants were children born in the United States to noncitizen parents of Haitian or Nigerian nationality.[302] The Trump Administration's efforts to end Temporary Protected Status for Haiti appears to have contributed to the northward flow of migrants.[303] As one Haitian migrant who fled to Canada with his spouse and U.S. citizen daughter explained, "We left because President Trump said he wanted to deport people."[304] After 2017, the numbers gradually shifted downward: 1,311 U.S. citizen asylum applicants in 2018; 1,076 applicants in 2019; and 345 applicants in 2020.[305]

Reported decisions from Canada reveal that immigration authorities artfully dodged the possibility of labeling the United States as a site of persecution, while acknowledging the hardships these children and their families might face. Although Canadian officials were sympathetic to the importance of keeping families together, they insisted that the principle of family unity could not, standing alone, justify a grant of asylum. Yet the authorities often acknowledged the reality that most of these children would not actually be separated from their families—at least not by the Canadian government.

In a 2018 decision, for example, the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada considered the appeal of the denial of a claim for refugee protection by three U.S. citizen minors, whose Sudanese parents had received refugee protection in Canada.[306] The minors argued "that they would face a risk of cruel and unusual treatment were they to be removed to the United States and separated from their parents."[307] The RAD challenged the contention that the children would actually be removed to the United States, noting that the parents had an opportunity to include the children in an application for permanent residence in Canada.[308] More generally, the RAD declined to

300. Refugee Data Finder: U.S. Asylum Applications in Canada, UNHCR, https://www.unhcr.org/refugee-statistics/download/?url=K88bZS [https://perma.cc/C6CQ-ARMQ] [hereinafter U.S. Asylum Applications in Canada] (last visited Sept. 9, 2022).

301. Id.

302. Wright, Asylum Statistics, supra note 41.

303. Id.

304. Martin Patriquin, Canada Registers Sixfold Increase in US Citizens Seeking Asylum in 2017, Guardian (Nov. 14, 2018), https://www.theguardian.com/world/2018/nov/14/us-citizens-seeking-asylum-canada-increases-immigration-refugees [https://perma.cc/7M2V-UNJC] (internal quotation marks omitted).

305. U.S. Asylum Applications in Canada, supra note 300.

306. X (Re), 2018 CanLII 142993, para. 1 (Can. Ont.).

307. Id. at para. 2.

308. Id. at paras. 10–13.

incorporate into the refugee status determination process consideration of family unity, noting that the broad objective of family reunification "do[es] not allow [the Canadian government] to confer of refugee or protected person status."[309] In a 2019 case involving a seventeen-year-old U.S. citizen whose parents (both of whom were Turkish citizens) were granted refugee status in Canada, the RAD similarly acknowledged that "[t]here are mechanisms in the Act that allow the preservation of the family unit and could allow the Appellant to avoid being removed to the US, but they are not within the purview of the RAD."[310] The RAD once again emphasized that "the concept of family unity does not exist in Canadian refugee law."[311]

In yet another case, in 2017, the RAD considered an appeal lodged by a young child, born in the United States in 2012 to parents who are citizens of Haiti.[312] His refugee protection claim in Canada was based on that of his mother.[313] The Refugee Protection Division (RPD) denied the mother's claim based on credibility considerations; as for the U.S. citizen child, the arguments before the RPD had focused on separation from the mother as opposed to a specific fear vis à vis the United States.[314] Thus, his claims for refugee and protected person status were also denied.[315] On appeal, counsel for the minor child emphasized "the right to family unity and the best interests of the child" as bases for granting the appeal.[316] The appellant argued that Canada had breached its obligations under Article 3 of the Convention on the Rights of the Child by failing to consider the appellant's best interests.[317] In response, the RAD noted as a "starting point for the analysis" that a "claimant cannot claim international protection if he can be protected in his country of nationality."[318] The RPD noted that it does not have authority to make decisions "based on humanitarian and compassionate considerations" but rather must limit its inquiry to the likelihood of persecution, torture, or cruel and unusual treatment.[319] The RPD declined to affirmatively address whether Canada would be in breach of its international obligations, noting the low likelihood that the child would actually be returned to the United States.[320] The RPD, echoing similar decisions from that body, noted that family unity

309. Id. at para. 7.
310. X (Re), 2019 CanLII 134803, para. 5 (Can. Que.).
311. Id. at para. 7.
312. X (Re), 2017 CanLII 142905, para. 1 (Can. Que.).
313. Id. at para. 2.
314. Id. at paras. 5–10.
315. Id. at para. 3.
316. Id. at para. 10 (internal quotation marks omitted).
317. Id. at para. 37.
318. Id. at para. 40.
319. Id. at para. 43.
320. Id. at para. 44.

alone is not a basis for granting refugee status and that no evidence was offered regarding the threat of persecution in the United States.[321]

Along these lines, RAD has declined to find in other cases that removal to the United States, should it actually occur, would result in mistreatment justifying protection under Canadian law. To support this finding, Canadian authorities have examined both the impact of separation and the treatment the children would experience as members of minority groups in the United States. Regarding the impact of separation, in the 2018 case involving the children of Sudanese descent, the RAD also found unavailing the suggestion that the children would face psychological harm if separated from the parents, noting that the studies cited involved U.S. citizen children whose parents were legally vulnerable in the United States, and thus in a position distinct from the parents in that case.[322] The tribunal also declined to find that the possibility of being placed in the child welfare system would amount to cruel and unusual punishment.[323] The RAD also engaged with arguments about the harm the children would experience as Muslims of African descent. Here, the RAD acknowledged that "[a]lthough recent years have seen some erosion of rights and freedoms in the United States, its citizens still benefit from democracy, a strong rule-of-law tradition, robust freedom of expressions and religion."[324] In the Turkish case, the appellant had argued that he feared return to the United States, inter alia, "because of the anti-Muslim sentiment of the current administration."[325] In dismissing the appeal, the RAD upheld the previous finding that the appellant "would benefit from adequate state protection" in the United States.[326]

In some instances, Canadian authorities have simply avoided any discussion of the merits of the claim advanced by the U.S. citizen child. In a case considered by the RAD in 2019, a family of five appealed the denial of refugee protection to the RAD.[327] The family consisted of: two parents with Haitian citizenship, their twenty-one-year-old daughter with Haitian citizenship, and two minor children—one a Haitian citizen and the other

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321. Id. at paras. 49, 52.

322. X (Re), 2018 CanLII 142993, para. 15 (Can. Ont.).

323. See id. at para. 18. In a similar vein, the IRB determined in a 2008 case that the possibility that a U.S. citizen minor might become a ward of the state was insufficient to justify refugee protection. X (Re), 2008 CanLII 88057 (Can. Ont.).

324. *X (Re)*, 2018 CanLII 142993, at para. 16.

325. X (Re), 2019 CanLII 134803, para. 1 (Can. Que.). Note that the very first sentence of the decision states that the appellant is a "citizen of Turkey" and from the context of the decision, including a later reference to nationalities (plural) in paragraph 9, it appears he may be a dual citizen of Turkey and the United States. Id. at paras. 1, 9.

326. Id. at para. 6. Along these lines, in a 2010 decision involving the U.S. citizen children of nationals of Kosovo, the IRB found that "there is nothing in evidence that would dispute the assumption that the United States is capable of protecting its own citizens, especially its children." X (Re), 2010 CanLII 98073, para. 2 (Can. Ont.).

327. X (Re), 2019 CanLII 132327, paras. 1, 5 (Can. Ont.).

a U.S. citizen.[328] The RAD ultimately dismissed the family's appeal and in its decision it detailed why the denial of refugee protection was justified.[329] With respect to the U.S. citizen child, the RAD simply noted that since the parents "are neither Convention Refugees nor persons in need of protection, the minor U.S. citizen Appellant's claim must also fail."[330]

This sliver of cases from Canada highlights the complexity of claims advanced by mixed-status families, along with the delicate approach foreign authorities have taken toward characterizing the rule of law in the United States. Adjudicators in Canada deftly avoided any direct critiques of the United States, occasionally noting some wearing of the social fabric, while generally emphasizing the availability of state protection. As a tactic to avoid directly confronting the question, adjudicators occasionally noted the likelihood that the minors would be allowed to remain in Canada or defaulted to citing Canadian precedent that limited their ability to consider the principle of family unity in this context. Perhaps most intriguingly, however, the cases raise questions about the relative impotency of U.S. citizenship and the value ascribed to it by the families seeking protection in Canada. While status in the United States remains a highly valued commodity worldwide, it was insufficient to keep the family safely anchored within the United States and was worth sacrificing in search of stability elsewhere.

III. OBSERVATIONS AND AVENUES FOR FUTURE RESEARCH

This initial survey of asylum-seeking by U.S. citizens reveals the variegated nature of the claims, including the highly diverse circumstances that lead to flight, and the complex, multilayered environments in which the claims are presented and adjudicated. Notwithstanding the diverse taxonomy of claims, certain themes consistently rise to the surface, as do opportunities for empirical exploration to better understand this phenomenon. What follows is a preliminary set of observations, situated in the relevant literature, and designed to provide a roadmap for future work. As described below, numerous dimensions of this trend merit further exploration, including the geopolitical context in which the asylum claims are presented and the implications of these cases for bilateral government relations; the possible influence of other independent variables on the outcomes of asylum cases lodged by U.S. citizens; the strategic choices made by the asylum seekers regarding where to file and how to navigate the process; the use, by some countries, of distinct legal categories for U.S. citizens seeking protection; and the implications of these cases for our understanding of how U.S. citizenship is perceived and valued by the asylum seekers and their families.

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328. Id. at para. 1.
329. Id. at paras. 11–29.
330. Id. at para. 30.

A. *Geopolitical Context and Bilateral Relations*

In many of the cases described above, geopolitical factors or concerns about bilateral relations have shaped the trajectory of the cases and decisions. Some destination countries—including Russia and Cuba—may view these cases as prime opportunities to embarrass the United States. Others, as encapsulated by the Costa Rican government's handling of the Tomayko case, might use the case as a vehicle to publicly assert their country's commitment to human rights principles or shame the United States.[331] In Canada, these cases feed into a long-standing national identity, which is defined, in part, by distinguishing itself from the United States via a more steadfast adherence to universal rights and humanitarianism.[332] Claims of U.S. citizens have gained some traction in these contexts.

Marc Rosenblum and Idean Salehyan have examined this precise set of foreign relations considerations in the opposite scenario: the decisions made by the U.S. government to grant asylum to foreign nationals.[333] Specifically, Rosenblum and Salehyan have explored the relationship between humanitarian considerations and strategic interests, noting that asylum grants "can strain diplomatic relations with countries of origin."[334] Using an empirical analysis, the authors concluded that instrumental considerations continued to significantly influence asylum decisionmaking in the United States, notwithstanding predictions about the ascendance of humanitarian norms.[335]

Michael Teitelbaum has similarly described how foreign policy decisions have shaped migration flows and, conversely, how states have used the mass migration of people as foreign policy tools.[336] Asylum and refugee policies, in particular, can be used to advance national ideological interests, or to "embarrass and discredit adversary nations."[337] Along these lines, Myron Weiner has written about how refugee decisions can be used to condemn foreign powers, and even to foment regime change in the country of origin.[338] Weiner also acknowledged, however, that grants of refugee status can create an adversarial relationship between states,

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331. See supra notes 233–245 and accompanying text.

332. See David Scott FitzGerald, Refugee Beyond Reach: How Rich Democracies Repel Asylum Seekers 127 (2019); Maria Cristina Garcia, Seeking Refuge: Central American Migration to Mexico, the United States, and Canada 130 (2006).

333. Marc R. Rosenblum & Idean Salehyan, Norms and Interests in US Asylum Enforcement, 41 J. Peace Rsch. 677, 677–78 (2004).

334. Id. at 678.

335. Id. at 693.

336. Michael S. Teitelbaum, Immigration, Refugees, and Foreign Policy, 38 Int'l Org. 429, 433–41 (1984).

337. Id. at 439, 445.

338. Myron Weiner, Security, Stability, and International Migration, 17 Int'l Sec. 91, 106–07 (1992).

whether intended or not.[339] Building upon this literature, Nora Hamilton and Norma Stoltz Chinchilla have described, in the context of Central American migration, how a receiving country's involvement in activities contributing to outflows from the sending country may affect their handling of refugee claimants from that country.[340] And naturally, a sending country may simply object to a grant of asylum because it does not want the receiving country to legitimize dissidents or protect fugitives.[341]

Domestic politics necessarily interact with these international relations considerations. As Salehyan and Rosenblum explored in subsequent work, the policies and preferences of the executive and legislative branches, along with public opinion, are likely to shape asylum decisionmaking.[342] The authors' empirical analysis of the ecosystem of asylum adjudication in the United States found that public and media attention contributed to a greater focus on humanitarian considerations, while the influence of the legislative branch was not uniform.[343] Mary Crock and Daniel Ghezelbash have similarly observed that asylum decisionmaking—specifically, asylum denials in the Australian context—is designed to garner domestic political support.[344] All of these theories are ripe for deeper analysis, exploration, and refinement in the context of U.S. citizen asylum seekers.

B. *Other Independent Variables Informing Asylum Outcomes*

In addition to analyzing the foreign relations dimensions of decisionmaking, various other independent variables might explain asylum outcomes, including the political leanings of the destination country, economic conditions in the country at the time the case is decided, general perceptions of the United States in that country, and other, more granular factors relating to the adjudicator and the adjudicative process. The existing scholarship on each of these variables could be extended to the study of asylum claims lodged by U.S. citizens.

The cases described above suggest that the nature of the government in the destination country—whether it is more progressive or conservative—is likely to shape the handling of claims filed by U.S.

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339. Id. at 107.

340. See Nora Hamilton & Norma Stoltz Chinchilla, Central American Migration: A Framework for Analysis, 26 Latin Am. Rsch. Rev. 75, 78, 105 (1991).

341. See, e.g., Costa Rica Grants Refugee Status to Chere Lyn Tomayko, supra note 241 (publicizing the U.S. government's concerns about the grant of refugee status to a fugitive and the resulting stoppage of the extradition process).

342. Idean Salehyan & Marc R. Rosenblum, International Relations, Domestic Politics, and Asylum Admissions in the United States, 61 Pol. Rsch. Q. 104, 107–08 (2008).

343. Id. at 115.

344. Mary Crock & Daniel Ghezelbash, Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals, 19 Griffith L. Rev. 238, 241, 274 (2010).

citizens. The treatment of war resisters in Canada perfectly exemplifies this trend, with warmer reception during the progressive Trudeau government and harsher treatment under the conservative Harper government.[345] Meredith Winn uncovered a similar tendency in her analysis of asylum decisions in Europe, finding that as far-right parties become more successful, the asylum recognition rate decreases.[346] Frøy Gudbrandsen reached a comparable conclusion in studying Norway, finding that refugee admissions are significantly lower during conservative rule, controlling for other variables.[347]

Other factors worth exploring include the nature of the political party in power in the United States (Republican versus Democrat) and measures of the respect for civil and political rights in a country. As Linda Camp Keith and Jennifer Holmes found in their empirical study of U.S. asylum seekers, the lack of adherence to core rights in the country of origin, as measured by Freedom House, was associated with a greater likelihood of receiving asylum.[348] Moreover, even perceptions about dynamics in the origin state—however stilted or stereotyped—can affect how asylum claims are received. As Susan Akram has explored in her work, neo-Orientalist framing of the Muslim world influences not only how Islamic countries are perceived but also ultimately undermines the success of asylum claims made by persons from those countries.[349] In the same way, given the oversized role that the United States plays in the global public imagination, nuance-free portrayals, whether favorable or critical, are likely to shape the outcome of claims filed by U.S. citizens.

Economic conditions at the time in the country of destination may also affect approval rates, as migration policy is often intertwined with domestic economic and labor market imperatives. In a detailed study of asylum decisionmaking in Germany, Gerard Schneider and his research team found that socio-economic factors shaped outcomes at the subnational level, with prosperous regions deporting fewer asylum seekers.[350] This conclusion aligns with earlier research finding that higher GDP levels are typically

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345. See supra section II.A.2.

346. Meredith Winn, The Far-Right and Asylum Outcomes: Assessing the Impact of Far-Right Politics on Asylum Decisions in Europe, 22 Eur. Union Pol. 70, 87 (2021).

347. Frøy Gudbrandsen, Partisan Influence on Immigration: The Case of Norway, 33 Scandinavian Pol. Stud. 248, 264 (2010).

348. Linda Camp Keith & Jennifer S. Holmes, A Rare Examination of Typically Unobservable Factors in US Asylum Decisions, 22 J. Refugee Stud. 224, 239 (2009) (discussing conditions in the country of origin, such as military rule or a lack of civil rights that make applicants more likely to be granted asylum).

349. See Susan Musarrat Akram, Orientalism Revisited in Asylum and Refugee Claims, 12 Int'l J. Refugee L. 7, 10–39 (2000) (examining the damage done to refugee rights by neo-Orientalist stereotypes of the Muslim world).

350. Gerald Schneider, Nadine Segadlo & Miriam Leue, Forty-Eight Shades of Germany: Positive and Negative Discrimination in Federal Asylum Decision Making, 29 German Pol. 564, 575 (2020).

associated with higher recognition rates, although concerns about unemployment may lead to decreased rates in certain countries.[351]

When granular data is available, researchers could examine any number of additional variables, including identity characteristics of the applicant or decisionmaker (such as gender), the time of day of the hearing, and even the weather on a given day.[352] Several scholars have chosen to focus on the role of gender in asylum adjudication, noting that the gender of both the judge and the applicant, and the gender distribution among cases generally, can affect outcomes.[353] In their landmark study of asylum adjudication disparities across the United States, Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag similarly examined the effect of a judge's gender on asylum outcomes, while also analyzing the impact of the adjudicator's prior work experience and the availability of legal representation.[354]

C. *Strategic Use of the Asylum Process by Applicants*

Given the potency of a U.S. passport, and the relative ease with which U.S. citizens can enter other countries, the decision to seek asylum is often an intentional and highly strategic act. Consistent with the considerations outlined just above, U.S. citizen asylum applicants are often deliberate about the chosen country of asylum, weighing the likelihood that a government or its people might be sympathetic to their claim. Many applicants use the asylum process—and the media attracted to the novelty of a U.S. citizen asylum applicant—to emphasize their grievances toward the United States, underscore their fear of return, and to make their case in the court of public opinion.[355]

As with any other migration decision, the flight of U.S. asylum seekers should be understood to follow an analysis of relative costs, where the risks of remaining in the United States are weighed against the anticipated hardships of the migration process.[356] Once an asylum seeker has made

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351. Patricia C. Rodda, Decision-Making Processes and Asylum Claims in Europe: An Empirical Analysis of Refugee Characteristics and Asylum Application Outcomes, 23 Decyzje 23, 29 (2015).

352. See generally Daniel L. Chen & Jess Eagel, Can Machine Learning Help Predict the Outcome of Asylum Adjudications?, 16th Int'l Conf. on A.I. & L. 237 (2017) (offering a predictive model to determine success rates for asylum seekers based on these variables).

353. See, e.g., Alejandro Ecker, Laurenz Ennser-Jedenastik & Martin Haselmayer, Gender Bias in Asylum Adjudications: Evidence for Leniency Toward Token Women, 82 Sex Roles 117, 124 (2020).

354. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication, 60 Stan. L. Rev. 295, 342–49 (2007).

355. See, e.g., supra notes 186–187 and accompanying text.

356. See Eric Neumayer, Bogus Refugees? The Determinants of Asylum Migration to Western Europe, 49 Int'l Stud. Q. 389, 391 (2005) ("An individual weighs the cost of staying in his/her country of origin versus the costs of migrating to the country of destination. If

the decision to depart, various factors shape their choice in destination. As Eric Neumayer has explored in his research, factors such as geographic proximity, language ties, and the presence of asylum seekers from the same country are strong determinants.[357]

Furthermore, as Vaughan Robinson and Jeremy Segrott have detailed, asylum seekers' decisions are shaped, at least in part, by the images they have received regarding the country of destination, including its political climate and the nature of the people.[358] These perceptions operate in tandem with other factors—including the presence of family or friends in the destination country and language considerations—to guide asylum seekers to particular nations.[359] Even within the destination country, applicants may travel to particular localities if they believe they will get a more favorable result on their claim.[360]

As these cases reveal, the U.S. citizen asylum seekers cannot be regarded as passive participants in a legal process. Rather, their flight from the United States and their experiences overseas are defined by strategic, often difficult, decisions at every turn. A deeper examination of agentic action by these asylum seekers will undoubtedly enrich understanding of this phenomenon by highlighting a dialectic between individual choices and the broader forces at play in a given case.

D. *Reliance on Other Types of Protection*

A close analysis of UNCHR data reveals that while relatively few U.S. citizens are granted refugee status, a significant number may be funneled into other categories of protection under domestic law that are less politically charged than the category of "refugee" or "asylee." The United States, itself, in recent decades has placed hundreds of thousands of individuals in liminal but long-term statuses because the conferral of full membership rights is not politically feasible. Cecilia Menjívar has explored how Central American migrants in the United States have navigated long-term uncertainties in their legal statuses, including their placement in temporary protection categories that require constant renewals and fall

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the costs of staying exceed the cost of migrating, then the individual . . . will decide to migrate and file an application for asylum.").

357. Eric Neumayer, Asylum Destination Choice: What Makes Some West European Countries More Attractive Than Others?, 5 Eur. Union Pol. 155, 173–74 (2004).

358. Vaughan Robinson & Jeremy Segrott, Home Office Research Study 243: Understanding the Decision-Making of Asylum Seekers 27–37, 62–63 (2002).

359. Id. (noting that respondents from certain countries were more interested in the United Kingdom because of linguistic and colonial ties).

360. Andy J. Rottman, Christopher J. Fariss & Steven C. Poe, The Path to Asylum in the US and the Determinants for Who Gets in and Why, 43 Int'l Migration Rev. 3, 29 (2009) ("Persons of differing national origins believe their chances are greater in certain locations around the country and as a result have been known to travel to a particular place to file their claims . . . .").

short of formal refugee protection.[361] Benjamin Roth has explored similar themes vis-à-vis the Deferred Action for Childhood Arrivals (DACA) program, demonstrating through qualitative analysis how DACA beneficiaries are placed in a "double bind" by receiving a valuable benefit that is also fragile and impermanent.[362]

In some instances, the reliance on these other categories stems not from a calculated political decision but from the narrowness of the refugee definition and its inability to capture many legitimate reasons for flight. As Elizabeth Keyes has explored, the strictures of the Refugee Convention have presented challenges for the United States and other countries as they receive varying types of contemporary migrant flows that the Convention's mid-twentieth-century framers simply did not contemplate.[363] The threat of displacement caused by nonstate actors and environmental forces ranks among the most vexing challenges for the global refugee law regime.

The phenomena described above are certainly not unique to the United States, as scholars across the globe have described and critiqued the use of temporary protection measures and the inadequacy of the refugee definition.[364] It should come as no surprise, therefore, that other countries, such as Canada and Germany, appear to be shuttling U.S. citizen applicants into other categories, whether for domestic political purposes, failure to comport with legal definitions, or simply to avoid a political fallout with the United States. By identifying distinct pathways to permanent residence or resorting to other forms of humanitarian protection, adjudicators render somewhat invisible their acquiescence with the applicant's request for protection.

The case law from Canada, in particular, underscores how adjudicators have struck a delicate balance by acknowledging the potential hardships faced by the applicants, studiously avoiding a strident critique of the United States, and justifying their decisions by deploying legal precedent. This trio of approaches allows adjudicators to sidestep the messy political and moral dimensions of these claims. Further exploration of these dynamics, through a systematic empirical analysis of decisions or via interviews with government officials, would undoubtedly generate more insights into the decisionmaking process. Such analysis would also permit further theorizing into how adjudicators handle refugee claims from the United States and other countries with substantial political and economic power.

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361. Cecilia Menjívar, Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States, 111 Am. J. Soc. 999, 1000–01 (2006).

362. Benjamin J. Roth, The Double Bind of DACA: Exploring the Legal Violence of Liminal Status for Undocumented Youth, 42 Ethnic & Racial Stud. 2548, 2549–50 (2019).

363. See Elizabeth Keyes, Unconventional Refugees, 67 Am. U. L. Rev. 89, 92, 94 (2017).

364. See, e.g., Liliana Lyra Jubilut, Camila Sombra Muiños de Andrade & André de Lima Madureira, Humanitarian Visas: Building on Brazil's Experience, 53 Forced Migration Rev. 76, 78 (2016) (describing the challenge inherent in Brazil's use of humanitarian visas).

E. *Implications for U.S. Citizenship*

This preliminary exploration of U.S. citizen asylum seekers suggests at least two interesting trends with respect to U.S. citizenship. First, all of these applicants have determined that their reasons for flight outweigh the bundle of rights, benefits, and protections that they receive as U.S. citizens. For political dissidents or persons fleeing criminal prosecutions, the decision to seek asylum overseas might be perceived, by some, as a convenient escape for someone evading accountability. Yet the United States itself routinely recognizes asylum applicants who themselves are political dissidents and those who have been subject to targeted or pretextual prosecutions.[365] This is not to suggest that the prosecutions of U.S. citizen asylum seekers necessarily lack integrity, or are equivalent to the retaliatory actions of a more repressive regime. Rather, at a minimum, scholars from the developed world must be open to the possibility that some U.S. citizens will encounter treatment that, had it occurred elsewhere, would create a colorable claim for asylum in the United States.

Moreover, other U.S. citizen asylum applicants, including racial and sexual minorities, may simply feel that the state can no longer protect them, or indeed, is complicit in harm they are experiencing. Scholars have long written about the paradoxes inherent in U.S. citizenship, including the superficial rhetoric of equality among citizens, belied by the reality of structural subordination.[366] African Americans, Asian Americans, Latinos, other racial minorities, women, intellectually disabled persons, and people convicted of a felony have all experienced (and continue to experience) forms of second-class citizenship in the United States.[367] Often, the

365. See, e.g., Michael English, Distinguishing True Persecution From Legitimate Prosecution in American Asylum Law, 60 Okla. L. Rev. 109, 129–55 (2007) (describing circumstances under which prosecution by government authorities may be treated as persecution).

366. See, e.g., Patricia Hill Collins, Like One of the Family: Race, Ethnicity, and the Paradox of US National Identity, 24 Ethnic & Racial Stud. 3, 3 (2001) (describing the dual treatment of African American women as both like a family member and a second-class citizen).

367. See, e.g., Mary Romero, Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community, 32 Critical Socio. 447, 468 (2006) (noting a pattern "of immigration law-enforcement practices" that "place Mexican Americans at risk before the law and designate them as second-class citizens with inferior rights"); Irene Scharf, Second Class Citizenship: The Plight of Naturalized Special Immigrant Juveniles, 40 Cardozo L. Rev. 579, 605–29 (2018) (describing how racial minorities, felons, women, and the intellectually disabled have been denied full and equal citizenship rights in the United States); Takeyuki Tsuda, 'I'm American, not Japanese!': The Struggle for Racial Citizenship Among Later-Generation Japanese Americans, 37 Ethnic & Racial Stud. 405, 406–07 (2014).

experience of second-class citizenship is felt most acutely in interactions with law enforcement and in the criminal legal system.[368]

This scholarly project raises an important set of questions vis-à-vis second-class citizenship in the United States: Can it reach a tipping point, such that the hardships associated with second-class status are no longer bearable? And when one's experience reaches that point, is flight from the United States a reasonably predictable outcome? The literature already suggests that treatment as a second-class citizen, including microaggressions and exoticization, can lead to negative mental health outcomes.[369] A study among African American men revealed the association between microaggressions (including assumptions of criminality) and mental health strain, leading to effects such as depressive symptoms.[370] Unsurprisingly, the highly publicized acts of anti-Black violence, including the killings of George Floyd and Michael Brown, have caused mental distress among Black Americans, resulting in a higher incidence of mental health days.[371] These studies aptly describe the difficulties that minority groups endure in the United States, but the existing literature does not explore when conditions reach a point such that flight from the country is contemplated. The case of U.S. asylum seekers provides a unique opportunity, therefore, to explore some of the extreme sequelae of second-class citizenship.

Another dimension of U.S. citizenship also merits further inquiry. Specifically, the large number of U.S. citizen children, who are themselves asylum applicants alongside their noncitizen parents, raises intriguing questions about the relational dimensions of U.S. citizenship. Leisy Abrego has explored how mixed-status families navigate complicated intra-familial dynamics when citizenship offers privileges to U.S. born children, leading those U.S. citizens to take on more responsibility and even to resist some of the privileges associated with U.S. citizenship out of solidarity with fellow

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368. See generally Amy Lerman & Vesla M. Weaver, Arresting Citizenship: The Democratic Consequences of American Crime Control (2014) (describing how carceral treatment of second-class U.S. citizens calls into question American democratic ideals).

369. Kevin L. Nadal, Katie E. Griffin, Yinglee Wong, Sahran Hamit & Morgan Rasmus, The Impact of Racial Microaggressions on Mental Health: Counseling Implications for Clients of Color, 92 J. Counseling & Dev. 57, 62 (2014) ("Individuals who perceive and experience racial microaggressions in their lives are likely to exhibit negative mental health symptoms, such as depression, anxiety, negative affect (or negative view of the world), and lack of behavioral control.").

370. Lucas Torres, Mark W. Driscoll & Anthony L. Burrow, Racial Microaggressions and Psychological Functioning Among Highly Achieving African-Americans: A Mixed-Methods Approach, 29 J. Soc. & Clinical Psych. 1074, 1092–95 (2010).

371. David S. Curtis, Tessa Washburn, Hedwig Lee, Ken R. Smith, Jaewhan Kim, Connor D. Martz, Michael R. Kramer & David H. Chae, Highly Public Anti-Black Violence Is Associated With Poor Mental Health Days for Black Americans, 118 Proc. Nat'l Acad. Sci. U.S.A. 1, 3 (2021).

family members.[372] In some instances, U.S. citizens in mixed-status families may feel they are undeserving of the legal rights afforded to them.[373] Along these lines, Mary Romero has documented how U.S. citizen children, through their own experiences with law enforcement and by witnessing the treatment of their noncitizen relatives, come to understand that their own citizenship may be called into question and that authorities may treat them unfairly.[374] How these experiences shape the U.S. citizens' sense of the "worth" of their U.S. citizenship, and also the mixed-status families' decisions to seek asylum elsewhere, merit further inquiry.

While these individuals will very likely retain their U.S. citizenship, the denial of refugee status overseas (as has been the recent trend in these cases) can leave them in a unique, and perhaps precarious, legal situation in the country of asylum. Moreover, this phenomenon is creating a class of U.S. citizens who may be "lost," whether temporarily or on a permanent basis, as a result of asylum processes that their parents are pursuing. This may simply be an unavoidable consequence in a global environment where the paradox of rigid border control and pluralistic citizenship is the norm. Yet, the U.S. citizens who find themselves overseas are likely to remain in liminal status in both their country of residence and country of birth. Should they return to the United States at some point, as Deborah Boehm eloquently observed, their "membership and place in the nation will likely be compromised, far from what it could have been."[375] While scholars like Boehm have begun to explore this dynamic in the context of the families of noncitizen deportees, the inquiry could be extended to families of asylum seekers that include U.S. citizens.

CONCLUSION

For some, stories of U.S. citizens seeking asylum are a source of amusement—a curious news event, likely involving someone looking to evade responsibility or garner media attention. Casual dismissal of these claims, however, precludes our understanding of a phenomenon that could possibly grow in the coming years. As this preliminary exploration reveals, U.S. citizens are applying for asylum in significant numbers and are driven from the country by a complex set of forces, often mediated by their own strategic decisionmaking. The reception of these claims in countries of destination is similarly nuanced and implicates questions of

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372. Leisy J. Abrego, Relational Legal Consciousness of U.S. Citizenship: Privilege, Responsibility, Guilt and Love in Latino Mixed-Status Families, 53 Law & Soc'y Rev. 641, 657–63 (2019).

373. Id. at 652.

374. Mary Romero, The Inclusion of Citizenship Status in Intersectionality: What Immigration Raids Tells Us About Mixed-Status Families, the State, and Assimilation, 34 Int'l J. Socio. & Fam. 131, 140–47 (2008).

375. Deborah A. Boehm, Returned: Going and Coming in an Age of Deportation 135 (2016).

foreign relations along with many other variables. U.S. citizenship is perhaps the most coveted status in the world, but its limitations and fragility—as evidenced by flight from the land of the free—merit careful and ongoing attention.

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VOL. 123, NO. 1

COLUMBIA LAW REVIEW

Pages
1
to
242

JANUARY 2023