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ABSTRACTS

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This Article interrogates the current and future role of employer-sponsored health insurance in reproductive autonomy, revealing the impact that employers' coverage choices have on access to reproductive care and the legal infrastructure that prioritizes employer choice over individual autonomy.

Over half of the population depends on employers for health insurance. Laws regulating employer plans give employers exceptionally wide latitude to decide what reproductive care services, if any, to cover. In their role as health care funders, employers pursue interests that often conflict with employees' interests and the aims of reproductive justice. Employers balk at covering services related to conceiving and bearing children, which they view as costly to them as both employers and insurers. While some employers' plans cover contraception and abortion, which may help them avoid the costs of pregnancy and additional dependents, many other employers object to covering these services. The legal infrastructure validates this wide spectrum of employers' choices, subordinating individuals' autonomy to their employers' interests.

Decoupling health care access from employment is thus necessary to bolster reproductive justice. But the most effective means of decoupling—a public option and single-payer public benefits—raise tough questions about reproductive exceptionalism. Shifting the third-party payment role from employers to governments does not truly remove the threat to reproductive justice, so progressive health reform risks sacrificing reproductive justice to the cause of universal benefits. This Article illuminates how vigilantly centering reproductive justice in single-payer reform proposals can make those reforms more feasible and durable.

The 2020 mass protests in response to the deaths of George Floyd and Breonna Taylor had a significant impact on American corporations. Several large public companies pledged an estimated $50

billion to advancing racial equity and committed to various initiatives to internally improve diversity, equity, and inclusion. While many applauded corporations' willingness to engage with racial issues, some considered it further evidence of corporate capitulation to extreme progressivism at shareholders' expense. Others, while thinking corporate engagement was long overdue, critiqued corporate commitment as insincere.

Drawing on historical evidence surrounding the passage of Title II of the Civil Rights Act of 1964, this Article engages with the debate on corporate "racial" responsibility to demonstrate that corporate engagement on race is not new. Indeed, during the struggle to desegregate public accommodations, corporate social responsibility was invoked to encourage voluntary desegregation and avoid federal intervention. Segregation was good business for some; for others, maintaining white supremacy justified any pecuniary losses.

While this Article argues that corporations have a role to play in achieving racial equity, it cautions against reliance on corporate social responsibility to advance racial equality. Past and current iterations of corporate racial responsibility have often represented a market-fundamentalist, value-extractive approach to racial equity that reifies existing racial hierarchies. By valuing racial equity in terms of its potential profitability, corporate racial responsibility can subordinate human dignity to wealth maximization. This Article argues for a more meaningful corporate racial responsibility that addresses the structures and laws undergirding racial inequities within corporations and our larger society.

NOTES

This Note addresses the ever-growing series of privacy laws being enacted throughout the United States and the danger that the "opt-out" data collection system poses to many populations. There is a disparity in the level of "digital literacy" throughout the United States, and as more consumer data privacy laws emerge and continue to replicate the existing legislation, that disparity deepens.

Patterns among who does and who does not opt out of data collection contribute to algorithmic bias. Access to consumer data can create discriminatory and unequal treatment, which may be exacerbated by disparities in participation in opt-out provisions, increasing the vulnerability of populations less aware of or educated about the potential dangers of data collection. It is crucial that the United States implement a more robust regulatory system regarding its opt-out provisions to protect those who are most vulnerable in the digital world.

environment and why a given societal problem—from discrimination to misinformation—is worthy of study under a privacy framework. Only then can privacy scholars articulate what we are expert in and participate meaningfully in global policy discussions about how best to govern information-based harms.

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ARTICLES

EMPLOYER-SPONSORED REPRODUCTION

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This Article interrogates the current and future role of employer-sponsored health insurance in reproductive autonomy, revealing the impact that employers' coverage choices have on access to reproductive care and the legal infrastructure that prioritizes employer choice over individual autonomy.

Over half of the population depends on employers for health insurance. Laws regulating employer plans give employers exceptionally wide latitude to decide what reproductive care services, if any, to cover. In their role as health care funders, employers pursue interests that often conflict with employees' interests and the aims of reproductive justice. Employers balk at covering services related to conceiving and bearing children, which they view as costly to them as both employers and insurers. While some employers' plans cover contraception and abortion, which may help them avoid the costs of pregnancy and additional dependents, many other employers object to covering these services. The legal infrastructure validates this wide spectrum of employers' choices, subordinating individuals' autonomy to their employers' interests.

Decoupling health care access from employment is thus necessary to bolster reproductive justice. But the most effective means of decoupling—a public option and single-payer public benefits—raise tough questions about reproductive exceptionalism. Shifting the third-party payment role

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from employers to governments does not truly remove the threat to reproductive justice, so progressive health reform risks sacrificing reproductive justice to the cause of universal benefits. This Article illuminates how vigilantly centering reproductive justice in single-payer reform proposals can make those reforms more feasible and durable.

INTRODUCTION

In the summer of 2022, as reproductive rights advocates mourned the demise of the constitutional right to abortion after *Dobbs v. Jackson Women's Health Organization*,[1] Walmart and other nationwide corporations announced they would cover some legally available abortion services and

1. 142 S. Ct. 2228 (2022).

related travel under their health plans.[2] Walmart's actions seem like a victory for reproductive freedom. Walmart is the largest private employer in twenty-one states[3] and employs 1.6 million people in the United States,[4] not including their employees' spouses and dependents. The corporation is also based in Arkansas[5]—a state that, after *Dobbs*, bans abortions with an exception to save the mother's life, but not for rape or incest.[6] Walmart's actions could well save some lives.

Walmart's decision surprised many, given the company's significant financial contributions to state legislators responsible for enacting trigger laws, which became enforceable bans after *Dobbs*,[7] and its historically stingy approach to employee insurance coverage. For example, until 2010, Walmart had resolutely opposed providing insurance to its hourly workers, instead relying on state Medicaid programs to cover its lower-waged employees.[8] After the Affordable Care Act (ACA) required that large

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2. Haleluya Hadero, Walmart Expands Abortion Coverage for Employees, PBS (Aug. 19, 2022), https://www.pbs.org/newshour/economy/walmart-expands-abortion-coverage-for-employees [https://perma.cc/5ABE-V8D7]. Walmart's expansion of its employee health plan covers abortion services for its employees when there is "a health risk to the mother, rape or incest, ectopic pregnancy, miscarriage or lack of fetal viability." Id. (quoting a company memo sent to employees). Walmart's plan also covers "travel support" for employees and dependents who must travel more than 100 miles to access those services. Id. For a discussion of legal issues raised by such abortion policies, see generally Brendan S. Maher, Pro-Choice Plans, 91 Geo. Wash. L. Rev. 446 (2023) [hereinafter Maher, Pro-Choice Plans].

3. Nick Routley, Walmart Nation: Mapping America's Biggest Employers, Visual Capitalist (Jan. 24, 2019), https://www.visualcapitalist.com/walmart-nation-largest-employers/ [https://perma.cc/MQ24-AXD7].

4. How Many People Work at Walmart?, Walmart, https://corporate.walmart.com/askwalmart/how-many-people-work-at-walmart [https://perma.cc/R8C4-FQAH] (last visited Jan. 18, 2024) (describing a total number of 1.6 million U.S. workers and a total global workforce of 2.1 million by the end of 2023).

5. Welcome to Walmart's New Home Office in Bentonville, Arkansas, Walmart, https://corporate.walmart.com/about/newhomeoffice [https://perma.cc/UZX5-LJD4] (last visited Feb. 8, 2024).

6. Human Life Protection Act, Ark. Code Ann. § 5-61-304 (2023).

7. See Janet Burns, Dear AT&T, Boeing, Pfizer, Comcast, Walmart, Etc: Stop Funding Abortion Attackers, Forbes (Aug. 21, 2019), https://www.forbes.com/sites/janetwburns/2019/08/21/dear-att-boeing-pfizer-google-comcast-stop-funding-abortion-attackers/ (on file with the *Columbia Law Review*) (explaining Walmart's contributions to the Republican State Leadership Committee and individual legislators who played a role in passing "extremely restrictive" abortion legislation).

8. See Katie Sanders, Alan Grayson Says More Walmart Employees on Medicaid, Food Stamps Than Other Companies, PolitiFact (Dec. 6, 2012), https://www.politifact.com/factchecks/2012/dec/06/alan-grayson/alan-grayson-says-more-walmart-employees-medicaid-/ [https://perma.cc/QC36-ZRA4] (describing data sources showing percentages of Walmart employees on various public-benefits programs); see also Gov't Accountability Off., GAO-21-45, Federal Social Safety Net Programs: Millions of Full-Time Workers Rely on Federal Health Care and Food Assistance Programs 9 (2020), https://www.gao.gov/assets/gao-21-45.pdf [https://perma.cc/E86M-F4PK] (providing data on the number of full-time workers on SNAP and Medicaid); Erin C. Fuse Brown &

employers offer health benefits to their employees or else pay a tax, Walmart dropped health benefits for many of its part-time workers because the mandate required coverage only for people working thirty hours or more per week.[9]

Walmart's limited expansion of abortion benefits in reaction to *Dobbs* is just one example in a long history of some private employers taking high-profile positions on reproductive health issues through their employees' health insurance benefits.[10] Hobby Lobby memorably fought against covering contraception under its employer health plan, culminating in *Burwell v. Hobby Lobby Stores, Inc.* in 2014.[11] A private, for-profit craft store chain with over 43,000 employees across forty-seven states,[12] Hobby Lobby is owned by David and Barbara Green, Christians who object to abortion.[13] Because the Greens believed that certain FDA-approved oral contraceptives and intrauterine devices (IUDs) effectively facilitated abortions, they refused to cover those offerings in their employee health plan.[14] The ACA required group plans to cover these contraceptives as "preventive care,"[15]

Elizabeth Y. McCuskey, Federalism, ERISA, and State Single-Payer Health Care, 168 U. Pa. L. Rev. 389, 424–25 (2020) (detailing states' legislative efforts to discourage Walmart from having employees on public-benefits programs); Michael Barbaro, Appeals Court Rules for Wal-Mart in Maryland Health Care Case, N.Y. Times (Jan. 18, 2007), https://www.nytimes.com/2007/01/18/business/18walmart.html (on file with the *Columbia Law Review*) (describing Walmart's praise of a Fourth Circuit decision invalidating a state law that forced it to spend more on employee health care); Clare O'Connor, Report: Walmart Workers Cost Taxpayers $6.2 Billion in Public Assistance, Forbes (Apr. 15, 2014), https://www.forbes.com/sites/clareoconnor/2014/04/15/report-walmart-workers-cost-taxpayers-6-2-billion-in-public-assistance/ (on file with the *Columbia Law Review*) (providing total costs of public benefits assistance to Walmart workers).

9. David A. Graham, Walmart and the End of Employer-Based Health Care, The Atlantic (Oct. 7, 2014), https://www.theatlantic.com/politics/archive/2014/10/walmart-and-the-end-of-employer-based-health-care/381199/ (on file with the *Columbia Law Review*) (describing Walmart's and other large employers' responses to the ACA's employer mandate).

10. See, e.g., Trina Jones, A Different Class of Care: The Benefits Crisis and Low-Wage Workers, 66 Am. U. L. Rev. 691, 692–93 (2017) [hereinafter Jones, A Different Class] (highlighting family leave policy press releases by Virgin and Netflix); see also Asees Bhasin, Business Responses to *Dobbs*: The Return to a "Reproductive Rights" Approach, and Suspicions Around Corporate Care, *in* Health Law as Private Law (Wendy Netter Epstein & Christopher Robertson eds., forthcoming 2024) (manuscript at 3–5) (on file with the *Columbia Law Review*) (examining the motivations behind firms' statements on *Dobbs* in the context of corporate social responsibility); Jennifer S. Fan, Corporations and Abortion Rights in a Post-*Dobbs* World, 57 U.C. Davis L. Rev. 819, 846–48 (2024) (detailing the strategic values and inconsistencies in corporate responses to *Dobbs*).

11. 573 U.S. 682 (2014).

12. Our Story, Hobby Lobby, https://www.hobbylobby.com/about-us/our-story [https://perma.cc/JX38-MML5] (last visited Oct. 24, 2023); see also *Hobby Lobby*, 573 U.S. at 702.

13. *Hobby Lobby*, 573 U.S. at 702–03 (discussing the Green family's Christian faith and its influence on their business practices).

14. Id. (explaining the Greens' religious objections to the contraception mandate).

15. 42 U.S.C. § 300gg-13(a)(4) (2018); see also Women's Preventive Services Guidelines, Health Res. & Servs. Admin., https://www.hrsa.gov/womens-guidelines

however, so the Greens challenged the enforcement of this provision.[16] Justice Samuel Alito's majority opinion recognized the right of a closely held corporation to exercise its owners' religious beliefs and thereby exempted Hobby Lobby from providing federally mandated contraception coverage.[17]

Reproductive rights advocates might laud Walmart and loathe Hobby Lobby in these circumstances. But this Article exposes the real villain in these stories: the legal and regulatory infrastructure of health insurance in the United States, which grants employers wide latitude over access to reproductive health care and the health and autonomy of their employees. When Walmart wants to expand abortion coverage for its employees, the law allows it. When Hobby Lobby wants to avoid a federal statute requiring contraception coverage for its employees, the law allows that, too. When either company wants to exclude coverage for assisted reproduction, the law effectuates that choice.[18] This permissiveness is a problem for reproductive autonomy as well as the broader concept of reproductive justice, which encompasses the right to not reproduce and "also the right to have children and to raise them with dignity in safe, healthy, and supportive environments."[19]

Due to the prohibitively high cost of health care in the United States, employer-sponsored insurance is practically the gatekeeper for over 100 million people's access to all kinds of health care, including reproductive

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[https://perma.cc/L5M8-R4PQ] (last visited Oct. 24, 2023) (detailing the ACA's preventive-services mandate regarding women's health).

16. *Hobby Lobby*, 573 U.S. at 703–04.

17. Id. at 717, 736; see also Mary Agnes Carey, Hobby Lobby Ruling Cuts Into Contraceptive Mandate, NPR (June 30, 2014), https://www.npr.org/sections/health-shots/2014/06/30/327065968/hobby-lobby-ruling-cuts-into-contraceptive-mandate [https://perma.cc/NHN5-3YHU]. A similar challenge by employers who object to covering pre-exposure prophylaxis (PrEP) medication to prevent HIV infection based on the company owners' beliefs that PrEP encourages sexual behavior they consider immoral—*Braidwood Management Inc. v. Becerra*—is currently pending before the Fifth Circuit. 666 F. Supp. 3d 613 (N.D. Tex. 2023), appeal docketed, No. 23-10326 (5th Cir. Apr. 3, 2023); see also Michelle M. Mello & Anne Joseph O'Connell, The Fresh Assault on Insurance Coverage Mandates, 388 New Eng. J. Med. 1, 1–3 (2023) (discussing *Braidwood*).

18. See Karen Gilchrist, Egg Freezing, IVF and Surrogacy: Fertility Benefits Have Evolved to Become the Ultimate Workplace Perk, CNBC (Mar. 14, 2022), https://www.cnbc.com/2022/03/14/egg-freezing-ivf-surrogacy-fertility-benefits-are-the-new-work-perk.html [https://perma.cc/EW3N-Y6ZC] (last updated Oct. 4, 2022) (discussing how some, but not all, employers offer "fertility benefits" to their employees).

19. Dorothy Roberts, Reproductive Justice, Not Just Rights, Dissent (2015), https://www.dissentmagazine.org/article/reproductive-justice-not-just-rights [https://perma.cc/G362-CXDL] [hereinafter Roberts, Reproductive Justice]; accord Rachel Rebouché, The Public Health Turn in Reproductive Rights, 78 Wash. & Lee L. Rev. 1355, 1431 (2021) ("Health justice and reproductive justice emphasize the limitations of strategies concerned only with the right to buy a service and support policies that lower or eliminate the costs of care, make child rearing more affordable, and address the country's tattered healthcare system.").

services.[20] Uninsurance and underinsurance remain entrenched problems that inhibit access to health care services generally and stymie the human flourishing and social benefit that effective care can enable.[21] Access to reproductive care is particularly important because it can have acute consequences for individuals' physical and mental health, financial security, participation in society, and self-determination, as the reproductive justice movement directly recognizes.[22] As the primary source of third-party funding during most people's reproductive years, employers play a dominant role in this especially profound aspect of human health and flourishing and, on the whole, have made very few shifts in response to *Dobbs*.[23]

This Article proceeds in three parts: First, it lays out the legal infrastructure that gives employers discretion in covering reproductive care; second, it exposes the power dynamics that put employer-sponsored insurance at odds with reproductive justice; and finally, it interrogates a range of reforms that could decouple the funding of reproductive care from employers.

Part I details the legal landscape that gives employers near-complete discretion over the coverage of reproductive care.[24] Employer-sponsored

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20. See How Much Does Health Insurance Cost?, Ramsey (Oct. 18, 2023), https://www.ramseysolutions.com/insurance/how-much-does-health-insurance-cost [https://perma.cc/YAZ7-8WHD] (showing that the cost of employer-sponsored insurance is significantly lower than that of market insurance); Michelle Long, Matthew Rae & Alina Salganicoff, Exclusion of Abortion Coverage From Employer-Sponsored Health Plans, KFF (May 12, 2020), https://www.kff.org/womens-health-policy/issue-brief/exclusion-of-abortion-coverage-from-employer-sponsored-health-plans/ [https://perma.cc/C3FC-CTW9] (noting that over 150 million employees receive diverse employer-sponsored insurance benefits, including reproductive health care).

21. See J.P. Ruger, The Moral Foundations of Health Insurance, 100 QJM 53, 55–56 (2007) (advancing a moral argument for universal health insurance); Sara R. Collins, Lauren A. Haynes & Relebohile Masitha, The State of U.S. Health Insurance in 2022, Commonwealth Fund (Sept. 29, 2022), https://www.commonwealthfund.org/publications/issue-briefs/2022/sep/state-us-health-insurance-2022-biennial-survey [https://perma.cc/Y7GA-U87U] (noting that forty-three percent of adults were inadequately insured in 2022).

22. See, e.g., Loretta J. Ross & Rickie Solinger, Reproductive Justice: An Introduction 9–10 (2017) (noting the importance of reproductive access to human flourishing and social well-being).

23. See Jessica L. Roberts, An Alternate Theory of *Burwell v. Hobby Lobby*, 22 Conn. Ins. L.J. 85, 86 (2016) [hereinafter Roberts, An Alternate Theory] (explaining how the necessity of insurance and the prominence of employer-sponsored insurance render employers "de facto health-care policy makers"); Michelle Long, Matthew Rae, Alina Salganicoff & Laurie Sobel, Coverage of Abortion in Large Employer-Sponsored Plans in 2023, KFF (Feb. 29, 2024), https://www.kff.org/womens-health-policy/issue-brief/coverage-of-abortion-in-large-employer-sponsored-plans-in-2023/ [https://perma.cc/8489-MWR4] (finding that the "vast majority" of firms whose plans excluded abortion coverage pre-*Dobbs* continue to do so, that only twelve percent of large firms that covered abortion pre-*Dobbs* have made any expansions since the ruling, and that only seven percent of large firms offer abortion travel coverage).

24. See Katherine Keisler-Starkey & Lisa N. Bunch, U.S. Census Bureau, Health Insurance Coverage in the United States: 2020, at 3–4 (2021), https://www.census.gov/content

insurance coverage for reproductive health services varies widely based on the size and type of the employer institution and its plan design choices. The variation is made possible by a complex legal infrastructure that mostly insulates employers' discretion over the extent of coverage for reproductive care.[25] Reproductive exceptionalism[26]—the practice of lawmakers and regulators treating reproductive services differently from other medical care—infuses insurance regulation, giving both public and private employers greater leeway to restrict coverage for reproductive care than other medical services.[27] Statutory and constitutional accommodations for religion widen the holes in coverage by exempting religious institutions—and even secular for-profit businesses such as Hobby Lobby—from certain coverage mandates.[28] Federal antidiscrimination statutes and state and local laws constrain discretion, but in limited ways that may sometimes give way to religious objections.[29] Public-sector employers, responsible for covering thirty-seven million people in the United States, are exempt from many of the regulations governing commercial insurance and so have even wider latitude to choose which services to cover.[30] These many loopholes and forces of exceptionalism have relegated the provision of reproductive care into separate funding and separate clinical settings, most apparently through treatments paid for by patients out of pocket,[31] Title X federally funded family-planning clinics, Planned Parenthood clinics, and privately funded independent abortion clinics.[32]

/dam/Census/library/publications/2021/demo/p60-274.pdf [https://perma.cc/UYE9-STAR] (stating that 54.4% of the population—nearly 178 million people—received employer-sponsored insurance).

25. See infra section I.A.

26. E.g., Courtney Megan Cahill, Reproductive Exceptionalism in and Beyond *Birth Rights*, 100 B.U. L. Rev. Online 152, 152–53 (2020), https://www.bu.edu/bulawreview/files/2020/07/CAHILL.pdf [https://perma.cc/8KW4-EK69] (offering examples of reproductive exceptionalism in the law).

27. See infra section I.A.

28. See infra notes 96–98 and accompanying text.

29. See Off. for C.R., Protection From Discrimination in Reproductive Health Care, HHS, https://www.hhs.gov/civil-rights/for-individuals/special-topics/reproductive-healthcare/index.html [https://perma.cc/2VVL-Z3XB] (last visited Oct. 24, 2023) (describing the ways that federal civil rights laws prohibit pregnancy discrimination).

30. See infra notes 203–221.

31. See Gabriela Weigel, Usha Ranji, Michelle Long & Alina Salganicoff, Coverage and Use of Fertility Services in the U.S., KFF (Sept. 15, 2020), https://www.kff.org/womens-health-policy/issue-brief/coverage-and-use-of-fertility-services-in-the-u-s/ [https://perma.cc/AN2T-DTFQ] ("Most patients pay out of pocket for fertility treatment . . . .").

32. See, e.g., Usha Ranji, Alina Salganicoff, Laurie Sobel & Ivette Gomez, Financing Family Planning for Low-Income Women: The Role of Public Programs, KFF (Oct. 25, 2019), https://www.kff.org/womens-health-policy/issue-brief/financing-family-planning-services-for-low-income-women-the-role-of-public-programs/ [https://perma.cc/9YHG-SS5M] (describing a patchwork of clinical settings that distribute reproductive services).

Dobbs further complicated the intricate legal landscape by allowing states to ban the provision of abortion care, even when insurance covers it.[33] This patchwork sows chaos for reproductive care access broadly,[34] including for employer plans that already covered aspects of abortion care. Employers typically design their plans to promise coverage for one year at a time, beginning on January 1 of the next year.[35] When the Supreme Court formally issued the *Dobbs* opinion on June 24, 2022,[36] state trigger laws immediately went into effect, and new bans quickly followed, forcing employers and insurers to consider the immediate impacts on their coverage in the middle of a plan year and to calibrate their responses.[37] For those in states that further restricted or criminalized abortion, employer plans that covered some abortion services had to determine whether and how to expand coverage to account for the additional travel and leave required to access those services across state lines[38] as well as how to safeguard their claims data, lest those data potentially implicate employees or administrators.[39]

Part II explores employers' coverage decisionmaking, revealing how coverage of reproductive benefits is informed by employers' business and personal interests rather than their employees' reproductive autonomy. Firms' incentives frequently misalign with the robust coverage of reproductive services. Companies perceive pregnancy as costly and disruptive,

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33. See Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2259 (2022) (entrusting abortion regulation "to the people and their elected representatives").

34. See Nicole Huberfeld, High Stakes, Bad Odds: Health Laws and the Revived Federalism Revolution, 57 U.C. Davis L. Rev. 977, 1001 (2023) ("[T]he variety of state actions in the wake of *Dobbs* have created chaos, conflict, and confusion . . . .").

35. See Lacie Glover, Open Enrollment for Health Insurance, NerdWallet (Oct. 18, 2019), https://www.nerdwallet.com/article/health/health-insurance-open-enrollment [https://perma.cc/TX7N-GBHR] (noting that coverage usually lasts for a full calendar year); see also When Can I Enroll in My Employer Health Plan?, KFF, https://www.kff.org/faqs/faqs-health-insurance-marketplace-and-the-aca/when-can-i-enroll-in-my-employer-health-plan/ [https://perma.cc/MZ66-V3ZY] (last visited Oct. 24, 2023) (explaining the open-enrollment process).

36. *Dobbs*, 142 S. Ct. at 2228.

37. See, e.g., Tara Siegel Bernard, Abortion Insurance Coverage Is Now Much More Complicated, N.Y. Times (July 12, 2022), https://www.nytimes.com/2022/07/12/your-money/health-insurance/abortion-health-insurance-coverage.html (on file with the *Columbia Law Review*) (charting the impact of *Dobbs* on insurance benefits for abortions); Greg Ash & Laura Fischer, How the *Dobbs* Decision Will Impact Benefit Plans and Sponsors, ALM BenefitsPro (July 21, 2022), https://www.benefitspro.com/2022/07/21/how-the-dobbs-decision-will-impact-benefit-plans-and-sponsors/ [https://perma.cc/MXH7-6E3D] (detailing the decisions that plans need to make in response to *Dobbs*).

38. See, e.g., Shea Holman & Hannah Naylor, The *Dobbs* Decision: Emerging Trends in Corporate Response, Purple Campaign (July 21, 2022), https://www.purplecampaign.org/purple-post/2022/7/20/the-dobbs-decision-emerging-trends-in-corporate-response [https://perma.cc/X7EL-LGEB] (tracking public corporate responses to *Dobbs*).

39. See HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care, HHS (June 29, 2022), https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html [https://perma.cc/XB4N-YLJN] (describing the HIPAA provisions that safeguard disclosures of reproductive services).

pointing to lost productivity and the need to accommodate pregnant workers.[40] Pregnancy also increases employers' insurance premiums; childbirth is one of the costliest medical procedures for employers annually and results in more dependents for the plan to cover.[41] But employers have also resisted covering contraception for decades[42]—long before Hobby Lobby publicly took its fight to the Supreme Court. When employers refuse to cover reproductive care, they externalize the costs of that care onto public programs or the employees themselves.

Although employers' interests may at times align with some employees' choices, this interest convergence is fragile and ultimately subordinates individuals' choices to the dominant forces of an entity's commercial interests. Decoupling health care from employment would begin to remedy this subordination, which contradicts reproductive justice.[43] Other health benefits models, including public programs like Medicaid, also impose burdens on reproductive justice and may carve such care out of their ambit. Yet employers pose a greater threat to reproductive justice given the power they exert over employees and their various conflicts of interest.

Part III offers tough but essential considerations for the future of health reform if it is to meaningfully support reproductive justice. Public-option and single-payer reforms would directly decouple employers from reproductive care access by placing health care coverage in the hands of government officials. Based on how federal and state governments already act in their capacity as employers and insurers, however, the outlook for reproductive justice is still bleak. As an insurer, the federal government has long excluded abortion from coverage in its employee benefits plan.[44] Through the Hyde Amendment, the federal government has also avoided paying federal funds toward abortions for almost fifty years, and politicians have constantly raised objections to abortion funding, even by stymieing measures unrelated to health care.[45] Though some states reject Hyde and

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40. See infra section II.A.1.

41. See infra notes 236–239 and accompanying text.

42. See, e.g., Sylvia A. Law, Sex Discrimination and Insurance for Contraception, 73 Wash. L. Rev. 363, 368–72 (1998) (describing the historical responses to contraception coverage by employers).

43. See Ross & Solinger, supra note 22, at 8, 93 (introducing the reproductive justice framework).

44. See Alina Salganicoff, Laurie Sobel & Amrutha Ramaswamy, The Hyde Amendment and Coverage for Abortion Services, KFF (Mar. 5, 2021), https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services/ [https://perma.cc/3SY3-D8U7] [hereinafter Salganicoff et al., Hyde Amendment] (describing the federal Hyde Amendment).

45. See, e.g., Karoun Demirjian, Tuberville Blockade Over Abortion Policy Threatens Top Military Promotions, N.Y. Times (July 10, 2023), https://www.nytimes.com/2023/07/10/us/politics/tuberville-abortion-joint-chiefs.html (on file with the *Columbia Law Review*) (describing Alabama Senator Tommy Tuberville's decision to block hundreds

cover the full range of reproductive care for their employees, a majority have enacted their own Hyde-style restrictions.[46] Any plan that places funding discretion in the hands of the government—or any third-party payer—must contend with this reality.

The direct-care model already serves as an alternative to traditional insurance-based, third-party funding. In direct care, the funding flows from the funder directly to the provider without a claims processor or insurance contract as an intermediary. Thus, providers receive payment (or salary) to treat whatever patients they serve, for whatever services fall within their scope of practice. For example, Title X clinics provide patients with nonabortion family-planning services, directly funded by federal grants.[47] Planned Parenthood and other independent private clinics, meanwhile, provide a fuller range of services, including abortion, using private funding (typically from nonprofit organizations).[48] Privately funded direct care largely removes the intervening influence of employers and political actors, but it nonetheless reflects and perpetuates the reproductive exceptionalism that undermines autonomy by isolating and treating differently from any other medical service the financing of reproductive care.

Using the framework of confrontational incrementalism,[49] this Article assesses whether the incremental changes that appear most feasible actually advance or thwart the ends of reproductive justice. This framework counsels that incremental reforms should be assessed based not just on their feasibility but ultimately on whether each increment also confronts the sources of subordination and inequity or accommodates them.[50] Applied to the reproductive health insurance context, the assessment compares the

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of military promotions until the DOD scraps its policy offering time off and travel reimbursement to service members traveling out of state for abortions).

46. See State Funding of Abortion Under Medicaid, Guttmacher Inst., https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid [https://perma.cc/PHY7-8SCP] (last updated Aug. 31, 2023) (providing an overview of state abortion funding in all fifty states).

47. See Angela Napili, Cong. Rsch. Serv., IF10051, Title X Family Planning Program, https://crsreports.congress.gov/product/pdf/IF/IF10051 [https://perma.cc/L7CP-LMNF] (last updated June 8, 2023) (describing the prohibition on the use of Title X funds for abortion).

48. See Abortion Care Network, Communities Need Clinics: The New Landscape of Independent Abortion Clinics in the United States 3 (2022), https://abortioncarenetwork.org/wp-content/uploads/2022/12/communities-need-clinics-2022.pdf [https://perma.cc/W8G6-8V8L] (noting that hospitals and physician practices account for only four percent of all abortion procedures provided in the United States and that Planned Parenthood and independent clinics provide the rest).

49. See Lindsay F. Wiley, Elizabeth Y. McCuskey, Matthew B. Lawrence & Erin C. Fuse Brown, Health Reform Reconstruction, 55 U.C. Davis L. Rev. 657, 665 (2021) [hereinafter Wiley et al., Health Reform Reconstruction] (explaining the concept of confrontational incrementalism as applied to health policy).

50. See id.

impacts on reproductive justice of incremental reforms that would merely constrain employer discretion in the current system with measures that would instead supplant employers' influence over health care funding and establish universal public programs.[51] The assessment further compares the potentially subordinating influences of private health care funding reforms and government funding reforms.[52] Applying these perspectives to recent experiences with state-level single-payer proposals, the Article concludes by observing some narrow openings for eroding reproductive exceptionalism to advance reproductive justice and by arguing that achieving universal care reforms that are feasible, durable, and equitable may require an embrace of reproductive justice.

I. THE INFRASTRUCTURE OF EMPLOYERS' REPRODUCTIVE CHOICE

In 2022, 159 million nonelderly people in the United States—nearly half of the nation's population—were covered by an employer-sponsored health insurance plan.[53] This reliance on employers as the predominant source of health insurance is unique to America and the trajectory of its health policy movements.[54] First, when other industrialized nations enacted national public health care programs in the early twentieth century, the United States did not.[55] Although Congress debated establishing a public health

51. See infra Part III.

52. See infra Part III.

53. See Gary Claxton, Matthew Rae, Emma Wager, Gregory Young, Heidi Whitmore, Jason Kerns, Greg Shmavonian & Anthony Damico, KFF, Employer Health Benefits 2022 Annual Survey 6 (2022), https://files.kff.org/attachment/Report-Employer-Health-Benefits-2022-Annual-Survey.pdf [https://perma.cc/3FLJ-PGZP] [hereinafter 2022 Employer Health Benefits Survey].

54. See Munira Z. Gunja, Evan D. Gumas & Reginald D. Williams II, U.S. Health Care From a Global Perspective, 2022: Accelerating Spending, Worsening Outcomes, Commonwealth Fund (Jan. 31, 2023), https://www.commonwealthfund.org/publications/issue-briefs/2023/jan/us-health-care-global-perspective-2022 [https://perma.cc/R88B-GZHT] (noting that "[t]he U.S. is the only high-income country that does not guarantee [government or public] health coverage" to all its residents); Shanoor Seervai, Arnav Shah & Robin Osborn, How Other Countries Achieve Universal Coverage, Commonwealth Fund (Oct. 27, 2017), https://www.commonwealthfund.org/blog/2017/how-other-countries-achieve-universal-coverage [https://perma.cc/92J8-NWTK] (comparing the United States to countries like England, France, and the Netherlands, all of which have achieved near-universal insurance coverage).

55. Cf. Erin C. Fuse Brown & Aaron S. Kesselheim, The History of Health Law in the United States, 387 New Eng. J. Med. 289, 289–90 (2022) (tracing the history of health law into distinct eras); see also Brendan S. Maher, Regulating Employment-Based Anything, 100 Minn. L. Rev. 1257, 1267 (2016) [hereinafter Maher, Employment-Based Anything] (explaining how the failure to enact national health care legislation in the 1930s drove reliance on employer-based insurance); George B. Moseley III, The U.S. Health Care Non-System, 1908–2008, 10 AMA J. Ethics 324, 324 (2008) (noting that, in the decade after 1908, "many European nations would adopt some form of compulsory national health insurance, but similar proposals in the U.S. were rejected because of lack of interest and resistance from physicians and commercial insurers").

insurance system in the New Deal era, it abandoned those plans and forged ahead with Social Security solely for retirement benefits.[56] This failure left health care financing largely to the private market and private charities.[57] As scholar Lawrence D. Brown put it, "Thus was the cultural die cast: [The U.S.] government's role in health coverage was 'officially' confined to filling in the gaps of an otherwise robust private system."[58] On a deeper level, the political and philosophical underpinnings of treating health care primarily as a benefit of work, rather than as a social good, reflect the forces of racism, sexism, and ableism that exclude vulnerable groups from the paid labor market.[59]

In 1965, Congress established the Medicare and Medicaid programs for retirees and those unable to work, thereby filling a large gap in the private, employment-based system of coverage.[60] Older people and people

56. See Moseley, supra note 55, at 325 (noting that the Social Security Act was passed without a health insurance component during a time when physicians were concerned about compulsory national health insurance).

57. See Deborah A. Stone, The Struggle for the Soul of Health Insurance, 18 J. Health Pol., Pol'y & L. 287, 289–90 (1993) (noting that, unlike in "most societies," the private insurance industry is "the first line of defense in the U.S." and depends on "charging the sick"). Likewise, the United States, "compared to other developed nations . . . has some of the least favorable family-friendly policies" and "is one of only two economically developed democracies that does not guarantee basic benefits like paid family leave." Jones, A Different Class, supra note 10, at 699.

58. Lawrence D. Brown, The More Things Stay the Same the More They Change: The Odd Interplay between Government and Ideology in the Recent Political History of the U.S. Health-Care System, *in* History and Health Policy in the United States 32, 45 (Rosemary A. Stevens, Charles E. Rosenberg & Lawton R. Burns eds., 2006).

59. See, e.g., Angela P. Harris & Aysha Pamukcu, The Civil Rights of Health: A New Approach to Challenging Structural Inequality, 67 UCLA L. Rev. 758, 762 (2020) (discussing how "markers of social stigma such as such as race, gender, sexuality, and class" contribute to the disparities in access to "health-promoting opportunities and resources"); Stone, supra note 57, at 290 (noting how the private health insurance industry's focus on actuarial fairness "foster[s] in people a sense of their differences, rather than their commonalities"); Wiley et al., Health Reform Reconstruction, supra note 49, at 664, 712–13, 723 (explaining how four fixtures of American health care—federalism, fiscal fragmentation, individualism, and privatization—have created and reinforced racial subordination); Ruqaiijah Yearby, Brietta Clark & José F. Figueroa, Structural Racism in Historical and Modern US Health Care Policy, 41 Health Affs. 187, 187–92 (2022) (noting "racial and ethnic minority populations' inequitable access to health care, which persists because of structural racism in health care policy"); Jeneen Interlandi, Why Doesn't the United States Have Universal Health Care? The Answer Has Everything to Do With Race., N.Y. Times Mag. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/universal-health-care-racism.html (on file with the *Columbia Law Review*) (quoting science historian Evelyn Hammonds's argument that "[t]here has never been any period in American history where the health of blacks was equal to that of whites," revealing that "[d]isparity is built into the system").

60. See Wiley et al., Health Reform Reconstruction, supra note 49, at 736 ("[Medicare] partially confronted privatization (established as a public program), individualism (automatic enrollment), fiscal fragmentation (federally financed without segmentation), and federalism (federally administered)."); see also Fuse Brown & Kesselheim, supra note 55, at 291 ("Medicare and Medicaid responded to the pressing social problem that health care was increasingly inaccessible to people who were left out of the . . . employment-

with disabilities are likelier to have more intensive, sometimes unique, health needs that private insurers would prefer not to add to their risk pools. For those without public coverage, private insurance plans are concerned about adverse selection, in which people wait to enroll in (and pay into) health insurance plans until they develop an expensive medical condition.[61] Adverse selection makes private insurance more expensive because plans must collect enough money to cover higher-cost medical needs from a smaller number of people.[62] Working people and their dependents, however, are grouped together by employment, rather than intensity of health needs, and therefore make attractive risk pools for private insurers to court.[63]

Without a universal public insurance program, the United States has resorted to enacting a pastiche of measures to prop up and nudge private employer-sponsored insurance, mainly through tax treatment and deregulation.[64] After World War II, the "federal decision to provide tax benefits for employers who established private health insurance for workers—a form of government-funded 'welfare capitalism'—galvanized the growth of private health insurance organized through the workplace."[65] Employ-

based health insurance system: [older patients], people with disabilities, and poor mothers and children.").

61. Mark A. Hall & Michael J. McCue, Does Making Health Insurance Enrollment Easier Cause Adverse Selection?, Commonwealth Fund Blog (Apr. 4, 2022), https://www.commonwealthfund.org/blog/2022/does-making-health-insurance-enrollment-easier-cause-adverse-selection [https://perma.cc/7E4B-48Q2].

62. Id.

63. See Am. Acad. Of Actuaries, Critical Issues in Health Reform: Risk Pooling 1 (2009), https://www.actuary.org/sites/default/files/pdf/health/pool_july09.pdf [https://perma.cc/4VWV-42KF] ("Pools created as a by-product of membership in a group that is formed for other reasons [such as employment], rather than a group that is formed for the specific purpose of obtaining health insurance, tend to be less subject to adverse selection."); see also Thomas C. Buchmueller, The Business Case for Employer-Provided Health Benefits: A Review of the Relevant Literature 1 (2000), https://www.chcf.org/wp-content/uploads/2017/12/PDF-BusinessCaseReport.pdf [https://perma.cc/5ND8-YMEN] (explaining that economies of scale and preferential tax treatment lower the cost of employer-sponsored insurance); Maher, Employment-Based Anything, supra note 55, at 1281–83 (explaining adverse selection in the insurance context).

64. See Timothy Jost, Neither Public nor Private: A Health-Care System Muddling Through, The Atlantic (May 18, 2012), https://www.theatlantic.com/health/archive/2012/05/neither-public-nor-private-a-health-care-system-muddling-through/257123/ (on file with the *Columbia Law Review*) (noting how employment-sponsored insurance is "heavily subsidized through tax expenditures to the tune of roughly $200 billion a year").

65. Rosemary A. Stevens, Medical Specialization as American Health Policy: Interweaving Public and Private Roles, *in* History and Health Policy in the United States, supra note 58, at 49, 58; see also Moseley, supra note 55, at 325 (noting the "spur [in] health insurance sales . . . during World War II"); Aaron E. Carroll, The Real Reason the U.S. Has Employer-Sponsored Health Insurance, N.Y. Times (Sept. 5, 2017), https://www.nytimes.com/2017/09/05/upshot/the-real-reason-the-us-has-employer-sponsored-health-insurance.html (on file with the *Columbia Law Review*) (explaining how the IRS's decision

ers offering benefit plans got two tax advantages: deductions from employers' taxable business income for the cost of providing benefits and exclusions of the value of the benefits from employees' taxable income.[66] This preferential tax treatment "firmly entrenched" employers as the primary source of health insurance[67] and currently represents "one of the federal government's largest tax expenditures," resulting in hundreds of billions of dollars in cumulative lost tax revenue.[68]

The Employee Retirement Income Security Act of 1974 (ERISA)[69] further nudged employers to offer these tax-preferred benefits by creating a uniform but sparse set of federal rules to govern them and preempting many additional state laws. For the past forty-nine years, ERISA has had a largely deregulatory effect on employer-sponsored health benefits.[70] The ACA ultimately doubled down on the tax-and-deregulation treatment of employer-sponsored insurance, building its other insurance reforms around a tax-enforced mandate for large employers to provide insurance[71] and a comparatively lighter set of new federal rules for employer plans versus individual private plans.[72] This reliance on employer-sponsored insurance and the piecemeal approach that it reflects contribute to the gestalt of a health care "*non*-system" in the United States.[73]

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to exempt employer-based insurance from taxation "made it cheaper to get health insurance through a job than by other means").

66. See Moseley, supra note 55, at 326; see also Comm. on Emp.-Based Health Benefits, Inst. of Med., Emp. & Health Benefits: A Connection at Risk 64, 70–71 (Marilyn J. Field & Harold T. Shapiro eds., 1993), https://www-ncbi-nlm-nih-gov.ezproxy.cul.columbia.edu/books/NBK235992/pdf/Bookshelf_NBK235992.pdf [https://perma.cc/32TP-RJ9U] (explaining how tax advantages boosted employer-sponsored health care).

67. Moseley, supra note 55, at 326.

68. Options for Reducing the Deficit: Reduce Tax Subsidies for Employment-Based Health Insurance, CBO (Dec. 7, 2022), https://www.cbo.gov/budget-options/58627 [https://perma.cc/U9QY-933L] (estimating lost tax revenues of $641 billion by 2032).

69. 29 U.S.C. § 1001 (2018).

70. See Elizabeth Y. McCuskey, ERISA Reform as Health Reform: The Case for an ERISA Preemption Waiver, 48 J.L. Med. & Ethics 450, 451–52 (2020) [hereinafter McCuskey, ERISA Reform] (noting ERISA preemption's "deregulatory" effect due to the consolidation of "authority in a single federal regulatory regime"); see also David A. Hyman, Drive-Through Deliveries: Is "Consumer Protection" Just What the Doctor Ordered?, 78 N.C. L. Rev. 5, 14 (1999) (noting "that ERISA effectively creates a health benefits free-fire zone" and with a majority of those covered by self-insured plans "in a regulatory no-man's-land," ERISA leaves "employment-based health insurance . . . effectively unregulated").

71. The employer penalty for large employers can be found at I.R.C. § 4980H (2018). Small businesses can receive tax credits but are not mandated to purchase benefits. Id. § 45R.

72. See 79 Fed. Reg. 8542, 8545 (Feb. 12, 2014) (codified at 26 C.F.R. pts. 1, 54, 301).

73. See Wiley et al., Health Reform Reconstruction, supra note 49, at 666–67 ("Many have acknowledged that [the U.S. health care system] is, more accurately, a non-system."); see also Moseley, supra note 55, at 324–28 (describing the history of "[t]he U.S. [h]ealth [c]are [n]on-[s]ystem").

The prohibitively high cost of most health care relative to average wages makes health insurance necessary for the purchase of health care.[74] Private employers' decisions about their health insurance benefits therefore drive a significant portion of health policy.[75]

As the remainder of this Part explains, this is even more acutely true for coverage of reproductive care. The complex legal infrastructure that has accumulated to regulate health insurance reflects reproductive exceptionalism and largely effectuates employers' choices about whether and how to cover reproductive care.[76] Since long before *Dobbs*, U.S. health insurance policy's deferential posture has made employers the de facto gatekeepers of their employees' access to reproductive care. When employers frequently choose *not* to cover reproductive care, they leave patients *under*-insured and shift the financial burden of care (as well as the consequences of not paying for it) onto individuals, public programs, and private nonprofits.[77] People in low-wage jobs experience this burden most acutely.[78]

A. *The Legal Infrastructure of Employer Choice*

Most Americans in their prime reproductive and working years (ages nineteen to sixty-four) have health insurance coverage through an employer health plan[79] with state-to-state variation based on demographics, economy, and labor markets.[80] Employer-based plans also constitute a significant source of coverage for adolescents (ages ten to eighteen) who receive coverage as dependents of employees during their initial years of reproductive capacity.[81] For all these people, employers effectively control access to many health care services by virtue of their control over what benefits they offer. In theory, employers could offer a

74. See Lunna Lopes, Marley Presiado & Liz Hamel, Americans' Challenges With Health Care Costs, KFF (Dec. 21, 2023), https://www.kff.org/health-costs/issue-brief/americans-challenges-with-health-care-costs/ [https://perma.cc/Q5NA-2W35] (noting that about one in four adults in the United States have delayed or forgone medical care in the last year due to cost).

75. See Roberts, An Alternate Theory, supra note 23, at 96 ("[T]he employer-provided [insurance] system renders employers de facto health-care policy makers.").

76. See infra section I.A.

77. See infra sections I.A.3, I.B.

78. See infra section I.A.1.

79. See Health Insurance Coverage of Adults 19–64, KFF, https://www.kff.org/other/state-indicator/adults-19-64/ [https://perma.cc/WTX9-NL9C] (last visited Jan. 18, 2024) (noting that 60.9% of adults in the United States were insured through employer-based plans in 2022).

80. See id.

81. See Donna L. Spencer, Margaret McManus, Kathleen Thiede Call, Joanna Turner, Christopher Harwood, Patience White & Giovann Alarcon, Health Care Coverage and Access Among Children, Adolescents, and Young Adults, 2010–2016: Implications for Future Health Reforms, 62 J. Adolescent Health 667, 669 tbl.2 (2018).

choice among plans, but in practice, seventy-five percent of employers that offer benefits offer only one health plan to employees.[82] Employers' choices reflect wide variation in coverage based on type of employer, size of employer firm, type of benefit plan, and type of reproductive care service described in this section.[83]

A complex legal infrastructure effectuates employers' choices in reproductive health care. While some aspects of state insurance laws, ERISA, the ACA, and antidiscrimination laws encourage employers to cover reproductive care, this web of laws predominantly grants employers discretion over the design of their health plans.[84] Sometimes, the law's deference to employer choice means expanded access to services, as in Walmart's recent action.[85] But employers who wish to restrict access to reproductive care also find their preferences validated by law.[86]

While states were historically the primary regulators of insurance providers, there has been a steady march of federal health insurance regulation since World War II.[87] The dominant source of regulation is now the federal government, though states add important requirements and play an implementation role for some federal programs.[88]

Most laws governing employer-sponsored insurance either incentivize coverage or patch up holes or inequities in coverage. ERISA, for example, offered the carrot of deregulation—that is, preemption of state laws in favor of minimal federal ones—to entice employers to offer benefits.[89] The statute implements standardized claims processing and imposes

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82. See 2022 Employer Health Benefits Survey, supra note 53, at 68.

83. See, e.g., id. (noting that "[l]arge firms are more likely than small firms to offer more than one plan type").

84. See McCuskey, ERISA Reform, supra note 70, at 451–52 (tracing ERISA plans' discretion about substantive coverage decisions).

85. See supra notes 2–6 and accompanying text.

86. See infra section I.A.3.

87. See supra note 65 and accompanying text; see also Elizabeth Y. McCuskey, Body of Preemption: Health Law Traditions and the Presumption Against Preemption, 89 Temp. L. Rev. 95, 135–44 (2016) (describing the interplay between state and federal health insurance regulation in the second half of the twentieth century).

88. See Abbe R. Gluck & Nicole Huberfeld, What Is Federalism in Healthcare for?, 70 Stan. L. Rev. 1689, 1697 (2018) ("While state authority over areas of healthcare certainly remains, the major decisions about allocation of power in healthcare now typically come . . . from political and policy decisions by *Congress* to incorporate states into federal schemes.").

89. See Phyllis C. Borzi, There's "Private" and Then There's "Private": ERISA, Its Impact, and Options for Reform, 36 J.L. Med. & Ethics 660, 663 (2008) (explaining how ERISA preemption "was deliberately designed to shield multi-state employers from the onerous burden of complying with . . . varying state or local laws" and spur coverage offerings); James A. Wooten, A Legislative and Political History of ERISA Preemption (pt. 1), 14 J. Pension Benefits 31, 31 (2006) (noting how the concern that "states would regulate employee-benefit plans if Congress failed to do so" motivated ERISA).

fiduciary responsibility on fund managers for some aspects of plan design and administration.[90] Congress has added a few more substantive coverage requirements to ERISA in piecemeal fashion while maintaining the preemption of state laws.[91] The Health Insurance Portability and Accountability Act of 1996 (HIPAA), another example, sustained the practice of employer-sponsored insurance but amended ERISA to limit the extent to which these plans could exclude care relating to preexisting conditions.[92]

The ACA built on the ERISA framework, adding an employer-mandate "stick" to ERISA's deregulation "carrot."[93] Most notably, the ACA expressly stated its intent *not* to alter ERISA's preemption.[94] Taken together, ERISA and the ACA give private employers choice in designing their health plans and leeway for deciding to cover or reject some main items of reproductive care.

Certain categories of employers enjoy even greater flexibility. Most regulation and data collection classify employers as private industry or public, and public employees as civilian or military.[95] Within the private employer category, religious organizations are exempt from many rules that govern other private firms, especially when it comes to coverage for reproductive care that the institutional dogma does not support.[96] Over

90. See ERISA, DOL, https://www.dol.gov/general/topic/health-plans/erisa [https://perma.cc/3MYF-HNY4] (last visited Oct. 25, 2023) (emphasizing the administrative and fiduciary requirements for ERISA plans).

91. See McCuskey, ERISA Reform, supra note 70, at 452 (describing the "piecemeal statutory amendments" to ERISA which have left section "1144 preemption unscathed").

92. 29 U.S.C. § 1181 (2018).

93. See Elizabeth Y. McCuskey, Agency Imprimatur & Health Reform Preemption, 78 Ohio State L.J. 1099, 1144–45 (2017) (describing the ACA's employer mandate, which "filled the vast regulatory void created by ERISA preemption").

94. See 29 U.S.C. § 1191(a)(2) (providing that the new ACA provisions shall not be construed to affect or modify the ERISA preemption clause as applied to group health plans); 42 U.S.C § 300gg-23(a)(2) (2018) (same); see also Gobeille v. Liberty Mut. Ins. Co., 577 U.S. 312, 326 (2016) (finding that the ACA had no bearing on ERISA preemption analysis).

95. See, e.g., Employment Cost Index: Classification Systems Used by the National Compensation Survey (NCS), U.S. Bureau Lab. Stats. (May 11, 2021), https://www.bls.gov/eci/factsheets/national-compensation-survey-classification-systems-mapping-files.htm (on file with the *Columbia Law Review*) (identifying survey classifications based on ownership by "civilian, private industry, and . . . government employers" and differentiating the military).

96. E.g., Women's Preventive Services Coverage and Non-Profit Religious Organizations, Ctr. for Medicare & Medicaid Servs., https://www.cms.gov/cciio/resources/fact-sheets-and-faqs/womens-preven-02012013 [https://perma.cc/MGZ7-2JLN] (last modified Sept. 6, 2023).

1.6 million people currently work for religious organizations,[97] which include, for example, hospital systems owned by religious organizations.[98]

The public-civilian employer classification includes plans maintained by federal, state, and local governments for their employees, some of which are also subject to collective bargaining with public-sector unions. The U.S. military, as an employer, usually receives a distinct classification because it maintains a unique set of coverage options: TRICARE as health coverage for active-duty military members and their dependents, the Veterans Administration (VA) as a funded direct-care provider of care for veterans, and Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA) for veterans' dependents and beneficiaries.[99] Public employers are subject to a few of the same rules as private employers, but many distinct ones, too—most notably the Hyde Amendment prohibiting federal funding for abortions.

In sum, the legal infrastructure at a minimum gives employers their choice of:

1. whether to offer health benefits to employees at all;

2. what type of plan to offer—a fully insured plan run by a state-regulated insurance provider, or a self-insured plan maintained by a third-party administrator and not subject to state insurance law;

3. what services to cover, including many aspects of reproductive care; and

4. which providers to include, and how much of the cost of covered care to shift onto employees and their dependents.

These are substantial choices bearing on the fundamental features of health benefits.[100]

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97. Religious Organizations Industry in the US—Market Research Report, IBIS World (Jan. 13, 2023), https://www.ibisworld.com/united-states/market-research-reports/religious-organizations-industry/ [https://perma.cc/7GQC-92A2] (using the 1.67 million estimate for 2023); Religious Organizations, Data USA, https://datausa.io/profile/naics/religious-organizations [https://perma.cc/9SAM-R6ZP] (last visited Feb. 19, 2023) (reporting a 1.73 million estimate from the 2019 Bureau of Labor Statistics data).

98. Three of the five largest health systems in the United States are operated by religious organizations. See Anna Falvey, 100 of the Largest Hospitals and Health Systems in America—2023, Becker's Hosp. Rev. (Feb. 28, 2023), https://www.beckershospitalreview.com/lists/100-of-the-largest-hospitals-and-health-systems-in-america-2023.html [https://perma.cc/AP2C-AKWB] (listing Commonspirit Health, Ascension, and Trinity Health—all Catholic organizations—in the top five).

99. See CHAMPVA Benefits, VA (Oct. 16, 2023), https://www.va.gov/health-care/family-caregiver-benefits/champva/ [https://perma.cc/Z6YZ-C6Z6]; TRICARE, https://www.tricare.mil/ [https://perma.cc/WTZ3-J9HA] (last visited Oct. 26, 2023); VA Health Care, VA (Aug. 30, 2023), https://www.va.gov/health-care/ [https://perma.cc/UQ7Q-VNF4].

100. See, e.g., Ogletree Deakins, Summary Checklist of Health Plan Design Options 1–5 (2019), https://www.acc.com/sites/default/files/resources/upload/Summary%20Checklist%20of%20Health%20Plan%20Design.pdf [https://perma.cc/M4TK-7NE4]

The following sections untangle the notoriously complex legal infrastructure governing these categories of choices, ultimately illustrating how these policies protect employer discretion in the financing of reproductive care. The analysis also illuminates the creep of reproductive exceptionalism in existing U.S. laws, which results in less protection for reproductive care than other types of care.[101]

1. *Whether to Offer Benefits.* — Employers of different sizes have various legal incentives to offer health benefits, but all maintain the option *not* to offer them.[102] The ACA's employer mandate pushes employers with fifty or more full-time employees to offer insurance by taxing their choice not to.[103] These so-defined "large" employers must decide whether to offer "minimum essential coverage" or instead pay the "shared responsibility payment" to the IRS,[104] which can be significant.[105] Under the ACA, the "small" employers with fewer than fifty employees who choose not to offer benefits owe nothing to the IRS for that choice.[106]

(listing best practices for employers designing their health benefits plans); Suzanne F. Delbanco, Roslyn Murray, Robert A. Berenson & Divvy K. Upadhyay, Urban Inst., A Typology of Benefit Designs 2 (2016), https://www.urban.org/sites/default/files/publication/80321/2000780-A-Typology-of-Benefit-Designs.pdf [https://perma.cc/UQ3W-6WXH] (providing a "typology of benefit designs" highlighting "the array of options available for health plan sponsors").

101. See, e.g., Greer Donley, Medication Abortion Exceptionalism, 107 Cornell L. Rev. 627, 703 (2022) (discussing the FDA-imposed limits on medication abortion despite it being "effective and safe").

102. While this Part deals with the incentives built into the law, other business and social interests inform employers' motivations in offering and designing benefits, as further explored in Part II. See, e.g., Mathematica Pol'y Rsch., Inc., HHS, Employer Decision Making Regarding Health Insurance, Off. of the Assistant Sec'y for Plan. & Evaluation (Apr. 30, 2000), https://aspe.hhs.gov/reports/employer-decision-making-regarding-health-insurance [https://perma.cc/GYV2-4Y5H] [hereinafter HHS, Employer Decisionmaking] (reporting on employers' perceived "social contract notion of employer-sponsored health insurance").

103. See I.R.C. § 4980H (2018).

104. See Determining if an Employer Is an Applicable Large Employer, IRS (Oct. 23, 2023), https://www.irs.gov/affordable-care-act/employers/determining-if-an-employer-is-an-applicable-large-employer [https://perma.cc/KCC7-B5P7] (explaining the ACA provisions that apply to "large" employers). Note that "large" employers are eligible to buy policies on the "small" business exchanges, which are subject to those exchanges' rules. See Affordable Care Act Tax Provisions for Large Employers, IRS (Jan. 31, 2023), https://www.irs.gov/affordable-care-act/employers/affordable-care-act-tax-provisions-for-large-employers [https://perma.cc/A9X3-GKMG].

105. See Julie M. Whittaker, Cong. Rsch. Serv., R43981, The Affordable Care Act's (ACA) Employer Shared Responsibility Determination and the Potential Employer Penalty 5–6 (2016), https://crsreports.congress.gov/product/pdf/R/R43981 [https://perma.cc/6GQY-6XCF] (explaining how to calculate the employer penalty); cf. Kip Piper & F. Randy Vogenberg, Implications of the Employer Mandate Delay on the Healthcare Marketplace, 6 Am. Health & Drug Benefits 303, 304 (2013) (noting the "employer mandate penalty—$2000 or $3000 per full-time employee" was designed to incentivize employer coverage).

106. See Whittaker, supra note 105, at 1.

ERISA broadly preempts all state and local laws that "relate to" employer benefits,[107] effectively prohibiting states from enforcing more robust employer coverage mandates.[108] ERISA also expressly exempts government and religious employers' plans from its framework.[109] The "church plans" exempt from ERISA include both plans for the direct employees of churches (and other organizations organized and operated for religious purposes)[110] and plans for church-affiliated organizations,[111] such as hospitals owned by the Catholic Church.[112] While religious employers do not have to comply with ERISA rules,[113] they likewise cannot use ERISA preemption to shield them from state regulation.[114]

The ACA's employer mandate, however, applies to both governmental and religious employers with at least fifty employees.[115] Thus, employers who choose *not* to offer benefits may face a variety of financial consequences, depending on their size and status. Their employees are left to find individual coverage on the ACA's insurance exchanges (which have some abortion coverage limitations and hurdles),[116] through their state's Medicaid or Children's Health Insurance

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107. 29 U.S.C. § 1144(a) (2018).

108. Hawaii passed an employer mandate just before ERISA was signed and later received a statutory exemption from preemption so that it could enforce its law. See Hawaii Prepaid Health Care Act, Haw. Rev. Stat. Ann. §§ 393-3(8), 393-11 (West 2023); Highlights of the Hawaii Prepaid Health Care Law, State of Haw. Dep't of Lab. & Indus. Rels., Disability & Comp. Div., https://labor.hawaii.gov/dcd/files/2013/01/PHC-highlights.pdf [https://perma.cc/V5CQ-KUB4] (last visited Oct. 24, 2023) (explaining how Hawaii's Prepaid Health Care Act was preempted by ERISA in 1981 but reinstated in 1983). States and cities may, however, impose payroll taxes to fund public health insurance programs which may have an indirect economic effect on employers' incentives for offering insurance. See ERISA Indus. Comm. v. City of Seattle, 840 F. App'x 248, 248–49 (9th Cir. 2021) (holding that Seattle's public health payroll tax provision does not trigger ERISA preemption); Golden Gate Rest. Ass'n v. City & County of San Francisco, 546 F.3d 639, 642 (9th Cir. 2008) (holding that ERISA does not preempt San Francisco's employer health care spending requirements).

109. See 29 U.S.C. § 1002(32), (33) (defining both a "governmental plan" and a "church plan").

110. Id. § 1002(33)(C)(ii).

111. Id. § 1002(33)(C)(iv).

112. See Advoc. Health Care Network v. Stapleton, 581 U.S. 468, 472 (2017) (clarifying that the exemption applies even to plans established by the hospitals rather than those established by the church that owns them).

113. Though they may elect to be treated as ERISA plans. See I.R.C. § 410(c)(1)(B) (2018).

114. See, e.g., Rebecca Miller, Note, God's (Pension) Plan: ERISA Church Plan Litigation in the Aftermath of *Advocate Health Care Network v. Stapleton*, 61 B.C. L. Rev. 3007, 3028 (2020) (noting how states "have an open door to create legislation that places affirmative duties on church plan sponsors").

115. Whittaker, supra note 105, at 1.

116. See Lisa C. Ikemoto, Abortion, Contraception and the ACA: The Realignment of Women's Health, 55 How. L.J. 731, 758 (2012) (explaining that the ACA explicitly excludes

Program (CHIP) offerings (most of which restrict abortion coverage under the Hyde Amendment),[117] or go uninsured if they do not qualify for Medicaid in their state and cannot afford exchange insurance.

Even with the ACA's employer mandate, there exists a "benefits gap" between high-wage, typically salaried employees, and low-wage, often part-time employees.[118] Women and people of color make up a disproportionate share of low-wage workers.[119] Low-wage workers are much less likely to be offered employer-sponsored insurance and are more likely to be underinsured or unable to afford employer-sponsored insurance when it is offered.[120] Loopholes in the Family Medical Leave Act and the ACA's employer mandate based on firm size and part-time status perpetuate gaps in coverage for low-wage workers.[121]

2. *Type of Plan.* — Any employer (large or small, private or public) can choose among different ways to fund its benefits. A "fully-insured" health plan refers to one sold by an insurance company to the employer, who works with the insurer to design the plan and project costs.[122] The insurer ultimately bears the risk if the plan collects insufficient money to pay all the claims. Alternatively, employers can use third-party administrators to run a "self-insured" plan.[123] With a self-insured (or "self-funded") style of plan, the employer has control over most aspects of the plan design and is responsible for collecting enough money to pay for all the benefits it has promised, though employers usually purchase "stop-loss" insurance to protect them if the claimed benefits exceed the funds they have set aside.[124]

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abortion from the list of required benefits, prohibits those insurers that cover abortion from using federal subsidy money to do so, and "leaves state insurance mandates and restrictions intact").

117. See Salganicoff et al., Hyde Amendment, supra note 44 (noting how the Hyde Amendment limits abortion coverage under Medicaid and other federal programs).

118. See Jones, A Different Class, supra note 10, at 695, 701, 714–15 (describing how high-wage workers typically enjoy better retirement benefits, health care benefits, and work-leave arrangements relative to low-wage workers).

119. See id. at 704, 737.

120. See id at 715. As Trina Jones points out, these low-wage workers lack protections, despite the "precarious nature of many low-wage jobs," which "can be physically demanding, emotionally degrading, and dangerous." Id. at 716.

121. See id. at 717 n.91; see also Rachel Garfield, Matthew Rae, Gary Claxton & Kendal Orgera, Double Jeopardy: Low Wage Workers at Risk for Health and Financial Implications of COVID-19, KFF (Apr. 29, 2020), https://www.kff.org/coronavirus-covid-19/issue-brief/double-jeopardy-low-wage-workers-at-risk-for-health-and-financial-implications-of-covid-19/ [https://perma.cc/ULL8-7568] (noting that forty-three percent of low-wage workers are employed in small firms).

122. See Fully-Insured Health Plan, healthinsurance.org, https://www.healthinsurance.org/glossary/fully-insured-health-plan/ [https://perma.cc/JG7R-GYRN] (last visited Oct. 25, 2023) (defining "a fully-insured health plan").

123. See Self-Insured Group Health Plans, Self-Ins. Inst. Am., https://www.siia.org/i4a/pages/Index.cfm?pageID=7533 [https://perma.cc/HW6B-HBC9] (last visited Oct. 25, 2023).

124. See Al Stewart, DOL, Annual Report to Congress on Self-Insured Group Health Plans 14 (2021), https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/

In addition, employers can arrange for providers to deliver medical care directly to their employees.[125] The military serves as the main model for direct care because it operates health care facilities, employs doctors that serve covered veterans through the VA, and operates facilities on military bases that provide care to TRICARE members.[126]

Despite its capacious preemption of all state law that merely "relate[s] to" employer benefits, ERISA expressly preserves states' ability to regulate insurance companies located in their jurisdiction.[127] Thus, if an employer chooses to offer benefits *and* chooses to get those benefits fully insured from a state-licensed insurance carrier, then the employer's plan will need to comply with state insurance law in addition to the ERISA rules.

The Supreme Court has further interpreted ERISA's preemption provisions as exempting employers' "self-funded" plans from state insurance rules by deciding that self-funded plans are not the kind of "insurance" business that the savings clause had in mind,[128] thereby deregulating self-funded plans even more than fully insured ones. So, an employer that chooses to offer benefits may also choose to "self-fund" them, thereby shedding its responsibility to comply with state insurance laws.[129] The ACA did not alter the availability of fully insured or self-funded types of plans.[130]

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retirement-bulletins/annual-report-on-self-insured-group-health-plans-2021.pdf [https://perma.cc/PFU4-9N2U].

125. See Benefits of Choosing a Direct Primary Care Provider for Your Employees, Assurance Healthcare & Counseling Ctr. (Jan. 17, 2022), https://assurancehealth.org/benefits-of-choosing-a-direct-primary-care-provider-for-your-employees/ [https://perma.cc/6QPM-62V4].

126. See, e.g., Getting Care, TRICARE, https://www.tricare.mil/GettingCare [https://perma.cc/9BTL-FWYD] (last updated Aug. 2, 2023).

127. 29 U.S.C. § 1144(b)(2)(A) (2018). This is commonly referred to as ERISA preemption's "savings clause." Elizabeth McCuskey, ERISA Preemption Reform: Unlocking States' Capacity for Incremental Reform, Harv. L. Petrie–Flom Ctr.: Bill of Health (May 10, 2021), https://blog.petrieflom.law.harvard.edu/2021/05/10/erisa-preemption-reform/ [https://perma.cc/E3W3-2NPN].

128. See Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 747 (1985) (interpreting ERISA's "deemer clause" in 29 U.S.C. § 1144(b)(2)(B) as preventing states from enforcing insurance law on self-funded plans). For background on the interaction between ERISA's "relate to," "savings," and "deemer" clauses, see generally Mary Ann Chirba-Martin & Troyen A. Brennan, The Critical Role of ERISA in State Health Reform, 13 Health Affs. 142 (1994).

129. See Phyllis C. Borzi, Ctr. for Health Servs. Res. & Pol'y, ERISA Health Plans: Key Structural Variations and Their Effect on Liability 12 (2002), https://hsrc.himmelfarb.gwu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1837&context=sphhs_policy_facpubs [https://perma.cc/VFQ3-CM5A] (noting how "self-insured ERISA plans can dramatically affect consumer protections" because of "the inapplicability of state consumer protection laws and insurance regulation"); Brinna Ludwig, Who Is Your Health Insurer?, Regul. Rev. (Apr. 28, 2022), https://www.theregreview.org/2022/04/28/ludwig-who-is-your-health-insurer/ [https://perma.cc/WDK3-3N73] (noting that "[m]any employers self-fund health insurance" but these plans "lack state law protections" due to ERISA preemption).

130. See Paul Fronstin, Self-Insured Health Plans Since the ACA: Trends Remain Unclear, Emp. Benefits Rsch. Inst., Brief No. 566, Aug. 25, 2022, at 1, 3–7, https://

And employers of various sizes have long chosen self-funded plans for the deregulation that ERISA preemption offers them.[131]

Most notably for reproductive care, the employer's plan type determines whether it will have to abide by state prohibitions or mandates to cover various reproductive services.

3. *Covered Services.* — Neither ERISA nor the ACA establishes a set of required services that employer plans must cover. While the ACA requires that plans sold to *individuals* cover a minimum set of "essential health benefits," most employer plans have no such minimum.[132] Even within a particular institution or firm (large or small), employers can offer different health benefits to different types of employees, such as salaried versus hourly employees and executives versus nonexecutives.[133] Unionized workers may get coverage from a multiemployer health plan through collective bargaining, which often results in more comprehensive coverage.[134]

Identifying the subset of covered services relevant to reproductive care requires some winnowing of a working definition because reproductive health care encompasses a broad range of needs and services. At its most general level, "reproductive health" refers to "a state of complete physical, mental and social well-being in all matters relating to the reproductive system"[135] and usually includes maternal and infant health and sexually transmitted infections.[136] Medical and health sciences' concepts of

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www.proquest.com/docview/2708431371?accountid=10226 [https://perma.cc/XXE3-A8WH] (revealing the trends in self-insured health plans since the passage of the ACA).

131. See, e.g., HHS, Employer Decisionmaking, supra note 102 (noting the "importance of . . . ERISA preemption" to companies' decision to self-insure).

132. See 42 U.S.C. § 300gg-6(a) (2018) (requiring only individual and small group plans to cover the "essential health benefits"); see also Christen Linke Young, USC–Brookings Schaeffer Initiative for Health Pol'y, Taking a Broader View of "Junk Insurance" 9 (2020), https://www.brookings.edu/wp-content/uploads/2020/07/Broader-View_July_2020.pdf [https://perma.cc/PY38-UMP5] ("[T]here is no provision in federal law that requires employer health plans to cover a comprehensive array of benefits.").

133. See Are Employers Allowed to Offer Different Benefits to Different Employees and to Charge More for the Same Benefit, or Is This a Discriminatory Practice?, Soc'y for Hum. Res. Mgmt., https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/offeringdifferentbenefitsfordifferentemployees.aspx (on file with the *Columbia Law Review*) (last visited Jan. 18, 2024).

134. See 29 C.F.R. § 825.211(a) (2023). Union plans produced by collective bargaining tend to have more comprehensive benefits and less cost-sharing than employer-provided plans. See Jon R. Gabel, Heidi Whitmore, Jennifer L. Satorius, Jeremy Pickreign & Sam T. Stromberg, Collectively Bargained Health Plans: More Comprehensive, Less Cost Sharing Than Employer Plans, 34 Health Affs. 461, 465 (2015).

135. Sexual & Reproductive Health, UN Population Fund, https://www.unfpa.org/sexual-reproductive-health [https://perma.cc/TGC2-U4QJ] (last visited Nov. 6, 2023).

136. See Report of the International Conference on Population and Development, 40, U.N. Doc. A/CONF.171/13/Rev.1 (1995) ("Reproductive health . . . [involves] appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. . . . It also includes sexual health . . . and care related to reproduction and sexually transmitted [infections].").

reproductive care include both sexual and reproductive health, the main components of which advocate Ann Starrs and her coauthors recently defined as contraception, abortion, fertility and infertility, maternal and newborn health, reproductive cancers, sexually transmitted infections, and gender-based violence.[137] Many regulatory definitions of "reproductive health care" are similarly broad, encompassing whatever care relates to the human reproductive system.[138] The insurance industry does not use a standard definition of reproductive care, but insurers (both private and public) rely heavily on the standardized International Classification of Diseases (ICD) codes for diagnoses and Current Procedural Terminology (CPT) codes to describe procedures performed when gathering data and processing claims.[139] These codes describe all aspects of care, including reproductive care, at a very granular level,[140] though insurance policies typically describe coverage at a very general, categorical level.

For the purposes of describing insurance coverage of reproductive services, this Article focuses on the following services and treatments in the components identified by Starr and her coauthors that bear most directly on whether and when an individual may reproduce, and the immediate consequences of reproduction: (a) contraception; (b) fertility, conception, infertility; (c) maternity care: pregnancy, prenatal, labor, delivery, postnatal; (d) newborns, infants; and (e) pregnancy loss, abortion.

Although this definition of reproductive services does not expressly include gender-affirming care, the issues raised in this Part have many parallel applications.[141]

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137. Ann M. Starrs et al., Accelerate Progress—Sexual and Reproductive Health and Rights for All: Report of the Guttmacher–*Lancet* Commission, 391 Lancet 2642, 2643, 2645–46, 2652 fig.3 (2018).

138. See, e.g., 18 U.S.C. § 248(e)(5) (2018) (defining "reproductive health services" in the Freedom of Access to Clinic Entrances Act as including "medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy").

139. Overview of Coding and Classification Systems, Ctrs. for Medicare & Medicaid Servs., https://www.cms.gov/cms-guide-medical-technology-companies-and-other-interested-parties/coding/overview-coding-classification-systems [https://perma.cc/NB8A-4B7B] (last updated Sept. 6, 2023) (explaining Medicare and Medicaid's use of Centers for Medicare and Medicaid Services and ICD coding systems); see also CPT Overview and Code Approval, AMA, https://www.ama-assn.org/practice-management/cpt/cpt-overview-and-code-approval [https://perma.cc/4Z9X-F7N9] (last visited Oct. 25, 2023) (explaining how most AMA professionals use the CPT system); International Statistical Classification of Diseases and Related Health Problems (ICD), WHO, https://www.who.int/classifications/classification-of-diseases [https://perma.cc/HXK7-8JBM] (last visited Oct. 25, 2023) (explaining the functions of the ICD system).

140. See, e.g., Commonly Used ICD-10 Codes in Reproductive Healthcare, Fam. Plan. Nat'l Training Ctrs., https://rhntc.org/sites/default/files/resources/fpntc_icd10_codes.pdf [https://perma.cc/8N3J-W258] (last visited Oct. 25, 2023) (categorizing reproductive health care conditions using specific labels).

141. There exist few data at present about the coverage or denial of gender-affirming care among employer plans, although the ACA's antidiscrimination provision protects

Which reproductive care services do plans cover? Most health plans promise coverage for all care that is "medically necessary" and define that term.[142] Initially, many insurance coverage decisions thus depend on the employers' administrator determining whether the services fit their definition of medical necessity.[143] Because the medical necessity catchall standard gives the insurer the authority to determine most coverage decisions,[144] it is the subject of consumer protection regulation and frequently of administrative appeals and litigation.[145] It is the also the source of many coverage denials for abortion and infertility treatments, as discussed below.[146]

ERISA, HIPAA, and the ACA have a few requirements for all private employer plans. ERISA's coverage requirements mostly rely on an if–then conditional application in which the ERISA requirement applies only *if* the employer has already chosen to cover a particular type of service. For example, *if* a self-insured plan covers hospitalizations *and* maternity, *then* it

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transgender individuals. See William V. Padula & Kellan Baker, Coverage for Gender-Affirming Care: Making Health Insurance Work for Transgender Americans, 4 LGBT Health 244, 244–45 (2017) (noting that "many U.S. health insurers deny coverage for transgender healthcare services" but that the landscape is changing). There is no federal law requiring that employer plans specifically cover gender-affirming care, but courts have held that their refusal to do so under the same terms as other "medically necessary" care unlawfully discriminates on the basis of sex and therefore violates Title VII. See, e.g., Lange v. Houston County, 608 F. Supp. 3d 1340, 1356–60 (M.D. Ga. 2022). And some states have added their own coverage mandates and protections. See Katie Keith, Unpacking Colorado's New Guidance on Transgender Health, Commonwealth Fund (Nov. 10, 2021), https://www.commonwealthfund.org/blog/2021/unpacking-colorados-new-guidance-transgender-health [https://perma.cc/JX38-NGC5] (reporting that Colorado's essential health benefits benchmark marketplace plan will require insurers to cover gender-affirming care beginning in 2023).

142. See Amy B. Monahan & Daniel Schwarcz, The Rules of Medical Necessity, 107 Iowa L. Rev. 423, 427 (2022) (explaining the health insurance industry's recent shift to "rules rather than standards" to define what is medically necessary); see also Nat'l Ass'n of Ins. Comm'rs, Understanding Health Bills: What Is Medical Necessity? 1 (n.d.), https://content.naic.org/sites/default/files/consumer-health-insurance-what-is-medical-necessity.pdf [https://perma.cc/T5ZN-UTQP] (last visited Oct. 26, 2023) (explaining that health insurance plans will "provide a definition of 'medical necessity' or 'medically necessary services'" in their policies).

143. See Wendy K. Mariner, Patients' Rights After Health Care Reform: Who Decides What Is Medically Necessary?, 84 Am. J. Pub. Health 1515, 1517 (1994) ("[D]ecisions about what counts as medically necessary care will be made, in the first instance, by individual health plans.").

144. See id. (noting the "considerable leeway" that health plans have "to make plausible choices about what is medically necessary").

145. See Sara Rosenbaum, Brian Kamoie, D. Richard Mauery & Brian Walitt, HHS, Pub. No. 03-3790, Medical Necessity in Private Health Plans: Implications for Behavioral Health Care 19–26 (2003), https://hsrc.himmelfarb.gwu.edu/cgi/viewcontent.cgi?article=1170&context=sphhs_policy_facpubs [https://perma.cc/S7V9-GYQF] ("Since the introduction of the concept of medical necessity into insurance contracts, countless challenges have been made to insurer and health plan denials of coverage based on medical necessity criteria.").

146. See infra text accompanying notes 175–179.

must cover hospital stays for up to 48 hours after vaginal delivery and up to 96 hours after cesarean section.[147] Federal laws requiring plans to cover certain services have been aptly described as piecemeal "single-service mandates" or "legislation by body-part."[148]

ERISA does not require that employer plans cover pregnancy or maternity, but the Pregnancy Discrimination Act of 1978 (PDA) requires that employers with fifteen or more employees cover maternity services.[149] Even so, employers with fifty or more employees have no obligation to cover labor and delivery for the employees' dependents,[150] many of whom are of reproductive age thanks to the ACA's requirement that plans enroll dependents through age twenty-six.

Fifteen states require some health plans to cover at least some infertility treatments, with great variation in the types of infertility treatments covered and with numerous exceptions, exclusions, and caps on these offerings.[151] Self-insured plans do not have to abide by these fifteen state mandates, thanks to ERISA. For the most part, however, even under fully insured plans, "[e]mployers make that decision . . . . Most insurance companies would offer [fertility coverage] if their customers—the employers—push[ed] for it."[152]

The ACA requires coverage of contraception for all plans, albeit indirectly.[153] The ACA's requirement that all plans cover "preventive health services" extends to items listed by the U.S. Preventive Services Task Force (Task Force) and, for women, any additional preventative care and screenings

147. 29 U.S.C. § 1185(a), (c)(2) (2018).

148. Cynthia Dailard, Guttmacher Inst., Contraceptive Coverage: A 10-Year Retrospective 7 (2004), https://www.guttmacher.org/sites/default/files/article_files/gr070206.pdf [https://perma.cc/YMY3-DLX4] [hereinafter Dailard, Contraceptive Coverage]; cf. Hyman, supra note 70, at 18–24 (criticizing the empirical basis for enacting a protection against early postpartum hospital discharges, known as "drive-through" or "drive-by" deliveries).

149. 42 U.S.C § 2000e(k) (2018); see also EEOC, EEOC-CVG-2015-1, Enforcement Guidance on Pregnancy Discrimination and Related Issues (2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues [https://perma.cc/7SMK-7Q9Q] [hereinafter EEOC PDA Guidance].

150. See FAQs: Health Insurance Marketplace and the ACA—Women's Health, KFF, https://www.kff.org/faqs/faqs-health-insurance-marketplace-and-the-aca/im-covered-as-a-dependent-under-my-parents-plan-and-im-pregnant-will-my-parents-plan-cover-my-prenatal-care-and-delivery-will-my-parents-plan-cover-my-ba/ [https://perma.cc/9UGS-XM5X] (last visited Oct. 26, 2023). These employers do have to cover prenatal care. Id.

151. See Weigel et al., supra note 31. Two states (California and Texas) require group health plans to *offer* at least one policy with infertility coverage (a "mandate to offer"), but employers are not required to choose these plans. Id.

152. Fertility Benefits: Who Pays the Price, WinFertility, https://www.winfertility.com/blog/fertility-benefits-pays-price/ [https://perma.cc/TS5P-KCMN] (last visited Jan. 19, 2024) (second alteration in original) (referring to a quotation from Sean Tipton, the American Society for Reproductive Medicine's Chief Advocacy, Policy, and Development Officer at a national meeting of the Society).

153. Ikemoto, supra note 116, at 764–65.

in the Health Resources and Services Administration (HRSA) guidelines.[154] Those statutory provisions do not mention contraception. But HRSA and the Task Force, in consultation with the Institute of Medicine, determined that preventative coverage should include prevention of pregnancy and therefore the "full range" of FDA-approved contraceptive methods.[155] The requirement to cover contraception could be lifted if courts accept the argument raised by opponents of the ACA in *Braidwood Management Inc. v. Becerra* that HRSA and the Task Force's authority are improper delegations of power.[156] And plans that did not cover preventative services before the ACA can still refuse to do so now under the "grandfather" exception in the statute.[157] Many employers also qualify for religious exemptions from the contraceptive coverage requirement, which extends to closely held for-profit businesses with religious objections thanks to *Hobby Lobby*.[158]

Antidiscrimination statutes restrict employers from selecting covered services in ways that discriminate based on enrollees' sex, gender, or disability.[159] The ACA expressly prohibited[160] some of the most common forms of past discrimination, like excluding prescription contraceptives from a prescription drug benefit.[161] But, under the PDA, even for services not

154. 42 U.S.C. § 300gg-13(a)(1), (4).

155. Women's Preventative Services Guidelines, Health Res. & Servs. Admin., https://www.hrsa.gov/womens-guidelines [https://perma.cc/2ZDD-FPDX] (last visited Jan. 20, 2024).

156. *Braidwood*, 627 F. Supp. 3d 624, 649 (N.D. Tex. 2022); see also Ian Millhiser, There's a New Lawsuit Attacking Obamacare—and It's a Serious Threat, Vox (Apr. 2, 2021), https://www.vox.com/2021/4/2/22360341/obamacare-lawsuit-supreme-court-little-sisters-kelley-becerra-reed-oconnor-nondelegation [https://perma.cc/3FJQ-2JZT] (explaining plaintiffs' arguments against the preventative care provisions of the ACA).

157. See Health Insurance Rights & Protections, HealthCare.gov, https://www.healthcare.gov/health-care-law-protections/grandfathered-plans/ [https://perma.cc/9FWB-L2EU] (last visited Oct. 25, 2023) (noting that grandfathered plans are not required to cover preventative care).

158. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 719 (2014) (holding that an HHS mandate requiring employer-sponsored health insurance plans to cover contraceptives "substantially burdened" a closely held corporation's exercise of religion).

159. See Section 1557 of the Patient Protection and Affordable Care Act, HHS, https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html [https://perma.cc/QC6P-TJ7J] (last updated Nov. 15, 2023); see also Law, supra note 42, at 373 (discussing Title VII of the Civil Rights Act).

160. See Ikemoto, supra note 116, at 766 (noting "the ACA rule requiring new plans to cover contraception without cost-sharing").

161. Compare Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1274 (W.D. Wash. 2001) (holding that the Pregnancy Discrimination Act prohibited the exclusion of contraceptives from a plan), with In re Union Pac. R.R. Emp. Pracs. Litig., 479 F.3d 936, 942 (8th Cir. 2007) (holding that contraception was not "related to" pregnancy and therefore not required to be in a prescription drug plan under the PDA).

expressly required by the ACA, employer plans cannot offer benefits in a way that excludes benefits used solely by potentially pregnant people.[162]

Except for abortion. Abortion remains the reproductive service about which employer plans have nearly total discretion in coverage. Republicans used abortion as a wedge issue in negotiations over the ACA and other health reform efforts; consequently, federal law does not require coverage and explicitly preserves plans' ability to exclude it.[163] Some states require coverage; some states prohibit it.[164] So employers who choose to offer fully insured plans subject to state law must also abide by that state's requirements or prohibitions.[165] But ERISA preempts the application of any of these laws to self-funded plans.[166] An employer in a state that prohibits insurance coverage of abortion can self-fund a plan that covers it. Likewise, an employer in a state that requires insurance coverage of abortion can self-fund a plan that excludes it. And, because the ERISA preemption extends to those laws that merely "relate to" employer benefits, it should preempt states from enforcing

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162. For example, no statute requires large group employer plans to cover dependents' pregnancies, so many employers' plans exclude this coverage. See, e.g., Michelle Andrews, Some Plans Deny Pregnancy Coverage for Dependent Children, KFF Health News (Aug. 6, 2012), https://kffhealthnews.org/news/under-26-pregnancy-coverage-michelle-andrews-080712/ [https://perma.cc/ZDV7-62SJ]. Yet the exclusion of dependents' pregnancies from group plan coverage unlawfully discriminates on the basis of pregnancy, as the Biden Administration's proposed rule for implementing the ACA's Section 1557 nondiscrimination provision would formally recognize. See Letter from Nat'l Women's L. Ctr. to Fontes Rainer, Dir. of the Off. of C.R., HHS (Oct. 5, 2022), https://nwlc.org/resource/nwlc-submits-comment-on-nondiscrimination-in-health-programs-and-activities-section-1557/ [https://perma.cc/B8NQ-NKD3]; cf. *Erickson*, 141 F. Supp. 2d at 1270–71 (explaining that "the intent of Congress in enacting the PDA" was to override precedents from Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976), and Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974), under which pregnancy- and abortion-related provisions were not unlawful sex discrimination); Rory Akers, Dependent Child Pregnancy . . . To Cover or Not Cover? What's Required?, Lockton (Dec. 4, 2017), https://locktonbenefitsblog.com/dependent-child-pregnancy-to-cover-or-not-cover-whats-required/ [https://perma.cc/2ZBT-ZTQL] (reflecting a private benefits consulting firm's advice to employers during the Trump Administration about covering maternity expenses for dependent children).

163. Nicole Huberfeld, With Liberty and Access for Some: The ACA's Disconnect for Women's Health, 40 Fordham Urb. L.J. 1357, 1383–87 (2013); Ikemoto, supra note 116, at 757–64; see also Tony Perkins, Don't Fund Abortions With Health Bill, Politico (July 28, 2009), https://www.politico.com/story/2009/07/dont-fund-abortions-with-health-bill-025475 [https://perma.cc/5JM5-RLWZ] (providing a contemporary example of how abortion concerns are leveraged in the public discourse surrounding the ACA).

164. Long et al., supra note 20 (showing that eleven states prohibit coverage for abortion and five states require insurers to cover it).

165. See Maher, Pro-Choice Plans, supra note 2, at 459 ("For insured plans, states can regulate the plan's insurer.").

166. See id. at 458–59 (noting that "states *cannot* directly regulate self-insured plans because of the deemer clause").

most of their antiabortion laws against self-funded plans like Walmart's that cover abortion and related travel expenses.[167]

This discretion has resulted in 10% of employees being covered by employer plans that expressly exclude abortion coverage in some (6%) or all (4%) circumstances,[168] in addition to those workers in states whose laws ban abortion coverage by fully insured plans. Employees of companies with 5,000 or more employees are more likely to be subject to an express abortion exclusion policy than those at smaller firms, and self-funded plans are more likely to have these exclusions.[169] Private not-for-profit employers (many of whom are religious institutions) are much more likely to exclude abortion from their plans than private for-profit employers.[170] Even plans that do cover abortion often have restrictions on the circumstances in which an abortion will be covered, including those relating to method, gestational age, and number of services covered per employee.[171]

"Elective" versus "medically necessary" abortion has long been a contested distinction, even under *Roe v. Wade*.[172] In *Doe v. Bolton*, decided on the same day as *Roe*, the Supreme Court considered a Georgia state law that criminalized abortion except in cases of rape, of fetal abnormality, or in which a licensed physician certified the procedure to be "necessary" to protect the pregnant person's life and health.[173] Responding to a vagueness challenge to the medical necessity determination, the Court held that the provision was sufficiently clear to be enforceable in postviability abortion scenarios, even under *Roe*, because it left space for the "attending physician . . . to make [their] best medical judgment."[174] The Hyde Amendment debate about whether Congress could withhold public funding for both "therapeutic or medically necessary" abortions and "elective" ones[175] perpetuated a binary view, which continued to influence all manner of abortion regulations.[176] And

167. See id. at 455 (noting that if the state law "relate[s] to" employee benefit plans, it is preempted (alteration in original) (quoting 29 U.S.C. § 1144(a) (2018))).

168. See Long et al., supra note 20.

169. See id. (finding those who work at the largest firms and at firms with self-funded plans to have a 17% and 14% chance, respectively, of having a policy expressly excluding abortion).

170. See id. (finding covered workers at not-for-profit firms to have an 18% chance of having a policy excluding abortion coverage compared to a 6% chance for covered works at private for-profit firms).

171. See id. (observing that these types of restrictions are prevalent in private plans without complete abortion bans).

172. 410 U.S. 113 (1973).

173. 410 U.S. 179, 183 (1973) (citing Ga. Code Ann. § 26-1202 (1969) (current version at Ga. Code Ann. § 16-12-141 (2023))).

174. Id. at 192.

175. See, e.g., Jon O. Shimabukuro, Cong. Rsch. Serv., RL33467, Abortion: Judicial History and Legislative Response 16–17 (2022) (reviewing cases in which the Court found "no statutory or constitutional obligation of the federal government or the states to fund medically necessary abortions").

176. See B. Jessie Hill, Essentially Elective: The Law and Ideology of Restricting Abortion During the COVID-19 Pandemic, 106 Va. L. Rev. Online 99, 112–13 (2020),

insurers of all types frequently classify fertility treatments as not "medically necessary" and therefore as services not covered under their plans.[177] Medical necessity continues to circumscribe private-employer coverage of abortions, too,[178] and remains a point of great contention for antichoice activists.[179] Within the insurance context, the medical-necessity determination gives employer plans exceptional discretion to deny coverage for abortion and fertility treatments.

4. *Provider Networks and Cost-Sharing*. — Even if they choose to cover aspects of reproductive care, employers may design their plans with restrictions on choice of providers or impose patient cost-sharing, both of which impede access to that covered care. Even before *Dobbs* prompted some states to criminalize abortion care, the cost of reproductive care and the dearth of doctors and facilities to provide it imposed practical hurdles to accessing reproductive care, including for people with health insurance, which persist today.[180] The cost-sharing and provider network features of group health plans further limit that access.[181]

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https://virginialawreview.org/wp-content/uploads/2020/12/Hill_FinalCheck.pdf [https://perma.cc/84ZC-LSLG] [hereinafter Hill, Essentially Elective] (explaining the problematic definition of "elective" used to justify abortion restrictions during the COVID-19 pandemic); B. Jessie Hill, What Is the Meaning of Health? Constitutional Implications of Defining "Medical Necessity" and "Essential Health Benefits" Under the Affordable Care Act, 38 Am. J.L. & Med. 445, 453 (2012) (noting how medical-necessity abortions "seemed to play a role in the legislative debates in the 1970s over the reauthorization and scope of the Hyde Amendment"); Katie Watson, Why We Should Stop Using the Term "Elective Abortion," 20 AMA J. Ethics 1175, 1177 (2018) (arguing that when hospitals prevent willing physicians from performing elective abortions, institutions are imposing moral judgment on patients and robbing them of medical care access).

177. Weigel et al., supra note 31.

178. See Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2018) (requiring employer-plan coverage for abortion only when "the life of the mother would be endangered if the fetus were carried to term, or . . . whe[n] medical complications have arisen from an abortion").

179. See, e.g., Robert P. Casey, No, Abortion Isn't a Health Care Service, *in* Abortion Services and President Clinton's Health Plan: Two Views, 3 J. Am. Health Pol'y 27, 29, 31 (1993) (arguing that, because the majority are "elective," abortions should not be included in a standard benefits package); "Medically Necessary" or "Health" Abortions: Abortion on Demand by Another Name, U.S. Conf. of Catholic Bishops (Nov. 13, 1995), https://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/medically-necessary-or-health-abortions-abortion-on-demand-by-another-name [https://perma.cc/S5KS-3TD7] (arguing that "medically necessary" abortion is merely a "term[] of art for abortion on demand").

180. See Luciana E. Hebert, Erin E. Wingo, Lee Hasselbacher, Kellie E. Schueler, Lori R. Freedman & Debra B. Stulberg, Reproductive Healthcare Denials Among a Privately Insured Population, 23 Preventive Med. Reps. 1, 2 (2021) (noting how institutional restrictions filter down from the health care system to individual hospitals and physicians to effectively deny even insured patients access to reproductive health care).

181. See, e.g., Lee A. Hasselbacher, Erin Wingo, Alex Cacioppo, Ashley McHugh, Debra Stulberg & Lori Freedman, Beyond *Hobby Lobby*: Employer's Responsibilities and Opportunities to Improve Network Access to Reproductive Healthcare for Employees, 4

The provider restrictions that employer plans impose typically take the form of referrals and "networking." Employers may choose to require a primary care referral as a prerequisite to receiving care by a specialized doctor.[182] Because the great majority of reproductive care services are provided by specialists (with limited roles for primary care in straightforward matters like prescribing birth control), designing a plan to require primary-care referral can impose an additional hurdle to receiving reproductive care. If private employers' plans cover gynecological services *and* require primary care referrals, then an ERISA regulation restricts the plan from imposing this referral requirement on OB-GYN providers.[183]

Networking refers to the practice by which employers and their insurers may choose the providers that they will (and will not) reimburse for covered services.[184] The supply of reproductive care providers is limited, even in states that have not already banned abortion care: The United States has among the fewest maternal health providers per capita of any high-income country.[185] Many employer plans attempt to control costs by selecting a "narrow" network of covered providers, which also tends to curb patients' use of their insurance to visit doctors.[186] "Even if the costs of a specific health service like contraception are *covered*, people can still experience barriers to reproductive health care because of the limited providers in their insurance network."[187]

The choice of providers for the plan network has additional ramifications for reproductive care because Catholic hospitals and health systems operate under a religious directive to refuse to perform many covered reproductive services like contraception, sterilization, fertility treatment, and abortion.[188] So even if the law permits it and insurance covers it, many

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Contraception: X, at 1, 1 (2022) (pointing to the "barriers" that persist, even with coverage, from "limited providers" in network).

182. See generally Referral, HealthCare.gov, https://www.healthcare.gov/glossary/referral/ [https://perma.cc/6SUW-DMDM] (last visited Oct. 25, 2023) (defining "referral").

183. 29 C.F.R. § 2590.715-2719A(a)(1)–(3) (2023) (protecting patients' choice of health care professional for their obstetrical and gynecological care).

184. Cf. What You Should Know About Provider Networks, HealthCare.gov: Health Ins. Marketplace 1, https://marketplace.cms.gov/outreach-and-education/what-you-should-know-provider-networks.pdf [https://perma.cc/4K3V-7XVC] (last visited Oct. 25, 2023) ("A provider network is a list of the doctors, other health care providers, and hospitals that a plan contracts with to provide medical care to its members.").

185. See Munira Z. Gunja, Shanoor Seervai, Laurie C. Zephyrin & Reginald D. Williams II, Health and Health Care for Women of Reproductive Age, Commonwealth Fund (Apr. 5, 2022), https://www.commonwealthfund.org/publications/issue-briefs/2022/apr/health-and-health-care-women-reproductive-age [https://perma.cc/25B3-V7YW].

186. See Alicia Atwood & Anthony T. Lo Sasso, The Effect of Narrow Provider Networks on Health Care Use, 50 J. Health Econ. 86, 90 (2016) (noting that offering a narrow network plan is a way for firms to control health care spending).

187. Hasselbacher et al., supra note 181, at 1.

188. See U.S. Conf. of Catholic Bishops, Ethical and Religious Directives for Catholic Health Care Services 18–19 (6th ed. 2018), https://www.usccb.org/resources/ethical-

seeking reproductive care are denied either the service or coverage or both. Among those with employer-sponsored insurance through S&P 500 companies, eleven percent reported someone on their health plan being denied a reproductive service that their health plan explicitly covered.[189] Even though the ACA requires plans to cover contraception, prenatal care, and labor and delivery, these services were the most commonly reported denials.[190] The prevalence of Catholic health systems in insurance networks contributes to this phenomenon.[191] In some states, Catholic hospitals make up nearly forty percent of the health system.[192]

And even outside of Catholic facilities, federal laws protect individual providers who refuse some reproductive services as a matter of religious belief.[193] While employer plans have some duties to contract with an adequate network of providers for the services they have promised to cover,[194] the large number of Catholic-owned facilities, and the increasing use of individual providers' objections even in non-Catholic facilities, can undermine the actual availability of covered services through the plan's network.[195]

Even if an employer plan covers reproductive services, the plan may impose additional out-of-pocket charges for patients who use those services.[196] Cost-sharing requirements tend to curb patients' use of those services and can create financial barriers to access even though the patient is insured.[197] To combat this effect, the ACA prohibits plans from imposing

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religious-directives-catholic-health-service-sixth-edition-2016-06_0.pdf [https://perma.cc/U8KD-KM8V]; see also Hebert et al., supra note 180, at 1.

189. See Hebert et al., supra note 180, at 4. For women, the reported denial rate was fourteen percent. Id.

190. See id.

191. See id. at 1.

192. See Hasselbacher et al., supra note 181, at 2.

193. Id.

194. Cf. Karen Pollitz, Network Adequacy Standards and Enforcement, KFF (Feb. 4, 2022), https://www.kff.org/health-reform/issue-brief/network-adequacy-standards-and-enforcement/ [https://perma.cc/JF64-ATT6] (assessing ACA-required network adequacy in qualified health plans offered through the marketplace).

195. Women in states that allow abortions only in limited circumstances frequently encounter providers that are unwilling to provide the service even under those circumstances. See, e.g., Amy Schoenfeld Walker, Most Abortion Bans Include Exceptions. In Practice, Few Are Granted., N.Y. Times (Jan. 21, 2023), https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html (on file with the *Columbia Law Review*).

196. See Cost Sharing, HealthCare.gov, https://www.healthcare.gov/glossary/cost-sharing/ [https://perma.cc/9KJP-589U] (last visited Oct. 25, 2023) (defining "cost sharing").

197. See, e.g., Geetesh Solanki & Helen Halpin Schauffler, Cost-Sharing and the Utilization of Clinical Preventive Services, 17 Am. J. Preventive Med. 127, 132 (1999) (finding lower utilization by employees in cost-sharing plans for eleven out of sixteen preventative services).

cost-sharing requirements on preventative services, including contraception.[198] Despite this federal mandate, twenty-five percent of women with private insurance report having to pay at least part of the cost of prescription contraception out of pocket, and many do not know that cost-sharing is prohibited.[199]

Federal laws requiring coverage of maternity and newborn care, however, expressly permit employer plans to impose cost-sharing rules on these services.[200] The cost-sharing rules applied to covered reproductive services add up quickly because the cost of reproductive care is often substantial. For example, "health costs associated with pregnancy, childbirth, and post-partum care average a total of $18,865," for which "women enrolled in large [employer] plans" paid an average of $2,854 out-of-pocket through cost-sharing.[201] Women in employer plans paid even more out-of-pocket for cesarean section deliveries (an average of $3,214).[202]

Public employers provide a unique example of the government acting as both the regulator and the provider of employee benefits.[203] The federal

198. 42 U.S.C. § 300gg-13(a)(4) (2018); see also Lois Kaye Lee, Michael Carl Monuteaux & Alison Amidei Galbraith, Women and Healthcare Affordability After the ACA, 35 J. Gen. Internal Med. 959, 959 (2020) (noting that, despite the ACA mandating maternity and preventative service coverage without cost sharing, "disparities in cost-related medication nonadherence still remains greater for women when compared with men").

199. Brittni Frederiksen, Usha Ranji, Michelle Long, Karen Diep & Alina Salganicoff, Contraception in the United States: A Closer Look at Experiences, Preferences, and Coverage, KFF (Nov. 3, 2022), https://www.kff.org/womens-health-policy/report/contraception-in-the-united-states-a-closer-look-at-experiences-preferences-and-coverage/ [https://perma.cc/4WC2-TUYB]. Some paid out of pocket for specific forms of contraception that were not covered, others paid because they received out-of-network care, and many did not know why they paid out of pocket. Id.

200. E.g., 29 U.S.C. § 1185(c)(3) (2018) (explaining that "[n]othing in [the Newborn's and Mothers' Health Protection Act] shall be construed as preventing a group health plan or issuer from imposing deductibles, coinsurance, or other cost-sharing in relation to benefits" required by the Act); id. § 1185b(a) (explaining that the Women's Health and Cancer Rights Act permits employer group plans to impose "annual deductibles and coinsurance provisions" as long as they are "consistent with those established for other benefits"); see also Krauss v. Oxford Health Plans, Inc., 517 F.3d 614, 626 (2d Cir. 2008) (construing the provisions of the Women's Health and Cancer Rights Act).

201. Matthew Rae, Cynthia Cox & Hanna Dingel, Health Costs Associated With Pregnancy, Childbirth, and Postpartum Care, Peterson–KFF: Health Sys. Tracker (July 13, 2022), https://www.healthsystemtracker.org/brief/health-costs-associated-with-pregnancy-childbirth-and-postpartum-care/ [https://perma.cc/9AUX-7ADK].

202. Id.

203. See, e.g., Isaac D. Buck, The Drug (Pricing) Wars: States, Preemption, and Unsustainable Prices, 99 N.C. L. Rev. 167, 180–201 (2020) (examining how state governments function as third-party payers, consumers, and regulators of prescription drugs); see also Sabrina Corlette, Karen Davenport & Emma Walsh-Alker, Geo. Univ. Ctr. on Health Ins. Reforms, Mixed Results: State Employee Health Plans Face Challenges, Find Opportunities to Contain Cost Growth 5 (2023), https://sehpcostcontainment.chir.georgetown.edu/documents/Mixed-Results-Cost-Growth.pdf [https://perma.cc/XP3B-K6EP] (noting that state health plan administrators can often "face pressure from state policymakers to generate savings").

government covers more than twenty million employees and their dependents[204] through several programs: civilian and tribal employees through the Federal Employees Health Benefits Program (FEHB),[205] active-duty military employees through TRICARE,[206] veterans through Veterans Affairs,[207] and veterans' families through CHAMPVA.[208] Although Congress initially applied appropriations restrictions only to Medicaid, it soon passed Hyde Amendment–style appropriation restrictions for federal employers too, restricting abortion coverage for employees of the Departments of Defense, Treasury, Postal Service, and Justice, and finally for all employees through the FEHB program.[209] Initially, the Office of Personnel Management (OPM) had eliminated abortion coverage for federal civilian employees in all circumstances other than to save the life of the pregnant person. Federal employee unions sued OPM to challenge the restriction, and the district court held that OPM had acted "outside the scope of its authority" in limiting the benefits this way without a statutory directive.[210] Within a year, Congress responded by imposing Hyde Amendment–style budget restrictions to the same effect.[211]

FEHB must cover maternity care under the PDA, and the plan has chosen to cover only diagnostic and iatrogenic fertility treatments.[212] It covers contraception, and the OPM "strongly encourages" FEHB plans to cover the full range of FDA-approved contraceptives, in line with the ACA requirement.[213] TRICARE covers contraceptives but not Plan B; the plan

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204. See Long et al., supra note 20.

205. See Healthcare, U.S. Off. of Pers. Mgmt., https://www.opm.gov/healthcare-insurance/healthcare/ [https://perma.cc/CZ52-8EYC] (last visited Oct. 24, 2023).

206. See Eligibility, TRICARE, https://www.tricare.mil/Plans/Eligibility [https://perma.cc/54SJ-4DV5] (last updated July 25, 2023).

207. See Eligibility for VA Health Care, VA, https://www.va.gov/health-care/eligibility/ [https://perma.cc/2ZAL-VFLZ] (last updated Sept. 30, 2023).

208. See CHAMPVA Benefits, VA, https://www.va.gov/health-care/family-caregiver-benefits/champva/ [https://perma.cc/NE3R-NTUA] (last updated Oct. 16, 2023).

209. See Act of Oct. 30, 1986, Pub. L. No. 99-591, § 209, 100 Stat. 3341, 3341–56 (DOJ); Act of Oct. 19, 1984, Pub. L. No. 98-525, § 1401(e)(5)(A), 98 Stat. 2492, 2618 (codified at 10 U.S.C. § 1093(a) (2018)) (DOD); Act of Nov. 14, 1983, Pub. L. No. 98-151, § 101(f), 97 Stat. 964, 973 (Treasury, USPS, and Federal Employees Health Benefits); Act of Oct. 13, 1978, Pub. L. No. 95-457, § 863, 92 Stat. 1231, 1254 (military).

210. See Am. Fed'n of Gov't Emps. v. Devin, 525 F. Supp. 250, 252 (D.D.C. 1981).

211. See Act of Nov. 14, 1983, Pub. L. No. 98-151, § 101(f), 97 Stat. 964, 973 (codified at scattered sections of 22 U.S.C.).

212. See Molly Weisner, Why Don't Federal Health Plans Cover More Infertility Treatments?, Fed. Times (Nov. 7, 2022), https://www.federaltimes.com/fedlife/benefits/2022/11/07/why-dont-federal-health-plans-cover-more-infertility-treatments/ [https://perma.cc/ARL8-5757] (reporting on legislator statements that expanding coverage for infertility would be "prohibitively expensive").

213. See U.S. Off. of Pers. Mgmt., Letter Number 2024-03, FEHB Program Carrier Letter (Jan. 30, 2024) (listing the various contraceptive methods that are covered); see also Exec. Order No. 14,101, 88 Fed. Reg. 41815 (Jun. 23, 2023) (directing OPM to consider

covers contraceptives without copay at military medical facilities but imposes a copay for service members' dependents who obtain contraception off base.[214]

TRICARE covers all the maternity care mandated by the PDA but covers very few Assisted Reproductive Technology (ART) services—except when infertility results from injury while on active duty.[215]

State and local governments employed 19.6 million people in 2002; local governments accounted for almost 75% of that number through employment of public schools and other services.[216] Thirteen percent of employees covered by state and local government plans are subject to abortion-coverage restrictions and exclusions because twenty states had bans on coverage of abortion in their public employee plans even before *Dobbs*.[217] But other states both require coverage of abortion in commercial insurance plans and provide coverage for their employees.[218] Fifteen states require commercial insurers to cover infertility treatment at some level,[219] and some cover the full range of infertility treatments including ART for state employees, too.[220] Many of these state and local governments collectively bargain their benefits with public-sector unions.[221]

B. *The Burdens of Employers' Choices*

Workers have become increasingly concentrated in large firms, as nearly 70% of people with employer-sponsored insurance are employed by firms with more than 200 employees and 38% of workers are at firms with more than 5,000 employees.[222] This heavy reliance on employers for health

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additional steps to "ensure, where appropriate, robust coverage of contraception under Federal programs").

214. See Health & Wellness: Contraception Chart, TRICARE, https://www.tricare.mil/HealthWellness/Public-Health/SexualHealth/Contraception-Chart [https://perma.cc/YL43-SGH6] (last updated Mar. 15, 2023).

215. See Covered Services: Assisted Reproductive Services, TRICARE, https://www.tricare.mil/CoveredServices/IsItCovered/AssistedReproductiveServices [https://perma.cc/H2ML-2KWZ] (last updated Dec. 14, 2022).

216. See Current Employment Statistics, Bureau Lab. Stats., https://www.bls.gov/ces/ (on file with the *Columbia Law Review*) (last visited Oct. 26, 2023).

217. See Long et al., supra note 20.

218. See id.

219. See Weigel et al., supra note 31.

220. See, e.g., Div. of Pensions & Benefits, N.J. Dep't of Treasury, Member Guidebook for Employees and Retirees Enrolled in the State Health Benefits Program 16, 36–37 (2023), https://www.nj.gov/treasury/pensions/documents/guidebooks/hb0814a.pdf [https://perma.cc/E5K6-6J4E].

221. See Monique Morrissey, Unions Can Reduce the Public-Sector Pay Gap, Econ. Pol'y Inst. (June 17, 2021), https://www.epi.org/publication/unions-public-sector-pay-gap/ [https://perma.cc/7DV5-KXZB].

222. 2019 Employer Health Benefits Survey, KFF (Sept. 25, 2019), https://www.kff.org/report-section/ehbs-2019-survey-design-and-methods/ [https://perma.cc/GXY4-CGVE].

insurance and heavy concentration of workers in a few large firms gives large employers considerable sway in health policy. Walmart's health benefit decisions alone affect millions of people.[223] While small firms' benefit decisions do not have the same scope of impact on the population, they have as much impact on individual employees.

Employers' choices reflect a variety of factors but most directly reflect their economic concerns about costs, workforce recruitment, retention, and productivity.[224] For the majority of employer firms, who do not collectively bargain about benefits with unionized employees, a combination of firm executives and outside consultants control the decisions whether to offer benefits and how to design them.[225] They often solicit employee input through surveys.[226] The process takes months and culminates in the selection of a vendor to provide or administer the benefits for a twelve-month period.[227]

With cost and administrative burdens cited by employers as first-order concerns in their benefits decisions,[228] the cost implications of covering reproductive care services and providers—and *not* covering them—reveal where the financial burdens of employers' choices fall.

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223. See Walmart, supra note 4 (describing a Walmart workforce of 1.6 million in the United States). Walmart's benefits decisions also affect many of the workers' spouses and children.

224. See, e.g., Buchmueller, supra note 63, at 2 (discussing the attractiveness of employer-sponsored health plans for acquiring and retaining employees); Oriana González & Arielle Dreher, Employers Expand Reproductive Health Benefits Amid Tight Labor Market, Axios (Oct. 11, 2022), https://www.axios.com/2022/10/11/fertility-benefit-reproductive-health-labor (on file with the *Columbia Law Review*) ("[C]ompanies are aware that offering [fertility] benefits [can] improve employee retention rates and attract new talent.").

225. See HHS, Employer Decisionmaking, supra note 102 (noting the involvement of a firm's CFO, CEO, and hired consultants in its health care decisionmaking); see also Joanne Sammer, It's Probably Time to Re-Bid Your Benefits Contracts, Soc'y for Hum. Res. Mgmt. (Mar. 5, 2018), https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/time-to-re-bid-benefit-contracts (on file with the *Columbia Law Review*) (describing factors employers should consider when selecting a health plan).

226. HHS, Employer Decisionmaking, supra note 102.

227. See id.

228. See, e.g., AON Health Solutions, Accolade: The Claims Cost Impact of Implementing Personalized Advocacy 5 (2021) (on file with the *Columbia Law Review*) (touting cost savings to self-insured plans from employing consulting service in benefits design); Imagine360, Broker Guide 4 (2023) (on file with the *Columbia Law Review*) (explaining the move to self-funded plans was based on a desire for "customization" and "cost-containment"); Jones, A Different Class, supra note 10, at 718–19 (describing how cost is the driving concern behind employers' refusal to extend family-friendly benefits to low-wage workers); Jake Spiegel & Paul Fronstin, What Employers Say About the Future of Employer-Sponsored Health Insurance, Commonwealth Fund (Jan. 26, 2023), https://www.commonwealthfund.org/publications/issue-briefs/2023/jan/what-employers-say-future-employer-health-insurance [https://perma.cc/523V-3U4Q] (providing employers' concerns about employer-sponsored insurance). They also tend to believe that their benefit plan designs will be better at controlling costs than the plans offered on the insurance exchanges will. See Spiegel & Fronstin, supra.

1. *Actuarial Costs of Covering Reproductive Care.* — The price of health benefits to the employer starts with projecting the likely medical and administrative costs for the twelve-month plan year ahead.[229] That actuarial projection, performed by insurance companies or consultants, models the likely costs using the plan's covered services and network of providers' rates, the portion of costs enrollees will pay through cost-sharing, the likely features of people who will enroll in the plan, and claims data from prior years for similar groups.[230] The projected cost for the full year is then divided into twelve monthly payments and by the number of people covered by the plan to get the monthly *premium* rate, which is the usual point of price comparison among plans.[231] (The employer typically pays a portion of the premium as the benefit, and the employee pays the remainder.[232]) The plan premium can account for the age distribution, gender makeup, and other features of the firm's actual workforce. Plan premiums for employer plans covering fifty or more employees can also account for the actual medical usage of those employees in the past.[233] But the ACA, HIPAA, ERISA, and some state laws prohibit plans from charging different premiums to different employees based on their individual medical needs, gender, or age.[234]

When an employer plan adds an optional item to its covered services, it thus changes the premium price of the plan. Adding a covered item that employees or their dependents are likely to use during the plan year adds to the projected cost. Employing a greater proportion of people who are likely to use the covered service would also add to the plan's cost. Because most plans cover a catchall category of "medically necessary" care, adding an item that is likely to help avoid the need for more costly or less effective care can bring premium projections down. Plans frequently use coverage

229. See generally Tammy Feit, What Goes Into Pricing a Group Health Insurance Plan?, Physicians Health Plan, https://www.phpni.com/blog/what-goes-into-pricing-a-group-health-insurance-plan [https://perma.cc/X3LF-4SJ4] (last visited Oct. 23, 2023) (explaining the various factors that determine health insurance premiums).

230. See Louise Norris, What Actuarial Value Means for Health Insurance, Verywell Health, https://www.verywellhealth.com/actuarial-value-and-your-health-insurance-4147819 [https://perma.cc/XWH9-HEA7] (last updated Oct. 21, 2023).

231. See Spiegel & Fronstin, supra note 228.

232. See Russ Banham, The Cure for Healthcare Costs, Chief Executive, https://chiefexecutive.net/the-cure-for-healthcare-costs/ [https://perma.cc/SS8G-ME3T] (last visited Oct. 24, 2023).

233. See DOL, Compliance Assistance Guide: Health Benefits Coverage Under Federal Law 25 (2014), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/compliance-assistance-guide.pdf [https://perma.cc/469P-KF95].

234. Id. at 25–26; see also 42 U.S.C. § 300gg-1(b) (2018); 27 R.I. Gen. Laws § 27-18-88 (2024) (prohibiting gender-rated premiums in individual and group health plans); 26 C.F.R. § 54.9802-1 (2018) (HIPAA); Michelle Long & Alina Salganicoff, Pre-Existing Condition Prevalence Among Women Under Age 65, KFF (Nov. 4, 2020), https://www.kff.org/womens-health-policy/issue-brief/pre-existing-condition-prevalence-among-women-under-age-65/ [https://perma.cc/2JJ9-X9LH].

of preventative services as a mechanism to help control costs.[235] And plans may pass the costs of preventative care on to enrollees and their dependents through deductibles, copays, coinsurance, and other cost-sharing mechanisms.

Each of the main items of reproductive care coverage thus has actuarial impacts on the plans' premiums. For example, pregnancy is one of the costliest medical conditions for employers. The average cost of covering a pregnancy, labor and delivery, and postpartum care is around $19,000.[236] Pregnancy complications are becoming more prevalent, and this contributes further to cost.[237] A plan that covers those services would use statistical modeling to project how many enrollees would be likely to get pregnant and give birth during the plan year in calculating that portion of the overall plan cost. The fact that people who give birth average $1,040 less in prescription drug costs during pregnancy would also factor into the projection,[238] as would the cost-sharing provisions the plan imposes that push an average of $3,000 of the pregnancy costs back to the patient.[239]

After birth, the plan must then cover the newborn as a dependent potentially through age twenty-six, adding to the cost of coverage (though plans are allowed to exclude the children of dependents).[240] Premature births cost employer plans 12.7 billion dollars annually in actuarial costs alone.[241] Not included in this calculation is the time away from work that pregnancy and any related leave may prompt for an employee who needs these covered services.

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235. See Feit, supra note 229.

236. See Rae et al., supra note 201.

237. See So O'Neil, Isabel Platt, Divya Vohra, Emma Pendl-Robinson, Eric Dehus, Laurie Zephyrin & Kara Zivin, The High Costs of Maternal Morbidity Show Why We Need Greater Investment in Maternal Health, Commonwealth Fund (Nov. 12, 2021), https://www.commonwealthfund.org/publications/issue-briefs/2021/nov/high-costs-maternal-morbidity-need-investment-maternal-health [https://perma.cc/EM8C-UQYG].

238. See Rae et al., supra note 201.

239. See id. (noting that women who give birth "pay almost $3,000 more out-of-pocket than those who do not give birth").

240. See, e.g., N.Y. Dep't of Fin. Servs., Report on Health Insurance Coverage for Childbirth 20–21 (2022), https://www.dfs.ny.gov/reports_and_publications/health_insurance_coverage_for_childbirth [https://perma.cc/X2HT-CCJA] (explaining New York's requirements for coverage of dependents but not their children); see also Sam Hughes, Emily Gee & Nicole Rapfogel, Health Insurance Costs Are Squeezing Workers and Employers, Ctr. for Am. Progress (Nov. 29, 2022), https://www.americanprogress.org/article/health-insurance-costs-are-squeezing-workers-and-employers/ [https://perma.cc/677X-WA39] (observing that family plan premiums cost more for employers and employees).

241. Premature Babies Cost Employers $12.7 Billion Annually, March of Dimes (Feb. 7, 2014), https://www.marchofdimes.org/about/news/premature-babies-cost-employers-127-billion-annually [https://perma.cc/38PJ-JL9P] ("For premature and/or low birth weight babies . . . the average cost was $55,393, of which $54,149 was paid by the health plan.").

Fertility treatments aimed at producing a pregnancy are likewise very expensive: IVF treatments cost more than $12,000 per cycle and often require multiple cycles for success.[242] Unlike pregnancy, no federal law requires employers to cover common infertility treatments, and most employers choose not to cover the full range of treatments.[243]

In contrast to covering these services, covering contraception looks quite cost-effective.[244] Abortions too, while prohibitively expensive for many individuals, represent net cost-savings for an employer plan: Abortion care ranges from $500 to $2,000[245] compared to the $16,000+ cost of maternity care and the added coverage for a new dependent. Unintended pregnancies may account for a full one percent of the employer's health benefits spending per year.[246]

The benefits of robust coverage to employers extend beyond these actuarial projections. First, health care supports a workforce healthy enough to perform their jobs.[247] Second, benefits may boost employee satisfaction and improve retention, thereby enhancing productivity and avoiding turnover costs.[248] But while employers are undoubtedly interested in retaining the best employees, the average employee turnover rate was 47.2% in 2021.[249] In frontline retail—such as in the Walmart and Hobby Lobby examples—the turnover rate is around sixty percent and has been

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242. See Weigel et al., supra note 31.

243. See id. ("[As of] 2017 . . . 56% of employers with 500 or more employees cover some type of fertility service, but most do not cover treatment services such as IVF, IUI, or egg freezing.").

244. See Michelle Andrews, Most Employers See a Benefit in Covering Contraceptives, NPR (July 15, 2014), https://www.npr.org/sections/health-shots/2014/07/15/331445402/most-employers-see-a-benefit-in-covering-contraceptives [https://perma.cc/8XMA-GX6G] (noting that "birth control is cheaper to cover than maternity and delivery"); see also KFF & Health Rsch. & Educ. Tr., Employer Health Benefits 186 (2010), https://www.kff.org/wp-content/uploads/2013/04/8085.pdf [https://perma.cc/8XMA-GX6G] (noting that the majority of firms' most-enrolled plans cover contraceptives).

245. 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 (on file with the *Columbia Law Review*).

246. Gabriela Dieguez, Bruce S. Pyenson, Amy W. Law, Richard Lynen & James Trussell, The Cost of Unintended Pregnancies for Employer-Sponsored Health Insurance Plans, 8 Am. Health & Drug Benefits 83, 88 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4437481/ [https://perma.cc/AN8M-2E5N].

247. Stephen Miller, Employees Are More Likely to Stay if They Like Their Health Plan, Soc'y for Hum. Res. Mgmt. (Feb. 14, 2018), https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/health-benefits-foster-retention.aspx [https://perma.cc/JG8T-PZFR] (quoting from an executive interview that "CEOs care about their employees being healthy, because healthy employees show up to work" (internal quotation marks omitted (quoting Paula Harvey, the vice president for human resources at a manufacturing company))).

248. See Jones, A Different Class, supra note 10, at 720–22.

249. Economic News Release: Job Openings and Labor Turnover Survey News Release, Bureau Lab. Stats. (Mar. 9, 2022), https://www.bls.gov/news.release/archives/jolts_03092022.htm# [https://perma.cc/5S4G-TYDJ].

since before the pandemic.[250] So, many employers view their role as actuaries in the short term, considering only what their employees' health care expenses may be in the present or forthcoming plan year, not on a long-term basis.[251] This churn in the workforce prevents employers from having a long-term commitment to the health outcomes of their employees. The rational employer might dream of having all the benefits of having a lot of women in its workforce while wishing to dodge the pregnant worker or premature baby, knowing the person may have newly joined the organization or may move on the following year to a competitor.

2. *Externalized Costs of Not Covering Reproductive Care.* — When employers do not provide coverage, they effectively externalize the costs of care. These costs may be borne by other sources of third-party funding—primarily public programs (mostly Medicaid) and nonprofit organizations—and individuals and their households. When employers do offer health insurance benefits but choose to exclude reproductive care from the benefit plan, the options for third-party funding are much narrower and the burdens on individuals greater.

Since its creation in 1965, Medicaid has provided a major source of public funding for reproduction and birth. Medicaid is a means-tested public program, limited to those people whose incomes fall below a set cap (between $14,580 and $31,347 a year for an individual in 2023),[252] and states may impose additional eligibility limitations as well.[253] Employers who pay wages below the Medicaid eligibility cap usually do not offer health benefits,[254] externalizing the cost of health care for millions of low-wage employees onto state Medicaid programs.[255] Low-wage employees

250. Id.

251. Cf. Am. Acad. of Actuaries, Drivers of 2023 Health Insurance Premium Changes 3–4 (2022), https://www.actuary.org/sites/default/files/2022-06/PremiumDrivers2023.pdf [https://perma.cc/25NT-HK54] (discussing factors for employers to consider when projecting costs in a single plan year).

252. See Medicaid Income Eligibility Limits for Adults as a Percent of the Federal Poverty Level, KFF (Jan. 1, 2023), https://www.kff.org/health-reform/state-indicator/medicaid-income-eligibility-limits-for-adults-as-a-percent-of-the-federal-poverty-level/ [https://perma.cc/UJE5-MXSJ] (showing that the Medicaid income eligibility limit ranges by state from the federal poverty line ($14,580) in several states to 215% of the federal poverty line ($31,347) in the District of Columbia).

253. See Medicaid Expansion & What It Means for You, HealthCare.gov, https://www.healthcare.gov/medicaid-chip/medicaid-expansion-and-you/ [https://perma.cc/Y9L6-LGLD] (last visited Oct. 25, 2023) (highlighting residency and citizenship rules, and that states that have not implemented the ACA's Medicaid expansion may limit enrollment to those with a qualifying disability).

254. Employers who pay very low wages rarely offer benefits to their low-wage workers. See Jones, A Different Class, supra note 10, at 716.

255. Gov't Accountability Off., GAO-21-45, Federal Social Safety Net Programs: Millions of Full-Time Workers Rely on Federal Health Care and Food Assistance Programs 12 (2020), https://www.gao.gov/assets/gao-21-45.pdf [https://perma.cc/98JS-PFMT]

who qualify for Medicaid have coverage only for the reproductive care included in their state Medicaid program, which varies by state. Medicaid covers most (but not all) pregnancy and childbirth care,[256] and the program pays for more than forty percent of births in the United States.[257] State Medicaid programs typically cover contraception,[258] but a majority of states cover neither fertility treatments[259] nor abortion[260] in their Medicaid programs. And the states that do cover abortion must fund that coverage without any federal matching funds due to the Hyde Amendment.[261] The reproductive exceptionalism baked into Medicaid coverage thus leaves most enrollees in need of fertility treatment or abortion care to pay for it entirely out of pocket (also known as "self-pay,"[262] which they categorically cannot afford), find a nonprofit organization offering those services, or forgo care.

Employees with wages above the Medicaid threshold whose employers either offer no coverage or offer extraordinarily skimpy coverage can purchase their own insurance on the exchanges, with subsidies available to defray the costs of coverage for those making less than $58,321.[263] Repro-

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(noting that roughly seventy-two percent of wage-earning adults who rely on Medicaid and SNAP work in industries with a high proportion of low-wage workers).

256. See Amy Chen & Emily Hayes, Nat'l Health L. Program, Q&A on Pregnant Women's Coverage Under Medicaid and the ACA 3 (2018), https://healthlaw.org/wp-content/uploads/2018/09/QA-on-Pregnant-Women%E2%80%99s-Coverage.pdf [https://perma.cc/8SHK-BG5B] ("Full-scope Medicaid in every state provides comprehensive [pregnancy] coverage, including prenatal care, labor and delivery, and any other medically necessary services.").

257. Usha Ranji, Ivette Gomez, Alina Salganicoff, Carrie Rosenzweig, Rebecca Kellenberg & Kathy Gifford, KFF, Medicaid Coverage of Pregnancy-Related Services: Findings From a 2021 State Survey 3 (2022), https://www.kff.org/report-section/medicaid-coverage-of-pregnancy-related-services-findings-from-a-2021-state-survey-report/ [https://perma.cc/4ZVS-JR4Z].

258. Usha Ranji, Ivette Gomez, Alina Salganicoff, Carrie Rosenzweig, Rebecca Kellenberg & Kathy Gifford, KFF, Medicaid Coverage of Family Planning Benefits: Findings From a 2021 State Survey 2 (2022), https://www.kff.org/womens-health-policy/report/medicaid-coverage-of-family-planning-benefits-findings-from-a-2021-state-survey/ [https://perma.cc/7889-TUDP].

259. See Weigel et al., supra note 31 ("Only one state Medicaid program covers any fertility treatment, and no Medicaid program covers artificial insemination or in-vitro fertilization.").

260. See State Funding of Abortions Under Medicaid, KFF (June 1, 2023), https://www.kff.org/medicaid/state-indicator/abortion-under-medicaid/ [https://perma.cc/6E9P-9VSX].

261. See Harris v. McRae, 448 U.S. 297, 302 (1980) (noting that, since its inception, the Hyde Amendment has prohibited "the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances").

262. See, e.g., Frank A. Sloan, Michael A. Morrisey & Joseph Valvona, Hospital Care for the "Self-Pay" Patient, 13 J. Health Pol. Pol'y & L. 83, 84 (1988).

263. See 26 U.S.C. § 36B (2018) (making premium-assistance tax credits apply to people with incomes 100–400% of the federal poverty level); 42 U.S.C. § 18071 (2018) (providing cost-sharing reduction); see also Brietta R. Clark, Erin C. Fuse Brown, Robert Gatter,

ductive exceptionalism again factored into the negotiation of the marketplace plan rules in the ACA, and although the statute does require that plans cover preventative services (including contraception) among the "essential health benefits" list, it does not include fertility treatments and explicitly excludes abortion from that list.[264] A majority of states have enacted rules prohibiting abortion coverage in marketplace plans, and in the states that permit or require such coverage, the Nelson Amendment requires that the plans themselves go through a morass of administrative steps to ensure that no federal subsidy money contributes to the benefit.[265] Thus, many employed people without employer-sponsored insurance have publicly subsidized private plans that still impose the costs of fertility and abortion care onto the patients and their households.

Employers who offer health benefits but choose not to cover the many aspects of reproductive care made optional under applicable law leave their employees and dependents with even fewer alternative options for funding. First, the jobs with health benefits tend to pay well over the Medicaid income threshold.[266] Second, the ACA generally does not make subsidized individual market coverage available to those with the option of employer-sponsored insurance.[267] So, an employee whose employer plan excludes

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Elizabeth Y. McCuskey & Elizabeth Pendo, Health Law: Cases, Materials and Problems 16 (9th ed. 2022) (explaining the history and operation of these subsidies). Note that there exists an even wider "coverage gap" for low-wage workers in non-expansion states because the ACA's income eligibility for subsidized individual market plans on the exchanges starts at one hundred percent of the federal poverty level (very near the Medicaid cap), meaning that people who have no qualifying disability and incomes below the Medicaid cap are neither eligible for subsidized individual market coverage nor eligible for Medicaid in nonexpansion states. Sara Rosenbaum, The Unfinished Business of Extending Health Care Coverage to All Low-Income Americans, Commonwealth Fund: To the Point (Oct. 31, 2022), https://www.commonwealthfund.org/blog/2022/unfinished-business-extending-health-care-coverage-all-low-income-americans [https://perma.cc/V3L3-W3WA] (estimating that there are 2.3 million people who are "too poor for Affordable Care Act (ACA) subsidies, yet ineligible for Medicaid").

264. See Ikemoto, supra note 116, at 733 (noting the ACA's "coverage of contraception of preventative case, in conjunction with the broad ban on abortion coverage").

265. See Alina Salganicoff, Laurie Sobel & Amrutha Ramaswamy, Coverage for Abortion Services in Medicaid, Marketplace Plans and Private Plans, KFF (June 24, 2019), https://www.kff.org/womens-health-policy/issue-brief/coverage-for-abortion-services-in-medicaid-marketplace-plans-and-private-plans/ [https://perma.cc/9DHL-G75B] (arguing that "[t]he Nelson Amendment included in the final law requires plans to segregate funds used for abortion coverage, effectively collecting an additional fee for this coverage, and adding a layer of administrative complexity" that may have deterred many plans from offering coverage). The provision provides that "[a] *State* may elect to prohibit abortion coverage in *qualified health plans* offered through an Exchange in such *State* if such *State* enacts a law to provide for such prohibition." 42 U.S.C. § 18023(a)(1) (emphasis added).

266. See Jones, A Different Class, supra note 10, at 695 ("[H]igh-wage workers tend to receive greater employment benefits than low-wage workers.").

267. People who are eligible for employer-sponsored insurance may be eligible to instead receive subsidies to purchase insurance on the exchange if the employer plan is unaffordable; for 2023, this means the premium for self-coverage must be 9.12% or more of an

needed reproductive care confronts a host of bad options: (1) self-pay for the excluded care, (2) find a nonprofit organization that provides free or reduced-cost care, (3) buy a supplemental plan that covers that care,[268] (4) refuse the employer plan and its tax benefit to buy an individual exchange plan that covers the care and pay full freight, (5) be or become low-income enough to qualify for Medicaid, and even then, only in states that elect to cover the full slate of reproductive services, or (6) forgo the excluded care.

A growing number of people covered by employer-sponsored insurance are *underinsured* (have coverage that does not enable them to afford needed health care), shifting the costs of care directly onto the insured despite the fact that they pay for insurance.[269] The reproductive exceptionalism in the legal infrastructure of employer-sponsored plans makes the underinsurance problem even more acute for reproductive care.[270] Employers' decision to exclude from coverage or impose heavy cost-sharing requirements for reproductive care thus shifts even more of the costs of care—and the costs of forgoing care—directly onto patients themselves, particularly women. As costs of insurance have risen, employer plans have increasingly imposed cost-sharing on employees.[271] For childbirth, the average cost-sharing imposed on insured patients rose from 12.3% in 2008 to 19.6% in 2015.[272]

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individual's annual household income. Affordable Coverage, HealthCare.gov, https://www.healthcare.gov/glossary/affordable-coverage/ [https://perma.cc/XM6R-7K3B] (last visited Oct. 24, 2023) (defining "Affordable coverage").

268. Cf. Nat'l Women's L. Ctr., Supplemental Insurance Coverage of Abortion Only Further Encourages the End of All Private Insurance Coverage of Abortion 1–2 (2013), https://nwlc.org/wp-content/uploads/2015/08/supp_ins_covg_abortion_factsheet_12-6-13.pdf [https://perma.cc/NE2P-BF5G] ("Politicians who promote bans on insurance coverage of abortion and claim to offer women an alternative through supplemental coverage are holding out a false promise. Supplemental coverage of abortion is just another attempt to ban all private insurance coverage of abortion, thereby making abortion more difficult to obtain.").

269. See Collins et al., supra note 21 (highlighting that forty-three percent of adults were inadequately insured in 2022).

270. See Sara Rosenbaum, Women and Health Insurance: Implications for Financing Preconception Health, 18 Women's Health Issues S26, S26 (2008) (noting the uncertainty surrounding what reproductive services will be covered in State Insurance Exchanges); cf. Richard G. Stefanacci, Impact of Health Care Reform on Reproductive Service Providers, 58 J. Reprod. Med. 3, 3 (2013).

271. See Hughes et al., supra note 240.

272. Michelle H. Moniz, A. Mark Fendrick, Giselle E. Kolenic, Anca Tilea, Lindsay K. Admon & Vanessa K. Dalton, Out-of-Pocket Spending for Maternity Care Among Women With Employer-Based Insurance, 2008–15, 39 Health Affs. 18, 20 (2020). The ACA does, however, place upper limits on employers' ability to minimize costs. See The Health Plan Categories: Bronze, Silver, Gold & Platinum, HealthCare.gov, https://www.healthcare.gov/choose-a-plan/plans-categories/ [https://perma.cc/6BPD-C2MA] (last visited Oct. 25, 2023) (requiring employers to pay a minimum of 60% of premiums to satisfy the employer mandate and capping employees' out-of-pocket costs at 9.86% of household income).

In these gaps where third-party funding fails to cover reproductive care or make it affordable, providers may offer that care at reduced cost to patients in need. This model of care, in which the providers' services are available to patients without a claims-processing intermediary, has been described as *direct care*.[273] The providers themselves may receive salary or other compensation from public programs or from private institutions, but the compensation flows directly from the funding institution to the provider and not through the patient. At the federal level, Title X grants support clinics that provide patients with nonabortion family-planning services.[274] Because reproductive exceptionalism has excluded so much reproductive care from public funding and publicly funded facilities, direct-care clinics specializing in reproductive care funded by private nonprofits have proliferated.[275] Private funding for Planned Parenthood and the networks of independent clinics that provide reproductive care shoulder some of the burden of employers' choice not to cover abortion.

For the great majority of excluded care, however, the individual bears the burden of paying for it or, more likely, not receiving it.

Employers have used their legally enshrined flexibility in plan design to make a variety of choices about coverage for major reproductive services. Thus, for the 159 million Americans covered by employer-sponsored health insurance, the practical ability to pay for these services varies widely based on the characteristics and choices of their employers. This practical dimension of financial access has long placed employers in a gatekeeping role for reproductive care. The numerous insurance carveouts for contraception, abortion, and fertility enable employers to more readily deny coverage for these aspects of care, making health insurance regulation a source of reproductive exceptionalism in law.[276] These financial hurdles compound the effects of *Dobbs*, which has allowed states to more severely limit the number of available providers for these services, even if they are covered by insurance. They drive more of the burden of reproductive care

273. See, e.g., Leona Rajaee, What Is Direct Care?, Elation Health Blog (June 8, 2022), https://www.elationhealth.com/resources/blogs/what-is-direct-care [https://perma.cc/B3QR-XADS].

274. See Cong. Rsch. Serv., IF10051, Title X Family Planning Program 2 (n.d.), https://crsreports.congress.gov/product/pdf/IF/IF10051 [https://perma.cc/VE5P-GJDC] (last updated June 8, 2023).

275. See Abortion Care Network, supra note 48, at 3 (noting that hospitals and physician practices account for only four percent of all abortion procedures provided in the United States and that Planned Parenthood and independent clinics provide the rest).

276. See, e.g., Maya Manian, The Consequences of Abortion Restrictions for Women's Healthcare, 71 Wash. & Lee L. Rev. 1317, 1318–20 (2014) (discussing the negative effects of isolating abortion from other areas of women's health); Gillian E. Metzger, Abortion, Equality, and Administrative Regulation, 56 Emory L.J. 865, 898 (2007) (arguing for a shift away from "abortion-specific regulation[s]" toward regulations that focus on "legitimate health concerns" affecting women's health more generally); see also Caitlin E. Borgmann, Abortion Exceptionalism and Undue Burden Preemption, 71 Wash. & Lee L. Rev. 1047, 1048 (2014) (describing "abortion exceptionalism" specifically).

onto the direct-care clinics that have responded to reproductive exceptionalism and, ultimately, onto the patients themselves.

II. The Tension Between Reproductive Justice and Employer-Sponsored Insurance

Political and legal discourse consider reproductive autonomy an individual choice made in concert with one's health care providers.[277] In reality, employers enjoy great power over access to reproductive services for most Americans, and this power undercuts individual reproductive autonomy.

While employers' ostensible role is to arrange health care benefits on behalf of their employees and dependents,[278] employers are not bound to serve these individuals' interests and have long resisted providing coverage for many facets of reproductive care or for leave to support caring for children. Far from centering reproductive justice and autonomy, the actuarial interests of benefits providers and the economic interests of businesses largely inform employers' coverage decisions. This puts employer-sponsored insurance in inherent tension with reproductive justice, both conceptually and practically. That employers' interests may sometimes converge with the expansion of access to reproductive care does not resolve the inherent tension. Instead, this Part argues that the pursuit of reproductive justice demands decoupling reproductive care access from employers' control.

A. *Employers' Actuarial and Ideological Interests Versus Individuals' Reproductive Autonomy*

Perhaps the most fulsome framework to explore individual reproductive autonomy is the reproductive justice framework, which distills individual reproductive autonomy into three essential determinations: whether to have a child, when to have a child, and how to raise one's children in a

277. See, e.g., Yvonne Lindgren, The Rhetoric of Choice: Restoring Healthcare to the Abortion Right, 64 Hastings L.J. 385, 386 (2013) (explaining feminist language of reproductive choice as in tension with "the medical model [which] sought to characterize abortion as an aspect of healthcare and thereby to vest the final decisionmaking authority with doctors").

278. See John Bronsteen, Brendan S. Maher & Peter K. Stris, ERISA, Agency Costs, and the Future of Health Care in the United States, 76 Fordham L. Rev. 2297, 2304–05 & n.24 (2008) (explaining how covered employees lack the "strict authority" to ensure that their employer insurer serves their interests); Maher, Employment-Based Anything, supra note 55, at 1294 (employers "are not . . . good agents" of their employees' interests in benefits, "absent extensive interventionist regulation"); Dayna Bowen Matthew, Controlling the Reverse Agency Costs of Employment-Based Health Insurance: Of Markets, Courts, and a Regulatory Quagmire, 31 Wake Forest L. Rev. 1037, 1040–41 (1996) (discussing how the health care interests of employees and employers diverge).

safe, healthy, and supportive environment.[279] The determination to reproduce and to not reproduce are two sides of the same coin of reproductive autonomy. Thus, access to medical services that *prevent* reproduction and enable timing are as important as those that *enable* reproduction. Reproductive justice also looks behind these conceptual dimensions of autonomy, too, emphasizing that legal rights alone are insufficient for reproductive autonomy.[280] Thus, reproductive justice recognizes that rights are meaningless without the economic and social resources needed to effectuate them, especially for groups long excluded from those resources, such as low-income women and people of color.[281]

The employer-sponsored insurance model lies in direct tension with the primary goals of the reproductive justice framework regarding individpush thual interests to both reproduce and avoid or delay reproduction.

1. *Conception, Pregnancy, and Childrearing*. — There is an antinatalist bent among American employers.[282] While the Pregnancy Discrimination Act forbids many employers from taking discriminatory actions against their pregnant employees,[283] this law does not change the reality that employee reproduction can often run counter to the business and economic interests of the employer, the actuarial interests of the employer's health plan, and sometimes the interests of the larger employee group

279. See Roberts, Reproductive Justice, supra note 19.

280. See Rebouché, supra note 19, at 1431.

281. See id.

282. "Natalism" and "antinatalism" describe attitudes and policies about the desirability of reproduction; natalists encourage reproduction, while antinatalists discourage it. Compare Natalism, Merriam-Webster, https://www.merriam-webster.com/dictionary/natalism [https://perma.cc/G5EC-8HSE] (last visited Oct. 25, 2023) (defining "natalism" as "an attitude or policy favoring or encouraging population growth"), and Emma Green, The Rebirth of America's Pro-Natalist Movement, The Atlantic (Dec. 6, 2017), https://www.theatlantic.com/politics/archive/2017/12/pro-natalism/547493/ (on file with the *Columbia Law Review*) (citing the Child Tax Credit as a pronatalist policy), with Kirk Lougheed, Antinatalism, Internet Encyc. of Phil., https://iep.utm.edu/anti-natalism/ [https://perma.cc/AM5U-R4RK] (last visited Oct. 25, 2023) (describing the different modes and philosophies of antinatalism), and Joshua Rothman, The Case for Not Being Born, New Yorker (Nov. 27, 2017), https://www.newyorker.com/culture/persons-of-interest/the-case-for-not-being-born (on file with the *Columbia Law Review*) (describing one antinatalist philosopher's belief that "life is so bad, so painful, that human beings should stop having children for reasons of compassion").

283. 42 U.S.C. § 2000e-2 (2018) makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e(k) defines "because of sex" or "on the basis of sex" to include "because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits . . . as other persons not so affected."

given workload issues and insurance costs.[284] Faced with the vast discretion the law gives employers over whether and what reproductive services to cover, many employers will privilege these many interests over the reproductive justice interests of employees.

Much of America's social policy has been organized around the traditional family wage model, in which all income and benefits are supplied by the household's male head while a female dependent remains at home to handle childbearing, childrearing, and other domestic obligations.[285] For instance, in the 1970s, schools regularly required that their female teachers take unpaid leave upon reaching months four or five of pregnancy and remain on leave for at least one year after delivering a baby.[286] These practices were motivated by the false idea that it was unsafe to work while pregnant, fears of lewdness because of the association between pregnancy and sex, and concerns about pregnant workers' productivity.[287] Feminists challenged this treatment of pregnancy in the workplace as a major barrier to women's equality both in the workplace and outside of it.[288]

Alongside the passage of pregnancy discrimination laws, the number of pregnant women in the workforce has grown dramatically,[289] as has the total number of women in the workforce.[290] Women are more likely now than in previous generations to work, remain working into the third trimester of pregnancy, and return to work after having a baby.[291]

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284. See, e.g., Daisuke Wakabayashi & Sheera Frenkel, Parents Got More Time Off. Then the Backlash Started., N.Y. Times (Sept. 5, 2020), https://www.nytimes.com/2020/09/05/technology/parents-time-off-backlash.html (on file with the *Columbia Law Review*) (last updated July 28, 2021) (reporting on how the extension of family leave during the COVID-19 pandemic was viewed negatively by some childfree workers).

285. See Nancy Fraser, After the Family Wage: Gender Equity and the Welfare State, 22 Pol. Theory 591, 591 (1994).

286. See Deborah Dinner, Recovering the *LaFleur* Doctrine, 22 Yale J.L. & Feminism 343, 346–47 (2010) (documenting practices in some industries of firing women or forcing them into leave once they reported their pregnancies or reached a certain stage of pregnancy).

287. Joanna L. Grossman, Pregnancy, Work, and the Promise of Equal Citizenship, 98 Geo. L.J. 567, 595 (2010).

288. See Reva B. Siegel, Employment Equality Under the Pregnancy Discrimination Act of 1978, 94 Yale L.J. 929, 952–55 (1985) [hereinafter Siegel, Employment Equality] (arguing for the doctrine of sex equality to recognize reproductive difference "in order to scrutinize inegalitarian relations predicated upon it in the . . . economic sphere[]").

289. See Carly McCann & Donald Tomaskovic-Devey, Ctr. for Emp. Equity, Pregnancy Discrimination at Work 8 (2021), https://www.umass.edu/employmentequity/sites/default/files/Pregnancy%20Discrimination%20at%20Work.pdf [https://perma.cc/MZ63-BLGY]. The number has grown from about 45% continuing to work in the 1960s up to 65% in 2008. Id.

290. See Grossman, supra note 287, at 574–75.

291. See id.; see also Brian Knop, Are Women Really Opting Out of Work After They Have Babies?, U.S. Census Bureau (Aug. 19, 2019), https://www.census.gov/library/stories/2019/08/are-women-really-opting-out-of-work-after-they-have-babies.html [https://perma.cc/LF9L-2R56] (explaining census data that reveals that most women return to the

Employers have had to accommodate pregnancy, but the transition has not been an easy one. The EEOC received over 40,000 complaints of pregnancy discrimination between 2010 and 2022.[292] Almost forty percent of all gender-based job discrimination suits involve pregnancy,[293] and an estimated 250,000 women are denied a pregnancy-related accommodation at work each year.[294]

The most common type of EEOC pregnancy complaint is wrongful termination.[295] Pregnancy-related firings are often swift, occurring on the day the employee announces the pregnancy to the employer.[296] The health care and insurance industries have the most complaints;[297] discrimination is also more likely to occur the more male-dominated the field.[298]

Employers may be acting in what they perceive as their own self-interest, viewing pregnant people as "financial liabilit[ies]."[299] Concerns about the capabilities and commitment of pregnant workers, loss of qualified workers from the workplace, and expenses to accommodate job modifications and leave during and after pregnancy influence employers' decisions.[300] Employers may also be accommodating other workers' concerns about organizational fairness and workload in occupations in which pregnant

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workforce within one year of childbirth, though women with a graduate or professional degree are more likely to resume work than women with a high school degree or less).

292. Pregnancy Discrimination Charges FY 2010–FY 2022, EEOC, https://www.eeoc.gov/data/pregnancy-discrimination-charges-fy-2010-fy-2021 [https://perma.cc/DNW8-57V2] (last visited Oct. 25, 2023).

293. Reginald A. Byron & Vincent J. Roscigno, Relational Power, Legitimation, and Pregnancy Discrimination, 28 Gender & Soc'y 435, 444 (2014) (finding forty percent of gender-based firing cases filed by women to be related to pregnancy in a study of all such cases filed in Ohio between 1986 and 2003).

294. This estimate is conservative, given other data suggesting that about one-third of women do not seek accommodations despite needing one. McCann & Tomaskovic-Devey, supra note 289, at 8–9; see also Byron & Roscigno, supra note 293, at 436 (noting that "[v]ulnerability to being terminated is an especially widespread issue for pregnant women").

295. McCann & Tomaskovic-Devey, supra note 289, at 15–16; see also Byron & Roscigno, supra note 293, at 436. Employers often justify these terminations ex post facto by citing neutral meritocratic policies or financial concerns. See McCann & Tomaskovic-Devey, supra note 289, at 15; see also Byron & Roscigno, supra note 293, at 452–54.

296. See McCann & Tomaskovic-Devey, supra note 289, at 15–16.

297. Id. at 18–20, figs.1 & 2.

298. Id. at 20, fig.2.

299. Reginald A. Byron, Discrimination, Complexity, and the Public/Private Sector Question, 37 Work & Occupations 435, 460 (2010).

300. See Byron & Roscigno, supra note 293, at 439 ("Compared to other workers, pregnant employees are, on average, viewed as less competent and committed to their job . . . ."); see also Grossman, supra note 287, at 577 (citing research which found that pregnant women "were viewed as overly emotional, often irrational, physically limited, and less than committed to their jobs" (quoting Jane A. Halpert, Midgle L. Wilson & Julia L. Hickman, Pregnancy as a Source of Bias in Performance Appraisals, 14 J. Organizational Behav. 649, 652–55 (1993))).

people receive accommodations[301] or accommodating customers' sensibilities.[302]

Though not as clearly captured by law, there is evidence of discrimination by employers into the "fourth trimester," in employers' failure to accommodate breastfeeding, increased care obligations, and the bodily recovery of their workers after giving birth.[303]

Pregnancy discrimination claims steadily persist decades after the passage of the PDA.[304] What one advocacy group—the National Partnership for Women & Families—finds striking is not that this discrimination persists but that "frequently cases involve straightforward violations of the PDA that seem to be fueled by a fundamental resistance to having pregnant women in the workplace."[305] Particularly, the year 2020 saw a sharp increase in cases, likely related to the pandemic and job market stressors.[306] Employers have historically attempted to avoid paying for contraception and maternity care for pregnant spouses of employees.[307] More recently, after the ACA extended family plans to cover adult children up to age

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301. Byron & Roscigno, supra note 293, at 440 ("[C]oworkers sometimes express concern about organizational fairness surrounding the workload accommodations that pregnant employees receive." (citations omitted)); see also Grossman, supra note 287, at 614 (noting that the PDA requires an employer to "provide accommodations only to the extent it provides them for other temporarily disabled employees").

302. See Byron & Roscigno, supra note 293, at 440 ("[T]he pregnant body itself—a body that is often portrayed as ailing, hormonal, and uncontrollable—is sometimes thought to disrupt organizational space by affecting coworker and patron comfort levels." (citation omitted)).

303. See Saru M. Matambanadzo, The Fourth Trimester, 48 U. Mich. J. Legal Reform 117, 120–21, 138 (2014) (arguing that current discrimination law "fails to account for the challenges of the fourth trimester," including "breastfeeding, infant care, and post-pregnancy recovery").

304. McCann & Tomaskovic-Devey, supra note 289, at 8–9 (discussing a study of pregnancy complaints from 2012–2016 which concluded that "an estimated 250,000 women are denied accommodations related to their pregnancies each year"). For less recent data on EEOC complaints, see Nat'l P'ship for Women & Fams., The Pregnancy Discrimination Act: Where We Stand 30 Years Later 5 (2008), https://nationalpartnership.org/wp-content/uploads/2023/02/pregnancy-discrimination-act-30-years-later.pdf [https://perma.cc/NE5F-PLH4] [hereinafter Nat'l P'ship for Women & Fams., PDA] (discussing the main findings from a study of EEOC pregnancy discrimination charges filed between 1996 and 2005).

305. Nat'l P'ship for Women & Fams., PDA, supra note 304, at 10.

306. See Katie Sear & Dori Goldstein, Analysis: Pregnancy Bias Suits Keep Rising Amid Pandemic, Bloomberg L. Analysis (Jan. 29, 2021), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-pregnancy-bias-suits-keep-rising-amid-pandemic (on file with the *Columbia Law Review*) (noting a sixty-seven percent rise in claims between 2016 and 2020, with 2020 seeing the biggest rise of claims in three years).

307. See Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1271 (W.D. Wash. 2001) (finding that an employer's "exclusion of prescription contraception from its prescription plan is inconsistent with the requirements of federal law"); Steven Lee Lapidus, Note, Pregnancy Discrimination, Equal Compensation and the Ghost of *Gilbert*: Medical Insurance Coverage for Spouses of Employees, 51 Fordham L. Rev. 696, 721 (1983) (noting that employers seeking to "trim costs" excluded coverage of "expenses resulting from the pregnancy-related conditions of [employees'] spouses").

twenty-six, many employers chose not to cover maternity care for these dependents.[308] Anticipation of these costs may drive employers to disfavor their employees who have the mere *potential* to become pregnant.[309]

In addition to punishing pregnancy, employers have generally not been supportive of policies that facilitate employee reproduction more broadly, such as coverage for fertility treatments and ART (which very few companies currently opt to cover).[310] The United States is also an outlier among other developed nations for its failure to mandate paid parental leave.[311] The Family Medical Leave Act of 1993 requires employers to grant up to 12 weeks of *unpaid* leave in certain circumstances.[312] But less than half of employed women have access to *paid* parental, family, and medical leave.[313] Such leave is even less likely for workers in part-time positions, lower wage workers, workers with less education, and those living in rural locations.[314] More than three-quarters of lower-income female workers and thirty-eight percent of higher-wage female workers report losing pay to stay at home and care for sick children, in part owing to insufficient family and sick leave.[315] Federal workers gained access to twelve weeks of parental

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308. See Michelle Andrews, Insurance Still Doesn't Cover Childbirth for Some Young Women, NPR (June 16, 2015), https://www.npr.org/sections/health-shots/2015/06/16/414688210/insurance-still-doesnt-cover-childbirth-for-some-young-women [https://perma.cc/Z3D7-D63Z] (noting that denying coverage for the maternity care of dependent children under large employer plans is "common").

309. See id. (emphasizing how "some employers have long tried to sidestep paying for maternity care").

310. Tom Murphy & Associated Press, Most of the Biggest U.S. Employers Now Cover Fertility Treatments, but Many Americans Still Can't Afford It, Fortune (May 16, 2023), https://fortune.com/2023/05/16/most-biggest-us-employers-cover-fertility-treatments-many-americans-still-cant-afford/ [https://perma.cc/9P3V-MPRV] (explaining that over half of large employers cover infertility treatments, but coverage gets "spotty" the smaller the employer).

311. Siegel, Employment Equality, supra note 288, at 942 ("Seventy-five countries, including . . . every industrialized country except the United States, provide some form of statutory maternity leave or parental benefit.").

312. 29 U.S.C. § 2601 (2018).

313. See Usha Ranji, Michelle Long, Brittni Frederiksen, Karen Diep & Alina Salganicoff, Workplace Benefits and Family Health Care Responsibilities: Key Findings From the 2022 KFF Women's Health Survey, KFF (Nov. 16, 2022), https://www.kff.org/womens-health-policy/issue-brief/workplace-benefits-and-family-health-care-responsibilities-key-findings-from-the-2022-kff-womens-health-survey/ [https://perma.cc/GWP5-REQV]. According to the 2022 Kaiser Family Foundation Women's Health Survey, "43% of employed women ages 18–64 say their employer offers paid parental leave and 44% say their employer offers paid family and medical leave," compared with 63% reporting paid sick leave. Id.

314. Seventy-three percent of full-time female workers report employers offering paid sick leave compared to 31% of part-time workers and 18% of those self-employed. Women with a college degree are likelier to have access to paid parental leave than those without a college degree (52% versus 36%). Id.

315. Id.; see also Jones, A Different Class, supra note 10, at 712 (discussing the effects of low-wage workers having less access to parental and sick leave than high-wage workers).

leave only recently, in 2020.[316] Less than ten percent of female workers report receiving assistance with childcare through their work, whether through on-site childcare or childcare subsidies.[317]

Fortune 500 companies have long lobbied against federal efforts to mandate any form of parental leave. When major business interest groups have come out in support of such regulations, they have advocated for preemption from state and local standards for employers that meet a minimum floor of coverage.[318] Where states have encouraged the creation of family leave policies, those voluntary policies are often less generous and more costly than a mandated public program.[319]

Despite the antinatalist bent among American employers, firms do, in certain circumstances, find it useful to expand benefits to attract and retain their desired workforce—or even their customer base. For example, a 2022 survey of benefits executives found that "[a] sense of paternalism, the desire to use health benefits as a recruitment and retention tool, and the preference to retain control over plan design" motivate employers to continue offering health benefits.[320] Considering employee satisfaction as a recruitment and retention tool, employers may respond to different preferences among their workers or desired hires. Employers with a younger workforce or a more predominantly female one may try to design a benefit plan that is attractive to them by covering more

316. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 7602, 133 Stat. 1198, 2306 (2019) (codified at 5 U.S.C. § 6382 (2021)) (establishing twelve workweeks of paid parental leave for federal employees).

317. Ranji et al., supra note 313.

318. See, e.g., Letter from David N. Barnes, Vice President of Glob. Workforce Pol'y, IBM Corp., to Joan Harrigan-Farrelly, Deputy Dir., DOL (Sept. 14, 2020), https://aboutblaw.com/Ta5 [https://perma.cc/8JRP-2FAC] (advocating that employers that meet federal sick-, family-, and medical-leave requirements not be subject to state or local requirements); Letter from Timothy J. Bartl, President & CEO, HR Pol'y Ass'n, to Joan Harrigan-Farrelly, Deputy Dir., DOL 2, https://aboutblaw.com/Ta2 [https://perma.cc/FM6D-KU56] (last visited Oct. 24, 2023) (arguing that compliance with either federal or state paid leave laws should exempt employers from compliance with the other); Letter from Aliya Robinson, Senior Vice President, Ret. & Comp. Pol'y, ERISA Indus. Comm., to Joan Harrigan-Farrelly, Deputy Dir., DOL 1 (Sept. 14, 2020), https://aboutblaw.com/Ta0 [https://perma.cc/C5ZL-RMF8] (urging lawmakers to establish a national paid leave exemption that relieves firms that already provide generous paid leave benefits from state and local mandates).

319. See Deborah A. Widiss, Privatizing Family Leave Policy: Assessing the New Opt-In Insurance Model, 55 Seton Hall L. Rev 1543, 1548–49 (2023) (noting that "mandatory paid leave policies implemented by states . . . tend[] to keep per-person costs exceptionally low" as compared to opt-in approaches).

320. Spiegel & Fronstin, supra note 228. But cf. HHS, Employer Decisionmaking, supra note 102 (finding in 2000, before the ACA, that employers' "[b]enefits philosophies in general [we]re seen as becoming less paternalistic and more sensitive to marketplace competition").

of the reproductive care they are likely to need.[321] But that responsiveness is often confined to the higher-wage, benefits-rich jobs occupied less often by women.[322]

Increasingly, women in the workplace expect comprehensive coverage of reproductive care as part of their benefits packages and do consider these benefits in particular during job selection.[323] The growing rates of women with children in the workplace, in higher-skilled positions, and with higher educational attainment[324] might increase pressure on employers to meet the needs of their female employees. Now that *Dobbs* has enabled state legislatures to ban or strictly limit abortion, companies headquartered in abortion-restricting states particularly may seek to fend off a loss of talent.[325] At the same time, not every employee shares these preferences, and employers and employees alike worry about the rising costs of health insurance.[326]

Consider the question whether an employer plan will cover fertility treatments and assisted reproductive technologies.[327] Because the forces of

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321. See, e.g., HHS, Employer Decisionmaking, supra note 102 (noting the "[c]ultural and generational differences between younger and older workers" and how "employers . . . have to adjust their [benefit] programs to respond to this evolution in employee careabouts").

322. See Jones, A Different Class, supra note 10, at 732–42 ("[L]ow-wage workers are disproportionately women.").

323. See Hasselbacher et al., supra note 181, at 3 (describing a 2018 survey of employed women in which "more than half . . . said benefits offering full reproductive care would be a deciding factor between two employment offers").

324. Rakesh Kochhar, Women Make Gains in the Workplace Amid a Rising Demand for Skilled Workers, Pew Rsch. Ctr. (Jan. 30, 2020), https://www.pewresearch.org/social-trends/2020/01/30/women-make-gains-in-the-workplace-amid-a-rising-demand-for-skilled-workers/ [https://perma.cc/SBS8-6E22]; see also Matt Gonzales, More Mothers of Small Children Are Working Than Ever Before, SHRM (Sept. 14, 2023), https://www.shrm.org/topics-tools/news/inclusion-equity-diversity/mothers-small-children-working-ever (on file with the *Columbia Law Review*).

325. Some employers support relocation to abortion-friendly states. See, e.g., Memorandum from Sec'y of Def. to Senior Pentagon Leadership (Oct. 20, 2022), https://media.defense.gov/2022/Oct/20/2003099747/-1/-1/1/MEMORANDUM-ENSURING-ACCESS-TO-REPRODUCTIVE-HEALTH-CARE.PDF [https://perma.cc/C6D9-536X] (noting that service members' locations, dictated by staffing, operational, and training requirements, "should not limit their access to reproductive care").

326. E.g., Irina Ivanova, Male Employees Seem to Really Hate It When Their Companies Advertise Abortion Access—But It Makes the Job Applications Roll In, Fortune (Aug. 9, 2023), https://fortune.com/2023/08/09/healthcare-reproductive-rights-male-employees-companies-abortion-access-job-application-polarization-workplace/ [https://perma.cc/5PPP-JT4U].

327. See Valarie Blake, It's an ART Not a Science: State-Mandated Insurance Coverage of Assisted Reproductive Technologies and Legal Implications for Gay and Unmarried Persons, 12 Minn. J.L. Sci. & Tech. 651, 653 (2011) (noting that ART coverage has been mostly a private-payer issue, but states have begun mandating it to ensure broader access). To understand the debate surrounding mandatory coverage of these services, compare David B. Seifer, Ethan Wantman, Amy E. Sparks, Barbara Luke, Kevin J. Doody, James P. Toner, Bradley J. van Voorhis, Paul C. Lin & Richard H. Reindollar, National Survey of the

reproductive exceptionalism described in Part I have made these services optional in insurance, employers may choose to offer these benefits to make themselves more attractive to skilled workers in a competitive labor market—particularly highly educated women who may value the ability to delay childbearing for career advancement. High-tech companies like Apple, Facebook, and Google touted these benefits for salaried employees.[328] Similarly, some universities and other white-collar industries have begun offering coverage.[329]

But the interest convergence evident in optional extension of fertility benefits still undermines reproductive justice in at least two respects. First, it serves the employers' interests in avoiding pregnancy in their workforce by encouraging the delay of pregnancy, contributing to the gestalt of antinatalism.[330] Second, it widens the economic status and racial divide in access to fertility treatments[331] because companies most often offer this benefit to the high-wage, highly educated workforce and rarely to lower-skilled and lower-wage or part-time workers most in need of resources and least able to exert clout in the labor market.[332] Class, race, and gender biases intersect in these employer motivations to provide fertility and family leave benefits because "for high-wage workers" who are disproportionately white and male, "having children is viewed very positively," whereas "for low-wage workers, and poor Black and Latina women" in particular, having children "is seen as a sign of irresponsible

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Society for Assisted Reproductive Technology Membership Regarding Insurance Coverage for Assisted Reproductive Technologies, 110 Fertility & Sterility 1081, 1081 (2018) (summarizing survey results showing that the majority of respondents want insurance to cover fertility treatments for specific segments of vulnerable populations), with Katie Falloon & Philip M. Rosoff, Who Pays? Mandated Insurance Coverage for Assisted Reproductive Technology, 16 AMA J. Ethics 63, 65–66 (2014) (arguing that mandated insurance coverage for infertility treatments is inadvisable policy for "a variety of troubling reasons").

328. See Dara Kerr, Egg Freezing, So Hot Right Now, CNET (May 22, 2017), https://www.cnet.com/tech/tech-industry/egg-freezing-so-hot-right-now/ [https://perma.cc/9EAT-ZLV3] (noting that various tech companies are offering egg-freezing benefits for female employees).

329. See Karen Gilchrist, Egg Freezing, IVF and Surrogacy: Fertility Benefits Have Evolved to Become the Ultimate Workplace Perk, CNBC (Mar. 14, 2022), https://www.cnbc.com/2022/03/14/egg-freezing-ivf-surrogacy-fertility-benefits-are-the-new-work-perk.html [https://perma.cc/NB7J-A2FN] (last updated Oct. 4, 2022); , Rise in Fertility Benefits From U.S. Employers, CBS: MoneyWatch, at 00:26 (Apr. 19, 2022), https://www.cbsnews.com/video/moneywatch-fertility-benefits-us-employers/#x [https://perma.cc/4KRY-AE39].

330. See Joya Misra, This "Perk" Masks the Larger Issue of Wage Penalties for Motherhood, N.Y. Times (Oct. 16, 2014), https://www.nytimes.com/roomfordebate/2014/10/15/freezing-plans-for-motherhood-and-staying-on-the-job/this-perk-masks-the-larger-issue-of-wage-penalties-for-motherhood (on file with the *Columbia Law Review*) ("[P]olicies that encourage women to freeze their eggs supposedly to delay parenthood[] may actually discourage women from becoming mothers altogether.").

331. See, e.g., Jamie M. Merkison, Anisha R. Chada, Audrey M. Marsidi & Jessica B. Spencer, Racial and Ethnic Disparities in Assisted Reproductive Technology: A Systematic Review, 119 Fertility & Sterility 341, 346 (2023).

332. See Jones, A Different Class, supra note 10, at 693–95.

behavior."[333] While it may give a public boost to a company's image, the selective extension of these benefits perpetuates biases.

This is also an era of increased consumer appreciation of socially conscious branding. Having captured the public's attention, *Dobbs* shines a spotlight on employers' coverage of abortion care. Companies may capitalize on popular opinion, given that most Americans oppose *Dobbs* and believe abortion should be legal in all or many circumstances.[334] Employees and customers alike may appreciate an employer who sides with health care access,[335] prompting companies to position themselves as champions of reproductive freedom and equal rights for women in the workforce.[336] Vox Media's CEO said, "[*Dobbs*] puts families, communities, and the economy at risk, threatening the gains that women have made in the workplace over the past 50 years."[337] Other reproductive services like prenatal care, pregnancy, and delivery, however, do not exert the same pressure on employers to state on the record their viewpoints and practices.

Expansions of benefits that enable and support reproduction have historically had to be mandated by law. When undertaken voluntarily without regulatory intervention, these expansions of employer benefits represent a fragile interest convergence that follows employers' perceptions of their interests and does not typically extend to low-wage workers. In short, interest convergence reinforces the power dynamic that places employers as gatekeepers to care for conception, pregnancy, birth, and childrearing.

2. *Contraception and Abortion.* — While employers' economic and actuarial interests undercut one dimension of reproductive justice, that of procreation, these very same forces would seem to motivate employers to support the dimension of reproductive justice that involves avoiding procreation. Yet the history and variety of employers' objections to covering contraception and abortion demonstrate irresolvable tensions here, too.

Coverage for contraception was nearly nonexistent in group health plans at the beginning of the ERISA era of employer-sponsored insurance

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333. Id. at 738–43.

334. See Pew Rsch. Ctr., Majority of Public Disapproves of Supreme Court's Decision to Overturn *Roe v. Wade* 4 (2022), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2022/07/PP_2022.07.06_Roe-v-Wade_REPORT.pdf [https://perma.cc/SN3N-8SHE].

335. See 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*) (detailing the companies that have affirmed their commitment to helping employees have access to health care).

336. See id. (relaying a statement from Levi Strauss & Co. saying that "[p]rotection of reproductive rights is a critical business issue impacting our work force, our economy and progress toward gender and racial equity").

337. A Note from Vox Media CEO Jim Bankoff on the Supreme Court Decision Overturning *Roe v. Wade*, Vox Media (June 24, 2022), https://www.voxmedia.com/2022/6/24/23181817/a-note-from-vox-media-ceo-jim-bankoff-on-the-supreme-court-decision-overturning-roe-v-wade [https://perma.cc/G2QQ-DCQX].

in 1978, and plans at that time covered sterilization and abortion at higher rates than contraception.[338] Some plans justified the exclusion as avoiding the cost of covering contraception, despite the actuarial logic and evidence that covering contraception saves plans the costs of unintended pregnancies and births.[339] By the time that President Bill Clinton proposed a sweeping health reform plan in 1993, this was still the case in the vast majority of plans.[340] After the comprehensive Clinton health plan failed to pass, members of Congress introduced some individual bills that would have required plans to cover contraception.[341] When those too failed to pass, states enacted their own contraceptive coverage mandates.[342] As Professor Sylvia Law posed in 1998, "[T]he [continued] exclusion and limitation of coverage for contraceptive services in employment-based insurance programs violates the PDA,"[343] and litigation has sought to force particular employers to add coverage.[344]

These decades of wrangling over contraception (which continues to the present day) illustrate how most employers have resisted covering contraception in their plans until political will or labor power forced them to do so.[345] The ACA, at long last, indirectly required group plans to

338. See Charlotte F. Mueller, Insurance Coverage for Contraception, 10 Fam. Plan. & Persps. 71, 77 (1978) (finding in a survey of group plans that, as of 1978, "[c]ontraceptive coverage, in contrast to abortion[] and . . . sterilization coverage, is almost nonexistent" and that only "one company's basic contract cover[ed] all contraceptive services").

339. See id. at 75 (noting that covering "[c]ontraceptive services [is] cost-effective because without them either abortions or deliveries would ensue, both of [which are] more expensive than family planning"). Other plans "sometimes justif[ied] limited maternity benefits on the grounds that pregnancy is planned and is not outside personal control, [even though] the reasoning is weakened by the failure of carriers to cover adequately both the prevention and the termination of unplanned pregnancies." Id. at 77; see also Cynthia Dailard, The Cost of Contraceptive Insurance Coverage 12–13 (2003), https://www.guttmacher.org/sites/default/files/article_files/gr060112.pdf [https://perma.cc/WUG9-4LBS] (highlighting that covering contraceptives has long been cost effective).

340. See Dailard, Contraceptive Coverage, supra note 148, at 6.

341. See id. (noting that the demise of Clinton's Health Security Act "harkened an era of incremental reform").

342. Id. at 7 (describing states' efforts, including California's 1994 bill that linked contraceptive and prescription drug coverage). For a more current overview of state actions to expand contraceptive coverage, see Beyond the Beltway, State Actions to Expand Contraceptive Coverage 2 (2023), https://powertodecide.org/sites/default/files/2023-06/State%20Action%20to%20Protect%20Access%20to%20Contraceptive%20Coverage.pdf [https://perma.cc/GC27-N4YY].

343. Law, supra note 42, at 363–64.

344. See Dailard, Contraceptive Coverage, supra note 148, at 8 (noting how contraceptive coverage advocates used litigation as a tool to apply pressure on individual employers).

345. See B. Jessie Hill, Symposium: The Contraceptives Coverage Controversy—What's Old Is New Again, SCOTUSBlog (Feb. 21, 2014), https://www.scotusblog.com/2014/02/symposium-the-contraceptives-coverage-controversy-whats-old-is-new-again/ [https://perma.cc/K842-7KT5] (summarizing the historical controversy over contraceptive coverage).

cover contraception but still with major exemptions for religious organizations.[346]

Employers, too, continue to seek validation of their owners' religious beliefs through denial of contraceptive coverage for employees and dependents.[347] Organizations that identify as being religiously "pro-life" are not coherently so in their health plans: Most employers who object to covering contraception and pregnancy termination also fail to provide benefits that support reproduction, such as fertility treatment, paid family leave, and childcare.[348]

Consider the example of Hobby Lobby, a private for-profit employer. The craft store owned by evangelical Christians, the Green family, made national news when its challenge to the ACA's contraception mandate went to the Supreme Court.[349] The Greens ultimately won their case, thus establishing that a closely held for-profit company can have religious beliefs that exempt it from providing its employees with contraception.[350]

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346. See supra section I.A.3.

347. See generally Holly Fernandez Lynch & Gregory Curfman, Bosses in the Bedroom: Religious Employers and the Future of Employer-Sponsored Health Care, *in* Law, Religion, Health in the United States 154–68 (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds., 2017) (assessing the implications of an employer's religion for an employee's health care coverage).

348. See, e.g., Sofia Resnick, Hobby Lobby Allegedly Fired Employee Due to Pregnancy, Rewire News Grp. (July 29, 2014), https://rewirenewsgroup.com/2014/07/29/hobby-lobby-allegedly-fired-employee-due-pregnancy/ [https://perma.cc/T9JX-C8A9] (alleging that Hobby Lobby both denies contraceptive coverage and fails to show concern for its pregnant employees). In an informal survey on Hobby Lobby employees' satisfaction with Hobby Lobby's maternity policies, respondents' comments included:

> "They refuse to accommodate pregnant workers." (2020).
>
> "They deny certain types of birth control, but won't hold your position and do not have maternity leave. Do NOT get pregnant while working there. And if you do, don't expect to be able to nurse your child or spend time with them. Company first, family last." (2019).
>
> "[M]aternity leave [policy] sucks. Hope you don't plan on having any kids because when you get back you're definitely expected to be working back at 100% on day one. Mentally, emotionally physically or not (man or woman) hope you're ready." (2017).

Maternity and Adoptive Leave at Hobby Lobby, InHerSight.com, https://www.inhersight.com/company/hobby-lobby/maternity-leave [https://perma.cc/T9JX-C8A9] (last visited Oct. 26, 2023); see also Doe v. Catholic Relief Servs., 429 F. Supp. 3d 440, 443–45 (D. Md. 2021) (involving a claim by an employee that his religious employer engaged in unlawful discrimination by removing the employee's same-sex spouse from the employer-sponsored health plan); cf. Anne Branigin, Who Can Access IVF Benefits? A Gay Couple's Complaint Seeks an Answer, Wash. Post (Apr. 13, 2022), https://www.washingtonpost.com/business/2022/04/13/gay-couple-ivf-benefits-discrimination-complaint/ (on file with the *Columbia Law Review*) (reporting on an EEOC class action against the City of New York as an employer alleging that the denial of IVF coverage to same-sex couples is unlawful discrimination).

349. See, e.g., Adam Liptak, Supreme Court Rejects Contraceptives Mandate for Some Companies, N.Y. Times (June 30, 2014), https://www.nytimes.com/2014/07/01/us/hobby-lobby-case-supreme-court-contraception.html (on file with the *Columbia Law Review*).

350. See Burwell v. Hobby Lobby, 573 U.S. 682, 688–93 (2014).

(HHS had already exempted religious nonprofits from the ACA mandate in accordance with the Religious Freedom Restoration Act (RFRA).[351]) The crux of the Greens' objection was their Christian beliefs "that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point."[352] Hobby Lobby provided evidence that it sometimes loses money in the name of its owners' religious beliefs, pointing to the loss of millions of dollars in revenue annually from being closed on Sundays to observe the Sabbath.[353]

But the case also illuminates some other interests at play. If the company elected to purchase insurance that did not cover these services, they would be fined $100 per day per employee, or roughly $475 million per year for Hobby Lobby.[354] If, instead, it dropped insurance altogether, Hobby Lobby faced substantial penalties of $26 million per year.[355] Dropping insurance altogether would also put companies like Hobby Lobby at a competitive disadvantage in attracting and retaining employees:

> The companies could attempt to make up for the elimination of a group health plan by increasing wages, but this would be costly. Group health insurance is generally less expensive than comparable individual coverage, so the amount of the salary increase needed to fully compensate for the termination of insurance coverage may well exceed the cost to the companies of providing the insurance. In addition, any salary increase would have to take into account the fact that employees must pay income taxes on wages but not on the value of employer-provided health insurance. . . . Likewise, employers can deduct the cost of providing health insurance, . . . but apparently cannot deduct the amount of the penalty that they must pay if insurance is not provided . . . . Given these economic incentives, it is far from clear that it would be financially advantageous for an employer to drop coverage and pay the penalty.[356]

The solution posed by the Court was a double win for Hobby Lobby and other religious objectors. These companies could provide insurance to their employees *and* leave out objected-to contraception without any penalty. The cost of providing the mandatory contraception coverage would instead fall on the third-party insurers, who, in turn, push that cost back onto other employers and their employees.[357] Despite having a solution that kept the

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351. See id. at 698–99 (describing how HHS had exempted some religious organizations from the ACA contraception mandate); see also 45 C.F.R. § 147.132 (2023) (listing the religious exemption).

352. *Hobby Lobby*, 573 U.S. at 703.

353. Brief for Respondents at *8, *Hobby Lobby*, 573 U.S. 682 (No. 13-354), 2014 WL 546899.

354. *Hobby Lobby*, 573 U.S. at 720.

355. Id.

356. Id. at 722.

357. See supra section I.B.2.

cost in the private domain, the Court majority could not help sniping at the government: "If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required . . . to pay *anything* in order to achieve this important goal."[358]

The economic interests in exemptions for Hobby Lobby and other religious for-profit employers are opaque but worth interrogating. First, religious organizations may reap savings by shifting some portion of the cost of contraceptive health care for their employees onto other organizations. The additional hurdles created by this shift deter many people from accessing these forms of contraception.[359] While the companies' health plans save money on the objected-to forms of contraception, they are likely to incur greater costs from at least some unwanted pregnancies that the lack of access to those contraceptives may produce.[360]

For Hobby Lobby, however, this short-term cost can be viewed as a potential long-term gain in reputation among powerful religious constituencies and in political influence from the notoriety of their decision.[361] Taking a high-profile political stance of this nature may also appear as a form of corporate social responsibility (CSR), or virtue signaling, branding, and profit seeking.[362] Business owners with credibly conservative evangelical beliefs have parlayed this into access to Supreme Court justices through donations to the Historical Society.[363] Likewise, even when a company does

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358. *Hobby Lobby*, 573 U.S. at 729.

359. See supra sections I.B.1–.2.

360. See supra note 339 and accompanying text.

361. Cf. Interview with Kristin Madison, Professor L. & Health Scis., Northeastern Univ. Sch. of L., in Bos., Mass. (Jan. 18, 2023) (explaining this possibility); Jodi Kantor & Jo Becker, Former Anti-Abortion Leader Alleges Another Supreme Court Breach, N.Y. Times (Nov. 19, 2022), https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html (on file with the *Columbia Law Review*) (reporting on how antiabortion leaders received advance news of the *Hobby Lobby* Supreme Court opinion).

362. See, e.g., Elizabeth Sepper & James D. Nelson, The Religious Conversion of Corporate Social Responsibility, 71 Emory L.J. 217, 220–21 (2021) (noting that "CSR enthusiasts continue to define religious exemptions as socially responsible behavior"); Christopher Beem, Why Virtue Signaling Isn't the Same as Virtue—It Actually Furthers the Partisan Divide, The Conversation (Aug. 29, 2022), https://theconversation.com/why-virtue-signaling-isnt-the-same-as-virtue-it-actually-furthers-the-partisan-divide-189195 [https://perma.cc/SL6T-4VUB] (defining and providing examples of virtue signaling).

363. See Robert Barnes & Ann Marimow, Justice Alito Denies Disclosing 2014 Hobby Lobby Opinion in Advance, Wash. Post (Nov. 19, 2022), https://www.washingtonpost.com/politics/2022/11/19/alito-hobby-lobby-supreme-court-nyt/ (on file with the *Columbia Law Review*); Jo Becker & Julie Tate, A Charity Tied to the Supreme Court Offers Donors Access to the Justices, N.Y. Times (Dec. 30, 2022), https://www.nytimes.com/2022/12/30/us/politics/supreme-court-historical-society-donors-justices.html (on file with the *Columbia Law Review*) (last updated Jan. 1, 2023); cf. Emma Green, Evangelical Mega-Donors Are Rethinking Money in Politics, The Atlantic (Jan. 2, 2019), https://www.theatlantic.com/politics/archive/2019/01/evangelical-mega-donors/578563/ (on file with the *Columbia Law Review*).

not seem particularly religiously oriented, the owners of that business may have individual fame and notoriety in mind.[364]

Yet, as Professors Elizabeth Sepper and James Nelson have pointed out, there exists a "foundational divergence between the political economies of CSR and corporate religious exemptions."[365] While CSR "looks to the democratic state" for direction and "involves doing more than state or federal laws require, . . . corporate religious exemptions lower the regulatory bar" and "def[y] the[] core commitments" of the democratic state.[366]

Viewed in context, an ostensibly natalist employer policy to discourage contraception more accurately fits this model of defiance and deregulation. The result is that, as Professor Sepper has argued elsewhere, the "underlying premises" of many instances in which businesses seek "religious exemption reflect a tradition of market libertarianism, rather than religious liberty."[367] The use of religious objections, rather than primarily ratifying an employer's natalist values, enables the firm to avoid regulations both requiring coverage and, possibly, prohibiting sex discrimination.[368]

From a reproductive justice vantage, employers who deny coverage for contraception and abortion are as problematic as those who discourage child birthing. Reproductive justice demands control equally over options to reproduce or not. Employers again place their own interests above the reproductive autonomy of individual employees. And while employees can certainly seek to match their own values and preferences over reproductive matters with common-minded employers,

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364. Consider, for example, the conservative activist Steven Hotze, who owns the health care services management firm, Braidwood Management Inc., which is at the helm of the pending Supreme Court litigation, *Braidwood Management Inc. v. Becerra*. See Laurie Sobel, Usha Ranji, Kaye Pestaina, Lindsey Dawson & Juliette Cubanski, Explaining Litigation Challenging the ACA's Preventive Services Requirements: *Braidwood Management Inc. v. Becerra*, KFF (May 15, 2023), https://www.kff.org/womens-health-policy/issue-brief/explaining-litigation-challenging-the-acas-preventive-services-requirements-braidwood-management-inc-v-becerra/ [https://perma.cc/36BC-B8BD]. Braidwood Management is not engaged in any religious activity, but Hotze himself attracts media attention and has taken many high-profile political positions. See, e.g., Zach Despart, GOP Megadonor Steven Hotze Charged After a Bogus Election Fraud Scheme Led a Former Cop to Threaten a Repairman, Tex. Trib. (Apr. 20, 2022), https://www.texastribune.org/2022/04/20/steve-hotze-houston-indicted-voter-fraud/ [https://perma.cc/AY6B-RZ3H] (describing the criminal charges brought against Hotze after he hired over a dozen private investigators to look for voter fraud ahead of the 2020 presidential election).

365. Sepper & Nelson, supra note 362, at 220.

366. Id.

367. Elizabeth Sepper, Free Exercise Lochnerism, 115 Colum. L. Rev. 1453, 1457 (2015).

368. Related issues are being raised in cases challenging coverage for HIV prevention medications. See Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 637 n.3 (N.D. Tex. 2022) ("Plaintiffs' . . . complaint asserted [Religious Freedom Restoration Act] claims against compulsory coverage of . . . PrEP drugs . . . ."); Sobel et al., supra note 364 (summarizing the *Braidwood* litigation and its stakes).

this becomes ever more difficult with the proliferation of safeguards for employer conscience for religious and nonreligious organizations alike.

Whether antinatalist or not, an employer acts on its own interests in choosing which medical services it will cover. Under most any motivation, the employer acts as a source of control over employees' sexual and reproductive choices within the confines of health insurance coverage. Reliance on employers' preferences subjects reproductive access to the whims of interest convergence, which critical theory posits will move dominant players to support the interests of subordinated groups if and only to the extent that doing so also furthers the dominant group's interest.[369] Given the economic interests in employers of controlling employees' reproductive decisions, and the divergence of employers' year-over-year outlook from the individual employee's lifetime perspective, the likelihood of interest convergence and its duration for reproductive care appears even more fragile.

B. *Decoupling Reproductive-Care Access From Employment*

Employers from all viewpoints use the discretion given to them under a host of health care laws to make decisions about their health plans that match their actuarial, commercial, and personal interests. Rather than any one employer's values, the greater threat to reproductive justice comes from the system of employer-sponsored insurance itself, which subjects the reproductive options of over half of the population to the whims of employers' self-interests.

Reproduction, and the avoidance of it, carry profound consequences for individuals and their families—with the most profound consequences for women and other birthing people. In *Roe*, the right of women to be free to make decisions surrounding abortions was described as an individual right in part because of how much pregnancy affects the individual's life and opportunities:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the

369. See Derrick A. Bell, Jr.,Comment, *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 524 (1980) (explaining how desegregation aligned with majority-white interests in 1954); see also Jennifer S. Hendricks, Converging Trajectories: Interest Convergence, Justice Kennedy, and Jeannie Suk's "The Trajectory of Trauma," 110 Colum. L. Rev. Sidebar 63, 67 (2010), https://columbialawreview.org/wp-content/uploads/2016/07/Hendricks.pdf [https://perma.cc/2W7W-UHLW] (exploring abortion rights advocacy and micro-interest convergence).

> problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[370]

Planned Parenthood v. Casey, too, echoed how defining reproduction is for one's life in more intangible ways, characterizing reproductive decisionmaking as "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[371]

Reproductive justice and autonomy implicate bodily integrity and informed consent principles, too, or the idea that apart from certain exceptions, individuals ought to have freedom of self-determination over their own bodies.[372] So too, personal autonomy or the ability to chart one's life course according to one's own values and preferences. [373] And these interests implicate gender equality, as the burdens of birthing and rearing children on persons who can become pregnant implicate so many life opportunities.[374]

This broader sentiment—that individuals ought to be supported to make decisions about their own bodies and their reproductive lives—conflicts with the employer-sponsored benefits system in which employers can act as de facto gatekeepers of access to reproductive services. Delegating

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370. Roe v. Wade, 410 U.S. 113, 153 (1973), overruled by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); see also *Dobbs*, 142 S. Ct. at 2317 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("*Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child.").

371. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992), overruled by *Dobbs*, 142 S. Ct. at 2228.

372. See Maya Manian, The Irrational Woman: Informed Consent and Abortion Decision-Making, 16 Duke J. Gender L. & Pol'y 223, 240 (2009) (discussing how informed-consent principles reflect values of bodily integrity and self-determination); see also B. Jessie Hill, Reproductive Rights as Health Care Rights, 18 Colum. J. Gender & L. 501, 502 (2009) (articulating a negative right to health encompassing abortion); Reva B. Siegel, Dignity and the Politics of Protection: Abortion Restrictions Under *Casey/Carhart*, 117 Yale L.J. 1694, 1740 n.132 (2008) [hereinafter Siegel, Politics of Protection] ("A clear articulation of dignity as autonomy or self-determination is echoed in Justice Stevens's concurrence [in *Casey*] . . . .").

373. Siegel, Politics of Protection, supra note 372, at 1753 ("[D]ignity-respecting regulation of women's decisions can neither manipulate nor coerce women: the intervention must leave women in substantial control of their decision, and free to act on it.").

374. See *Dobbs*, 142 S. Ct. at 2317 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions."); Reva B. Siegel, Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression, 56 Emory L.J. 815, 818–19 (2007) (discussing a multitude of ways in which control over when to give birth implicates important life decisions and opportunities); Lavanya Vijayasingham, Veloshnee Govender, Sophie Witter & Michelle Remme, Employment Based Health Financing Does Not Support Gender Equity in Universal Health Coverage, BMJ 1–2 (2020), https://www.bmj.com/content/bmj/371/bmj.m3384.full.pdf [https://perma.cc/JXJ2-VZGC] (noting how employer-sponsored insurance threatens women's access to health care because "women face more employment insecurity and transitions across their work lives, including for reproduction and unpaid care work").

these highly consequential policy decisions to employers establishes the power dynamic that thwarts reproductive justice as it sublimates individuals' access to institutions' and owners' preferences.[375]

Of course, employers through their benefit decisions do not exert complete control over the reproductive lives of their employees, unlike political bodies that can make procedures illegal and thus totally inaccessible. Employers cannot ban their employees from seeking available reproductive care and are constrained by the Pregnancy Discrimination Act from discriminating against employees based on their reproductive care decisions, including seeking, obtaining, or forgoing abortions.[376]

Still, when employers choose not to cover a full range of reproductive services from contraception and abortion to comprehensive prenatal care and delivery to fertility therapies, they act as a very real barrier to access to care for employees. Eleven percent of Americans say they lack enough cash, savings, credit card balances, or other means to pay a $400 bill.[377] Twenty-four percent of Americans struggle to pay their bills each month.[378] Compare these financials to the out-of-pocket burden of various reproductive treatments: contraception (between $20 and $50 monthly),[379] a Plan

375. Professor B. Jessie Hill has posited that laws giving private entities complete control over employees' health care benefits may be an unconstitutional delegation, considering that those employees would otherwise be entitled to subsidized coverage under the ACA. See B. Jessie Hill, Religious Nondelegation, 54 Loy. U. Chi. L.J. 511, 530–32 (2022).

376. See 42 U.S.C. § 2000e(k) (2018) (noting that an employer does not need to "pay for health insurance benefits for abortion" but cannot discriminate on the basis of childbirth and related medical conditions); 29 C.F.R. pt. 1604 app. (2023) ("An employer cannot discriminate in its employment practices against a woman who has had an abortion."); see also Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358, 364 (3d Cir. 2008) (holding that the PDA prohibits employers from discriminating against a female employee because she had an abortion); Turic v. Holland Hosp., Inc., 85 F.3d 1211, 1214 (6th Cir. 1996) (holding that firing a pregnant employee because she contemplated having an abortion violated the PDA); EEOC PDA Guidance, supra note 149 ("Title VII protects women from being fired for having [or contemplating] an abortion.").

377. Bd. of Governors of the Fed. Rsrv. Sys., Economic Well-Being of U.S. Households in 2021, at 36 fig.20 (2022), https://www.federalreserve.gov/publications/files/2021-report-economic-well-being-us-households-202205.pdf [https://perma.cc/V83U-LPCR].

378. See id. at 36 (providing a breakdown of households not able to fully pay their current monthly bills).

379. See How Do I Get Birth Control Pills?, Planned Parenthood, https://www.plannedparenthood.org/learn/birth-control/birth-control-pill/how-do-i-get-birth-control-pills [https://perma.cc/3VN9-2QVH] (last visited Oct. 24, 2023) (stating that one month of birth control "start[s] at $20/pack" and can cost "up to $50"). The Biden administration considers out-of-pocket costs for contraception worrisome enough to prompt it to propose a rule that makes contraception entirely free to individuals with plans under the ACA. See Press Release, Ctrs. for Medicare & Medicaid Servs., Biden–Harris Administration Proposes New Rules to Expand Access to Birth Control Coverage Under the Affordable Care Act (Jan. 30, 2023), https://www.cms.gov/newsroom/press-releases/biden-harris-administration-proposes-new-rules-expand-access-birth-control-coverage-under-affordable [https://perma.cc/NT39-D9EX] (noting that the rule proposes an independent pathway to access contraceptive services "through a willing contraceptive provider" at no cost).

B dosage (between $40 and $50),[380] prenatal/childbirth/postpartum care ($18,865),[381] and one cycle of in vitro fertilization ($12,500).[382] Most people need third-party financing to have meaningful access to reproductive care.

The United States' reliance on employer-sponsored insurance gives commercial entities great sway in which reproductive services will receive funding and does so in a regressive way, benefitting high-income workers at the expense of low-income ones and conferring outsized benefits on white men with economic status at the expense of people of color.[383] Beyond racial inequality and regressivity, the enshrined preference for employer-sponsored insurance gives dominion over reproductive care access to the very same private entities whose economic interests often conflict with reproductive justice.[384] Thus, reforms that aim to justly distribute health care resources almost all propose the decoupling of health care financing from employment status.[385] In the more discrete language of political economy, progressive health care funding strategies shift away from private market direction and toward public control.[386]

Decoupling reproductive care funding from employment represents a net positive for reproductive autonomy for several reasons. First, employers' expansion of reproductive care coverage is exceedingly fragile, secured only by the whims of corporate managers and their perceived economic and other interests. Walmart was, until the passage of the ACA, the

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380. Plan B Morning-After Pill, Planned Parenthood Mass., https://www.plannedparenthood.org/planned-parenthood-massachusetts/online-health-center/planned-parenthood-services-birth-control-abortion-std-hiv-pregnancy-health-care/emergency-contraception-plan-b [https://perma.cc/CKP6-2FPR] (last visited Oct. 24, 2023).

381. Rae et al., supra note 201 (finding health costs associated with pregnancy, childbirth, and postpartum care to average $18,865).

382. Weigel et al., supra note 31 (citing Georgina M. Chambers, Elizabeth A. Sullivan, Osamu Ishihara, Michael G. Chapman & G. David Adamson, The Economic Impact of Assisted Reproductive Technology: A Review of Selected Developed Countries, 91 Fertility & Sterility 2281, 2288 (2009)).

383. See Clark C. Havighurst & Barak D. Richman, Distributive Injustice(s) in American Health Care, 69 Law & Contemp. Probs. 7, 8 (2006) (arguing that the United States health care system regressively distributed health care costs on the basis of class and wealth); Jonathan Oberlander, The Political Economy of Unfairness in U.S. Health Policy, 69 Law & Contemp. Probs. 245, 250–51 (2006) (same); Wiley et al., Health Reform Reconstruction, supra note 49, at 723–24 (describing how employer-sponsored insurance benefited white people given few Black people had jobs with employer-sponsored benefits).

384. See supra section II.A.

385. See, e.g., Nancy S. Jecker, Can an Employer-Based Health Insurance System Be Just?, 18 J. Health Pol. Pol'y & L. 657, 671 (1993); Lindsay Wiley, From Patient Rights to Health Justice, 37 Cardozo L. Rev. 833, 837 (2016) [hereinafter Wiley, From Patient Rights].

386. See, e.g., Oberlander, supra note 383, at 262–64 (explaining why markets cannot ensure progressive health financing); Anja Rudiger, Human Rights and the Political Economy of Universal Health Care: Designing Equitable Financing, 18 Health & Hum. Rts. 67, 68 (2016).

paradigm of corporate resistance to benefits expansion.[387] And it was, until *Dobbs*, no vocal supporter of reproductive choice.[388] Changes in corporate control or strategy can immediately retrench its expansion of abortion access through its health plan.[389] Similarly, the creeping availability of exemptions to reproductive care coverage mandates for employers with religious objections give employers a lever to pull at their discretion to alter the coverage for their employees.[390] More types of employers are emboldened to assert that challenge to more and more aspects of reproductive and sexual health care coverage. Expansions of coverage from employer choice are not durable.

The control over employee behavior that employers' choices exert is itself a source of subordination.[391] Withdrawing employers from the decision over what reproductive care to fund removes this source of control—and of current and historic discrimination—from the equation.[392] The subordinating effects are most apparent for people of color, who are the most likely to be in low-wage jobs with the least generous

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387. See, e.g., Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180, 183 (4th Cir. 2007) (noting the "nationwide campaign to force Wal-Mart Stores, Inc., to increase health insurance benefits for its 16,000 Maryland employees").

388. See supra notes 7–9 and accompanying text.

389. Cf. Siddharth Cavale & Arriana McLymore, Walmart Shareholder Proposal for Report on Abortion Ban Impact Fails, Reuters (June 1, 2022), https://www.reuters.com/world/us/walmart-shareholder-proposal-abortion-ban-impact-fails-2022-06-01/ (on file with the *Columbia Law Review*) (reporting that Walmart shareholders rejected an investor-led proposal for a "report assessing the impact on its employees if the U.S. Supreme Court rolls back abortion rights").

390. Timothy S. Jost, Supreme Court Excuses Organizations With Religious or Moral Objections From Covering Workers' Birth Control, Commonwealth Fund Blog (July 9, 2020), https://www.commonwealthfund.org/blog/2020/supreme-court-excuses-organizations-religious-or-moral-objections-covering-workers-birth [https://perma.cc/E4N8-23L5] (describing two Supreme Court cases upholding Trump-era regulations that exempted objecting organizations from mandatory contraceptive coverage); Amy Myrick & Sabrina Merold, Religious Liberty and Access to Reproductive Health Care, Am. Bar Ass'n (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/religious-liberty-and-access-to-reproductive-health-care/ (on file with the *Columbia Law Review*) (explaining how rules promulgated under Donald Trump, relying in part on the Religious Freedom Restoration Act, have expanded the scope of religious exemptions).

391. Cf. Mahmoud F. Fathala, The Impact of Reproductive Subordination on Women's Health & Family Planning, 44 Am. U. L. Rev. 1179, 1181–82 (1995) (describing subordination by "[p]atriarchal societies" as flowing from the reasoning "that if women had control over their reproduction, they would also have the *unthinkable*—control over their own sexuality"); Maher, Employment-Based Anything, supra note 55, at 1296–98 (describing the long-recognized "imbalance in power between management and workers in real world markets" and the lack of constraints on exploitation in the context of health-insurance benefits).

392. See, e.g., Yearby et al., supra note 59, at 188–89 (describing how health policies during the Jim Crow era allowed unions and employers to discriminate against racial-minority workers—a tactic that persists in the structure of modern health care).

and most restrictive benefits.[393] Further, employers' actuarial interests may exacerbate the impulse toward surveilling these groups of employees,[394] many of whom come from marginalized communities that are already heavily surveilled. Removing reproductive care from the grasp of employers removes these subordinating influences of employers over individual reproductive autonomy and wider reproductive justice.

III. INSURANCE REFORMS FOR REPRODUCTIVE JUSTICE

Examples of how and why employers seek to control employee reproduction to serve commercial ends reveal the conflict at the core of employers' dominant role in directing access to reproductive care. This conflict represents a net loss for reproductive justice. If proponents of reproductive justice worry about governmental intrusion in individuals' intimate decisions about reproduction,[395] they also must scrutinize employers' intrusions, which subordinate individuals' reproductive autonomy to the myriad moral *and* economic preferences of commercial entities and their owners. Decoupling reproductive health care access from the discretion of employers ought to be a central aim of health reform in support of the meaningful reproductive autonomy contemplated by the reproductive justice framework.

This Article concludes by considering how health reform may achieve this decoupling. Doing so raises tough questions about reproductive care in universal health reform that the existing policy literature has yet to fully

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393. See, e.g., Heeju Sohn, Racial and Ethnic Disparities in Health Insurance Coverage: Dynamics of Gaining and Losing Coverage Over the Life-Course, 36 Population Rsch. Pol'y Rev. 181, 182 (2017) ("[L]ow income and propensity to work in jobs with no health benefits [are] the primary causes for high uninsurance rates among African Americans." (citation omitted)); Rosemarie Day & Deb Gordon, Employer-Sponsored Health Insurance Contributes to Structural Racism, The Hill (Sept. 5, 2020), https://thehill.com/opinion/healthcare/515184-employer-sponsored-health-insurance-contributes-to-structural-racism/ [https://perma.cc/FD8Z-VN42] ("Having to rely on a job for health insurance significantly disadvantages Black and brown people because they are less likely to be working in jobs that offer [employer-sponsored insurance] benefits.").

394. See Matthew Brodie, Beyond Privacy: Changing the Data Power Dynamics in the Workplace, Law & Pol. Econ. Project (Feb. 7, 2023), https://lpeproject.org/blog/beyond-privacy-changing-the-data-power-dynamics-in-the-workplace/ [https://perma.cc/9JL7-67KZ] (noting the value of employee surveillance, which provides employers with "huge data sets to feed increasingly sophisticated algorithms" about their employees' habits and rhythms).

395. See, e.g., Barbara Hewson, Reproductive Autonomy and the Ethics of Abortion, 27 J. Med. Ethics ii10, ii11 (2001) ("If people are to be free, that freedom must include freedom to make these difficult and extremely personal choices."); Keeanga-Yamahtta Taylor, Abortion Is About Freedom, Not Just Privacy, New Yorker (July 6, 2022), https://www.newyorker.com/news/our-columnists/abortion-is-about-freedom-not-just-privacy (on file with the *Columbia Law Review*) (noting that the "right to privacy" includes both protection from state interference with personal decisions and "the more fundamental freedom of women to control their own bodies").

confront:[396] namely the control over reproductive options inherent in any third-party funding system and the special danger to reproductive freedom in relocating third-party funding control to American governmental units.

The most effective mode of removing employers from their gatekeeping function over reproductive care is to shift from an employer-dependent, multipayer funding system to a universal, single-payer system. Yet, while a single-payer system would release the hold of private employers over reproductive autonomy to a great extent, it also shifts that same power to

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396. See, e.g., David DeGrazia, Single Payer Meets Managed Competition: The Case for Public Funding and Private Delivery, 38 Hastings Ctr. Rep. 23, 24 (2008) (making no reference to contraception or abortion). Many analyses assume universality means coverage for all reproductive services. See, e.g., Nat'l Network of Abortion Funds, Abortion Funding: A Matter of Justice 19 (2005), https://clacaidigital.info/bitstream/handle/123456789/206/Abortion.Funding.pdf [https://perma.cc/54S9-92RX] (calling on Congress to "[i]nclude abortion in all government health programs"); Nat'l P'ship for Women & Fams., A Framework for Making Universal Coverage Meaningful for Women 7 (2019), https://nationalpartnership.org/wp-content/uploads/2023/02/universal-health-coverage.pdf [https://perma.cc/H7V9-VALX] [hereinafter Nat'l P'ship for Women & Fams., Universal Coverage] ("[U]niversal coverage proposals must include comprehensive coverage for abortion care for all enrollees."); Vidya Visvabharathy, Don't Call It Universal Without Including Abortion Coverage, Physicians for a Nat'l Health Program (Sept. 4, 2017), https://pnhp.org/news/dont-call-it-universal-without-including-abortion-coverage/ [https://perma.cc/NWF9-QUV2] ("[S]ingle-payer groups must explicitly advocate for coverage of abortion services . . . ."); Erica West & Emma Wilde Botta, Why Single Payer Is a Feminist Issue, SocialistWorker.org (Jan. 18, 2018), https://socialistworker.org/2018/01/18/why-single-payer-is-a-feminist-issue [https://perma.cc/QCG2-SLTQ] ("Single-payer would significantly improve women's health by mandating coverage of all essential reproductive care and all LBGTQ health care[,] . . . preventive care[,] and . . . all forms of contraception."). Others note abortion as a political sticking point. See, e.g., Roger M. Battistella, Health Care Turning Point: Why Single Payer Won't Work 33, 37–42 (2010) (noting that disagreement over abortion will likely prevent the consensus necessary to pass federal single payer); Michael S. Sparer, States as Policy Laboratories: The Politics of State-Based Single-Payer Proposals, 109 Am. J. Pub. Health 1511, 1511–13 (2019) (noting Colorado's experience but otherwise not tackling reproductive care).

Some have considered workarounds for abortion. See, e.g., Robert M. Veatch, Single Payers and Multiple Lists: Must Everyone Get the Same Coverage in a Universal Health Plan?, 7 Kennedy Inst. Ethics J. 153, 161–62 (1997) (posing that a single-payer system in which individuals could buy into a series of different coverage "lists" could solve the abortion debate). Few consider the deeper problem for all reproductive services from reproductive exceptionalism. See Kaitlin Hunter & Gabe Horwitz, What Could Happen to Reproductive Health Care Under Single Payer?, Third Way (Sept. 13, 2019), https://www.thirdway.org/memo/what-could-happen-to-reproductive-health-care-under-single-payer [https://perma.cc/46MK-SDBN] (noting that a Republican-controlled federal government could exclude or defund contraception and abortion); Lab. Campaign for Single Payer, It's a Workers' Issue! Abortion Access and the Right to Health Care, YouTube, at 44:03 (Oct. 21, 2022), https://www.youtube.com/watch?v=lnEqCKsEDYc (on file with the *Columbia Law Review*) (describing the knock-on effects of abortion bans on other areas of reproductive care). And fewer still—if any—consider the inherent gatekeeping function of a third-party payment model.

lawmakers and bureaucrats.[397] In theory, a publicly funded system in a democratic society should reflect the political will of the governed and therefore enact coverage that reflects the broad public support that contraception and abortion access have had for decades.[398] In practice, however, contraception and abortion access have been leveraged by countermajoritarian political forces and have made reproductive care exceptional in other efforts at universal coverage, much to the detriment of reproductive autonomy.[399]

A variety of reform options exist. This Part examines the degree to which each option may further the aims of reproductive justice. While the political economy of health reform suggests that incremental reforms may be more politically feasible than transformative ones, this Article employs the broader framework of confrontational incrementalism to investigate whether feasible increments would confront or continue to accommodate the subordinating influences of the employer-sponsored insurance system detailed in the previous Parts. The United States' experience with employer funding of reproductive care suggests that systemic reforms ought to confront both the subordinating influences of third-party control over individual reproductive autonomy and the trend of reproductive exceptionalism that has diminished access to reproductive services. Ultimately, confrontational incrementalism suggests a path pursuing reproductive autonomy simultaneously with universal public benefits and a path on which state-level reforms may need to lead the way.

A. *Assessing Health-Reform Options*

At its most tangible, the problem of employer-sponsored reproduction is about the power to control the distribution of resources for reproductive care and its consequences. Working in tandem, America's decisions not to establish universal public health care and to cobble together a porous legal infrastructure of reproductive exceptionalism

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397. Cf. Deborah Stone, Single Payer—Good Metaphor, Bad Politics, 34 J. Health Pol. Pol'y & L. 531, 534 (2009) ("The countries that [implement] single-payer [don't] hav[e] one payer, but *one rule maker*.").

398. See, e.g., Public Attitudes About Birth Control, Roper Ctr. for Pub. Op. Rsch. (July 27, 2015), https://ropercenter.cornell.edu/public-attitudes-about-birth-control [https://perma.cc/ZKF9-6ZTP] (recounting a 1998 poll finding that seventy-five percent of the country would approve of a national bill requiring coverage for prescription birth control); Public Opinion on Abortion, Pew Rsch. Ctr. (May 17, 2022), https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/ [https://perma.cc/K675-MBXC] (charting public opinion on abortion between 1995 and 2022).

399. See, e.g., Courtney Megan Cahill, The New Maternity, 133 Harv. L. Rev. 2221, 2223–25 (2020) (analyzing how "[c]onstitutional law's assumptions about obvious maternity and complicated paternity" work to validate sex discrimination); Metzger, supra note 276, at 898 ("[A]dvocates need to convince courts that abortion's uniqueness does not necessarily justify abortion-specific regulation but on the contrary may necessitate subjecting some abortion-specific measures to greater scrutiny.").

hand employers significant power over this distribution with relatively little constraint or responsibility to the individuals who depend on it. Reforms that would alter this power dynamic range from incremental constraints on employer discretion (e.g., coverage mandates for specific services) to systemic reforms (e.g., establishing universal public funding).

In the parlance of political economy, smaller incremental reforms may offer greater *feasibility* of enactment and implementation, with the trade-off of less impact.[400] Systemic reforms may have greater policy impact, but they have slim chances of enactment.[401] Concerns over feasibility manifested in the two most recent debates over system-wide health reforms during the Clinton and Obama Administrations. Both began with big ideas but ultimately pursued more modest changes that relied on the continued availability of employer-sponsored insurance, with the ACA marking the "apotheosis" of this incrementalism trend by building other insurance reforms around a mandate for large employers to provide insurance.[402] While a few states in recent years have pursued public options that would create alternatives to employer-sponsored insurance, Congress and most state legislators have instead taken pains to protect the connection between health care coverage and employment.[403]

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400. See Federico Sturzenegger & Mariano Tommasi, Introduction, *in* The Political Economy of Reform 1, 3 (Federico Sturzenegger & Mariano Tommasi eds., 1998) (describing various academic models of political reform); Michael R. Reich, Political Economy Analysis for Health, 97 Bull. WHO 514, 514 (2019) (advocating for applying to health care reform political economy's focus on the power to distribute resources and assessment of political feasibility for policy change).

401. See, e.g., Ashley M. Fox & Michael R. Reich, Political Economy of Reform, *in* Scaling Up Affordable Health Insurance: Staying the Course 395 (Alexander S. Preker, Marianne E. Lindner, Dov Chernichovsky & Onno P. Schellekens eds., 2013) (explaining why transforming health financing systems is popular and effective but has proven so difficult to pass).

402. See Dailard, Contraceptive Coverage, supra note 148 (recounting Clinton's "sweeping, controversial proposal to achieve universal health insurance" in 1993 that ultimately "harkened an era of incremental reform"); Wiley et al., Health Reform Reconstruction, supra note 49, at 671–72 (describing the view that the ACA is an "incremental step" toward the "bold[] aim" of universal coverage).

403. See Jaime S. King, Katherine L. Gudiksen & Erin C. Fuse Brown, Are State Public Option Health Plans Worth It?, 59 Harv. J. on Legis. 145, 191 (2022) (providing an overview of all state public-option bills, and demonstrating that even the most aggressive "[c]omprehensive public option" plans merely permit employers to opt-in); Christine Monahan, Justin Giovannelli & Kevin Lucia, Update on State Public Option-Style Laws: Getting to More Affordable Coverage, Commonwealth Fund: To The Point (Mar. 29, 2022), https://www.commonwealthfund.org/blog/2022/update-state-public-option-style-laws-getting-more-affordable-coverage [https://perma.cc/W9XJ-ZNGN] (describing the public-option-type laws adopted in three states); cf. Peter R. Orszag & Rahul Rekhi, Policy Design: Tensions and Tradeoffs, *in* The Trillion Dollar Revolution: How the Affordable Care Act Transformed Politics, Law, and Health Care in America 53 (Ezekiel J. Emanuel & Abbe Gluck eds., 2020) (recounting that the designers of the ACA worked with a directive to "do no harm" to employer-sponsored insurance while pursuing universal coverage strategies).

How, then, to measure progress? This Article sets its sights on assessing how large and small reforms to the employer-sponsored insurance default may advance or thwart reproductive justice. To assess the trade-offs involved in potential reforms, it employs the framework of confrontational incrementalism, which centers principles of justice as the desired ends for reform, while interrogating whether and to what extent proposed reforms confront or accommodate the sources of subordination that impede justice.[404] Put concretely, incremental reforms that use up political energy and resources to expand access without confronting the subordinating influence of employer-sponsored insurance, therefore, may lay stumbling blocks to reaching the goal of universal access to meaningful reproductive care rather than stepping stones toward achieving it.[405]

Consider examples of reforms that would merely constrain employer choice, such as a recent federal proposal for amending ERISA or the ACA to require all group plans to cover fertility treatment.[406] It would incrementally expand access to this portion of reproductive care for many people. But objections from religious employers[407] would likely limit some of its impact, just as such objections have done to similarly modest attempts to expand coverage for sexual and reproductive health care after the *Hobby Lobby* decision.[408] Among the fifteen states that have enacted some form of fertility coverage mandate, several already include exemptions for religious employers.[409] And, of course, ERISA preempts states from enforcing rules against self-funded plans,[410] further diluting the impact of these incremental reforms at the state level.

Assessed under the lens of confrontational incrementalism, a fertility coverage mandate might expand access yet not ultimately advance reproductive justice. A federal coverage mandate for group insurance would give

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404. See Wiley et al., Health Reform Reconstruction, supra note 49, at 733–41 (presenting the confrontational incrementalism framework and applying it to prepandemic and pandemic-era health care reforms); cf. Angela P. Harris & Aysha Pamucku, The Civil Rights of Health: A New Approach to Challenging Structural Inequality, 67 UCLA L. Rev. 758, 809 (2020) (comparing environmental justice and reproductive justice movements); Gabriel Scheffler, Equality and Sufficiency in Health Care Reform, 81 Md. L. Rev. 144, 169–71 (2021) (finding points of comparison and convergence between conceptions of the right to health care as equality in access versus an acceptable minimum of care).

405. See Wiley et al., Health Reform Reconstruction, supra note 49, at 734–35.

406. See Access to Infertility Treatment and Care Act, S. 1461, 116th Cong. (2019) (proposing that all private and federal public-health plans cover fertility treatment).

407. See Cynthia Brougher, Cong. Rsch. Serv., RL34708, Religious Exemptions for Mandatory Health Care Programs: A Legal Analysis 5–6 (2012) (discussing religious-employer exemptions from mandatory coverage).

408. E.g., Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020); Zubik v. Burwell, 578 U.S. 420 (2016); DeOtte v. State, 20 F.4th 1055 (5th Cir. 2021); Braidwood Mgmt. Inc. v. Becerra, 666 F. Supp. 3d 613 (N.D. Tex. 2023).

409. Weigel et al., supra note 31 ("Many states [with laws requiring coverage of at least some infertility treatments] provide exemptions for . . . religious employers.").

410. See id.

more people the financial means for fertility treatment, enabling more people who wish to have a child to do so. But such a mandate would maintain the tether between access and employment, excluding the low-wage and part-time workers and uninsured nonworkers for whom fertility treatment already is farthest out of financial reach. Unless the coverage mandate were paired with the enactment of fertility coverage requirements for individual market plans and public programs (Medicare and Medicaid), it would likely entrench the existing socioeconomic and racial disparities in access.[411] Even under a mandate, plans' narrow definitions of infertility may exclude LGBTQ enrollees from getting that coverage.[412] When enacted at the state level, mandates contribute to the already profound geographic disparities in access and resources,[413] which follow historical trends of racial exclusion.[414] And neither federal nor state fertility coverage mandates deal with employers' failure to support (or worse, the hostility to) pregnancy, childbirth, and child-rearing that fertility treatments aim to produce.[415]

Proposals to tweak the existing regulatory infrastructure are instances of the cat-and-mouse of reproductive exceptionalism in insurance: Employers are reluctant to cover reproductive care and proponents must gather

411. Katharine F.B. Correia, Katherine Kraschel & David B. Seifer, State Insurance Mandates for In Vitro Fertilization Are Not Associated With Improving Racial and Ethnic Disparities in Utilization and Treatment Outcomes, 228 Am. J. Obstetrics & Gyn. 313.3l, 313.e7 (2023) (finding that state insurance mandates alone "do not seem to be sufficient in their present form to result in narrowing or creating equal access to or outcomes from IVF"); see also Katherine Kraschel, Going Public—The Future of ART Access Post-*Dobbs*, Harv. L. Petrie–Flom Ctr.: Bill of Health (May 23, 2023), https://blog.petrieflom.law.harvard.edu/2023/05/23/going-public-the-future-of-art-access-post-dobbs/ [https://perma.cc/9F4J-EFH9] ("[S]tate insurance mandates that require only private insurers to cover infertility treatment disproportionately exclude BIPOC . . . and may, in fact, exacerbate racial disparities in access to care." (citing Katharine F.B. Correia, Katherine Kraschel & David B. Seifer, State Insurance Mandates for In Vitro Fertilization Are Not Associated With Improving Racial and Ethnic Disparities in Utilization and Treatment Outcomes, 228 Am. J. Obsetrics & Gynecology 331 (2023))).

412. See Janet Choi & Cynthia McEwen, In Their Rush to Offer Fertility Benefits, Employers Could Be Unwittingly Creating a New Inequity for LGTBQIA+ Employees, Fortune (July 12, 2023), https://fortune.com/2023/07/21/in-their-rush-to-offer-fertility-benefits-employers-could-be-unwittingly-creating-a-new-inequity-for-lgtbqia-employees/ [https://perma.cc/F2X5-YC7K] (noting how policies that define "infertility" as "six to 12 months of unprotected, heterosexual sex without successful conception" exclude same-sex couples from fertility-care coverage); Weigel et al., supra note 31 ("LGBTQ individuals also face heightened barriers to accessing fertility care, as they often do not meet definitions of 'infertility' that would qualify them for covered services.").

413. See Weigel et al., supra note 31 (highlighting that most of the poorest states have no fertility mandate).

414. See Wiley et al., Health Reform Reconstruction, supra note 49, at 719 (explaining the historical trend of "continued exclusion [and] subordination of Black and Brown people from the health care system").

415. See supra section II.B.

either the labor-market clout to convince them[416] or the political will to require them to do so.[417] When advocates do muster the political will to pass requirements for reproductive coverage, the enactments frequently have concessions and exemptions for religious employers or small businesses and carveouts for abortion.[418] To the extent that the passage of these tweaks have consumed the political energy needed for reforms that more fully engage the dimensions of reproductive justice and establish alternatives to employer-sponsored insurance, they could pose stumbling blocks to the realization of reproductive justice.[419]

Other reforms focus on establishing alternative sources of insurance in the multipayer system—usually referred to as public options. Establishing a source of public insurance that *individuals* could choose to buy (the individual public option) could give people an alternative to their employer plans.[420] The public option's effect on reproductive choice, however, would depend on whether the public option covers those aspects of reproductive care the employer plan restricts, as well as the relative affordability of the public plan.

Establishing a source of public insurance that *employers* could offer their employees (the employer public option)[421] could "simultaneously offer an out for employers who want" to release their involvement in health care financing and "start to build the foundation for a simpler, more equitable financing system down the road."[422] Because they establish alternatives to employer-

416. For instance, DOJ employees formed the Gender Equality Network (DOJ GEN) to advocate for various policy changes in their employment, including for coverage of fertility benefits in their federal employees' health-benefit plan. See Pay Equity and FEHB Coverage for Fertility Treatments, DOJ GEN Blog (Nov. 18, 2022), https://dojgen.org/blog/updates-on-pay-equity-and-fehb-coverage-for-fertility-treatments [https://perma.cc/S62T-KTJL].

417. Cf. Brown, supra note 58, at 41 (observing that "[s]ome of the push for regulation" of employer-sponsored insurance "comes from organizations that applaud more government steering of the system . . . , but no small amount derives from groups that opportunistically insist that government make regulations on behalf of their worthy ends and then go away").

418. This pattern is exemplified by the ACA's exclusion of abortion in subsidized exchange plans and religious-employer exemptions in state fertility-coverage mandates. See supra notes 163–171 and accompanying text.

419. See Wiley et al., Health Reform Reconstruction, supra note 49, at 733–35 (discussing how "incremental reforms" can be "stumbling blocks" if they accommodate, rather than dismantle, problematic structures).

420. See Monahan et al., supra note 403 (describing public-option-style laws in Colorado, Nevada, and Washington).

421. See Allison K. Hoffman, Howell E. Jackson & Amy Monahan, A Public Option for Employer Health Plans 21–41 (Feb. 17, 2021) (unpublished manuscript), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3265&context=faculty_scholarship [https://perma.cc/69PK-R85W] (introducing the concept of an employer public option and reviewing the policy, regulatory, fiscal, and business arguments in favor of it).

422. Alison K. Hoffman, A Long View on Health Insurance Reform: The Case for an Employer Public Option, Harv. L. Petrie–Flom Ctr.: Bill of Health (May 18, 2021), https://

sponsored insurance, both styles of public option present incremental reforms that would more meaningfully confront employers' influence on coverage.

Single-payer reform offers the most effective and complete decoupling, placing the primary responsibility for health care finance in a "public" system.[423] The complication for reproductive care in this mode stems from the Hyde Amendment and accumulated public laws exempting pregnancy termination from public funding. Under an unflinching inquiry, the benefits of decoupling health care from employment by establishing universal public insurance must confront the forces of reproductive exceptionalism and political control over reproduction that pervade American law and discourse.

B. *Single-Payer: Promise and Perils*

Single-payer systems in other countries score higher across affordability, equity, health outcomes, and administrative efficiency measures than the U.S. healthcare system.[424] There exists considerable heterogeneity in the systems categorized as "single-payer," but most share the features of collecting revenue through taxation, pooling the money in a publicly controlled fund, making all residents eligible to receive health care payment from that fund, setting broad criteria for the services covered by the fund, and negotiating prices and requiring all providers to accept reimbursement from that fund.[425]

A single-payer model decouples employers from health care by defining public eligibility for the program and often by prohibiting employers from offering benefits that duplicate those offered by the single-payer program.[426] Individuals get access to health care based on residence rather than employment status.

But this does not fully resolve the "gatekeeping" aspects of reproductive care; instead, it shifts the gatekeeping function from

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blog.petrieflom.law.harvard.edu/2021/05/18/employer-public-option-health-insurance/ [http://perma.cc/U7UZ-TDBR/].

423. See Stone, supra note 397 (describing public health care as "a mechanism for implementing mutual aid").

424. Eric C. Schneider, Arnav Shah, Michelle M. Doty, Roosa Tikkanen, Katherine Fields & Regina D. Williams II, Mirror, Mirror 2021: Reflecting Poorly, Commonwealth Fund (Aug. 4, 2021), https://www.commonwealthfund.org/publications/fund-reports/2021/aug/mirror-mirror-2021-reflecting-poorly [http://perma.cc/Q8EB-4TZA].

425. See, e.g., J.L. Liu & R.H. Brook, What Is Single-Payer Health Care? A Review of Definitions and Proposals in the U.S., 32 J. Gen. Intern. Med. 822, 822–31 (2017) (highlighting common features of single-payer plans).

426. See Fuse Brown & McCuskey, supra note 8, at 438–39 (explaining how many state single-payer bills include nonduplication provisions that "remove commercial competitors to the single-payer plan benefits and permit insurers only to offer 'wraparound' services that supplement the single payer's coverage").

employers to the federal government. In single-payer systems, the government assumes primary responsibility for financing care. Employers are involved only to the extent of their tax contributions and, occasionally, their ability to offer supplementary benefits that the public system does not cover.[427] Would the federal government be a superior gatekeeper of reproductive care? Currently, the evidence is mixed. A federal single-payer program would likely mean many major reproductive services were covered universally for all people but leave open important questions about the scope of coverage. For instance, many people lack access to infertility treatments, like IVF, under the current model. Would the single-payer program uniformly cover these services and for all people, including LGBTQ persons? The Hyde Amendment currently forbids federal money from funding abortion care. Could single-payer reform endanger reproductive justice by making the Hyde Amendment restrictions universal?

1. *The Promise of Universal Benefits.* — A universal public system would offer at least three valuable gains for reproductive care: equality of access, (presumably adequate) benefits, and affordability. Currently, access to reproductive care varies greatly depending on whether one receives benefits on the exchange, through a public system, or through work, subject to all the variations discussed in Part I and the preferences and beliefs of one's employers at any given moment.

A single-payer health care plan removes this uncertainty, giving everyone access to the same benefits package. This may prove particularly important for communities of color, people with disabilities, lower-income individuals, and other groups who are frequently more likely to be uninsured, underinsured, or covered by public programs and who face significant disparities in reproductive health care,[428] maternal morbidity, and mortality.[429] Universal benefits could go some way in reducing these avoidable inequalities.[430]

Take, for example, uninsured people who qualify for health benefits only upon becoming pregnant. Medicaid and CHIP provide services to

427. Id.

428. Madeline Sutton, Ngozi Anachebe, Regina Lee & Heather Skanes, Racial and Ethnic Disparities in Reproductive Health Services and Outcomes, 2020, Nat'l Libr. of Med. (Jan. 5, 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7813444/ [https://perma.cc/VRW7-TPCP/].

429. Id.

430. See Roosa Tikkanen, Munira Z. Gunja, Molly FitzGerald & Laurie C. Zephyrin, Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries, Commonwealth Fund (Nov. 18, 2020), https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries [https://perma.cc/QW24-AK2E/] (comparing the reproductive-health outcomes of citizens of the United States against countries with universal coverage).

pregnant people at certain income ranges, and until recently, these benefits terminated sixty days after a person delivered the baby. Under the American Rescue Plan Act, states have the option to use Medicaid funds to cover the person's health care needs up until one year postpartum.[431] Universal care, by contrast, would provide people guaranteed access to a basic minimum of reproductive services (including pregnancy prevention) regardless of pregnancy status or financial need and not subject to the whims or business interests of employers.

Alternatively, consider a pregnant woman working a full-time job that provides benefits for her, her spouse, and two other children. Perhaps the job affords her very little parental leave, her wages pale in comparison to the costs of daycare for three in her area, and a high-risk pregnancy makes work dangerous. She would like to leave her job and seek work again when the kids are older, but doing so means giving up the security of benefits during her pregnancy and afterward for her, the baby, and all the other members of the family. Or perhaps she is offered a different job opportunity with greater pay but no health benefits or with less coverage of pregnancy care. Her pregnancy status makes job mobility impossible solely because of health benefits.[432] Under the universal-care model, this woman would be free to take that time out of the workforce or change jobs and still maintain health coverage for her and her family.

The draft House bill for Medicare for All (H.R. 1976) provides a concrete example of consistency in benefits. The bill agrees to pay for "[c]omprehensive reproductive, maternity, and newborn care" so long as it is "medically necessary or appropriate for the maintenance of health or for the diagnosis, treatment, or rehabilitation of a health condition."[433] These services would be available without any cost sharing.[434]

The bill offers no greater details about reproductive care than this blanket guarantee. Specifics would likely be addressed at the regulatory level, with an agency determination of what counts as "medically necessary

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431. Medicaid Postpartum Coverage Extension Tracker, KFF (Feb. 13, 2023), https://www.kff.org/medicaid/issue-brief/medicaid-postpartum-coverage-extension-tracker/ [http://perma.cc/A3JS-PYNG] (summarizing the relevant provision and tracking the states that have implemented the extended postpartum-care coverage).

432. See Katherine Elizabeth Ulrich, You Can't Take It With You: An Examination of Employee Benefit Portability and Its Relationship to Job Lock and the New Psychological Contract, 19 Hofstra Lab. & Emp. L.J. 173, 196–97 (2001) (noting that Americans remain at jobs longer than they otherwise would when they feel that their employee benefits are not "portable" between jobs). For more on how the employer market shapes people's job opportunities and other personal freedoms, see Valarie K. Blake, The Freedom Premium (draft manuscript on file with the *Columbia Law Review*). For an analysis of how the relative scarcity of fertility coverage drives labor market trends, see Valarie K. Blake & Elizabeth Y. McCuskey, The Infertility Shift, Harv. L. Petrie–Flom Ctr.: Bill of Health (May 12, 2023), https://blog.petrieflom.law.harvard.edu/2023/05/12/the-infertility-shift/ [https://perma.cc/R3V5-392N].

433. Medicare for All Act of 2021, H.R. 1976, 117th Cong. § 201(a) (2021).

434. Id. § 202.

or appropriate." Presumably, such broad language suggests an intent to be as comprehensive and inclusive as possible, initiating the coverage decisions with the individual's doctor and their determination of the patient's needs. But the debate referenced in Part I about medical necessity in termination of pregnancy likely will spill over into this aspect of single payer, too. Likewise, private insurance's exclusions of fertility treatment and assisted reproductive technologies from their necessity definitions pose a threat to access, especially for LGBTQ communities who are frequently implicitly excluded even when coverage is available.[435] Despite the universality in its wording, Medicare for All may still be subjected to the forces of reproductive exceptionalism.[436]

Medicare for All would cover all aspects of reproductive care on parity with other medical care, without any premium or form of cost sharing.[437] This stands in direct contrast to the thousands of dollars that most insured people pay out of pocket for childbirth or the devastating costs of birthing a premature child. For contraception, Medicare for All is a fully enforceable coverage mandate not subject to exemptions for religion and likely not subject to RFRA exclusions.[438] For fertility treatment, the medical necessity determination may be subject to agency rulemaking discretion, but nothing in Medicare for All prohibits employers from offering wraparound coverage for those items that may be excluded from the public plan.[439]

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435. See Blake, supra note 327, at 667–73 (noting that state regulations often use exclusionary language that makes it difficult, if not impossible, for LGBTQ individuals to access reproductive care).

436. Compare Nat'l P'ship for Women & Fams., Universal Coverage, supra note 396, at 7 (advocating that "universal coverage proposals must include comprehensive coverage for abortion"), with Kevin Pham, Supporting "Medicare for All" Isn't Pro-Life, Heritage Found. (Dec. 26, 2019), https://www.heritage.org/medicare/commentary/supporting-medicare-all-isnt-pro-life [https://perma.cc/FU6G-4JPM] (arguing that pro-life advocates cannot support Medicare for All unless the reproductive care guarantees that arguably cover abortion were removed). It is important to note, too, that Medicare in its current form does not cover many contraceptive services and treatments. See Gina Jiménez, For Young People on Medicare, a Hysterectomy Sometimes Is More Affordable Than Birth Control, KFF Health News (Mar. 7, 2023), https://kffhealthnews.org/news/article/medicare-birth-control-disabilities-coverage/ [https://perma.cc/R4LY-54GR].

437. H.R. 1976, 117th Cong. § 202 (2021) ("The Secretary shall ensure that no cost-sharing . . . is imposed on an individual for any benefits provided under this Act.").

438. Recall that Justice Alito in *Hobby Lobby* admonished the government for making private entities pay for mandated contraception, saying, "If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required . . . to pay *anything* in order to achieve this important goal." Burwell v. Hobby Lobby, 573 U.S. 682, 729 (2014). A single-payer system removes the private payer as the agent of public policy.

439. See, e.g., Jonathan Foley, Taking Medicare for All Seriously, Health Affs. Forefront (June 11, 2019), https://www.healthaffairs.org/content/forefront/taking-medicare-all-seriously [https://perma.cc/9SG3-92Y9] (explaining that Medicare for All would eliminate private health insurance, "except for affinity benefits"). Medicare currently does not generally cover ART, though it may cover diagnostic testing for infertility. See Weigel et al., supra note 31.

Though rife with pitfalls, publicly funded universal health care aligns the interests of patients and the payer (their elected representatives) to a much greater extent than the current employer-sponsored insurance system does. Employers' motivations to exclude cost-effective preventative reproductive care stem at least in part from their short-term, year-over-year perspective of who is in their risk pool.[440] The employer who refuses to pay the modest cost of contraception does so on the hope that the employee who has an unintended pregnancy will be some other employer's (or public program's) responsibility by the time the condition manifests.[441] A single-payer system, by contrast, bears responsibility for the entire population over their lifetimes. As a funder, the single payer must consider both short and long-term risks for everyone, as well as the social costs of its funding decisions.[442]

This realignment of payer and patient interests better serves population-health and health-justice goals.[443] And it offers a counterweight to reproductive exceptionalism for contraception and abortion because it forces the funding institution to consider and bear the additional financial and social costs of denying these services.[444]

2. *Abortion Exceptionalism in Universal Care.* — Still, any single-payer plan, while promising equal and affordable access to reproductive care, must reckon with the reality that political pressure has long rendered the federal government unwilling to fund abortion.

In the wake of *Roe*, Congress responded almost immediately by passing the Hyde Amendment, prohibiting the use of federal funds to pay for abortions except in cases of rape, incest, or endangerment of the pregnant person's life.[445] The federal practice of denying payment for abortion care is persistent: Though not codified into law, the Hyde Amendment is a rider to the appropriations bill that is *renewed annually* by Congress,[446] suggesting the overall commitment of the governing body to this premise. It is also

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440. See supra section I.B.2.

441. See supra section I.B.2.

442. See Erin C. Fuse Brown, Matthew B. Lawrence, Elizabeth Y. McCuskey & Lindsay F. Wiley, Social Solidarity in Health Care, American-Style, 48 J.L. Med. & Ethics 411, 413 (2020) (noting that single-payer systems aim to improve population health, universal and equitable access to care, and manageable health care costs at both the country and household levels).

443. See Wiley, From Patient Rights, supra note 385, at 879 (emphasizing that health justice requires protection of collective and individual interests).

444. For fertility treatments, the actuarial picture is more complex because expensive fertility treatments, if successful, lead to additional expenses. See Dependent Health Coverage and Age for Healthcare Benefits, Nat'l Conf. of State Legislatures (Nov. 1, 2016), https://www.ncsl.org/health/dependent-health-coverage-and-age-for-health-care-benefits [https://perma.cc/8R6D-WATJ] (outlining the ACA and state law requirement that insurers must extend dependent coverage to children); Weigel et al., supra note 31 (analyzing the cost of fertility treatments).

445. Salganicoff et al., Hyde Amendment, supra note 44.

446. Id.

pervasive: Hyde-style prohibitions exist in all the major federal health care programs.[447]

The Hyde Amendment prohibits states from using federal money to fund abortions, but it does not prohibit the use of state money.[448] Thirty-two states and the District of Columbia have passed their own Hyde-style restrictions on the use of state funds for abortions.[449] One state, South Dakota, is more restrictive than Hyde, only allowing state funds in the case of endangerment to the pregnant person's life.[450] A minority, seventeen states, allow state money to pay for abortion care.[451] The Hyde Amendment has thus had a dramatic effect on who carries the fiscal burden of abortions in America. Low-income people and people of color are more likely to seek abortions and more likely to be on Medicaid and face a barrier to coverage.[452]

Lawmakers seeking to pass a single-payer plan would have to confront the Hyde Amendment, forcing three possible choices: override Hyde, permit Hyde to continue, or remain silent on the topic. Medicare for All legislation took the approach to override the Hyde Amendment.[453] Draft language states, "Any other provision of law in effect on the date of enactment of this Act restricting the use of Federal funds for any reproductive health service shall not apply to monies in the Trust Fund."[454] Of course, such provisions may prove to be a sticking point in the passage of universal health care, raising the possibility that preserving Hyde may be a concession to attract consensus from more center-left or moderate politicians. Opposition to abortion (and to some extent to contraception, too) has consistently been a wedge issue, wielded for political purposes to stymie past health reform efforts and increase the transaction costs of their enactment.[455]

Single-payer plans have grown increasingly popular among voters: A recent poll reported that as many as 63% of Americans believe it is the government's responsibility to pay for health care.[456] Similarly, 61% of

447. See id. (describing the range of federal programs impacted by the Hyde Amendment).

448. See id.

449. See State Funding of Abortion Under Medicaid, supra note 46 (explaining that these thirty-two states and the District of Columbia follow the federal standard).

450. See Salganicoff et al., Hyde Amendment, supra note 44.

451. See State Funding of Abortion Under Medicaid, supra note 46. Of the states permitting the use of state funds for abortion care, nine do so pursuant to a court order for payment. Id.

452. See Salganicoff et al., Hyde Amendment, supra note 44.

453. See Medicare for All Act of 2021, H.R. 1976, 117th Cong. § 701(b)(3) (2021).

454. Id.

455. See, e.g., Jeannie I. Rosoff, The Clinton Health Plan: What Does It Do for Reproductive Health Services?, 26 Fam. Plan. Persps. 39, 40 (1994) (noting that President Clinton's proposed health plan omitted the word "abortion" to avoid political backlash).

456. Bradley Jones, Increasing Share of Americans Favor a Single Government Program to Provide Health Care Coverage, Pew Rsch. Ctr. (Sept. 29, 2020), https://

Americans believe abortion should be legal in most or all cases.[457] But the idea that federal funds should go to paying for abortions enjoys less popularity, at least in the polls that predate *Dobbs*. A 2016 poll found that 55% of Americans supported the Hyde Amendment; within Democrats, as many as 41% supported Hyde compared with 44% who rejected it.[458] A Politico–Harvard poll in that same year showed similar figures. Fifty-eight percent of voters opposed allowing Medicaid to fund abortions, while that same percentage of voters supported ongoing federal funding for Planned Parenthood.[459]

A federal single-payer health care system that fails to address Hyde has the potential to decrease the demand for abortion while simultaneously diminishing abortion access. The expansion of access to coverage for contraception and family planning services in a universal public plan would further reduce the demand for abortion.[460] In a Hyde-restricted single-payer program, however, individuals would have one option for health benefits, and it would deny payment for abortion care except in those narrow categories of exceptions. Those who currently have private insurance that covers abortion care would be moved to the abortion-restricted single-payer plan, and the funds that private employers currently spend on health plans would be channeled through the federal government as tax revenue, subjected to Hyde. Although private plans might be able to offer supplemental coverage for abortion, that would be too costly for many to afford unless provided as a benefit from any employer.

Failure to expressly reject Hyde could mean that single-payer draft legislation fails to garner enough support from the political left, where its greatest champions would likely be. Senator Bernie Sanders has made plain that a repeal of the Hyde Amendment is part and parcel of the goal of a

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www.pewresearch.org/fact-tank/2020/09/29/increasing-share-of-americans-favor-a-single-government-program-to-provide-health-care-coverage/ [https://perma.cc/N5TQ-AEME].

457. Hannah Hartig, About Six-in-Ten Americans Say Abortion Should Be Legal in All or Most Cases, Pew Rsch. Ctr. (June 13, 2022), https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/ [https://perma.cc/BJ3X-EMWE].

458. Peter Moore, Most Americans Back Federal Abortion Funding Ban, YouGov (Aug. 12, 2016), https://today.yougov.com/topics/politics/articles-reports/2016/08/12/taxation-and-morality [https://perma.cc/H3KY-DFAA].

459. Politico & Harv. T.H. Chan Sch. Pub. Health, The 2016 Election: Clinton vs. Trump Voters on American Health Care 16–17 (2016), https://www.politico.com/f/?id=00000158-039b-d881-adda-77db04b70000 [https://perma.cc/JCW2-HZA9].

460. Abortion rates declined in Massachusetts after the adoption of "RomneyCare" in 2006, which was the blueprint for the ACA. Patrick Whelan, Abortion Rates and Universal Health Care, 362 New Eng. J. Med. e45(1), e45(2) (2010) (reporting a decrease in abortion rates of 1.5% generally and 7.4% in teenagers). The same happened nationwide after implementation of the ACA. Joelle Abramowitz, Planning Parenthood: The Affordable Care Act Young Adult Provision and Pathways to Fertility, 31 J. Population Econ. 1097, 1108 (2018) (reporting that the ACA's passage was associated with a disproportionate decrease in abortion rates for people aged twenty to twenty-four).

single-payer health plan,[461] while more centrist democratic leaders like President Joe Biden have also recently come out in opposition to the Hyde Amendment.[462] This could make it politically difficult for Democrats to rally around any proposal that did not outright reject Hyde.

Colorado's attempt to adopt a state single-payer model in 2017 provides an illuminating example of the clash between single-payer health reform and reproductive rights when Hyde-style restrictions remain in place.

In 2017, after six years of effort, a Democratic politician finally got enough votes to put a state-based universal health care plan on the ballot. Amendment 69 would have amended the Colorado Constitution to create a state-based single-payer plan, funded through a 10% payroll tax that would effectively end private insurance in the state.[463] An overwhelming 78% of voters rejected the amendment.[464] One reason the amendment did not pass was that it may have effectively removed all abortion care coverage options because, in 1984, Colorado amended its constitution to ban the use of public funds for abortions.[465]

The National Association for the Repeal of Abortion Laws (NARAL), an abortion rights organization, opposed Amendment 69 on grounds that the state plan might not be able to fund abortions and private insurance would also no longer be an option, leaving people in the state without any financial support for abortion care.[466] Because the Colorado single-payer bill did not expressly confront the state's constitutional ban on abortion spending, it jeopardized abortion access to a degree that reproductive justice advocates found unacceptable.[467] Note that at the federal level, the Hyde Amendment gets passed annually as an appropriations bill, so a federal single-payer statute that was *silent* on Hyde would still be subject to its funding restrictions that year—but Congress could remove the Hyde restrictions by simply not

461. See Claire Landsbaum, Bernie Sanders's Medicare-for-All Bill Covers All Women's Health Services, Including Abortion, The Cut (Sept. 13, 2017), https://www.thecut.com/2017/09/bernie-sanders-medicare-for-all-bill-covers-abortion.html [https://perma.cc/Q6NG-SX8P].

462. William Saletan, Abortion Funding Isn't as Popular as Democrats Think, Slate (June 12, 2019), https://slate.com/news-and-politics/2019/06/joe-biden-hyde-amendment-democratic-support.html [https://perma.cc/KZ78-4762].

463. Colorado Creation of ColoradoCare System, Amendment 69 (2016), Ballotpedia, https://ballotpedia.org/Colorado_Creation_of_ColoradoCare_System,_Amendment_69_(2016) [https://perma.cc/AQS5-P4HK] (last visited Oct. 25, 2023).

464. Id.

465. Dylan Matthews, Single-Payer Health Care Failed Miserably in Colorado Last Year. Here's Why., Vox (Sept. 14, 2017), https://www.vox.com/policy-and-politics/2017/9/14/16296132/colorado-single-payer-ballot-initiative-failure [https://perma.cc/92ZG-Z3YA]; see also Colo. Const. art. V, § 50 (prohibiting the use of public funds to pay for abortions).

466. See Becca Andrews, Here's Why Abortion Advocates Won't Vote for Universal Health Care in Colorado, Mother Jones (Sept. 12, 2016), https://www.motherjones.com/politics/2016/09/colorado-ballot-measure-universal-health-care-abortion/ [https://perma.cc/F3HK-N2XM].

467. See id.

including the amendment in the next year's appropriation for HHS or exempting the single-payer trust from that restriction.[468]

Conservatives will not support Medicare for All in its current form because it ostensibly covers the full range of reproductive services.[469] The progressives who drafted and support it do so in part *because* the bill comprehensively covers reproductive care, including abortion. So, abortion exceptionalism undermines the political consensus required to pass single-payer reforms.

3. *State-Level Single-Payer.* — Despite the challenges observed in Colorado, state-level single-payer plans remain potentially more politically feasible than a federal one.[470] Two aspects of state-level single-payer may more effectively confront the reproductive exceptionalism and political hurdles of enacting federal single-payer.

First, the political economy of health reform suggests that the states most likely to enact single-payer reforms are those in which the populace has elected progressive representatives to the legislative and executive branches. While multiple states—including California, Iowa, Massachusetts, and Ohio—have had single-payer bills *introduced* in their legislatures, only Vermont has passed a bill.[471] The states who have taken more meaningful steps toward single payer tend to have progressive politics. Colorado, Nevada, and Washington recently enacted state-level public option programs.[472] And, for example, Oregon's Legislative Task Force on Universal Health Care submitted a detailed proposal for a statewide single-payer system in September 2022.[473]

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468. See James V. Saturno, Megan S. Lynch & Bill Heniff, Jr., Cong. Rsch. Serv., R42388, The Congressional Appropriations Process: An Introduction (2016), https://crsreports.congress.gov/product/pdf/R/R42388 [https://perma.cc/3Y8T-SH7H] (detailing aspects of the congressional appropriations process); Matthew B. Lawrence, Congress's Domain: Appropriations, Time, and *Chevron*, 70 Duke L.J. 1057, 1059–61 (2021) (explaining the difference between annual and permanent appropriations).

469. See, e.g., Louis Brown, Health Care: The Greatest Pro-Life Political Battle of Our Time, Pub. Discourse (Dec. 2, 2019), https://www.thepublicdiscourse.com/2019/12/58579/ [https://perma.cc/R8MC-3WSP] ("The right to life would not survive a single-payer health care system."); Pham, supra note 436 ("But in reality there is only one single-payer plan currently up for debate, 'Medicare for All,' and there is unequivocally no pro-life argument for that bill.").

470. See Fuse Brown & McCuskey, supra note 8, at 400–01 ("[T]here is a nontrivial possibility that some state or states could thread the political, administrative, financial, and legal needles necessary to pass a single-payer plan in the coming years.").

471. Jean Yi, More States Are Proposing Single-Payer Health Care. Why Aren't They Succeeding?, FiveThirtyEight (Mar. 9, 2022), https://fivethirtyeight.com/features/more-states-are-proposing-single-payer-health-care-why-arent-they-succeeding/ [https://perma.cc/XZ7Y-DZHZ].

472. Monahan et al., supra note 403.

473. See Ore. Legis. Pol'y & Rsch. Off., Joint Task Force on Universal Health Care: Final Report & Recommendations, at v–vi (2022), https://www.oregon.gov/oha/HPA/HP/TFUHC%20Meeting%20Documents/Joint%20Task%20Force%20on%20Universal%20

The states most likely to enact single payer are thus also the states whose majority constituencies are most likely to demand full coverage for reproductive services, including abortion. The experience with Colorado's Amendment 69 again is instructive. The referendum failed among voters not due to lack of support for the concept of a single-payer system but because the proposal could not accommodate abortion funding as drafted without also changing the state's constitution. At the state-by-state level, attracting sufficient political support for single-payer might *require* that a plan also dismantle some facets of abortion exceptionalism. In Oregon, for example, the Task Force's single-payer plan contemplates coverage without reproductive exceptions, and public commentary raised the concern that all reproductive services should be part of the coverage to gain public support.[474]

Second, the experience of states as payers (both as administrators of Medicaid plans and as civilian public employers) also suggests that exceptions to the funding streams for abortion care may play less prominent roles in any single-payer experiment. While thirty-three states have enacted their own Hyde-style restrictions on coverage for abortion in their employee health plans,[475] those states are also the ones politically less likely to pursue single-payer seriously. The sixteen states who already cover abortion and a fuller range of reproductive and sexual health care in their employee plans are more likely to pursue single-payer options. Thus, state funding restrictions are less likely to factor into state single-payer coverage. And some states whose politics have leaned conservative in recent years saw voter referenda come out in support of abortion rights in the election cycle immediately after *Dobbs*.[476] The referenda in Kentucky, Michigan, North Carolina, and Ohio imply that even some purple states may have voter-level support for expanding access to reproductive care—or at least no further appetite for curtailing it.[477]

Health%20Care%20Final%20Report%20%20Recommendations%20September%202022.pdf [https://perma.cc/BB5B-PHJB].

474. Id. at 20, 69.

475. See Salganicoff et al., Hyde Amendment, supra note 44 (noting that thirty-three states have elected to extend Hyde to their state coffer, while only sixteen states permit use the of state funds for abortions).

476. See, e.g., Spencer Kimball, Abortion Rights Keep Winning on the Ballot in Conservative States—Florida and Arizona Could Be Next, CNBC (Aug. 9, 2023), https://www.cnbc.com/2023/08/09/abortion-rights-keep-winning-on-the-ballot-in-conservative-states.html [https://perma.cc/G5MD-3J5L] (describing the abortion-related votes in Kansas and Kentucky in the immediate aftermath of *Dobbs*).

477. See Rachel Rebouché & Mary Ziegler, Why Direct Democracy Is Proving So Powerful for Protecting Abortion Rights, The Atlantic (Nov. 11, 2022), https://www.theatlantic.com/ideas/archive/2022/11/abortion-rights-midterm-election-ballot-initiatives/672071/ (on file with the *Columbia Law Review*); Billy Wynne, Alyssa Llamas, Erin Slifer & Audrey McClurg, What Recent State Elections Mean for Health Care, Health Affs. Forefront (Nov. 16, 2022), https://www.healthaffairs.org/content/forefront/recent-state-

State single-payer systems do, however, require the receipt of federal funding streams to fully fund their plans.[478] Getting waivers to "pass-through" federal money from Medicaid, Medicare, and the ACA exchanges will be essential to the feasibility of any state single-payer.[479] Unless Congress abandons the Hyde Amendment, that federal funding will still come with abortion restrictions on its use. States would thus need to use separate state funds to pay for abortion services, as a few already do in their Medicaid programs.[480]

Pursuing single payer at the state level dilutes the universality of these reforms, and it likely leaves unaided those marginalized groups already most subordinated by the political system. But in the framework of confrontational incrementalism, it represents a step forward, despite its limited jurisdictional reach.[481] Pragmatically, pursuing single-payer to decouple health care access from employment appears as a net positive if pursued in states with durable support for reproductive choice. From an interest convergence perspective, government funding comes out ahead of employer funding due to its direct accountability to the populace and its broader, longer-term view of health care costs.

C. *Whose Choice? Vigilance About Third-Party Funding*

These seemingly intractable trade-offs in the pursuit of reproductive justice through health reform point to a more fundamental obstruction in the design of health care: the reliance on third-party funding. Situating these consequential decisions about the availability of medical care in *any* "third party" beyond the patient (and their doctor) invites the mechanisms of subordination and control into the realm of individual reproductive autonomy. The analyses above have illustrated the subordinating influences of placing employers' personal and commercial interests in this role. The implications of shifting third-party funding control to governments may not be better because many of those governments have themselves acted as

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elections-mean-health-care [https://perma.cc/8KEQ-XTZN]; see also Adam Edelman, In a Win for Abortion-Rights Supporters, Ohio Voters Reject Issue 1, NBC News (Aug. 8, 2023), https://www.nbcnews.com/politics/elections/ohio-issue-one-reject-loss-abortion-rights-ballot-measure-rcna98842# [https://perma.cc/KR3G-VA7H] (reporting on the failure of a ballot measure in Ohio that would have made it more difficult to pass a future amendment to the constitution to protect abortion rights).

478. See Fuse Brown & McCuskey, supra note 8, at 398 & n.39.

479. Id.

480. Lindsay F. Wiley, Medicaid for All? State-Level Single-Payer Health Care, 79 Ohio St. L.J. 843, 868–69 (2018).

481. See Wiley et al., Health Reform Reconstruction, supra note 49, at 739–41. A focus on state-level reform may present some serious limitations, however, that deserve critical evaluation for whether they meet the standards for confrontational incrementalism. Some states will never progress, and too great a focus on state-level reform could leave those states (and their residents) with less appetite for national reform behind.

subordinating influences both historically and currently. Whether a private entity or a governmental unit wields the power of the purse in relatively more or less subordinating ways becomes a central issue in health reform aimed at expanding reproductive justice.

The insurance model of third-party funding also relies heavily on the concept of "medical necessity" in distributing plan resources. As explained above,[482] the determination of whether a covered service is "medically necessary" hands additional power to employers, insurers, and lawmakers to exclude reproductive care. Even when an insurance plan has committed to covering abortion, contraception, or fertility, its administrators may deny coverage for such care under a determination that the patient does not meet the medical-necessity standard.[483] This insurance-based coverage carveout is a highly discretionary and contestable standard that patients rarely have the wherewithal to contest.[484] This determination is exceptionally punishing for reproductive care and for LGBTQ enrollees trying to access fertility benefits.[485]

Health-reform efforts should therefore approach any third-party funding mechanism with greater vigilance to its influence over reproductive justice. As Professor Matthew Lawrence has explained in the context of government appropriations, "The subordination question ('who pays?') should be as familiar to institutional analysis of separation-of-powers questions as is the legal-process question ('who decides?')."[486] To be antisubordinative, a government funding mechanism must also confront exceptionalism and situate the decisionmaking in a segment of government that is as accountable to the affected stakeholders as possible.[487] The questions of *who pays* and *who decides* are bound together. And, as Dean Rachel Rebouché predicted, the focus of abortion access efforts post-*Roe* must turn "from rights to resources."[488]

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482. See supra section I.A.3.

483. Cf. Hill, Essentially Elective, supra note 176, at 100 (discussing limits on abortions when they are classified as "'non-essential,' 'non-urgent,' or 'elective'" procedures).

484. See Karen Pollitz, Justin Lo, Rayna Wallace & Salem Mengistu, Claims Denials and Appeals in ACA Marketplace Plans in 2021, KFF (Feb. 9, 2023), https://www.kff.org/private-insurance/issue-brief/claims-denials-and-appeals-in-aca-marketplace-plans/ [https://perma.cc/H6RK-58NE] ("In 2021, HealthCare.gov consumers appealed less than two-tenths of 1% of denied in-network claims.").

485. See Blake, supra note 327, at 663–65.

486. Matthew B. Lawrence, Subordination and Separation of Powers, 131 Yale L.J. 78, 89 (2022).

487. See id. at 153–54 ("Exercises of power that threaten harm to the country as a whole pose less risk of subordination and avoid the institutional and operational concerns . . . [because] once costs are particularized, it is often logistically and politically difficult to prevent them from being targeted at marginalized groups.").

488. Rebouché, supra note 19, at 1416.

In health care terminology, an alternative to the ordinary insurance model of third-party finance of care is "direct care,"[489] in which a program directly funds providers from whom patients may receive care without the involvement of an insurer to arrange payment. Examples of direct care internationally include the U.K.'s National Health System[490] and domestically include the Veterans' Health Administration (VHA)[491] and Indian Health Service (IHS),[492] which operate health care facilities that treat patients in their respective populations: veterans and members of federally recognized tribes. Providing reproductive services through direct-care organizations would diminish the control that third parties have over access to these services and may mitigate the medical-necessity determination problem too. But it would not entirely avoid the influence of funding, as some entity must determine how to fund the providers themselves. The experiences thus far with direct care in the VHA and IHS have not been positive for a host of reasons,[493] many of which stem from the vulnerability of the defined populations they serve.[494] Notably, the VHA began offering abortion care in September 2022, even in states where abortion is banned or restricted.[495]

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489. See, e.g., Andis Robeznieks, Pondering Direct Care? 13 Potential Benefits and Drawbacks, Am. Med. Ass'n (Oct. 10, 2018), https://www.ama-assn.org/practice-management/payment-delivery-models/pondering-direct-care-13-potential-benefits-and [https://perma.cc/T8F9-UCF2] (defining "direct care" and assessing its benefits and drawbacks).

490. See The NHS Constitution for England, Gov.UK, https://www.gov.uk/government/publications/the-nhs-constitution-for-england/the-nhs-constitution-for-england [https://perma.cc/QZ9H-KY7G] (last updated Aug. 17, 2023) (describing England's National Health Service).

491. See Veterans Health Administration, VA, https://www.va.gov/health/ [https://perma.cc/E22U-5CJG] (last updated Oct. 24, 2023).

492. See About IHS, Indian Health Serv., https://www.ihs.gov/aboutihs/ [https://perma.cc/ZT6B-83FP] (last visited Oct. 26, 2023) ("The IHS provides a comprehensive health service delivery system for approximately 2.6 million American Indians and Alaska Natives who belong to 574 federally recognized tribes in 37 states.").

493. See Associated Press, Veterans Share Stories of Bad Experiences With VA Medical Care, GulfLive (May 31, 2014), https://www.gulflive.com/mississippi-press-news/2014/05/veterans_share_stories_of_bad.html [https://perma.cc/THH2-S9CT] (reporting on issues at several VA facilities that have prompted investigations and calls for criminal probes); Mark Walker, Pandemic Highlights Deep-Rooted Problems in Indian Health Service, N.Y. Times (Sept. 29, 2020), https://www.nytimes.com/020/09/29/us/politics/coronavirus-indian-health-service.html (on file with the *Columbia Law Review*) (last updated Oct. 8, 2021) (explaining how the IHS has been "plagued by shortages of funding and supplies, a lack of doctors and nurses, too few hospital beds and aging facilities").

494. See Disparities, Indian Health Serv. (Oct. 2019), https://www.ihs.gov/newsroom/factsheets/disparities/ [https://perma.cc/CAP6-K4JT] (detailing the poor health, economic, and social conditions of Native Americans); Social Justice and Health Care for Veterans, Duq. Univ., https://guides.library.duq.edu/veterans [https://perma.cc/5HER-T8CH] (last updated Aug. 30, 2023) (acknowledging that the physical, mental, and social issues that veterans face make them a "vulnerable population").

495. See Abigail Abrams, Veterans Affairs' New Policy to Provide Abortions Sets Off Battle With Conservative States, Time (Sept. 15, 2022), https://time.com/6214024/veterans-affairs-

Yet the full consideration of reform demands more attention to the possibilities of moving further toward direct care provision for reproductive services, whether publicly funded, privately funded, or both. In 1970, Congress established the Title X federal grant program to ensure that financial considerations did not prevent people from accessing family-planning services,[496] a tenet of reproductive justice.[497] Title X funding for family planning thus serves as an existing model of how Hyde-restricted public funding for direct care works and does not work. Title X–funded clinics provide much more effective access to contraception than clinics that do not receive Title X funding and play a major role in securing access to contraception for adolescents.[498] But political pressures and the Hyde Amendment mean that Title X–supported clinics cannot use federal funds for abortion and are at the whim of executive branch maneuvering, including gag rules for abortion referrals and parental-notification policies that diminish their impact.[499] As a recent study concludes, political changes in "[s]tate and federal policies that shift how and to whom publicly supported family planning care is delivered have real-time effects on providers attempting to serve patients."[500]

The reproductive exceptionalism that has carved reproductive care (and especially abortion) out of each piece of the multipayer system in the United States has driven the proliferation of separate, independent, and predominately privately funded reproductive care clinics.[501] Thus, this mode of providing reproductive care serves patients who fall into the large gaps in the current system and supplies the care that political moves have carved out of public programs. Independent, privately funded clinics have come to be the predominant providers of abortion services,[502] including the surgical and

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abortion-fight/ (on file with the *Columbia Law Review*) (explaining that the VA is exempt from the Hyde Amendment); see also Shaye Beverly Arnold, Reproductive Rights Denied: The Hyde Amendment and Access to Abortion for Native American Women Using Indian Health Service Facilities, 104 Am. J. Pub. Health 1892, 1893 (2014) (explaining how the Hyde Amendment leads to discriminatory restrictions on Native Americans).

496. See Diana J. Mason & Lisa David, Title X: Moving Forward or Backward on Women's Health?, 321 JAMA 236, 237 (2019).

497. See supra text accompanying note 19.

498. See Blair G. Darney, Frances M. Biel, Megan Hoopes, Maria I. Rodriguez, Brigit Hatch, Miguel Marino, Anna Templeton, Jee Oakley, Teresa Schmidt & Erika K. Cottrell, Title X Improved Access to Most Effective and Moderately Effective Contraception in US Safety-Net Clinics, 2016–18, 41 Health Affs. 497, 500–02 (2022).

499. See id. at 498.

500. Alicia VandeVusse, Jennifer Mueller, Marielle Kirstein, Philicia W. Castillo & Megan L. Kavanaugh, The Impact of Policy Changes From the Perspective of Providers of Family Planning Care in the US: Results From a Qualitative Study, 30 Sexual & Reprod. Health Matters 1, 12 (2022).

501. See supra section I.B.2; see also Abortion Care Network, supra note 48, at 3.

502. See Abortion Care Network, supra note 48, at 3.

medication abortion care that has been the most exceptionalized.[503] (And the cycle of exceptionalism means that the proliferation of these clinics to fill these gaps may also *enable* those gaps to persist.) So the model of privately funded direct-care clinics has precedent in providing the full range of reproductive care outside of the insurance-based, third-party payment system; this infrastructure could be a place to direct private funding to expand its impact.

In considering direct-care clinics as an alternative to insurance-style, third-party funding, it is important to differentiate between direct-care clinics, which provide the services outlined in section I.A.3 as "reproductive care," and "crisis pregnancy centers," which counsel against abortion and typically do not provide medical care.[504] The proliferation of crisis pregnancy centers is also a byproduct of the exceptionalism that has forced reproductive care outside of the current funding system.[505] Trump-era regulations extending Title X federal funding to crisis pregnancy centers, repealed by the subsequent administration, illustrate the political maneuvering that public funding for privately established entities invites when it comes to abortion.[506]

Still, direct care might be a more desirable place to invite private funding for reproductive care rather than entrenching it at the employer level. For instance, private organizations that serve patient interests and advocate for universal care and reproductive choice have interests aligned with individuals' autonomy. In this mode, channeling private funding to direct-care organizations may offer a small step forward in access, though it necessarily works within the confines of reproductive exceptionalism. A private–public partnership might even be possible for direct-care providers located on federal lands within restrictive states.[507]

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503. See David S. Cohen, Greer Donley & Rachel Rebouché, Abortion Pills, 76 Stan. L. Rev. (forthcoming 2024) (manuscript at 73) (noting how fear of enforcement may cause abortion providers to change their habits); see also Donley, supra note 101, at 703 ("The REMS has segregated medication abortion outside of traditional healthcare settings into abortion and family planning clinics.").

504. See Am. Coll. of Obstetricians & Gynecologists, Issue Brief: Crisis Pregnancy Centers 1 (Oct. 2022), https://www.acog.org/-/media/project/acog/acogorg/files/advocacy/issue-briefs/crisis-pregnancy-centers.pdf [https://perma.cc/3CD5-E7PD]; Off. of Sexual Health & Youth Dev., Warning About Crisis Pregnancy Centers, Mass.gov (July 12, 2022), https://www.mass.gov/news/warning-about-crisis-pregnancy-centers [https://perma.cc/A22K-K2GR].

505. See Oriana González, Anti-Abortion Pregnancy Centers Are Expanding in the Post-*Roe* Era, Axios (Aug. 19, 2022), https://www.axios.com/2022/08/19/crisis-pregnancy-centers-abortion-roe-health-care (on file with the *Columbia Law Review*).

506. See 42 C.F.R. § 59.5(b)(3)(iii) (2023) (repealing the 2019 policy change by "ensur[ing] access to equitable, affordable, client-centered, quality family planning services").

507. See Kevin J. Hickey & Whitney K. Novak, Cong. Rsch. Serv., Congressional Authority to Regulate Abortion 4 (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10787 [https://perma.cc/MRD3-N2GT] ("Pursuant to its powers under the

Of course, the exceptionally high prices of medical and reproductive care in the United States prompt these funding conundrums and power dynamics in the first place. Therefore, policies that would decrease the prices of care would support reproductive justice, too. This Article leaves it to other scholars and researchers to press forward on that front, noting that direct care provided by the government at least removes the profit motivations from the provision of care by private entities.

CONCLUSION

As the battle for reproductive autonomy rages in America, many have never truly been free from third-party control. For generations, the legal and regulatory system has entrenched employer-sponsored insurance, placing employers in the role of gatekeepers of reproductive care and therefore reproductive freedom. In this relationship, individuals' interests in reproductive self-determination are subordinate to employers' actuarial, economic, and selfish interests. Those concerned about governmental control over their reproductive lives ought to be no more tolerant of commercial intrusion into that private space.

Single-payer health care, either state or federal, might unbind health care payment from employers' grip but could hand it over to some of the same political forces that have long restricted access to reproductive care. Thus, health reform that expands access to care requires extra vigilance to ensure that it confronts, rather than perpetuates, reproductive exceptionalism and makes meaningful progress for reproductive autonomy. This project implores those committed to universal health care to meaningfully center reproductive justice in their efforts. As challenging as that endeavor may be, incorporating reproductive justice is essential to the durability and promise of universal health care—and *Dobbs* has made that effort both imperative and urgent.

Spending Clause, Congress could leverage federal funds to restrict or expand access to abortion, either directly or indirectly."); David S. Cohen, Greer Donley & Rachel Rebouché, The New Abortion Battleground, 123 Colum. L. Rev. 1, 80 (2023) ("State abortion bans might be inapplicable on [federal] lands.").

CORPORATE RACIAL RESPONSIBILITY

Gina-Gail S. Fletcher & H. Timothy Lovelace, Jr.***

The 2020 mass protests in response to the deaths of George Floyd and Breonna Taylor had a significant impact on American corporations. Several large public companies pledged an estimated $50 billion to advancing racial equity and committed to various initiatives to internally improve diversity, equity, and inclusion. While many applauded corporations' willingness to engage with racial issues, some considered it further evidence of corporate capitulation to extreme progressivism at shareholders' expense. Others, while thinking corporate engagement was long overdue, critiqued corporate commitment as insincere.

Drawing on historical evidence surrounding the passage of Title II of the Civil Rights Act of 1964, this Article engages with the debate on corporate "racial" responsibility to demonstrate that corporate engagement on race is not new. Indeed, during the struggle to desegregate public accommodations, corporate social responsibility was invoked to encourage voluntary desegregation and avoid federal intervention. Segregation was good business for some; for others, maintaining white supremacy justified any pecuniary losses.

While this Article argues that corporations have a role to play in achieving racial equity, it cautions against reliance on corporate social responsibility to advance racial equality. Past and current iterations of corporate racial responsibility have often represented a market-fundamentalist, value-extractive approach to racial equity that reifies existing racial hierarchies. By valuing racial equity in terms of its potential profitability, corporate racial responsibility can subordinate human dignity to wealth maximization. This Article argues for a more meaningful corporate racial responsibility that addresses the structures and laws undergirding racial inequities within corporations and our larger society.

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"Corporations which do America's business must be corporations of conscience."

—Dr. Martin Luther King, Jr.[1]

1. Thomas F. Jackson, From Civil Rights to Human Rights: Martin Luther King, Jr., and the Struggle for Economic Justice 185 (2007).

INTRODUCTION

The 2020 killings of George Floyd and Breonna Taylor had a significant impact on a perhaps unexpected segment of American society: corporations. As antiracist protests increased in 2020, many activists demanded that corporations participate in the country's racial reckoning.[2] Corporations across the United States sprang into action, embracing the Black Lives Matter (BLM) movement and calling for an end to racial injustice.[3] Amazon was one prominent example. Days after George Floyd's murder, Amazon tweeted its "solidarity with the Black community—[Amazon's] employees, customers, and partners—in the fight against systemic racism and injustice."[4] It announced a $10 million donation to a group of racial justice organizations, including the NAACP, the National Urban League, and the Thurgood Marshall College Fund.[5] Amazon also updated Alexa, its virtual technology assistant, to respond favorably to questions about the BLM movement.[6] The company even appointed its first Black executive after years of criticism concerning the racial and gender homogeneity of its leadership council.[7] It seemed that Amazon was taking racial equity seriously.

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2. See, e.g., Jena McGregor, With Protests, Silence Is 'Not an Option' for Corporate America, Wash. Post (June 1, 2020), https://www.washingtonpost.com/business/2020/06/01/with-protests-silence-is-not-an-option-corporate-america/ (on file with the *Columbia Law Review*) ("Because those who remain neutral have been tagged as contributing to the problem of racism, companies that have traditionally preferred to say nothing are being forced to wade in.").

3. See id. (describing statements by various companies and executives condemning injustice and paying tribute to George Floyd and Black Lives Matter).

4. Amazon (@amazon), Twitter (May 31, 2020), https://twitter.com/amazon/status/1267140211861073927 [https://perma.cc/9DEX-Z9NM].

5. See Amazon Donates $10 Million to Organizations Supporting Justice and Equity, Amazon (June 3, 2020), https://www.aboutamazon.com/news/policy-news-views/amazon-donates-10-million-to-organizations-supporting-justice-and-equity [https://perma.cc/49LY-QEDJ] (last updated July 14, 2020).

6. See Todd Haselton, Amazon Alexa, Apple Siri, Google Assistant Have Been Updated to Express Support for Black Lives Matter, CNBC (June 9, 2020), https://www.cnbc.com/2020/06/09/apple-siri-google-assistant-new-response-to-do-black-lives-matter.html [https://perma.cc/2V9Y-BK8U]. As of this publication, when you ask Alexa if Black lives matter, it responds: "Black lives matter. I believe in racial equality. I stand in solidarity with the Black community in the fight against systemic racism and injustice. To learn how you can take action, I recommend visiting blacklivesmatter.com and NAACP.org." Id. Similarly, if you ask Alexa whether all lives matter, it responds: "All lives matter, however Black lives are disproportionately in danger in the fight against systemic racism and injustice. To learn how you can take action, I recommend visiting blacklivesmatter.com and NAACP.org." Id.

7. See Matt Day, Amazon Names First Black Executive to Bezos's Ruling Council, Bloomberg (Aug. 21, 2020), https://www.bloomberg.com/news/articles/2020-08-21/amazon-names-first-black-executive-to-bezos-s-ruling-council (on file with the *Columbia Law Review*) (noting that the group of executives is "largely white" and "male" and that Alicia Boler Davis's appointment came after criticism of its makeup).

Companies such as Nike,[8] Walmart,[9] Apple,[10] and Delta[11] made similar pledges. These companies and many others voiced their support for BLM, announced racial equity initiatives, and emphasized their commitments to improving diversity, equity, and inclusion within their companies.[12]

Many corporate leaders called this the dawning of a new era of corporate social responsibility (CSR).[13] As the phrase implies, CSR is the belief that corporations should pursue goals that benefit society and, in this case, view racial equity and justice as important to their operations, profits, and overarching societal obligations.[14] CSR advocates believe that corporations have obligations not only to shareholders but to a broad cross section of stakeholders—employees, consumers, and society at large.[15] The wave of

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8. See Press Release, Nike, Inc., Jordan Brand and Michael Jordan Statement on Commitment to the Black Community (June 5, 2020), https://about.nike.com/en/newsroom/releases/jordan-brand-statement-on-commitment-to-black-community [https://perma.cc/Y2KA-MFZC] (announcing $100 million in donations to racial justice organizations).

9. Doug McMillon, Letter to Walmart Associates on Advancing Our Work on Racial Equity, Walmart (June 12, 2020), https://corporate.walmart.com/news/2020/06/12/advancing-our-work-on-racial equity [https://perma.cc/7AD8-JLFV] [hereinafter Letter From Doug McMillon] (announcing racial equity initiatives, including a $100 million commitment to start a center for racial equity).

10. See Tim Cook, Speaking Up on Racism, Apple, https://www.apple.com/speaking-up-on-racism/ [https://perma.cc/D2KK-55TV] (last visited Oct. 23, 2023) (announcing donations to Equal Justice Initiative and other organizations alongside a commitment to address issues impacting communities of color).

11. See Ed Bastian, Memo: Taking Action on Racial Justice, Diversity, Delta News Hub (Aug. 11, 2020), https://news.delta.com/ed-bastian-memo-taking-action-racial-justice-diversity [https://perma.cc/QA23-SLTK] (announcing a commitment to racial equity through leadership changes, talent strategy, partnerships with community organizations, and prioritizing Black business partners).

12. See Tracy Jan, Jena McGregor & Meghan Hoyer, Corporate America's $50 Billion Promise, Wash. Post (Aug. 23, 2021), https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/ (on file with the *Columbia Law Review*) [hereinafter Jan et al., Corporate America's $50 Billion Promise] (last updated Aug. 24, 2021) (detailing commitments beyond the traditional forms of philanthropy, including diversifying the workforce and buying from Black-owned businesses).

13. See, e.g., Ass'n of Corp. Citizenship Pros. & Rocket Soc. Impact, Impact of COVID-19 & Racial Justice Movement on Corporate Social Responsibility 3 (2021), https://accp.org/resources/csr-resources/data-research/the-impact-of-pandemic-racial-justice-movement-on-csr/ (on file with the *Columbia Law Review*) (highlighting survey results showing that the racial justice movement is driving increased corporate investment in diversity, equity, and inclusion); Sustainable Inv. Team & Equity Rsch. Team, Putnam Invs., Toward Racial Justice 6–8 (2021), https://www.putnam.com/static/pdf/325702-toward-racial-justice.pdf [https://perma.cc/KT39-D23X] (describing shifts in the current cultural environment that necessitate change in business tactics).

14. David Chandler & William B. Werther, Jr., Strategic Corporate Social Responsibility: Stakeholders, Globalization, and Sustainable Value Creation 6 (3d ed. 2013). See generally Emilie Aguirre, Beyond Profit, 54 U.C. Davis L. Rev. 2077 (2021) (discussing how corporations pursue goals beyond profitability).

15. See, e.g., Stefan J. Padfield, Corporate Social Responsibility & Concession Theory, 6 Wm. & Mary Bus. L. Rev. 1, 16 (2015) ("Simply put, the CSR position is that shareholder wealth may be sacrificed if the net social gain is positive, so that a board may defend its

corporate commitments to racial equity seemed to indicate that corporations were viewing their purpose more broadly and that this purpose went beyond profitability.

Now, however, two years removed from the massive racial justice protests that gripped the United States, some corporations have backtracked on their antiracist commitments. Their financial pledges to antiracist causes have gone unfulfilled.[16] Their promises to diversify their workforces have not been realized.[17] Other corporate antiracist programs that were priorities in the aftermath of George Floyd's murder are no longer so.[18] Those who still believe that CSR can ensure and sustain racial equity efforts are learning a tough and unfortunate lesson. As easily as a corporation might create initiatives that purport to advance racial equity, it can retreat or even end those initiatives just as easily and with no repercussions.

Fleeting corporate commitments to racial equity are nothing new. They are inherent to racial equity strategies that depend on CSR. During the civil rights movement, for example, similar problems emerged as businesses became critical sites for antisegregation protests and demands for CSR. In 1960, a wave of sit-in demonstrations erupted at segregated public accommodations throughout the South.[19] These protests would change the civil rights movement forever. One of the activists' core demands was that these segregated businesses act responsibly.[20] Segregated lunch counters

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actions by pointing to some accounted-for social benefit even when it demurs on the issue of shareholder wealth maximization.").

16. See Shaun Harper, Where Is the $200 Billion Companies Promised After George Floyd's Murder?, Forbes (Oct. 17, 2022), https://www.forbes.com/sites/shaunharper/2022/10/17/where-is-the-200-billion-companies-promised-after-george-floyds-murder/ [https://perma.cc/E8DH-8B5U] (stating that, as of August 2021, "37 of the 50 largest companies had disbursed only $1.7 billion of the nearly $50 billion pledged" in the aftermath of the murder of George Floyd (citing Jan et al., Corporate America's $50 Billion Promise, supra note 12)).

17. See Ebony Flake, Tech Companies Are Quietly Defunding Diversity Pledges and Industry Layoffs Are Hitting Black and Brown Workers Hardest—Experts Say the Message Is Clear, Essence (Dec. 8, 2022), https://www.essence.com/news/money-career/tech-companies-quietly-defunding-diversity-pledges [https://perma.cc/V8XK-WX7K] ("A 2022 study showed minimal increase in the percentage of Black employees since 2020." (citing Donald T. Tomaskovic-Devey & JooHee Han, The Tech Industry Talks About Boosting Diversity, but Research Shows Little Improvement, The Conversation (Mar. 1, 2022), https://theconversation.com/the-tech-industry-talks-about-boosting-diversity-but-research-shows-little-improvement-177011 [https://perma.cc/MM4M-R952])).

18. See id. ("As recession fears cause executive decision-makers to reassess their bottom lines, many have quietly divested from commitments to diversity and inclusion.").

19. Aldon D. Morris, The Origins of the Civil Rights Movement: Black Communities Organizing for Change 197–99 (1984); see also Julian Bond, SNCC: What We Did, Monthly Rev. (Oct. 1, 2000), https://monthlyreview.org/2000/10/01/sncc-what-we-did/ [https://perma.cc/TJ7B-AAH8] (explaining the sit-ins' far-reaching implications).

20. See Ella Baker, Bigger Than a Hamburger, S. Patriot (May 1960), reprinted in C.R. Movement Archive, https://www.crmvet.org/docs/sncc2.htm [https://perma.cc/SPV7-MBY6] (last visited Oct. 24, 2023).

made visible injustice and corporate social *irresponsibility*—a business's participation in an immoral and unethical social and legal code.[21] Civil rights activists initially attempted to persuade individual businesses to end their Jim Crow practices.[22] Activists appealed to businesses' CSR, urging them to surpass their legal obligations and desegregate voluntarily because it was the right thing to do.[23]

Socially minded businesses and civic and political leaders also championed CSR as a solution to the racial protests of the early to mid-1960s.[24] Proponents of CSR asserted that business owners' voluntary desegregation of public accommodations could end or prevent divisive sit-ins, litigation, and legislative wrangling. CSR, therefore, was framed as a means to meet civil rights activists' demands while preserving corporate interests and avoiding government interference.[25] Segregated public accommodations regularly provoked demonstrations and limited businesses' commerce with patrons of all races.[26] Voluntary desegregation seemed to offer a progressive, sensible, and potentially profitable approach to the problem of Jim Crow in public accommodations. It could even enhance some businesses' racial reputation.

Nonetheless, reliance on CSR failed to achieve meaningful desegregation in southern localities. Many white-owned businesses would agree to desegregate during negotiations with civil rights leaders but renege shortly thereafter—or they would simply refuse to desegregate.[27] CSR, therefore, allowed some white businesses to claim compliance with civil rights ideals without changing significant aspects of their operations, thus becoming a tool that ultimately undermined racial progress. Black activists soon moved away from CSR as a possible path toward desegregation and instead initiated a campaign that led to the enactment of Title II.[28] Title II profoundly transformed the debate around race and CSR. Most notably, it set

21. See id.

22. See Morris, supra note 19, at 197–213.

23. For example, the Nashville sit-ins—which lasted from February 13 to May 16, 1960—combined with a series of negotiations and economic boycotts by Black patrons helped "convince" private businesses and public facilities in downtown Nashville of the "benefits" of voluntarily desegregating. Id. at 205–13; see also Martin Oppenheimer, The Sit-In Movement of 1960, at 124–26 (David J. Garrow ed., 1989) (highlighting the negotiation effort and difficulties in desegregating Nashville).

24. See infra Part II.

25. See infra Part II.

26. See Oppenheimer, supra note 23, at 129 (explaining how sit-ins and other demonstrations negatively affected businesses); Ricard Gil & Justin Marion, Residential Segregation, Discrimination, and African-American Theater Entry During Jim Crow 7 (Nov. 23, 2015), https://ssrn.com/abstract=2694691 [https://perma.cc/5DFP-K9CH] (unpublished manuscript) (detailing the effects of segregation in the movie-theater industry during Jim Crow).

27. See infra section II.A.

28. See Morris, supra note 19, at 199–203 (describing the role of the Southern Christian Leadership Conference (SCLC) in organizing the mass sit-in movement of 1960).

a federal floor for racial justice in the area of public accommodations.[29] After its passage, Black people no longer had to depend on corporate leaders' hearts and minds to receive service and basic human dignity. The law now guaranteed their civil rights.

This Article uses legal and social history to examine "corporate *racial* responsibility"[30]—the engagement of businesses[31] in racial equity—from a historical and contemporary standpoint. It argues that past and current iterations of corporate racial responsibility present a market-fundamentalist, value-extractive approach to racial equity that reifies existing racial hierarchies and fails to produce change. While the authors believe firmly that businesses have a role to play in achieving racial equity, past and present iterations of corporate racial responsibility do not reflect a meaningful attempt to engage in racial equity.[32] Rather, corporate racial responsibility prioritizes corporate interests over human dignity, requiring Black and Brown communities to prove their value to the corporate bottom line before being worthy of attention. Further, in privileging a voluntary, market-based approach to corporate racial responsibility, firms stymie racial progress by undercutting regulation that would result in more meaningful change. The sum total of these strategies enacted under the guise of progressivism, therefore, is to exploit the very communities who ought to benefit from corporate racial responsibility.

This Article makes three core contributions.

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29. See infra section II.C.

30. The Article switches between using "corporate social responsibility" (CSR) and "corporate racial responsibility" at various junctures. As discussed in the Article, "CSR" is capacious enough to describe corporate commitment to a wide range of social responsibilities, including the environment, labor rights, sustainability, and race. This Article's focus is primarily (and in some instances exclusively) on businesses' engagements on race-related matters. Historically and today, business engagement in racial equity is generally cabined under CSR in common parlance. But the Article uses "CSR," primarily for historical accuracy, when discussing these efforts during the civil rights era. When analyzing contemporary efforts to engage firms in racial equity, this Article defaults to "corporate racial responsibility" to indicate its specific focus.

31. This Article uses "businesses," "corporations," and "firms" to refer to private enterprises engaged in commerce. The authors recognize that not all businesses and firms are corporations but use the terms somewhat loosely to refer to all forms of businesses, regardless of how they are organized.

32. This Article adopts the following definition of racial equity:

> Racial equity is a process of eliminating racial disparities and improving outcomes for everyone. It is the intentional and continual practice of changing policies, practices, systems, and structures by prioritizing measurable change in the lives of people of color.
>
> . . . Racial equity is the process for moving towards the vision of racial justice. Racial equity seeks measurable milestones and outcomes that can be achieved on the road to racial justice. Racial equity is necessary, but not sufficient, for racial justice.

What Is Racial Equity?, Race Forward, https://www.raceforward.org/what-racial-equity-0 [https://perma.cc/2UJQ-MGSW] (last visited Oct. 23, 2023) (emphasis omitted).

First, it connects two bodies of literature in a unique way. The first body of scholarship is the civil rights canon. Civil rights scholars have used sit-ins to demonstrate the power of protest on law. They emphasize that civil rights activism created the political environment for Congress to reconsider its abilities to regulate interstate commerce, ensure equal protection, and protect private property rights.[33] This Article's reexamination of the sit-in movement innovates civil rights scholarship because it demonstrates CSR's role in proving the *need* for legal intervention to guarantee civil rights. These insights challenge civil rights scholars to recognize that civil rights history is part of corporate governance scholarship; such an account expands traditional understandings of the scope of the civil rights movement.[34] Civil rights activists were not only interested in transforming federal law—they were also challenging and reimagining conceptions of CSR.

The second body of scholarship is robust literature on CSR. Over the past two decades, businesses, investors, and consumers have invested more significantly in CSR and its more commonly known counterpart, "ESG" (environmental, social, and governance).[35] Yet despite demands for more prosocial corporations, race has not figured prominently in this scholarly literature. Rather, scholars have examined race primarily when discussing corporate board diversity.[36] Despite these gaps in the extant scholarship, broader societal debates will continue about how corporations can advance racial equity in ways that transcend their (minimal) legal responsibility. There has been some reckoning about race and racism in corporate life; there must also be a reckoning about the neglect of race and racism in corporate governance scholarship. This Article seeks to contribute to that conversation.

Second, this Article engages with current debates on CSR to illustrate that the primary critiques against corporate racial responsibility fail to consider the lessons from the civil rights era and misconstrue corporate

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33. See, e.g., Jackson, supra note 1, at 170 ("In retrospect, 1963 and 1964 presented the last, best opportunity of the postwar era to institutionalize social democratic policies that could have addressed the growing crisis of joblessness at the heart of the racial and urban crises that endure to this day."). See generally Tomiko Brown-Nagin, Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement (2011) (providing a leading social-movement history of the Civil Rights Act of 1964).

34. Cf. Jacquelyn Dowd Hall, The Long Civil Rights Movement and the Political Uses of the Past, 91 J. Am. Hist. 1233, 1234–36 (2005) (describing civil rights historiography and challenging the "master narrative" of the civil rights movement, which limits the movement to a short "classical" phase culminating in the passage of the Civil Rights Act of 1964).

35. See Elizabeth Pollman, The Making and Meaning of ESG, Harv. Bus. L. Rev. (forthcoming 2024) (manuscript at 1), https://ssrn.com/abstract=4219857 [https://perma.cc/66FH-KKME] (explaining that "trillions" of dollars have flowed into ESG-labeled investment products).

36. See, e.g., Atinuke O. Adediran, Disclosing Corporate Diversity, 109 Va. L. Rev. 307, 309 (2023) (arguing that ESG disclosures can be used to diversify corporate boardrooms and workplaces).

engagement's most pressing shortcomings in racial equity. For example, one of the more strident critiques against corporate racial responsibility is that corporations should not engage with race-related issues because it is beyond the ambit of their proper purpose.[37] This critique, however, takes a narrow and ahistorical view of corporate engagement in racial issues. Corporations actively participated in the transatlantic trade of Black Africans, profiting from the transportation, sale, and forced labor of enslaved Black people.[38] Doing so required denying the humanity and dignity of Black people, which corporations (and many white people) were willing to do. This is an early and striking example of business engagement in race-related issues, which shows that corporations have long cared about race, even if the reasons and ways have changed over the centuries.

In more recent history, during the civil rights era, some businesses agreed to desegregate voluntarily to avoid demonstrations and enhance their reputation, but then they often retreated from their pledges to desegregate when they deemed these pledges no longer in their interests.[39] Likewise, in today's environment, many corporations have reneged on their racial equity pledges.[40] This historical continuity reveals that corporate commitments to racial equity are not a modern development in deference to social pressure; rather, corporations typically make, and have historically made, these commitments to further their short-term private interests.

Third, this Article illustrates its thesis by critically assessing corporate racial responsibility. As both past and present developments demonstrate, corporate racial responsibility adopts a market-fundamentalist, value-extractive approach to racial equity that subordinates human dignity to wealth maximization, reifies existing racial hierarchies, and stymies true

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37. See Andrew Edgecliffe-Johnson, The War on 'Woke Capitalism', Fin. Times (May 27, 2022), https://www.ft.com/content/e4a818e5-4039-46d9-abe0-b703f33d0f9b (on file with the *Columbia Law Review*) (listing prominent critiques of corporate social responsibility, including that companies "seized . . . th[e] opportunity to teach this generation that the way to fill [the hunger to find a higher purpose at work] is to . . . order a cup of ice-cream with a cup of morality on the side" (internal quotation marks omitted) (quoting then–presidential candidate Vivek Ramaswamy)).

38. See Rashad Robinson, Opinion, Corporations Profit From Racism. It's Time for Us to Stand Up to Them, The Guardian (May 16, 2019), https://www.theguardian.com/commentisfree/2019/may/16/racial-justice-corporations [https://perma.cc/8V9U-6NU2] (discussing the role of corporations in promoting racist ideologies in America); Zoe Thomas, The Hidden Links Between Slavery and Wall Street, BBC (Aug. 28, 2019), https://www.bbc.com/news/business-49476247 [https://perma.cc/39NA-ABMG] (noting that "[s]ome of the largest insurance firms in the US—New York Life, AIG and Aetna—sold policies that insured slave owners would be compensated if the slaves they owned were injured or killed").

39. See infra section II.B.1.

40. See Jan et al., Corporate America's $50 Billion Promise, supra note 12 ("[C]ompanies reported just a tiny fraction [of their collective $49.5 billion pledge]—about $70 million—went to organizations focused specifically on criminal justice reform . . . .").

racial progress. Both the civil rights era and today provide salient examples. During the Title II debates, some political actors argued that voluntary desegregation was sufficient to end Jim Crow.[41] They cited the incremental steps in some southern localities as proof that federal intervention in the area of civil rights was unnecessary.[42] In other words, a few businesses' willingness to engage in voluntary desegregation became a way to undermine civil rights activists' demands. As a contemporary example, corporations might resist mandatory diversity disclosures on the basis that they already provide that information voluntarily.[43] Corporate racial responsibility legitimates—at least implicitly—antiregulatory, temporary, and often ad hoc responses to enduring and systemic racial problems. Such an approach is far from racial equity. It often replicates an older, racist, and antidemocratic paradigm whereby the fates of racial minorities are largely in the hands of white corporate elites.

This Article proceeds in four parts. Part I chronicles the major scholarly debates around CSR and corporate purpose. It also begins a racial reckoning in the corporate governance scholarship by detailing how and why scholars should take greater account of race in this literature.

Part II details the corporate racial responsibility debates during the civil rights movement. Activists in cities like Birmingham, Alabama, and Atlanta, Georgia, learned that voluntary desegregation could not end Jim Crow in public accommodations.[44] Their activism exposed the limits of corporate-led approaches to racial justice, and these experiences ultimately drove them to seek federal civil rights legislation.[45] Title II, which desegregated public accommodations, proved to be a far more effective and durable remedy for racial discrimination in public accommodations than voluntary desegregation.

Part III analyzes the contemporary debates on corporate racial responsibility, challenging critiques that derive from different—and to some extent, opposed—political stances to show that these critiques ignore the lessons of the civil rights era and miss what is truly problematic about corporate racial responsibility. This Part excavates corporate racial responsibility's shortcomings, analyzing its market-fundamentalist, antiregulatory features that seek to extract value from the communities corporate racial responsibility is meant to benefit rather than enact meaningful change.

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41. See infra Part II.

42. See infra Part II.

43. See Jeff Green, Katherine Chiglinsky & Cedric Sam, America's Top Employers Are Winning at Race Data Transparency—Except Musk and Buffett, Bloomberg (Mar. 21, 2022), https://www.bloomberg.com/graphics/diversity-equality-in-american-business/ (on file with the *Columbia Law Review*) (detailing S&P 100 companies' approaches to voluntarily disclosing racial diversity information via their EEO-1 reports).

44. See infra section II.B.

45. See infra section II.B.

Part IV concludes by applying the lessons learned from civil rights history to the contemporary struggle for racial equity. It offers corporations concrete recommendations so that the recent protests and corporate racial pledges can be more than fleeting moments of racial reckoning. Justice demands far more. If corporations are sincerely committed to ensuring racial equity, they must be honest enough to learn from their past racial shortcomings, bold enough to envision a future beyond mere profit maximization, and committed enough to work for robust, progressive civil rights legislation.

I. CORPORATE SOCIAL RESPONSIBILITY AND RACE

What is the corporation's role in society? This question has occupied corporate scholars' attention for much of the twentieth and twenty-first centuries.[46] Early corporations were formed through special government grants for specific public purposes, such as public works and public transportation.[47] Over time, these early corporations gave way to the modern corporation, which needs no special government grant for creation, ensures limited liability for its shareholders, and has a legal identity separate from its incorporators and shareholders.[48]

The increasing size, power, and influence of the modern corporation underlies contemporary debates on the question of the corporation's proper role in society. For much of the twentieth century, the dominant response to this foundational question was "shareholder wealth maximization": the belief that the corporation's primary (sole) purpose is to maximize shareholder profitability.[49] In recent years, as shareholders, investors, consumers, and employees have demanded that corporations be more prosocial, CSR has gained prominence as a viable countervailing theory to shareholder wealth maximization.[50]

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46. See, e.g., Edward B. Rock, For Whom Is the Corporation Managed in 2020?: The Debate Over Corporate Purpose, 76 Bus. Law. 363, 364–66 (2021) (detailing a variety of positions on corporate purpose).

47. See Elizabeth Pollman, Reconceiving Corporate Personhood, 2011 Utah L. Rev. 1629, 1634 ("As a special government 'privilege' or 'grant,' states mainly awarded charters for enterprises that would benefit the public good . . . .").

48. See id. at 1638–40; see also Jennifer S. Fan, Woke Capital: The Role of Corporations in Social Movements, 9 Harv. Bus. L. Rev. 441, 446 (2019) (discussing the rise of the "modern business corporation").

49. See Lynn A. Stout, New Thinking on "Shareholder Primacy," 2 Acct. Econ. & L., no. 2, art. 4, 2012, at 1, 2. More accurately, shareholder wealth maximization dominated the debates starting in the 1970s with the rise of the Chicago School of economists. Before the 1970s, the debate between the two camps was "evenly matched, with perhaps a slight advantage to the 'managerialist' view that corporations should be run in the interests of not just shareholders, but also stakeholders and society at large." Id.

50. See generally Tom C.W. Lin, Incorporating Social Activism, 98 B.U. L. Rev. 1535, 1566–67 (2018) (discussing the rise of CSR and business leaders' recognition of their responsibilities to other stakeholders).

This Part lays the foundation for understanding CSR, situating it in the debate on corporate purpose and tracing its theoretical development and contemporary application.

A. *Defining Corporate Social Responsibility*

The modern origins of CSR in the United States can be traced to the 1930s debate between Adolf A. Berle and Merrick Dodd on the purpose of the corporation.[51] Berle was a proponent of what is now known as "shareholder primacy" or "shareholder wealth maximization." He believed that managers ought to operate the corporation to maximize shareholder profitability.[52] Dodd, on the other hand, argued that corporate purpose ought not to be limited to shareholder interests; rather, the corporation should also act in the interests of other stakeholders that are affected by its actions.[53] In broadening the focus of the corporation beyond shareholders and profitability, Dodd described the modern foundations of CSR.

While Dodd laid the conceptual foundation, there is no singular definition of "corporate social responsibility."[54] CSR refers broadly to a firm's voluntary consideration of issues beyond its economic and legal obligations, including social, environmental, ethical, moral, and philanthropic principles.[55] CSR, therefore, can be understood as a rejection of corporate profitability as the sole or primary purpose of the corporation.[56] Even on this seemingly unifying point, however, proponents differ in their normative views of the interplay between social interests and profitability. For example, some scholars believe that corporations have a responsibility to balance profitability and the interests of other corporate constituents, whether or not they are shareholders.[57] Others posit that corporations

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51. See Stout, supra note 49, at 2 n.3.

52. See A.A. Berle, Jr., Corporate Powers as Powers in Trust, 44 Harv. L. Rev. 1049, 1049 (1931) (arguing that all powers granted to corporate managers are "at all times exercisable only for the ratable benefit of all the shareholders").

53. See E. Merrick Dodd, Jr., For Whom Are Corporate Managers Trustees?, 45 Harv. L. Rev. 1145, 1148 (1932) ("[T]he business corporation [is] an economic institution which has a social service as well as a profit-making function . . . .").

54. A study on the definitions of CSR found thirty-seven different definitions from articles published between 1980 and 2003. See Alexander Dahlsrud, How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions, 15 Corp. Soc. Resp. & Env't Mgmt. 1, 3 (2008).

55. See id. at 7–11.

56. See Lance Moir, What Do We Mean by Corporate Social Responsibility?, 1 Corp. Governance, no. 2, 2001, at 16, 17–19 (presenting CSR stakeholder and social contract theories that contrast the neoclassical view of CSR).

57. See, e.g., Margaret M. Blair & Lynn A. Stout, A Team Production Theory of Corporate Law, 85 Va. L. Rev. 247, 286 & n.82 (1999) ("[D]irectors should be viewed as disinterested trustees charged with faithfully representing the interests not just of shareholders, but of all team members . . . .").

should be legally obligated to express a social purpose.[58] Still others believe that merely considering social interests is sufficient, even if those interests remain secondary to profitability.[59]

Why do U.S. corporations engage voluntarily in CSR absent legal requirements to do so? The answer often lies not in altruism but in wealth maximization—many corporations anticipate financial benefits for engaging in CSR. Over the past few decades, a large body of literature has demonstrated that CSR enhances corporate profitability in many ways.[60] Other studies have shown that engagement in CSR reduces the cost of capital for corporations[61] and improves long-term corporate performance.[62]

Despite the numerous positive attributes associated with CSR, many have criticized it. Nobel Prize–winning economist Milton Friedman aptly summarizes the main critique against CSR with his now-famous quote: "[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits . . . ."[63] To Friedman and other critics, allowing managers to consider social responsibility rather than solely profits would not only harm the corporation but also undermine individual freedoms.[64] Further, some note

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58. See, e.g., Colin Mayer, Prosperity: Better Business Makes the Greater Good 23 (2018) (proposing that corporations be legally required to articulate a purpose).

59. See Gerlinde Berger-Walliser & Inara Scott, Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening, 55 Am. Bus. L.J. 167, 214 (2018) (identifying the shortcomings of current CSR definitions).

60. See, e.g., Caroline Flammer, Does Corporate Social Responsibility Lead to Superior Financial Performance? A Regression Discontinuity Approach, 61 Mgmt. Sci. 2549, 2562–63 (2015) (finding that CSR programs increase long-term profitability and listing three ways CSR programs improve operating performance).

61. See, e.g., Beiting Cheng, Ioannis Ioannou & George Serafeim, Corporate Social Responsibility and Access to Finance, 35 Strategic Mgmt. J. 1, 2, 9 (2014) (finding that better CSR performance leads to lower capital constraints given greater stakeholder engagement and increased transparency); Rob Bauer & Daniel Hann, Corporate Environmental Management and Credit Risk 15 (Dec. 23, 2010), https://ssrn.com/abstract=1660470 [https://perma.cc/A9YN-PUSP] (unpublished manuscript) ("[Our findings] show that firms with proactive environmental engagement pay a lower cost of debt financing.").

62. See, e.g., Robert G. Eccles, Ioannis Ioannou & George Serafeim, The Impact of Corporate Sustainability on Organizational Processes and Performance, 60 Mgmt. Sci. 2835, 2836 (2014) (finding that companies that voluntarily adopted sustainability policies by 1993 outperformed their counterparts over the long term); Kent Greenfield, The Third Way, 37 Seattle U. L. Rev. 749, 767–68 (2014) (proposing that stakeholder-inclusive boardrooms can provide a remedy to "short-termism"); see also Michael E. Porter, Mark Kramer & George Serafeim, Opinion, Where ESG Fails, Institutional Inv. (Oct. 16, 2019), https://www.institutionalinvestor.com/article/2bswdin8nvg922puxdzwg/opinion/where-esg-fails [https://perma.cc/D6FL-WEDZ] (arguing that companies that pursue social-impact goals "can outperform their peers, delivering superior returns both to society and to their shareholders").

63. Milton Friedman, A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits, N.Y. Times Mag., Sept. 13, 1970, at 126 (internal quotation marks omitted) (quoting Milton Friedman, Capitalism and Freedom 133 (1st ed. 1962)).

64. See id. ("But the doctrine of 'social responsibility' taken seriously would extend the scope of the political mechanism to every human activity. . . . That is why . . . I have

that the firm's diffused obligations under CSR would produce managers with no real accountability as they pursue various social interests and goals.[65] Critics also question corporate competency to address social issues. In their view, although corporations have resources and expertise, their skills are suited for the narrow scope of the corporation's business, not social and environmental issues, which are better handled through the markets or by the government.[66] Relatedly, some believe that increasing corporate engagement in societal issues also increases corporations' power and undermines democratic governance.[67]

While shareholder wealth maximization is the dominant legal and theoretical framework of corporate purpose, CSR remains a salient alternative that is resurging in the 2020s. The debate has shifted from questions of *whether* CSR ought to exist to questions of *how* corporations can best support and engage with social and environmental issues. Today, CSR is a key feature of major publicly traded corporations, most of which variously engage in social activism, as discussed in greater detail below.

B. *The Contemporary Rise of Corporate Social Responsibility*

In the past two decades, corporate managers' commitment to CSR has increased in both intensity and scope. According to a 2019 poll, 41% of *Fortune* 500 CEOs viewed "solving social problems" as part of their core business strategy.[68] This broad embrace of CSR is a marked change in corporate America's attitude and a turning point in the corporate approach to social issues.

Larry Fink, the CEO of BlackRock—the world's largest asset manager—epitomized this changing ethos and the shift in attention from shareholders to stakeholders in a 2017 statement that called on corporations to "benefit all of their stakeholders, including shareholders,

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called it a 'fundamentally subversive doctrine' in a free society . . . ." (quoting Milton Friedman, Capitalism and Freedom 133 (1st ed. 1962))).

65. See Mark J. Roe, The Shareholder Wealth Maximization Norm and Industrial Organization, 149 U. Pa. L. Rev. 2063, 2065 (2001) ("[A] stakeholder measure of managerial accountability could leave managers so much discretion that managers could easily pursue their own agenda, one that might maximize neither shareholder, employee, consumer, nor national wealth, but only their own.").

66. See Janet E. Kerr, The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens, 81 Temp. L. Rev. 831, 863 (2008) (arguing that corporations should tackle problems relevant to their markets and within their competencies).

67. See, e.g., Lin, supra note 50, at 1588–93 ("The rise of contemporary corporate social activism could lead to a corrosion of core democratic, moral values . . . .").

68. Alan Murray, America's CEOs Seek a New Purpose for the Corporation, Fortune (Aug. 19, 2019), https://fortune.com/longform/business-roundtable-ceos-corporations-purpose/ (on file with the *Columbia Law Review*).

employees, customers, and the communities in which they operate."[69] Fink followed up his 2017 statement with a similar letter to CEOs in 2019. In this letter, Fink urged managers to embrace a purpose beyond profits that creates value for all stakeholders.[70] In the same year, the Business Roundtable—a nonprofit trade association representing corporate executives and directors—issued a statement supporting the view that corporations should be managed to serve the interests of all stakeholders, not just shareholders.[71] Some viewed this statement, signed by almost 200 chief executive officers, and its rejection of shareholder primacy as a watershed moment in corporate commitment to social responsibility.[72] The Business Roundtable's full-throated embrace of CSR is particularly noteworthy because of the association's prior complete rejection of any corporate purpose other than serving shareholder interests.[73]

Investors have been one significant impetus for the increasing embrace of CSR. Over the past decade, investors have demanded more socially conscious investment options, which has led to an increase in ESG investment. ESG is more recent than CSR and arose as an investment strategy, but the two are largely synonymous today.[74] As the SEC has described it:

> ESG . . . may be referred to in many different ways, such as sustainable investing, socially responsible investing, and impact investing. ESG practices can include, but are not limited to, strategies that select companies based on their stated commitment to one or more ESG factors—for example, companies with policies aimed at minimizing their negative impact on the environment or companies that focus on governance principles and transparency. ESG practices may also entail screening out companies in certain sectors or that, in the view of the fund manager, have shown poor

69. Larry Fink, Larry Fink's 2018 Letter to CEOs: A Sense of Purpose, BlackRock, https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter [https://perma.cc/KTA7-FFSA] (last visited Oct. 23, 2023).

70. See Larry Fink, Larry Fink's 2019 Letter to CEOs: Purpose & Profit, BlackRock https://www.blackrock.com/corporate/investor-relations/2019-larry-fink-ceo-letter [https://perma.cc/6ZPS-5LS4] (last visited Oct. 23, 2023).

71. See Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy that Serves All Americans', Bus. Roundtable (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/WPH3-U34B] [hereinafter Business Roundtable 2019 Statement].

72. David Gelles & David Yaffe-Bellany, Shareholder Value Is No Longer Everything, Top C.E.O.s Say, N.Y. Times (Aug. 19, 2019), http://nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html (on file with the *Columbia Law Review*).

73. Bus. Roundtable, Statement on Corporate Governance 3 (1997) ("[T]he paramount duty . . . of boards of directors is to the corporation's stockholders . . . .").

74. See Adediran, supra note 36, at 317 n.32.

> performance with regard to management of ESG risks and opportunities.[75]

Moving from the fringe and closer to the center of investment practices, ESG investments increased by 42% between 2018 and 2020,[76] reaching $26 trillion in 2023.[77] Market demands for ESG investment have motivated corporations to take seriously and embrace socially responsible conduct.

Related to investor pressure is employee pressure. Studies have shown that employees, particularly millennials, would prefer to work for firms that engage in CSR.[78] Recently, employees have been more vocal in demanding that corporations "do the right thing" in their business dealings. For example, in 2019, Wayfair—a furniture manufacturing and distribution company—entered into a contract to supply furniture to an immigrant detention center at the United States–Mexico border.[79] Hundreds of employees demanded that the company cease doing business with detention centers and, when the company refused to terminate the contract, staged a walkout.[80] Market response to the employee walkout was almost immediate: Wayfair's share price plummeted by more than 5%.[81] By deciding to maintain the contract, Wayfair found it more difficult "to attract and retain talented employees."[82] Employees have made similar demands at other

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75. Environmental, Social and Governance (ESG) Funds—Investor Bulletin, SEC (Feb. 26, 2021), https://www.sec.gov/oiea/investor-alerts-and-bulletins/environmental-social-and-governance-esg-funds-investor-bulletin [https://perma.cc/QZX3-2P4X].

76. Jason Stevens, The Rise of ESG and the Importance of ESG Data, Ultimus Fund Sols.: Blog (Nov. 18, 2021), https://www.ultimusfundsolutions.com/blog/the-rise-of-esg-and-the-importance-of-esg-data/ [https://perma.cc/QTB7-2FMA].

77. Alyssa Stankiewicz, U.S. Sustainable Funds Register First Annual Outflows in 2023, Morningstar (Jan. 17, 2024), https://www.morningstar.com/sustainable-investing/us-sustainable-funds-register-first-annual-outflows-2023 [https://perma.cc/AW6R-NQCZ].

78. See Gallup, How Millennials Want to Work and Live 52 (2016), https://www.gallup.com/workplace/238073/millennials-work-live.aspx [https://perma.cc/9BTW-ZDTQ] ("[S]lightly more than one in three millennial workers strongly agree that the mission or purpose of their organization makes them feel their job is important.").

79. Abha Bhattarai, Wayfair Is Supplying Beds to Texas Detention Centers for Children—And Its Employees Are Protesting, Wash. Post (June 25, 2019), https://www.washingtonpost.com/business/2019/06/25/wayfair-is-supplying-beds-texas-detention-centers-children-its-employees-are-protesting/ (on file with the *Columbia Law Review*).

80. Id.

81. See Jasmine Wu, Wayfair Employees Protest Apparent Sale of Children's Beds to Border Detention Camp, Stock Drops, CNBC (June 25, 2019), https://www.cnbc.com/2019/06/25/wayfair-employees-protest-apparent-sale-of-childrens-beds-to-detention-camp.html [https://perma.cc/3M54-9Q68] (last updated June 26, 2019).

82. See Peter Cohen, 3 Reasons to Sell Wayfair on Today's Employee Walkout, Forbes (June 26, 2019), https://www.forbes.com/sites/petercohan/2019/06/26/3-reasons-to-sell-wayfair-on-todays-employee-walkout/?sh=3b091501492f (on file with the *Columbia Law Review*).

large public corporations, including Google,[83] Microsoft,[84] and Amazon.[85] Being competitive in the labor market thus provides a strong incentive for corporations to be attentive to CSR.

The rise of CSR has transformed the debate on corporations' role in society. Rather than *whether* corporations should engage in CSR, the question now is one of *how* and *how much*. While shareholder primacy continues to be a for-profit corporation's legal requirement,[86] many corporations are nonetheless considering the interests of stakeholders and society in their decisionmaking.[87] But on more controversial issues, such as race and racial justice, corporations have been slower to engage.

C. *Corporate Social Responsibility and the Issue of Race*

Notably, CSR scholarship, discourse, and practice have not focused on race. For example, in charting the history and evolution of CSR, scholars Mauricio Andrés Latapí Agudelo, Lára Jóhannsdóttir, and Brynhildur Davídsdóttir barely discuss race, despite their emphasis on the theory's development in the United States.[88] As Professor Atinuke O. Adediran notes in her recent scholarship on CSR disclosures: "Until recently, scholarship on ESG was largely devoid of discussions about corporate diversity," and when diversity was mentioned, it "was often acknowledged in cursory fashion."[89] Even scholars who view CSR expansively to include corporate behavior related to the environment, labor, sustainability, politics, and war, among other themes,

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83. See Shirin Ghaffary, Google Employees Protest the Company's "Attempt to Silence Workers", Vox (Nov. 22, 2019), https://www.vox.com/recode/2019/11/22/20978537/google-workers-suspension-employee-activists-protest [https://perma.cc/GB3N-C4LF].

84. See Avie Schneider & Laura Sydell, Microsoft Workers Protest Army Contract With Tech 'Designed to Help People Kill', NPR (Feb. 22, 2019), https://www.npr.org/2019/02/22/697110641/microsoft-workers-protest-army-contract-with-tech-designed-to-help-people-kill [https://perma.cc/Z7YD-UTHP].

85. See Caroline O'Donovan, Amazon Employees Protest the Sale of Books They Say Are Anti-Trans, Wash. Post (June 1, 2022), https://www.washingtonpost.com/technology/2022/06/01/amazon-trans-pride-month-books-protest/ (on file with the *Columbia Law Review*).

86. See, e.g., eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34–35 (Del. Ch. 2010) ("Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law."). But see Robert J. Rhee, A Legal Theory of Shareholder Primacy, 102 Minn. L. Rev. 1951, 1957 (2018) (asserting that "[i]t is difficult to find the locus of law" and that "[t]here is no well-established body of case law or a statute commanding [shareholder primacy]").

87. See infra notes 92–95, 99–101 (documenting corporate engagement in environmental causes and philanthropy).

88. See Mauricio Andrés Latapí Agudelo, Lára Jóhannsdóttir & Brynhildur Davídsdóttir, A Literature Review of the History and Evolution of Corporate Social Responsibility, 4 Int'l J. Corp. Soc. Resp., no. 1, 2019, at 1, 3–15.

89. Adediran, supra note 36, at 316–17.

rarely theorize race as within the scope of a corporation's social obligations.[90]

Similarly, in practice, CSR has traditionally focused on environmental goals[91] or philanthropy.[92] This historical focus is reflected in the contemporary emphasis on climate change and sustainability. For example, several corporations have pledged to become net-zero producers of carbon emissions,[93] adopt a range of sustainability measures,[94] or donate to worthwhile causes.[95] Corporate reticence to engage in social issues is reflected

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90. Before the 1950s, CSR had focused on female and child labor. See Archie B. Carroll, A History of Corporate Social Responsibility, *in* The Oxford Handbook of Corporate Social Responsibility 19, 21 (Andrew Crane, Abigail McWilliams, Dirk Matten, Jeremy Moon & Donald S. Siegel eds., 2008). Early literature in the 1950s broadly states that businesses have social consequences and thus have social responsibility to consider their impact on society and to follow the values of society. See Archie B. Carroll, Corporate Social Responsibility: Evolution of a Definitional Construct, 38 Bus. & Soc. 268, 269–70 (1999). Social movements in the 1970s that focused on "the environment, worker safety, consumers, and employees" might have affected the focus and reach of CSR. See id. at 275.

91. See, e.g., Ofer Eldar, Designing Business Forms to Pursue Social Goals, 106 Va. L. Rev. 937, 940 (2020) (equating CSR with environmental concerns and noting that "[w]ithout a mechanism for ensuring that CSR actually benefits the stakeholders, companies can easily use it as a means of 'greenwashing'"); Thomas Lee Hazen, Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies' CSR and ESG Disclosures, 23 U. Pa. J. Bus. L. 740, 742 & n.6 (2021) (citing a law firm memo as indicating that "social responsibilities and good corporate governance" include "elimination of toxic corporate culture and enhancement of diversity, inclusion, and equity" (citing Clare Connellan, Maia Gez, Seth Kerschner & Jacquelyn MacLennan, ESG Takes Center Stage Amid Economic Crisis and Social Unrest, White & Case LLP (Aug. 5, 2020), https://mergers.whitecase.com/highlights/esg-takes-center-stage-amid-economic-crisis-and-social-unrest [https://perma.cc/Y97V-XY5T])); Kerr, supra note 66, at 846 (focusing exclusively on sustainability and the environment).

92. See, e.g., M. Todd Henderson & Anup Malani, Corporate Philanthropy and the Market for Altruism, 109 Colum. L. Rev. 571, 581–82 (2009) (analyzing competing views on whether philanthropy promotes shareholder interests).

93. According to the Climate Pledge, at least 464 signatories have committed to becoming net-zero producers by 2040. See Climate Pledge, https://www.theclimatepledge.com/us/en/ [https://perma.cc/JHM5-BP9R] (last visited Jan. 20, 2024).

94. See, e.g., Thor Olavsrud, NHL Turns to Venue Metrics Data to Drive Sustainability, CIO (Jan. 3, 2023), https://www.cio.com/article/416508/nhl-turns-to-venue-metrics-data-to-drive-sustainability.html [https://perma.cc/6E76-2YKH] (overviewing the NHL's efforts to leverage data and analytics to identify resource consumption reduction opportunities); Stakeholder Metrics Initiative: Over 150 Companies Implement Sustainability Reporting Metrics, World Econ. F. (Jan. 11, 2024), https://www.weforum.org/impact/stakeholder-capitalism-reporting-metrics-davos2024/ [https://perma.cc/HTL4-23T3] (noting that 158 companies produced sustainability reports aligned with the World Economic Forum's "Stakeholder Metrics" in 2023).

95. See, e.g., Press Release, Amazon, Amazon Donates 100 Million Returned Items to Nonprofits (May 10, 2022), https://www.aboutamazon.com/news/operations/amazon-donates-100-million-returned-items-to-nonprofits [https://perma.cc/38UG-UYRG] ("[T]hrough a partnership with Good360, a nonprofit that helps facilitate the donation of unsellable goods to those who need them most, donations have impacted 11 million lives, including 6.9 million people in 2021 alone, in communities across the U.S. and recently Canada."); Press Release, Apple, 15 Years Fighting AIDS With (RED): Apple Helps Raise Nearly $270 Million (Dec. 1, 2021),

in ESG scholarship, in which the *E* and *G* (environmental and governance) have often been the focus, while the *S* (social) has been more muted.[96]

Corporations have feared consumer or political backlash if they assert a position on social issues.[97] Thus, even as corporations have engaged in greater levels of CSR—by, for example, adopting net-zero carbon pledges or donating money to philanthropy—they have been reluctant to take a stance on social issues, including and especially race.[98] Recently, corporations have become more willing to engage in some of these issues, such as marriage equality,[99] transgender rights,[100] and gender pay equity.[101] Race, however, has been different. Before 2020, CSR as it related to race typically subsumed race under the broader banner of "diversity."[102] These diversity efforts have ranged from making statements in support of diversity; to facil-

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https://www.apple.com/newsroom/2021/12/15-years-fighting-aids-with-red-apple-helps-raise-nearly-270-million/ [https://perma.cc/Q588-ZWJB] ("Since 2006, Apple customers have helped raise nearly $270 million to fund prevention, testing, and counseling services for people impacted by HIV/AIDS."); Press Release, Bank of Am., BofA Provides Nearly $19 Million to Local Hunger Organizations From Employee Booster Campaign (Dec. 14, 2022), https://newsroom.bankofamerica.com/content/newsroom/press-releases/2022/12/bofa-provides-nearly–19-million-to-local-hunger-organizations-f.html [https://perma.cc/TYJ6-EEJ7] ("Bank of America has a longstanding commitment to address hunger relief and strengthen local communities, having donated nearly $150 million toward hunger relief efforts since 2015.").

96. See Adediran, supra note 36, at 316 (noting the lack of discussion of corporate diversity in traditional ESG scholarship).

97. For example, Florida Governor Ron DeSantis publicly condemned Disney and threatened to revoke the company's "special district" status for opposing Florida's "Parental Rights in Education" law. See Gary Fineout, DeSantis and Disney: The Ride Is Hurtling to the End, Politico (Dec. 5, 2022), https://www.politico.com/newsletters/florida-playbook/2022/12/05/the-slow-moving-storm-at-the-florida-supreme-court-00072135 [https://perma.cc/JWY6-GD8S].

98. See infra notes 102–108 and accompanying text.

99. See, e.g., Chris Capossela, Microsoft Celebrates Pride Around the World—Even in the Metaverse—As We Donate to LGBTQIA+ Nonprofits, Release Xbox Pride Controller and More, Microsoft (June 1, 2022), https://blogs.microsoft.com/blog/2022/06/01/microsoft-celebrates-pride-around-the-world-even-in-the-metaverse-as-we-donate-to-lgbtqia-nonprofits-release-xbox-pride-controller-and-more/ [https://perma.cc/K589-Q22S] ("To mark the launch of our campaign, we're contributing a total of $170,000 to LGBTQIA+ nonprofits around the world.").

100. See, e.g., Adam Dorfman, How Google Supports Pride, Near Media (June 8, 2021), https://www.nearmedia.co/google-supports-pride/ [https://perma.cc/VMJ3-Q59P] ("Google's actions appear to be a genuine reflection of its culture. For instance, in 2011, Google made significant improvements to its coverage of transgender healthcare.").

101. See, e.g., Marianne Wilson, Kohl's Among Five Retailers on Top 75 Companies for Executive Women List, Chain Store Age (June 9, 2022), https://chainstoreage.com/kohls-among-five-retailers-top-75-companies-executive-women-list [https://perma.cc/4KRK-JNKN] (detailing corporate engagement on achieving gender pay equity, including efforts from Kohl's, Best Buy, and Target).

102. See Ben Hecht, Moving Beyond Diversity Toward Racial Equity, Harv. Bus. Rev. (June 16, 2020), https://hbr.org/2020/06/moving-beyond-diversity-toward-racial-equity [https://perma.cc/AC6K-X3VT] ("With traditional diversity interventions failing, these [business] leaders—the majority of whom were white—reported feeling ill-equipped, even afraid, to act.").

itating the creation of affinity groups to creating entire positions dedicated; to promoting diversity, equity, and inclusion (DEI).[103]

This changed in 2020, when the murders of George Floyd and Breonna Taylor ignited the largest racial justice movement since the civil rights era.[104] During the summer of 2020, the United States witnessed widespread protests against the state's repeated murders of Black citizens.[105] Suddenly, the BLM movement had gained broad-based support from a multiracial, multiethnic, multinational group demanding racial justice.[106] Although the BLM movement had begun in 2013 after the murder of Trayvon Martin,[107] before 2020, corporations had largely spurned the movement, refusing to endorse the group's calls for racial justice.[108]

After 2020, corporations could no longer ignore the changing tide. According to recent research from Professor Lisa Fairfax, approximately 86% of *Fortune* 100 companies and 66% of *Fortune* 500 companies released statements supporting Black communities, rejecting racism, acknowledging structural racial inequities in society, and pledging to engage in

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103. Interestingly, despite these sustained corporate efforts, the demographics of America's largest corporations—particularly regarding leadership positions—have not changed meaningfully. See Veronica Root Martinez & Gina-Gail S. Fletcher, Equality Metrics, 130 Yale L.J. Forum 869, 887 (2021), https://www.yalelawjournal.org/pdf/FletcherMartinezEssay_8vxh887p.pdf [https://perma.cc/4SVS-TQEP] ("Black directors, specifically, make up just 4% of more than 20,000 directors, while Black women make up just 1.5%."); Jeanne Sahadi, Corporate America Promised to Get More Diverse. But It's Still Mostly White Women Making Gains, CNN (June 8, 2021), https://www.cnn.com/2021/06/08/success/board-diversity-corporate-america/index.html [https://perma.cc/BGJ6-NDZ2] (describing how increases in board diversity are largely limited to white women); Pippa Stevens, Companies Are Making Bold Promises About Greater Diversity, but There's a Long Way to Go, CNBC (June 11, 2020), https://www.cnbc.com/2020/06/11/companies-are-making-bold-promises-about-greater-diversity-theres-a-long-way-to-go.html [https://perma.cc/85E6-YZYR] (last updated June 15, 2020) (emphasizing uncertainty in both ascertaining corporate diversity in leadership and proving its utility).

104. See Larry Buchanan, Quoctrung Biu & Jugal K. Patel, Black Lives Matter May Be the Largest Movement in U.S. History, N.Y. Times (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html (on file with the *Columbia Law Review*).

105. See Derrick Bryson Taylor, George Floyd Protests: A Timeline, N.Y. Times (Nov. 5, 2021), https://www.nytimes.com/article/george-floyd-protests-timeline.html (on file with the *Columbia Law Review*).

106. See Kim Parker, Juliana Menasce Horowitz & Monica Anderson, Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement, Pew Rsch. Ctr. (June 12, 2020), https://www.pewresearch.org/social-trends/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/ [https://perma.cc/JE4U-6265].

107. Herstory, Black Lives Matter, https://blacklivesmatter.com/herstory/ (on file with the *Columbia Law Review*) (last visited Oct. 24, 2023).

108. See Eugene Y. Chan, Why Companies Were So Quick to Endorse Black Lives Matter, The Conversation (Aug. 21, 2020), https://theconversation.com/why-companies-were-so-quick-to-endorse-black-lives-matter-142532 [https://perma.cc/7DQT-WDBB] ("Not too long ago, few companies paid much attention to Black Lives Matter.").

antiracist and racial equity work both internally and socially.[109] Large, well-known public companies such as Amazon, Twitter, Walmart, and Nike were among those now publicly embracing BLM.[110] Notably, these were the same companies that had remained silent around instances of racial injustice years earlier.

Walmart illustrates the trend. In 2014, police officers shot and killed John Crawford III, a Black man, inside an Ohio Walmart.[111] At the time of his murder, Crawford was holding an air rifle, not a gun, that was for sale in the store.[112] His death was roundly criticized as another example of police brutality,[113] but even though a Walmart store was the site of Crawford's murder, the company was noticeably silent and did not condemn the police for their role in his death.[114]

In contrast, in June 2020—as the United States was experiencing daily racial justice protests—Walmart held a virtual meeting of its associates in which its CEO, Doug McMillon, discussed racial injustice in the United States and its deep historical roots.[115] The CEO's plans to address racial injustice included a $100 million commitment to create a center for racial equity.[116] The center would be responsible for directing Walmart's $100 million pledge to philanthropic initiatives to shape four key areas: healthcare, education, criminal justice, and financial security.[117] Despite these laudable plans, Walmart does not have

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109. Lisa M. Fairfax, Racial Rhetoric or Reality? Cautious Optimism on the Link Between Corporate #BLM Speech and Behavior, 2022 Colum. Bus. L. Rev. 118, 121 (describing the range of statements, including open-ended promises, concrete commitments, and denouncements of silence).

110. Mercey Livingston, These Are the Major Brands Donating to the Black Lives Matter Movement, CNET (June 16, 2020), https://www.cnet.com/culture/companies-donating-black-lives-matter/ [https://perma.cc/4CXD-HWGV]; see also Tech Firms Say They Support George Floyd Protests—Here's What's Happening, CNET (June 10, 2020), https://www.cnet.com/culture/tech-companies-say-they-support-george-floyd-protests-heres-whats-happening/ [https://perma.cc/Y3CD-2TQD].

111. Family Sues Over Fatal Shooting at Ohio Wal-Mart, CBS News (Dec. 16, 2014), https://www.cbsnews.com/news/family-sues-over-fatal-shooting-at-ohio-walmart/ [https://perma.cc/S4PN-GZ7T].

112. Id.

113. See, e.g., Joe Coscarelli, No Charges Against Ohio Police in John Crawford III Walmart Shooting, Despite Damning Security Video, N.Y. Mag.: Intelligencer (Sept. 24, 2014), https://nymag.com/intelligencer/2014/09/no-charges-john-crawford-iii-walmart-shooting-video.html [https://perma.cc/YKD6-W2L9] ("[S]urveillance video, shown publicly for the first time, shows the circumstances that led to yet another young [B]lack man dead at the hands of law-enforcement.").

114. See Family Sues Over Fatal Shooting, supra note 111.

115. Doug McMillon, Walmart CEO, Remarks at Company Meeting: Making a Difference in Racial Equity (June 5, 2020), https://corporate.walmart.com/news/2020/06/05/equity (on file with the *Columbia Law Review*).

116. Id.

117. Letter From Doug McMillon, supra note 9.

a stellar reputation for tackling racial injustice.[118] As some have noted, Walmart exploits its vulnerable workforce—paying low wages and providing limited health insurance—which has contributed to significant disparities in the economic well-being of its Black workforce.[119]

Notwithstanding the emergence of racial equity as part of the CSR discourse in recent years, history provides a cautionary tale about corporate engagement in matters of race. As Part II details, CSR shaped civil rights–era debates on the desegregation of public accommodations. Civil rights activists urged businesses in the South to desegregate their restaurants, stores, and workforces, invoking businesses' potential to do well while doing good. Civil rights activists encouraged businesses to desegregate voluntarily, but they also knew that CSR alone was not enough because it did not bind businesses to their promises. For others, the nonbinding nature of CSR was its appeal: Businesses could decide whether to desegregate without government intervention, thereby protecting white businesses' private property rights.

II. THE ROAD TO TITLE II OF THE CIVIL RIGHTS ACT

The sit-in movement forced citizens, policymakers, and judges to wrestle with thorny issues of equal protection, private property rights, and interstate commerce.[120] The movement also forced Americans to wrestle with the power and limitations of an evolving concept: CSR. Yet reliance on CSR did not resolve the sit-in crisis, as developments soon illustrated. Federal action did. Congress adopted Title II,[121] and the U.S. Supreme Court shortly thereafter upheld the statute in *Heart of Atlanta Motel v. United States*[122] and *Katzenbach v. McClung*.[123] This Part explores the social and legal history behind Title II to show the promise, cost, and, ultimately, failure of reliance on CSR in the struggle to end racial discrimination in public accommodations.

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118. See Blair Johnson, How the Black Lives Matter Movement Enhanced Corporate Governance in 2020, 8 Emory Corp. Governance & Accountability Rev. 99, 111 (2021) (calling Walmart's history on racial injustice issues "scarce").

119. Cat Davis & Dorian Warren, Opinion, Walmart Exploits Black Lives While Paying Lip Service to Black Lives Matter, NBC News (June 18, 2020), https://www.nbcnews.com/think/opinion/walmart-exploits-black-lives-while-paying-lip-service-black-lives-ncna1231493 [https://perma.cc/KH5P-6CAX].

120. See H. Timothy Lovelace Jr., Making the World in Atlanta's Image: The Student Nonviolent Coordinating Committee, Morris Abram, and the Legislative History of the United Nations Race Convention, 32 Law & Hist. Rev. 385, 392 (2014).

121. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 201–207, 78 Stat. 241, 243–46 (codified at 42 U.S.C. §§ 2000a–2000a-6 (2018)).

122. See 379 U.S. 241, 261 (1964).

123. See 379 U.S. 294, 305 (1964).

A. *The United States' Segregation Problem and the Promise of Corporate Social Responsibility*

Sit-ins at segregated public accommodations were catalysts for the major civil rights reforms of the 1960s. Civil rights activists appealed to businesses' CSR, urging these businesses to go beyond their legal obligations and voluntarily desegregate.[124]

Yet businesses were often reluctant to do so, which led Black people toward alternative methods to ensure they received service at public accommodations. One of the most well-known alternatives was the *Negro Travelers' Green Book*, commonly referred to as the *Green Book*. Victor Green first published the book in 1936.[125] The book's national prominence and long publication run illustrated the limitations of relying solely on CSR to achieve full desegregation. The *Green Book* offered Black people a fifty-state survey of hotels, motels, tourist homes, and restaurants that would provide them with proper service.[126] The book's dual implications were clear. CSR could help Black people enjoy equal access to public accommodations because only businesses that rejected segregation and treated Black people with dignity were listed in the *Green Book*.[127] As Green realized, however, CSR was not enough to end nationwide racial discrimination in public accommodations—had CSR been sufficient, there would have been no need for the *Green Book* in the first place.

Green pled for much more than voluntary desegregation. The opening pages of the *Green Book* praised "the militancy of . . . civil rights groups . . . [that] widened the areas of public accommodations accessible to all."[128] Green also emphasized the need for legal regulation of public accommodations, agreeing with civil rights groups that had made "it very clear that the Negro is only demanding what everyone else wants[:] . . . what is guaranteed all citizens by the Constitution of the United States."[129]

Many other civil rights activists argued that CSR was not a sufficient substitute for public accommodations legislation. Frank Stanley, a columnist

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124. See supra note 23 and accompanying text.

125. Norrinda Brown Hayat, Accommodating Bias in the Sharing Economy, 83 Brook. L. Rev. 613, 623 (2018).

126. See Victor H. Green, Travelers' Green Book: International Edition 1 (1963–64 ed. 1963). The *Green Book* additionally provided information about state statutes on racial discrimination in public accommodations and state commissions to which those who faced discrimination could complain. See id. at 2–4. But as the *Green Book*'s list revealed and the U.S. Supreme Court later declared, this state-by-state approach was not enough to eliminate a national public accommodations problem. See id.; see also *Heart of Atlanta Motel*, 379 U.S. at 252–53 (citing "voluminous testimony" that "discrimination by hotels and motels impedes interstate travel").

127. See, e.g., Green, supra note 126, at 4–6 (listing Black-friendly accommodations in various Alabama cities).

128. Id. at 2.

129. Id. (ellipsis in original).

for the *Chicago Defender*, one of the nation's leading Black newspapers, asserted that relying solely on CSR to end public accommodations discrimination actually inflicted a dignitary harm on Black people.[130] He believed that public accommodations discrimination was an "illegal and unchristian act" and that a business owner's so-called right to discriminate among patrons should come "second to the rights of those citizens against whom he discriminates."[131] Hence, Stanley maintained that he was willing to "force" business owners to desegregate because "total public accommodations desegregation [would] never be achieved until there [was] a law requiring it."[132]

Stanley noted that in Louisville, for example, Black people had presented five public accommodations ordinances in 1961 after voluntary desegregation failed.[133] He maintained that Black Louisvillians now preferred "political power" instead of voluntary desegregation because their experiences had shown them that they had no legal recourse against segregationists absent public accommodations legislation.[134] Others went further. Congressman Robert N.C. Nix Sr. introduced a federal civil rights bill to desegregate public accommodations nationally, although it received no traction.[135]

Segregation and corporate social *irresponsibility* in the form of support for Jim Crow had domestic as well as foreign policy implications. During the early 1960s, as African countries won independence from their former European colonizers, the U.S. government often welcomed diplomats from these newly independent countries to the United States.[136] But when many of these diplomats visited Washington, D.C., they were denied service at public accommodations.[137] They faced additional humiliation on the drive from the nation's capital to the United Nations Headquarters in New York City when

130. Frank L. Stanley, Being Frank: About People, Places and Problems, Chi. Def., July 8, 1961, at 8.

131. Id.

132. Id.

133. Id.

134. Id.

135. Nix Points Up New Federal Legislation: Anti-Bias Bill Is Backed by Local Solons, Phila. Trib., Sept. 19, 1961, at 1.

136. See Harold R. Isaacs, American Race Relations and the United States Image in World Affairs, *in* Race and U.S. Foreign Policy During the Cold War 260, 265–66 (Michael L. Krenn ed., 1998); Michael Krenn, The Unwelcome Mat: African Diplomats in Washington, D.C., During the Kennedy Years, *in* Window on Freedom: Race, Civil Rights, and Foreign Affairs, 1945–1988, at 163, 163 (Brenda Gayle Plummer ed., 2003); Renee Romano, No Diplomatic Immunity: African Diplomats, the State Department, and Civil Rights, 1961–1964, 87 J. Am. Hist. 546, 551–52 (2000). See generally Brenda Gayle Plummer, The Changing Face of Diplomatic History: A Literature Review, 38 Hist. Tchr. 385 (2005) (canvassing scholarship that detailed the Cold War's effect on U.S. diplomacy with newly formed African nations).

137. See Krenn, supra note 136, at 165 (recounting "horror stories" of African diplomats seeking housing in Washington, D.C., in the 1960s); see also Isaacs, supra note 136, at 265–66 (similar); Romano, supra note 136, at 551–52 (similar).

they were denied access to public accommodations on Maryland's Route 40.[138] They repeatedly complained to the State Department and their home governments about this degrading treatment.[139] Racial segregation undermined the United States' position in the Cold War and provoked an important question: How could the United States preach about democracy abroad when it practiced racism at home?[140] Racial segregation fed Soviet propaganda machines and raised serious doubts in the newly independent countries about the United States' commitment to its creed.[141]

President John F. Kennedy had been relatively uninterested in desegregating public accommodations until he recognized how voluntary desegregation would improve the United States' image abroad.[142] In September 1961, Kennedy penned a telegram read to 200 Maryland leaders in communities along the Route 40 highway, urging them to open service to "any American citizen or visitor from abroad."[143] In the telegram, Kennedy argued that this form of corporate racial responsibility was "basic to our moral strength . . . as the Nation possesses leadership in the world."[144] The Kennedy administration turned to the State Department for assistance in this project: Pedro Sanjuan, a Cuban American and the Assistant Chief of Protocol for the State Department, was asked to help lead "a pilot effort . . . to arouse local public sentiment in favor of voluntary desegregation in public eating and sleeping establishments."[145] Acting Secretary of State Chester Bowles also met with Maryland newspaper editors to arouse support for "the immediate voluntary desegregation of public accommodations in Maryland as requested by President Kennedy."[146] Yet the

138. Romano, supra note 136, at 551–52; see also U.S. Seeks Law to Stop Cafe Insults: Bias Called Worse Than Espionage, Afro-Am. (Balt.), Sept. 23, 1961, at 20 ("[T]he much-travelled route between the United Nations in New York and the White House in Washington is through the State of Maryland, and it is here, as statistics prove, that the majority of these incidents are likely to take place . . . ." (internal quotation marks omitted) (quoting State Department official Pedro Sanjuan)).

139. See Krenn, supra note 136, at 165–68 (detailing reports made by State Department officials on specific acts of discrimination against African diplomats).

140. See id. at 174–75 (noting that "communist propagandists were having a field day with each new incident involving an African diplomat").

141. See Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 Stan. L. Rev. 61, 110–11 (1988) ("Racial segregation interfered with the Cold War imperative of winning the world over to democracy . . . .").

142. See Krenn, supra note 136, at 167–71 (recalling the Kennedy Administration's efforts to desegregate businesses along Route 40 through a program of "voluntary cooperation").

143. Maryland Gets Kennedy Plea on Bias, Wash. Post, Sept. 26, 1961, at A4 (internal quotation marks omitted) (quoting a telegram from John F. Kennedy, U.S. President).

144. Id. (alteration in original) (internal quotation marks omitted) (quoting a telegram from John F. Kennedy, U.S. President).

145. Id.

146. Robert E. Baker, Bowles Pleads With Md. Editors to Aid Cafe Bias Fight, Wash. Post, Sept. 27, 1961, at B1.

Kennedy Administration's efforts fell short. Many business owners on Route 40 refused to desegregate voluntarily.[147] They feared the potentially negative economic impact of desegregation and resented what they viewed as federal interference in the public accommodations debate.[148] For them, segregation was profitable. Doing well, therefore, meant *not* "doing good."

So civil rights advocates in Maryland sought other means of racial redress. They launched protests at segregated public accommodations, but voluntary desegregation was both slow and piecemeal.[149] Public accommodations along Route 40 in Maryland were desegregated only after the enactment of civil rights legislation.[150]

B. *Voluntary Desegregation in Practice: The Examples of Birmingham and Atlanta*

The civil rights protests in Birmingham, Alabama, produced some of the most dramatic moments in U.S. history. These protests also exposed the limitations of heavy reliance on corporate racial responsibility to desegregate public accommodations.

1. *Birmingham, Alabama.* — In 1962, Reverend Fred Shuttlesworth, a Birmingham civil rights leader and the founder of the Alabama Christian Movement for Human Rights (ACMHR), began negotiations with segregated merchants in downtown Birmingham.[151] When negotiations did not secure full desegregation, he invited Martin Luther King, Jr., the president of the Southern Christian Leadership Conference (SCLC), to aid the Birmingham campaign.[152] This alliance led to Project Confrontation (Project C): protests and boycotts of segregated downtown merchants.[153] An April 1963 protest landed King in jail.[154]

In his *Letter From Birmingham Jail*, King highlighted the shortcomings of CSR in securing racial justice. King explained that months before SCLC and the ACMHR launched Project C, the ACMHR met with Birmingham's business leaders to desegregate downtown businesses.[155] King wrote, "In

147. See Romano, supra note 136, at 571–72.

148. Id. (quoting a restaurant owner who said he "wouldn't have a customer left" if he allowed the diplomats to dine there).

149. See id. at 572–73 (explaining the targeted sit-ins planned by civil rights advocates along Route 40 and highlighting that many restaurants proclaimed but failed to fulfill their promises to desegregate).

150. Id. at 574.

151. Martin Luther King, Jr., Why We Can't Wait 51–52 (Signet Classics mass-market ed. 2000) (1964) [hereinafter King, Why We Can't Wait].

152. Id. at 52–53. Shuttlesworth invited King to Birmingham because King had a national reputation and the ACMHR was SCLC's affiliate in Birmingham. Id.

153. Id. at 53–54.

154. Id. at 81–82.

155. Id. at 88.

the course of the negotiations, certain promises were made by the merchants—for example, to remove the stores' humiliating racial signs."[156] Upon receiving these promises, "Shuttlesworth and the leaders of the [ACMHR] agreed to a moratorium on all demonstrations."[157] But King, Shuttlesworth, and—indeed—the world saw the flaws of entrusting racial justice to the whims of merchants. King continued, "As the weeks and months went by, we realized that we were the victims of a broken promise. A few signs, briefly removed, returned; the others remained. As in so many past experiences, our hopes had been blasted, and the shadow of deep disappointment settled upon us."[158]

King explained that the Birmingham activists also initiated an Easter boycott of downtown merchants to spur desegregation because "the Easter season . . . except for Christmas . . . [was] the main shopping period of the year" in Birmingham.[159] While the boycott put some financial pressure on these merchants and dramatized Black people's plight, it, too, failed to end Jim Crow in Birmingham.[160]

King and other civil rights leaders turned to Birmingham's largest corporation, U.S. Steel, for assistance.[161] Civil rights groups requested that U.S. Steel take a stand against segregation. The groups wrote in a letter to U.S. Steel: "It would be financially beneficial and ethically correct for you, and for the Birmingham community, if you supported . . . desegregation of public facilities . . . ."[162] Black activists also protested at the New York building occupied by U.S. Steel in October 1963 to condemn the company's failure to use its influence to advance civil rights.[163] These activists urged U.S. Steel to embrace its social responsibility to treat Black people as full citizens and with dignity. Roger M. Blough, Chairman of U.S. Steel, balked. He argued that "it was doubtful whether his company possessed sufficient power to influence attitudes on so controversial a subject as segregation in a Deep South community."[164] Moreover, he asserted that "for a corporation to attempt to exert any kind of economic compulsion to achieve a particular end in the social area seems to me to be quite beyond

156. Id.

157. Id.

158. Id.

159. Id. at 89.

160. See Jackson, supra note 1, at 162–66 (detailing the negotiations following the Birmingham campaign, which did not produce a clear agreement).

161. See U.S. Steel Under Fire on Bama Fight, N.Y. Amsterdam News, May 4, 1963, at 31.

162. Id. (internal quotation marks omitted) (quoting a letter from civil rights organizations to Roger M. Blough, Chairman, U.S. Steel, and Leslie B. Worthington, President, U.S. Steel).

163. Group Here Pickets U.S. Steel Building, N.Y. Times, Oct. 1, 1963, at 23.

164. Andrew Hacker, Do Corporations Have a Social Duty?, N.Y. Times Mag., Nov. 17, 1963, at 21, 21.

what a corporation should do."[165] U.S. Steel saw its mandate as an economic one, not one of CSR.

The debate over CSR in Birmingham spotlighted what was now a much larger, national problem. In a *New York Times* article, *Do Corporations Have a Social Duty?*, Cornell University professor Andrew Hacker analyzed Americans' competing visions over the roles corporations should play in ending racism. Hacker noted that U.S. Steel had been criticized for "not doing as much as it might to alleviate racial tensions in Birmingham."[166] According to Hacker, the growing demands of the civil rights movement were challenging traditional ideas of a corporation's purpose and responsibilities. For King and other civil rights activists, corporate governance issues were also civil rights issues.[167]

Hacker emphasized that corporations typically selected the locations of their plants based on economic factors such as labor costs and proximity to their markets rather than race or racial issues.[168] On the other hand, Hacker said, "[T]here is a tacit agreement on the part of management to accept the prevailing customs of the community. In the case of U.S. Steel in Birmingham this meant abiding by the principle of segregation."[169] Hacker explained that the public now knew U.S. Steel by the political company it kept. "U.S. Steel's willingness to cooperate with the folkways of Birmingham actually served to strengthen those social patterns. For this reason the company's officials cannot protest that they have been mere bystanders amid the racial controversy."[170] According to Hacker, corporations like U.S. Steel did not need to defend segregation despite benefiting from it. "[They] can and should justify [their] position solely on economic grounds. Moreover, if corporation executives find themselves involved in politics, on however informal a basis, they ought at least to explain their involvement by pointing out that this promotes the best interests of the company that has hired them."[171]

Hacker's unapologetic embrace of shareholder primacy created a false distinction between "economic grounds" and considerations of race. Hence, he conveniently sidestepped the knottier question of how a corporation's "economic" considerations had a real racial impact. In other words, racism and economics were intimately tied considerations, rather than separate and distinct, because U.S. Steel's close ties to local politicians conferred greater legitimacy on Birmingham segregationists.

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165. Id. (internal quotation marks omitted) (quoting Roger M. Blough).

166. Id.

167. Id. ("Today, large companies are caught on the firing line amid the civil-rights controversy . . . .").

168. Id.

169. Id. at 118.

170. Id.

171. Id.

Hacker's analysis also ignored how U.S. Steel could dismiss local racism owing to their corporate leaders' white privilege: Blough, and white U.S. Steel employees, did not have to suffer the humiliation of racism. Hacker resolved, "U.S. Steel's protest that its power in Birmingham did not extend beyond the plant gates has some validity to it, at least on a question as inflamed as race relations."[172] But he left readers with a more pressing, and critical, normative question: Should corporations, even those that can shape local politics, have the same power in policy debates as ordinary citizens?[173]

U.S. Steel did not wield its outsized political power to help desegregate public accommodations in Birmingham, nor did downtown Birmingham merchants desegregate voluntarily. SCLC and the ACMHR escalated their protests because CSR failed to solve the growing racial crisis.[174] Soon, the SCLC and ACMHR's peaceful protesters were met with incredible violence. Most infamously, Eugene "Bull" Connor, Birmingham's commissioner of public safety, unleashed snarling police dogs and high-pressure fire hoses on thousands of demonstrators. Many of those brutalized and jailed were children.[175] These horrific images of brutality in Birmingham became an international embarrassment for the country.[176]

As protests in Birmingham raged, President Kennedy finally acted. He made a nationally televised speech in which he stated that ending Jim Crow was "a moral issue . . . as old as the scriptures and . . . as clear as the American Constitution."[177] He stressed that Jim Crow undermined the United States' "worldwide struggle" against communism.[178] But it was now evident, according to the President, that CSR was not enough to overcome these moral and foreign policy problems. During the speech, the President revealed that he had "recently met with scores of business leaders[,] urging them to take voluntary action to end this discrimination" across the

172. Id.

173. See id. ("The phrase 'corporate citizen' . . . assumes that the voice of a corporation and that of ordinary voters may be listened to with equal deference by those who make policy. Democracy takes on a curious form when both corporations and citizens are regarded as equal participants in the political process.").

174. See Jackson, supra note 1, at 155 (describing how SCLC first attempted to "win concessions on desegregation and hiring from downtown merchants" but changed tactics after demonstrations were brutally suppressed).

175. See Adam Fairclough, To Redeem the Soul of America: The Southern Christian Leadership Conference & Martin Luther King, Jr. 125–26 (1987) (detailing student participation in the Birmingham demonstrations and the ensuing police violence).

176. See id. at 126–27.

177. President John F. Kennedy, Televised Address to the Nation on Civil Rights, John F. Kennedy Presidential Libr. & Museum, at 04:13 (June 11, 1963), https://www.jfklibrary.org/learn/about-jfk/historic-speeches/televised-address-to-the-nation-on-civil-rights (on file with the *Columbia Law Review*) [hereinafter Kennedy, Address to the Nation on Civil Rights].

178. Id. at 01:24.

country.[179] While he was encouraged by some of their responses, many other business leaders still refused to desegregate public accommodations. Moreover, Kennedy found the "voluntary approach . . . insufficient to prevent the free flow of commerce from being arbitrarily and inefficiently restrained and distorted by discrimination in such establishments."[180] The President declared, "[F]or this reason, nationwide legislation is needed" to end Jim Crow and the protests.[181] He submitted to Congress what would become Title II of the Civil Rights Act of 1964.[182]

2. *Atlanta, Georgia.* — What is most striking—and what might easily get overlooked—about the CSR debates leading up to Title II's enactment is that voluntary desegregation had a vicious underside. CSR became a tool to undermine civil rights activists' attempts to secure meaningful federal public accommodations legislation. The public accommodations debate in Atlanta illustrates this shortcoming.

In the mid-twentieth century, Atlanta was known as "a city too busy to hate."[183] As the city's nickname suggested, local leaders billed it as one so interested in economic development that it had no time to discriminate.[184] For these leaders, the fruits of racial moderation and economic prosperity were evident. Atlanta boasted one of America's largest Black middle-class populations, had the world's largest constellation of historically Black colleges, and was home to several prominent civil rights organizations.[185] In 1962, the city elected as its mayor Ivan Allen, Jr., the immediate past president of the Atlanta Chamber of Commerce and a racial moderate who cultivated the image of a city whose identity was intimately tied to CSR.[186]

Allen credited an informal brokerage system for the city's racial reputation. According to Allen, "Atlanta . . . coped with the race issue better than any other major city in America" because an interracial coalition of

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179. Id. at 09:15.

180. Special Message to the Congress on Civil Rights and Job Opportunities, 1963 Pub. Papers 483, 486 (June 19, 1963).

181. Kennedy, Address to the Nation on Civil Rights, supra note 177, at 09:33; see also id. at 08:35 ("[I]n too many communities, in too many parts of the country, wrongs are inflicted on Negro citizens, and there are no remedies at law. Unless the Congress acts, their only remedy is the street.").

182. See Special Message to the Congress on Civil Rights and Job Opportunities, supra note 180, at 484.

183. Virginia H. Hein, The Image of "A City Too Busy to Hate": Atlanta in the 1960's, 33 Phylon 205, 207 (1972).

184. See id. at 207–08 (describing Atlanta's development strategy during the 1960s).

185. See id. at 210–11. See generally Ronald Baylor, Race and the Shaping of Twentieth-Century Atlanta (1996) (discussing the history of Atlanta race relations).

186. See Godfrey Hodgson, Obituary: Ivan Allen, The Guardian (July 9, 2003), https://www.theguardian.com/news/2003/jul/10/guardianobituaries [https://perma.cc/3BLL-RJ9Z] (describing Allen's accomplishments on desegregation while serving as Atlanta's mayor); International Civil Rights Walk of Fame: Ivan Allen, 1911–2003, Nat'l Park Serv., https://www.nps.gov/features/malu/feat0002/wof/ivan_allen.htm [https://perma.cc/983Z-VVQF] (last visited Oct. 24, 2023) (similar).

"responsible" business and civic leaders had been able to coax many segregated facilities into voluntary desegregation.[187] Atlanta's desegregation was gradual in the early 1960s, but Allen boasted that voluntary desegregation had led to tangible results. In 1961, several lunch counters in department and variety stores voluntarily desegregated.[188] In 1962, many theaters voluntarily desegregated.[189] In 1963, eighteen hotels and motels and thirty restaurants voluntarily desegregated.[190] Allen held that other southern cities, like Little Rock, had struggled economically when their business communities did not take the lead in major racial clashes.[191] Businesses and schools often closed during racial protests, and a city's racial turmoil damaged its ability to attract outside investment.[192] For Allen, voluntary desegregation could simultaneously advance race relations and business interests.

Local newspapers also played a significant role in branding Atlanta as "a city too busy to hate" and championing corporatist approaches to racial justice.[193] Eugene Patterson, editor of the *Atlanta Constitution*, was one of the country's foremost advocates for voluntary desegregation. He believed that segregationists could be convinced that desegregation was the morally right thing to do and that "negotiation and persuasion" were essential tools for ensuring equal access to public accommodations.[194] Atlanta offered Patterson evidence. Patterson emphasized that Atlanta's approach to desegregation had made the city a national leader, as once-segregated businesses were "moving voluntarily to meet their public responsibilities without being forced by law to do it."[195]

Nevertheless, Patterson's faith in voluntarism posed real dangers for desegregationists. Although Patterson openly criticized segregationists and claimed to support civil rights, he, too, opposed Title II of the proposed Civil Rights Act. Patterson justified his position because of the "considerable voluntary progress . . . being made to desegregate hotels, theaters and restaurants," arguing that "[n]o law should be passed unless there

187. See Ivan Allen, Jr. with Paul Hemphill, Mayor: Notes on the Sixties 90, 176 (1971).

188. Civil Rights—Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Com., 88th Cong. 863 (1963) [hereinafter Civil Rights—Public Accommodations Senate Hearings] (statement of Ivan Allen, Jr., Mayor, Atlanta, Ga.).

189. Id.

190. Allen, supra note 187, at 107.

191. See id. at 52–53 ("Little Rock had virtually died on the vine when it failed to face the school-integration issue realistically four years earlier.").

192. See id. at 53; see also David Andrew Harmon, Beneath the Image of the Civil Rights Movement and Race Relations: Atlanta, Georgia, 1946–1981, at 108–09 (1996) (explaining how a city's racial violence could lead to economic hardships).

193. Hein, supra note 183, at 208.

194. Eugene Patterson, Editorial, The Law Is Not Needed, Atlanta Const., June 21, 1963, at 4.

195. Id.

is an overriding need for it."[196] He added, "Negotiation, persuasion and voluntary progress deserve—on their present scale in America—to continue. They are now yielding better results than would the proposed law which, if passed, could be thwarted by massive evasion."[197]

Georgia Governor Carl Sanders submitted similarly reasoned congressional testimony. Sanders stressed that although he opposed the federal public accommodations bill, he was not a segregationist.[198] He simply believed the proposed law would destroy individual rights and could open the door to "any other regulation of private business by the federal government."[199] Furthermore, Sanders argued that a federal public accommodations law would actually undermine the recent racial progress.[200] According to Sanders, race relations were improving without federal legislation, so federal intrusion in this area was unwise and untimely. He warned that if Congress enacted the proposed law, the law "would 'put the cork in the bottle of mutual cooperation . . . erect barriers . . . and cause people now working to end discrimination to throw in the towel.'"[201]

Although voluntary desegregation was mere gradualism, this process nonetheless sparked a white conservative backlash in Atlanta. Lester Maddox, a prominent restaurateur and ardent segregationist, formed an organization named "Georgians Unwilling to Surrender" to oppose public accommodations desegregation.[202] Maddox argued that Allen's attempts to broker desegregation in downtown Atlanta were "a shameful capitulation to the [B]lack mobs."[203] He also ripped the purportedly "responsible members of the Atlanta Chamber of Commerce" for promoting desegregation,[204] and he claimed that those in power were eager to infringe upon free enterprise, individual rights, and states' rights to advance civil rights.[205] Georgians Unwilling to Surrender held large public rallies at

196. Id.

197. Id.

198. Ted Lippman, Bill Perils Gains, Says Sanders, Atlanta Const., July 31, 1963, at 1.

199. Id.

200. See id. ("[A] national law would cause people now working for an end to discrimination to quit and 'leave it up to the government.'" (quoting Governor Carl Sanders)).

201. Id. (alterations in original) (quoting Governor Carl Sanders). Patterson publicly praised Sanders's stance and depicted Sanders's views as racially progressive. Eugene Patterson, Editorial, A Question of Self-Adjustment, Atlanta Const., July 31, 1963, at 4 (stating that Sanders did not oppose the bill "on the old, empty ground that racial discrimination is all right . . . [but] on the ground that Georgia is in a self-adjusting condition, on a voluntary basis").

202. Kevin M. Kruse, White Flight: Atlanta and the Making of Modern Conservatism 195–97 (2005). Maddox was later able to generate a larger white backlash to civil rights gains in Georgia, and he became governor of the state in 1967. See id. at 233–34.

203. Id. at 198–99.

204. See Lester Maddox, Pickrick Says, Atlanta Const., Jan. 21, 1961, at 5.

205. See id.

which speakers red-baited the city's political and business leaders, urging attendees to "save our country from collectivism and socialism."[206]

As voluntary desegregation at hotels and restaurants moved slowly in Atlanta, some of the city's civil rights activists found new ways to force more critical discussions on corporate legal responsibility. For these activists, while voluntary desegregation was one way to temporarily ease bigots' grip on the city, it was no substitute for public accommodations legislation.[207] In fact, simple reliance on voluntary segregation seemed to suggest that Black people should wait for a more favorable day when white people changed their minds and decided to give Black people first-class citizenship.[208]

In late 1963 and early 1964, the Student Nonviolent Coordinating Committee (SNCC) led a new, more radical series of protests in Atlanta.[209] The activists targeted segregated hotels, motels, and restaurants as well as Allen himself.[210] During one protest, scores of student demonstrators "play[ed] hooky for freedom" and descended upon downtown.[211] The organizers urged students to "join the March on Atlanta [to] learn civics in the streets, history at the counters, and teach Mayor Allen democracy."[212] After weeks of mass demonstrations and arrests, Allen condemned the allegedly "irresponsible elements" in the city's civil rights community and called for a "cooling off period" to "guarantee racial harmony."[213] The most militant demonstrators refused to relent.[214] Yet local civil rights activists had already made their point before the nation and, indeed, the world:[215] The city was not as progressive as advertised, and business owners should no longer dictate the timetable for racial justice.

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206. 700 Hear Attack on Integration, Atlanta Const., Dec. 7, 1960, at 18 (internal quotation marks omitted) (quoting Representative Dale Alford).

207. Marion Gaines, Negroes Ask Aldermen to Vote Integration of Public Places, Atlanta Const., Nov. 28, 1963, at 16A.

208. See SNCC, Demonstrations Gain Additional Support, Student Voice (Atlanta, Ga.), Feb. 3, 1964, at 1. After Allen deplored civil rights demonstrations and called for more reliance on voluntary desegregation, activist Wyatt Tee Walker responded, "[I]f we waited for voluntary action, most of us would still be picking cotton." Id.; see also King, Why We Can't Wait, supra note 151, at 91–93 (describing the dignitary harms caused by relying on voluntarism).

209. Brown-Nagin, supra note 33, at 221–24.

210. Winston A. Grady-Willis, Challenging U.S. Apartheid: Atlanta and Black Struggles for Human Rights, 1960–1977, at 43–44, 46 (2006).

211. Id. at 44.

212. Lovelace, supra note 120, at 397 (alteration in original) (internal quotation marks omitted) (quoting News Release, SNCC, Now Is the Time for Action (Jan. 1964), microformed on SNCC Papers, 1959–1972, No. A:VIII:105 (Univ. Microforms Int'l)).

213. Stanley S. Scott, Allen Asks "Cooling Off Period" With Program to "Guarantee Racial Harmony", Atlanta Daily World, Jan. 30, 1964, at 1.

214. Marion Gaines, Allen Calls for a 30-Day Halt in Integration Demonstrations, Atlanta Const., Jan. 30, 1964, at 6.

215. Lovelace, supra note 120, at 417–19.

Local developments during the sit-in movement compelled Allen to reconsider his sole reliance on voluntary desegregation.[216] Some segregationists could never be persuaded into opening their businesses to all people.[217] Allen had learned a crucial lesson along the way. Making desegregation optional implicitly endorsed the idea that business owners had a right to discriminate racially.[218] Allen was also deeply concerned that without public accommodations legislation, some businesses might "slip backwards" and resegregate if business owners lost their commitments to racial progress.[219] Moreover, with Atlanta's image in the balance and the ever-present threats of sit-ins and social turmoil, Allen realized that Atlanta needed much more than CSR to end the racial crisis. Atlanta, like the rest of the South, needed the federal government to intervene.[220]

C. *The Triumph of Title II*

The tension between racial justice and the alleged sanctity of private property was at the heart of Congress's debates over Title II of the Civil Rights Act of 1964. Everett Dirksen, a Republican Senator from Illinois and Senate Minority Leader, argued, characteristically, that Congress lacked the authority to pass Title II. Dirksen called any congressional attempt to "force business . . . to accept integration a violation of constitutional protection of property rights."[221] In this argument, Dirksen found common cause with congressmen such as Strom Thurmond, Barry Goldwater, and James Eastland—politicians whose views on racial justice and property rights have appropriately cast them in a dismal historical light.[222]

Mayor Allen testified before the Senate Commerce Committee in support of Title II and was the only southern mayor to do so.[223] In his testimony, he praised the strides Atlanta had made in public accommodations,

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216. Brown-Nagin, supra note 33, at 247–48.

217. See id. at 248 (explaining that although there was some voluntary desegregation in Atlanta, "segregation endured in the city as a whole" until "the Civil Rights Act . . . forced the desegregation of public accommodations").

218. See Richard L. Lyons, Atlanta Mayor Backs New Rights Laws, Wash. Post, July 27, 1963, at A2 ("Failure to pass this bill . . . would amount, by inference, to an indorsement [sic] of private business setting up an entirely new status of discrimination throughout the Nation." (internal quotation marks omitted) (quoting Mayor Ivan Allen, Jr.)).

219. See id.

220. See id.

221. Marjorie Hunter, Dirksen Imperils Civil Rights Plan, N.Y. Times, June 18, 1963, at 1; see also Al Kuettner, 29 States Already Have Strong Rights Laws, but They're Snubbed, Chi. Daily Def., Aug. 1, 1963, at 6 (describing de facto segregation in northern cities despite those cities' antidiscrimination laws).

222. See 110 Cong. Rec. 14511 (1964) (roll call vote on the Civil Rights Act of 1964, H.R. 7152, 88th Cong., showing that Thurmond, Goldwater, and Eastland opposed the bill).

223. Civil Rights—Public Accommodations Senate Hearings, supra note 188, at 861 (statement of Ivan Allen, Jr., Mayor, Atlanta, Ga.).

but he emphasized that voluntary desegregation had its limits.[224] His experiences in Atlanta were instructive. Allen stressed that the current battles over voluntary desegregation frustrated many local business owners and slowed racial progress.[225] Voluntary desegregation was a socially explosive issue that placed these business owners in the debate's crosshairs.[226] They were forced to choose a side in the controversy. Allen testified that many Atlanta business owners actually believed federal public accommodations legislation was the answer to their dilemma. Federal legislation would speed desegregation because all business owners would be forced to comply with the desegregation mandate despite their personal feelings.[227] Further, demonstrations often forced public establishments to close for the day, and major businesses rarely wanted to be located in cities with major social disruptions. He declared that without federal legislation, America would recycle "the old turmoil of riots, strife, demonstrations, boycotts, and picketing."[228]

On the other side of the debate, the Atlanta Chamber of Commerce submitted a statement to the Senate Commerce Committee, adopted by the Chamber's board of directors in May 1963, in opposition to the Civil Rights bill and in support of voluntary desegregation of public accommodations.[229] The policy had "recognized the inherent right of a proprietor to make his own management decisions as to the use of his property by stating[:] . . . 'The chamber of commerce will never allow itself to be placed in the position of trying to tell any proprietor how he should conduct his business . . . .'"[230] The policy did not, however, back down in its support for voluntary desegregation: "The board of directors of the Atlanta Chamber of Commerce appeals to all businesses soliciting business from the general public to do so without regard to race, color, or creed and to do so as expeditiously as good judgment will dictate . . . ."[231] Reflecting on that statement, the Committee said:

> Consistent with its earlier stand for local and voluntary elimination of discrimination, the [Atlanta Chamber of Commerce] opposes passage of H.R. 7152, the proposed civil rights bill as at present drafted. The bill is calculated to narrow the role of voluntary action and to substitute the force of the Federal

224. See id. at 862–63.

225. See id. at 869–70.

226. See id.

227. See id.

228. Id. at 865.

229. Id. at 974 (statement of the Atlanta Chamber of Com.).

230. Id. (second and third alterations in original) (quoting Atlanta Chamber of Com., Statement of Policy on the Subject of Discrimination in Public Accommodations (May 29, 1963)).

231. Id. (alteration in original) (internal quotation marks omitted) (quoting Atlanta Chamber of Com., Statement of Policy on the Subject of Discrimination in Public Accommodations (May 29, 1963)).

> Government, posing a grave threat to local responsibility and personal freedom which far outweighs any possible improvement in the opportunities of minority groups. The [Atlanta Chamber of Commerce] finds particularly objectionable that section which would deprive purely private business enterprises of the right to serve or refuse service to whomever they please.[232]

Other chambers of commerce submitted statements against the bill. The Atlanta Junior Chamber of Commerce declared that the bill "would deny and negate the fundamental principle of free enterprise that allows a businessman to choose his customers and to select the economic and social groups that he will cater to and do business with."[233] The statement continued, "The question whether a business should discriminate upon color, race, social, or, indeed for any other reason, is peculiarly one of good business and moral judgment to be decided by the individual businessman."[234] The South Carolina State Chamber of Commerce criticized the bill for being a serious encroachment upon states' rights, private property rights, and individual rights.[235] The chamber's statement also interjected voluntary desegregation into the debate. It concluded, "[T]he Federal Government should take action only on those problems which cannot be solved either by voluntary effort or by local or State governments. In the present situation, we believe that emotionally inspired legislation would aggravate rather than resolve the problem."[236]

Burke Marshall, Assistant Attorney General for Civil Rights at the U.S. Department of Justice, testified before the Senate Commerce Committee in support of Title II.[237] Marshall maintained that "[p]ersuasion will not solve the problem in a locality where all establishments but one want to desegregate, but cannot do so for fear of giving a competitive advantage, in increased white trade, to the one exception."[238] Marshall recognized desegregation's collective action problem. Had there been a Civil Rights Act, he maintained, "the demonstrations [in Birmingham] would not have had to take place."[239]

Leaders in the private sector convened in Washington during the Title II debates, and they too acknowledged CSR's limits. President Kennedy invited the Business Council, self-described as a group of "responsible" businessmen, to the White House to discuss the nation's segregation woes.[240] In his comments to this group, which included many of

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232. Id.
233. Id. (statement of the Atlanta Junior Chamber of Com.).
234. Id.
235. Id. at 1099 (statement of the S.C. State Chamber of Com.).
236. Id.
237. Id. at 205 (statement of Burke Marshall, Assistant Att'y Gen., C.R. Div., DOJ).
238. Id. at 206.
239. Id. at 215.
240. Businessmen Hear JFK on Rights, Wash. Post, July 12, 1963, at A10.

the nation's most prominent business voices, Kennedy declared that more robust federal efforts were necessary to end the most critical issue facing the country.[241] The Business Council's chairman agreed that while business might have a role in advancing racial justice, CSR alone could not solve America's racial problems.[242]

More "responsible" business leaders joined the fray. For example, Earl B. Schwulst, the Chairman of the Board of Directors of the Bowery Savings Bank, told a National Association of Real Estate Brokers meeting that "[p]roperty rights are always subject to human rights as evidenced by instance after instance of jurisprudence in this country."[243] He continued, "No man can use property rights as a shield from behind which he can affront human dignity at will and insult a fellow citizen . . . who wishes merely to give him the patronage which he holds himself out as eagerly seeking from the public."[244]

U.S. Attorney General Robert F. Kennedy shared this sentiment in his testimony before the Senate Commerce Committee. He lamented that the pursuit of desegregation through "channels of voluntary cooperation" was not a completely effective means of ending racial segregation in public accommodations.[245] The time for relying solely on corporate racial responsibility was over. The Attorney General stated that "the Federal Government has a clear responsibility to help put a stop to discrimination."[246]

One of the most persuasive critics of sole reliance on voluntary desegregation was U.S. Secretary of State Dean Rusk. His testimony before the Senate Commerce Committee highlighted the moral and foreign policy problems caused by segregation. He announced to Congress that a public establishment's denying service to diplomats of color was an affront to human dignity and violated the Vienna Convention on Diplomatic Relations, which codified that diplomats must be treated with due respect, freedom, and dignity.[247] Rusk added that the United States' prestige abroad suffered due to the "treatment of nonwhite diplomats and visitors to the United States" in the nation's public accommodations.[248] For Rusk, if America was truly the most exceptional country in the world, then Congress needed to pass legislation that recognized non–U.S. citizens of color as stakeholders in the public

241. Id.

242. See id. (quoting the Business Council chair as saying "[every] responsible businessman . . . is interested in finding a solution to [the problem of segregation]" and "[i]t is not only a government problem—it is a civic problem").

243. Editorial, Who Helps Public Accommodations Bill?, Atlanta Const., Sept. 27, 1963, at 4 (internal quotation marks omitted) (quoting Earl B. Schwulst).

244. Id. (internal quotation marks omitted) (quoting Earl B. Schwulst)

245. Civil Rights—Public Accommodations Senate Hearings, supra note 188, at 22 (statement of Robert F. Kennedy, U.S. Att'y Gen.).

246. Id.

247. Id. at 283 (statement of Dean Rusk, U.S. Sec'y of State).

248. See id.

accommodations debate, too. Other members of the Kennedy Administration also testified before Congress. Sanjuan, for example, explained how the diplomatic incidents on Route 40 illustrated the need for public accommodations legislation.[249]

Roy Wilkins, Executive Secretary of the NAACP, blasted the heavy reliance on CSR in his congressional testimony. He criticized the continued calls for Black people to wait for changes in "men's hearts" or an establishment's "voluntary action."[250] Wilkins stated that Black people were citizens who had "done everything for their country that has been asked of them, even to standing back and waiting patiently, under pressure and persecution, for that which they should have had at the very beginning of their citizenship," and that they were no longer prepared to wait patiently.[251] He testified that Black people were not impressed with the arguments that demonstrations were "hurting their cause" or that public accommodations legislation was an invasion of property rights.[252] He said it was "ironical that a proponent of this argument should be a representative of the State of Abraham Lincoln" (referring to Senator Dirksen of Illinois) because the same argument was used 100 years prior to oppose emancipation of the enslaved.[253] Black people "ha[ve] been waiting upon voluntary action since 1876. . . . If the Thirteen Colonies had waited for voluntary action by England, this land today would be a part of the British Commonwealth."[254]

The Senate Commerce Committee agreed with the assessments that corporate social responsibility was not enough to ensure full desegregation. A report from the Senate Commerce Committee included a quote from Mayor Allen's testimony that discussed the role of businesses:

> Surely the Congress realizes that after having failed to take any definite action on this subject in the last 10 years, to fail to pass this bill would amount to an endorsement of private business setting up an entirely new status of discrimination throughout the Nation. Cities like Atlanta might slip backward.
>
> Hotels and restaurants that have already taken this issue upon themselves and opened their doors might find it convenient to go back to the old status. Failure by Congress to take definite action at this time is by inference an endorsement of the right of private business to practice racial discrimination and, in my opinion, would start the same old round of squabbles and demonstrations that we have had in the past.[255]

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249. See Stephen E. Nordlinger, Racial-Bills Hearing Held, Balt. Sun, Jan. 30, 1963, at 21.

250. Civil Rights—Public Accommodations Senate Hearings, supra note 188, at 659 (statement of Roy Wilkins, Exec. Sec'y, NAACP).

251. Id. at 657.

252. See id. at 658 (internal quotation marks omitted).

253. Id.

254. Id. at 659.

255. S. Rep. No. 88-872, at 15 (1964) (quoting Civil Rights—Public Accommodations Senate Hearings, supra note 188, at 866 (statement of Ivan Allen, Jr., Mayor, Atlanta, Ga.).

On July 2, 1964, President Lyndon B. Johnson signed the Civil Rights Act into law.[256] As Johnson signed the Act, he advanced a bold moral vision for corporate governance. He proclaimed that Title II now mandated that "those who are equal before God shall now also be equal . . . in hotels, and restaurants, and movie theaters and other places that provide service to the public."[257] Title II's passage rejected a patchwork, corporate-dependent approach to racial justice and installed a powerful federal framework requiring business owners to respect Black customers' dignity. More importantly for Johnson and much of Congress, Title II's enactment showed those at home and abroad that the United States was actually seeking to live up to its creed.

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The U.S. Supreme Court upheld Title II in *Heart of Atlanta Motel v. United States*[258] and *Katzenbach v. McClung*.[259] These cases stemmed from the struggle to desegregate public accommodations in the Atlanta and Birmingham movements, respectively.[260] In both cases, the Court declared that Congress had the constitutional authority to regulate interstate commerce and that the Act was a reasonable and appropriate means to remedy segregation's burden on interstate commerce.[261]

The Court emphasized that Congress had compiled an extensive record showing how segregated public accommodations caused myriad national social problems. In *Heart of Atlanta Motel*, for example, the Court explained that as millions of Americans of all races traveled the country, Black people in particular faced racial discrimination in transient accommodations.[262] Black people often had to travel long distances to find accommodations, and Black travelers even went as far as consulting "a special guidebook," the *Green Book*,[263] to find businesses that would serve them.[264] Nonetheless, public accommodations discrimination persisted.[265] The Court's decision dealt a death blow to Jim Crow in public accommodations.

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256. Civil Rights Act (1964), Nat'l Archives, https://www.archives.gov/milestone-documents/civil-rights-act [https://perma.cc/272U-7N6V] (last visited Oct. 24, 2023).

257. President Lyndon B. Johnson, Remarks Upon Signing the Civil Rights Act of 1964 (July 2, 1964), Libr. of Cong., at 05:02, https://www.loc.gov/exhibits/civil-rights-act/multimedia/johnson-signing-remarks.html (on file with the *Columbia Law Review*).

258. See 379 U.S. 241, 261 (1964).

259. See 379 U.S. 294, 305 (1964).

260. *Katzenbach*, 379 U.S. at 296–97; *Heart of Atlanta Motel*, 379 U.S. at 243–44.

261. See *Katzenbach*, 379 U.S. at 304–05; *Heart of Atlanta Motel*, 379 U.S. at 261–62.

262. *Heart of Atlanta Motel*, 379 U.S. at 252–53.

263. See supra notes 126–128 and accompanying text.

264. *Heart of Atlanta Motel*, 379 U.S. at 252–53.

265. Id.

Moreover, these decisions made clear the implications of the nation's experiment with CSR. Localities throughout the country had tested voluntary desegregation for years, and this approach had shown that corporations could not solve the nation's public accommodations problem. In fact, this approach had proven to be a nationwide failure. Ultimately, federal action, not CSR, had ensured racial justice in this defining phase of the civil rights movement.

III. CRITIQUING CORPORATE RACIAL RESPONSIBILITY

In hindsight, the failures of CSR and voluntary desegregation are unsurprising. As desegregation strategies, they asked Black people to accept piecemeal recognition of their humanity and dignity. Those who favored CSR as a way to end segregation of public accommodations framed it as a positive way to engage firms in the civil rights movement and achieve corporate commitment to a fraught social proposition. But for Black people and civil rights activists, CSR was a corporate-centric approach that subordinated racial equity to the protection of corporate interests and preferences. As such, CSR as it was promoted during the civil rights era was less about firms' consideration of racial equity beyond their legal obligations and more about a veneer to defend corporate preferences and profitability at the expense of Black citizens' rights and true racial equity.

Today, as during the civil rights era, corporations are being asked to play a pivotal role in efforts to achieve racial equity. And once again, corporate engagement in pressing matters of racial equity and justice is being framed as an appeal to CSR. But a closer look at contemporary corporate engagement in racial equity reveals that today's approach echoes many of the problems evident during the civil rights era, and this time, it is arguably more insidious. Corporations have pledged support for the BLM movement, launching advertising and social media campaigns to demonstrate their commitment.[266] These displays often earn corporations considerable goodwill with consumers and even some lawmakers, which can translate to increased profitability.[267] Yet these same corporations are major donors to politicians and interest groups that denounce BLM and its core movement

266. See supra notes 110–118 and accompanying text.

267. See Shannon Bond, Senate Democrats Urge Google to Investigate Racial Bias in Its Tools and the Company, NPR (June 2, 2021), https://www.npr.org/2021/06/02/1002525048/senate-democrats-to-google-investigate-racial-bias-in-your-tools-and-company [https://perma.cc/F6UE-NQMT] (reporting on senators' attempts to hold Google to its previous commitments to racial justice); Nat Ives, Consumers Are More Likely to Use or Drop Brands Based on Racial Justice Response, Survey Finds, Wall St. J. (May 6, 2021), https://www.wsj.com/articles/consumers-are-more-likely-to-use-or-drop-brands-based-on-racial-justice-response-survey-finds-11620333257 (on file with the *Columbia Law Review*) ("Some 42% of [surveyed consumers] said they had started or stopped using a brand in the past year because of its response to protests against racial injustice . . . .").

principles.[268] Or they may lobby against legislation to improve the lives of their marginalized employees.[269] Corporations are therefore able to benefit from the commodification of the racial identities of Black and Brown citizens without making any meaningful changes to the internal corporate or external societal structures that create and reinforce racial inequity.

Contemporary critiques of corporate racial responsibility come from both those who believe corporations should not be engaged in racial equity and those who believe corporations are not doing nearly enough. Part III engages with each of these critiques, but it also argues that they miss the point. While these critiques derive from different—and to some extent opposed—political stances, they ignore the lessons from the civil rights era and misconstrue the most pressing shortcomings of corporate engagement in racial equity. One such lesson is that corporate racial responsibility—as implemented both today and in the past—is a market-fundamentalist approach to racial equity that subordinates human dignity to corporate interests and dilutes progress to true racial equity. Further, corporate racial responsibility's corporate-centric focus means businesses are focused on extracting value from marginalized communities and, as much as possible, limiting their potential liability for racial discrimination rather than enacting meaningful structural changes.

A. *The Contemporary Debate on Corporate Racial Responsibility*

The modern inclusion of racial equity within CSR has not been universally lauded. Indeed, in the years since corporations pledged support for BLM and other racial equity and justice initiatives, there has been considerable backlash against this support.[270] While there are several criticisms

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268. For example, Amazon, AT&T, Disney, and Walmart have all made public commitments to racial justice. But each donated, either directly or indirectly, to the reelection campaign of Florida Governor Ron DeSantis, who has supported and passed laws limiting how race can be taught in public schools. David Smith, DeSantis's Corporate Donors Under Fire for 'Hypocrisy' Over Black History Month, The Guardian (Feb. 13, 2023), https://www.theguardian.com/us-news/2023/feb/13/desantis-political-donations-black-history-month (on file with the *Columbia Law Review*).

269. See, e.g., Tony Romm, Corporate America Launches Massive Lobbying Blitz to Kill Key Parts of Democrats' $3.5 Trillion Economic Plan, Wash. Post (Aug. 31, 2021), https://www.washingtonpost.com/us-policy/2021/08/31/business-lobbying-democrats-reconciliation/ (on file with the *Columbia Law Review*) (reporting that lobbyists representing large corporations, including Pfizer and Disney, opposed a budget proposal that would expand social welfare programs).

270. See Andrew Edgecliffe-Johnson, 'Woke Capitalists' Provoke Backlash From US Conservatives, Fin. Times (May 22, 2021), https://www.ft.com/content/42989bc5-fd8e-4915-a6c0-41a9e22351e7 (on file with the *Columbia Law Review*) ("A right-leaning group called Consumers Research this week announced a $1m-plus advertising campaign targeting companies which, it said, were 'putting woke politics over consumer interests.'" (quoting Consumer First Initiative: Protecting Consumers From Woke Companies, Consumers' Rsch., https://consumersresearch.org/consumersfirst/ [https://perma.cc/X6GM-Y8VW] (last visited Feb. 10, 2024))).

of corporate racial responsibility, this section focuses on three: first, on the most negative end of the spectrum, the critique that corporate racial responsibility is evidence of a progressive "woke agenda" overtaking society; second, from those who believe that—despite the rhetoric—shareholder primacy prevails, the belief that corporate racial responsibility may negatively affect corporate profitability; and third, from those who are skeptical of but not necessarily opposed to corporate racial responsibility, the criticism that it is insincere and nothing more than "cheap talk."

1. *The "Woke" Corporate Purpose.* — One of the most strident critiques against corporate racial responsibility is that it is an improper and unjustified extension of corporate purpose to engage in matters such as race. This camp includes those who accuse corporations of acquiescing to progressive demands and others who are concerned that racial equity initiatives are unmoored from the corporation's main purpose—shareholder wealth maximization.[271] For these critics, corporate racial equity is problematic because it ignores basic economic principles of profit maximization and represents corporate capitulation to liberal, "woke" ideologies.[272]

First, this critique implies that corporate engagement in race issues is a new development, but as this Article has shown, that is inaccurate. To many critics, corporate support for racial equity is a recent response to the BLM movement and the 2020 protests for George Floyd and Breonna Taylor.[273] But because businesses are focal points for change, activists and others have often sought corporate participation to achieve change. This was as true in the 1970s with antiwar protests[274] as it is today with demands that businesses make amends for their exclusion of Black people from corporate spaces. And as detailed in Part II, civil rights activists and local leaders in the South asked businesses to desegregate voluntarily, calling on them to embrace their corporate social responsibilities to Black patrons

271. See, e.g., Heritage Explains, Woke Corporate Capitalism, Heritage Found., at 03:24 (Apr. 11, 2021), https://www.heritage.org/progressivism/heritage-explains/woke-corporate-capitalism [https://perma.cc/B2VT-PHXY] (discussing a perceived trend wherein corporations "are willingly becoming activated political arms for left-wing causes").

272. See, e.g., Jessica Guynn, 'Woke Mind Virus'? 'Corporate Wokeness'? Why Red America Has Declared War on Corporate America, USA Today (Jan. 4, 2023), https://www.usatoday.com/story/money/2023/01/04/desantis-republicans-woke-big-business-war/10947073002/ [https://perma.cc/MFE8-K7YT] (last updated Jan. 5, 2023) (quoting Florida Governor DeSantis as stating that "[w]e will never surrender to the woke mob").

273. See Ben White, Corporate America Got More 'Woke.' Will It Last?, Politico (May 25, 2021), https://www.politico.com/news/2021/05/25/george-floyd-death-corporate-america-diversity-490016 [https://perma.cc/2CRD-3AGJ] ("The traditional position of corporate America, especially the Fortune 500, is anodyne centrism. That became untenable over the past 12 months.").

274. See, e.g., Napalm and the Dow Chemical Company, PBS, https://www.pbs.org/wgbh/americanexperience/features/two-days-in-october-dow-chemical-and-use-napalm/ [https://perma.cc/9M8B-UGKQ] (last visited Oct. 24, 2023) (describing student protests against Dow Chemical during the Vietnam War).

and employees.[275] Those demands closely resemble the demands being made on corporations today. Additionally, what is particularly interesting is that the contemporary resistance to corporate racial responsibility on the grounds of "wokeness" mirrors segregationists' resistance during the civil rights era.[276] Just as segregationists—such as former Georgia Governor Lester Maddox—argued against businesses caving to civil rights activists' demands, so too are politicians today—such as Florida Governor Ron DeSantis—refusing to surrender.[277] Thus, neither the demands nor the critiques of today are new. They instead echo in significant ways the discourse during the struggle for desegregation.

Second, this critique assumes that only progressive voices favor CSR.[278] During the civil rights era, it was not only civil rights activists who encouraged businesses to consider voluntary desegregation. Some policymakers and local proprietors who believed in segregation or, at a minimum, a business owner's right to decide to remain segregated also pushed CSR. These actors were far from progressive but favored discretionary and voluntary desegregation for businesses.[279] History thus demonstrates that encouraging businesses to participate in corporate racial responsibility was not simply a progressive issue. Rather, actors along the political spectrum saw value in businesses engaging in CSR in the form of voluntary desegregation, particularly as a way to avoid federal intervention.[280]

A similar dynamic is at play today. Many corporations that have positively supported corporate racial equity are under the same leadership and management that adopted and continue to engage in practices that hurt their vulnerable stakeholders. Although Amazon made substantial racial

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275. See, e.g., supra note 23 and accompanying text (describing activists' attempts to convince businesses to voluntarily desegregate in Nashville).

276. See supra text accompanying notes 202–206.

277. See supra note 272.

278. Contemporary criticism of CSR is primarily from right-leaning people and entities who view prosocial activities as beyond the proper purpose of the corporation. See, e.g., Laurent Belsie, Are Corporations Going Liberal? Conservative Pushback on the Rise., Christian Sci. Monitor (Apr. 26, 2023), https://www.csmonitor.com/Business/2023/0426/Are-corporations-going-liberal-Conservative-pushback-on-the-rise [https://perma.cc/FC4B-SBC5] (describing an alliance of nineteen Republican governors who aim to "push back against . . . [the] ESG agenda"); Press Release, House Comm. on Oversight & Accountability, Comer: ESG Is Just Window Dressing for Liberal Activism and Far-Left Ideology (May 10, 2023), https://oversight.house.gov/release/comer-esg-is-just-window-dressing-for-liberal-activism-and-far-left-ideology [https://perma.cc/35ZS-BZTZ] ("ESG commitments are often . . . used to force businesses to comply to a far-left ideology."). But see Max Zahn, What Is ESG Investing and Why Are Some Republicans Criticizing It?, ABC News (Feb. 15, 2023), https://abcnews.go.com/Business/esg-investing-republicans-criticizing/story?id=97035891 [https://perma.cc/M5QQ-3G3Z] (explaining that while most ESG critics are politically conservative, there are some progressive critics as well).

279. See supra text accompanying notes 225–236 (discussing some business leaders' and policymakers' preference for voluntary desegregation).

280. For more detailed analysis of this point, see supra section II.B.2.

equity commitments,[281] the corporation also withered under searing criticism for its policies that many have described as anti-Black.[282] For example, in 2020, Black employees were the largest group among Amazon's field and customer support employees, accounting for 31% of the workforce.[283] In contrast, during the same time period, only 3.9% of Amazon's senior leadership was Black.[284] Additionally, Amazon has strong ties to policing, providing police departments with facial recognition software that has falsely identified people of color with mugshots.[285] Further, in the same year Amazon pledged support for Black lives, it donated over $100,000 to the Republican State Leadership Committee (RSLC),[286] which supported several candidates vehemently opposed to the BLM movement and corporate racial responsibility.[287] Troublingly, given the opacity of campaign finance in the United States, the true depth of Amazon's giving to comparable political organizations is unknown.[288]

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281. See Sean Keane, Further Tech Giants Pledge Funds, Voice to Fight Racial Injustice, CNET (June 4, 2020), https://www.cnet.com/news/politics/tech-giants-pledge-funds-to-fight-racial-injustice-facebook-amazon-google [https://perma.cc/NNN6-PTE4] (noting that Amazon pledged $10 million toward social and racial justice causes).

282. See, e.g., Jason Del Rey, Bias, Disrespect, and Demotions: Black Employees Say Amazon Has a Race Problem, Vox (Feb. 26, 2021), https://www.vox.com/recode/2021/2/26/22297554/amazon-race-black-diversity-inclusion [https://perma.cc/7KSF-6UE3] ("Black [Amazon] employees receive 'least effective' marks more often than all other colleagues and are promoted at a lower rate than non-Black peers.").

283. Our Workforce Data, Amazon, https://www.aboutamazon.com/news/workplace/our-workforce-data [https://perma.cc/7HVG-KQX3] (last visited Oct. 23, 2023). In 2020, Amazon's field and customer support workforce had 31.3% Black employees compared to 28.8% white employees and 26.4% Latine employees. Id.

284. Id.

285. See Jacob Snow, Amazon's Face Recognition Falsely Matched 28 Members of Congress With Mugshots, ACLU (July 26, 2018), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28 [https://perma.cc/MXQ8-S62T] ("[T]he software incorrectly matched 28 members of Congress, identifying them as other people who have been arrested for a crime. . . . The false matches were disproportionately of people of color, including six members of the Congressional Black Caucus, among them civil rights legend Rep. John Lewis (D-Ga.).").

286. See Ctr. for Pol. Accountability, Corporate Enablers: Who Are the Leading Bankrollers of Voter Suppression Legislation? 35 (2021), https://www.politicalaccountability.net/wp-content/uploads/2021/07/Corporate-Enablers.pdf [https://perma.cc/F7N6-QRES] (showing that Amazon donated $116,681 to the RSLC during the 2020 election cycle).

287. See Julia Manchester & Juliegrace Brufke, GOP Seizes on 'Defund the Police' to Galvanize Base, The Hill (June 27, 2020), https://thehill.com/homenews/campaign/504805-gop-seizes-on-defund-the-police-to-galvanize-base/ (on file with the *Columbia Law Review*) (highlighting the RSLC's role in releasing advertisements claiming that "[r]adical liberals are fighting for a police-free future" and warning not to "let them put your family in danger").

288. See generally Chisun Lee, Douglas Keith, Katherine Valde & Benjamin T. Brickner, Secret Spending in the States (2016), https://www.brennancenter.org/media/210/download [https://perma.cc/GB3N-KHTP] (identifying and quantifying corporate giving in state politics).

A third facet of the "woke" criticism is that CSR falls beyond the scope of businesses' objectives and obligations. Both during the civil rights era and today, many have upheld the mantra that the only "social responsibility of business . . . [is] to increase its profits."[289] Yet this aphorism fails to appreciate the different elements that contribute to corporate profitability, including racial equity, and the myriad paths available to managers to pursue these objectives. It is undeniable that for some businesses, particularly in the South, segregation was profitable, at least in the short term.[290] As protests mounted and businesses were unable to engage in daily operations, they undoubtedly suffered losses. Nevertheless, these businesses persisted with segregation—doubtless an unprofitable choice that violated the profit-maximization mantra.[291] Viewed from this perspective, racial equity is not anathema to profits, and conversely, racial *inequity* is not conducive to profit. Therefore, it would seem well within the scope of corporate purpose to engage in corporate racial responsibility.

In a broader sense, it is worthwhile to remember that corporations, including many large corporations that are known to us today, have been engaged—and arguably inescapably involved—in racial issues for centuries. The notion that the corporation normatively or in practice stands pristinely in its own world, concerned only with profit and insulated from social reality as it pursues this goal, is another false dichotomy that runs throughout the CSR discourse. For example, JPMorgan Chase accepted enslaved people as collateral, furthering the institution of slavery in the 1800s.[292] And Aetna, a large health insurer, sold policies that reimbursed enslavers for the deaths of enslaved people they owned.[293] Corporations

289. Friedman, supra note 63, at 126 ("[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud." (internal quotation marks omitted) (quoting Milton Friedman, Capitalism and Freedom 133 (1st ed. 1962))).

290. See Lisa D. Cook, Maggie E.C. Jones, Trevon D. Logan & David Rosé, The Evolution of Access to Public Accommodations in the United States, 138 Q.J. Econ. 37, 42 (2023) (discussing businesses' reluctance to desegregate in the 1950s and 1960s for fear that they would lose their discriminatory white consumers).

291. See Adedayo Akala, Cost of Racism: U.S. Economy Lost $16 Trillion Because of Discrimination, Bank Says, NPR (Sept. 23, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/09/23/916022472/cost-of-racism-u-s-economy-lost-16-trillion-because-of-discrimination-bank-says [https://perma.cc/587N-RHKS] (reporting findings from Citigroup, a major bank, that the economy lost $16 trillion between 2000 and 2020 as a result of discrimination against Black people (citing Citi GPS, Closing the Racial Inequality Gaps (2020), https://ir.citi.com/NvIUklHPilz14Hwd3oxqZBLMn1_XPqo5FrxsZD0x6hhil84ZxaxEuJUWmak51UHvYk75VKeHCMI%3D [https://perma.cc/73KM-FME7])).

292. See Debert Cook, 15 Major Corporations You Never Knew Profited From Slavery, Afr. Am. Golfer's Dig. (May 7, 2014), https://africanamericangolfersdigest.com/15-major-corporations-you-never-knew-profited-from-slavery/ [https://perma.cc/A7PB-KRS7].

293. See id.; see also Thomas, supra note 38 ("Some of the largest insurance firms in the US—New York Life, AIG and Aetna—sold policies that insured slave owners would be compensated if the slaves they owned were injured or killed.").

not only participated in social institutions that have shaped the racial hierarchies of today but also created these practices. Scholars have detailed the active role banks played in redlining,[294] denying Black customers loans because of their address and skin color.[295] This, too, is part of the history of corporations and race. It is spurious to argue that businesses that have historically created and benefited from the hierarchies foundational to racial inequities today have no role to play in dismantling them.

2. *The Tension With Profitability.* — Another related view of corporate racial responsibility focuses on the impact of racial equity initiatives on the firm's profitability. Specifically, this view differs in focus from concerns about whether corporate racial responsibility is beyond the proper scope of a corporation's purpose. Concerns about the impact on profitability accept that CSR is within the corporation's purpose but question how and to what extent engagement in race-related matters may negatively (or positively) impact corporate profits. On the positive side, one may see corporate commitments to racial equity as a rational market response to constituents' demands. For managers, corporate racial responsibility, then, is an economically rational response to indications from consumers, investors, and employees that they expect corporations to do more to address racial equity, which will have positive pecuniary benefits for the corporation and its shareholders. On the negative side, one may view corporate racial responsibility as destructive to corporate profitability. Managers who acquiesce to demands for racial equity do so to the detriment of investors and without any value in return to corporate owners.

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294. See Keeanga-Yamahtta Taylor, Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership 3–6 (2019) (detailing the role of government agencies and private brokers and bankers in redlining). See generally Camila Domonoske, Interactive Redlining Map Zooms In on America's History of Discrimination, NPR (Oct. 19, 2016), https://www.npr.org/sections/thetwo-way/2016/10/19/498536077/interactive-redlining-map-zooms-in-on-americas-history-of-discrimination (on file with the *Columbia Law Review*) (detailing the role of the Home Owners' Loan Corporation in redlining).

295. See Banks Continue to Deny Home Loans to People of Color, Equal Just. Initiative (Feb. 19, 2018), https://eji.org/news/banks-deny-home-loans-to-people-color [https://perma.cc/AG74-KY3H] ("Controlling for nine economic and social factors, including applicants' income, loan amount, and the neighborhood where they wanted to buy, the analysis found that racial disparities [in mortgages] persist in 61 metro areas across the country . . . ." (citing Aaron Glantz & Emmanuel Martinez, For People of Color, Banks Are Shutting the Door to Homeownership, Reveal (Feb. 15, 2018), https://revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/ [https://perma.cc/5SCR-VYK6])); Diana Olick, A Troubling Tale of a Black Man Trying to Refinance His Mortgage, CNBC (Aug. 19, 2020), https://www.cnbc.com/2020/08/19/lenders-deny-mortgages-for-blacks-at-a-rate-80percent-higher-than-whites.html [https://perma.cc/VX47-TKY8] (presenting the story of a Black man who began to receive mortgage offers when he stopped disclosing his ethnicity to lenders). See generally Chloe N. Thurston, At the Boundaries of Homeownership (2018) (detailing the government's role in restricting home ownership during the twentieth century).

Regardless of whether one's stance on corporate racial equity and profitability is positive or negative, two things are constant with this view. First, this view narrowly frames the question in terms of pecuniary gains or losses. This narrow framing fails to recognize other nonpecuniary measures that may contribute to a firm's success and stem from corporate racial equity. For example, CSR tends to foster a positive image of an organization and can thus enhance employee motivation and performance.[296] In treating corporate racial responsibility as part of the corporation's bottom line, this view sees racial equity (and those who are served by it) as something that can and ought to be abandoned unless it yields pecuniary benefits for the corporation and its shareholders. This stance is problematic for several reasons. It illustrates a perspective that endorses including Black and Brown constituencies and issues in the sphere of business only to the extent that such inclusion can benefit businesses and their beneficiaries. In other words, it does not value racial equity for its own sake. It also assumes that investors and consumers do not value racial equity and likewise measures its "success" in economic terms.

The second commonly held view among both those who support and those who reject corporate racial equity is a strongly antiregulatory stance. Those with a positive view of corporate racial responsibility say that the market has responded to the issue and there is no need for government intervention.[297] Critics of corporate racial responsibility point to the economic losses that accompany mandated diversity quotas, for example, as proof that regulations are not the best course.[298] But this antiregulatory

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296. See Said Id Bouichou, Lei Wang & Salman Zulfiqar, How Corporate Social Responsibility Boosts Corporate Financial and Non-Financial Performance: The Moderating Role of Ethical Leadership, Frontiers Psych., no. 871334, 2022, at 1, 4 ("Corporate social responsibility is one of the most significant aspects in developing a positive image for an organization, and many organizations exhibit CSR activities to show their good image in the market . . . " (citing R. Edward Freeman, Strategic Management: A Stakeholder Approach (Cambridge Univ. Press ed. 2010))); see also Angela Glover Blackwell, Mark Kramer, Lalitha Vaidyanathan, Lakshmi Iyer & Josh Kirschenbaum, The Competitive Advantage of Racial Equity 2–4 (2017), https://www.policylink.org/sites/default/files/The%20Competitive%20Advantage%20of%20Racial%20Equity-final.pdf [https://perma.cc/N2UN-X67R] ("[C]ompanies . . . have found new sources of growth and profit by driving equitable outcomes for employees, customers, and communities of color. . . . [A] focus on racial equity is critical in order to innovate, to create products and services that serve a more diverse consumer base, and to cultivate a strong workforce.").

297. See Leonid Polishchuk, Corporate Social Responsibility or Government Regulation: An Analysis of Institutional Choice, 52 Probs. Econ. Transition, no. 8, 2009, at 73, 74 (treating voluntary CSR efforts as a "private (not requiring government intervention) institutional alternative to economic regulation"); Margaret Ryznar & Karen E. Woody, A Framework on Mandating Versus Incentivizing Corporate Social Responsibility, 98 Marq. L. Rev. 1667, 1690–93 (2015) (analyzing the effects of regulation and incentivization on corporate behavior).

298. See, e.g., John Dobson & Mahdi Rastad, Women on Boards: EU Board Gender Quotas, and Why the U.S. Should Avoid Them, 37 Bus. & Pro. Ethics J. 1, 2 (2018) (noting that the European Union's approach to board gender diversity raises concerns regarding

stance serves only to reify oppressive structures. Those with power rarely hand it over willingly to those without, and thus, government intervention is often needed to secure the rights of marginalized people. As Dr. King wrote in *Letter From Birmingham Jail*:

> [I]t is an historical fact that privileged groups seldom give up their privileges voluntarily. Individuals may see the moral light and voluntarily give up their unjust posture; but, as Reinhold Niebuhr has reminded us, groups tend to be more immoral than individuals.
>
> We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed.[299]

This was evident in the desegregation debate, as CSR proponents argued against federal intervention to mandate desegregation. Activists, however, knew that they could never fully secure their civil rights through reliance on the hearts and minds of white people. Thus, even as Black activists pursued voluntary desegregation, they knew that legislation was necessary to achieve true racial equity. Likewise, many today are opposed to regulations that would mandate board diversity for public corporations and regulatory disclosures on diversity.[300] But as discussed in greater detail in Part IV, legal responsibilities must be imposed on corporations to achieve racial equity within economic spheres of our society.

3. *Cheap Corporate Talk.* — Even those in favor of corporate racial responsibility have taken recent corporate commitments with a large dose of skepticism. To these skeptics, corporations' pledges to racial equity and justice are insincere—nothing more than a marketing campaign—and worse, further proof of corporate hypocrisy.

Evidence of alleged corporate insincerity abounds, which lends credence to these critiques. To start, many 2020 corporate statements were vague, lacked any specific commitment, and were not followed with tangible, measurable actions. For example, in expressing his support for BLM, Mark Zuckerberg, founder and CEO of Meta (formerly Facebook), pledged $10 million to "groups working on racial justice."[301] But as many

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corporate financial performance); Jesse M. Fried, Will Nasdaq's Diversity Rules Harm Investors? 12 Harv. Bus. L. Rev. Online, no. 3, 2021, at 1, 3, https://journals.law.harvard.edu/hblr/wp-content/uploads/sites/87/2022/02/Fried-Will-Nasdaq-Diversity-Rules-Harm-Investors.pdf [https://perma.cc/GXQ8-N34B] ("[A] fair review of the evidence suggests that Nasdaq's diversity rules create real downside risks for investors . . . . Nasdaq's pursuit of social justice objectives may well cause collateral damage to investors.").

299. King, Why We Can't Wait, supra note 151, at 91.

300. See, e.g., Can California Legally Require Women on Corporate Boards?, Fox Bus. (Dec. 1, 2021), https://www.foxbusiness.com/politics/california-legally-require-women-corporate-boards [https://perma.cc/JHU2-XBAU] (describing a lawsuit alleging that it is illegal to "use taxpayer funds to enforce a law that violates the equal protection clause of the California Constitution by mandating a gender-based quota").

301. Tarpley Hitt, These Companies Have the Most Hypocritical Black Lives Matter Messaging, Daily Beast (June 4, 2020), https://www.thedailybeast.com/the-companies-with-

noted, Zuckerberg's statement neither indicated which groups would receive funding nor explained how monetary donations would address the racial problems that the company itself faced or that are prevalent on its social media platforms.[302]

The fact that many of these statements were crafted by marketing teams underscores skeptics' views that these announcements were made to enhance businesses' reputations rather than enact meaningful change.[303] Some skeptics have criticized businesses for simply engaging in a marketing ploy to increase their bottom line rather than investing the time to reflect on how to meaningfully participate in the discourse on racial equity and devise a plan to accomplish these goals.[304] Corporations were accused of trying to profit from the racial equity and justice movement with little intention of actually making a difference.[305] According to a recent Rockefeller Foundation report, companies pledged $50 billion toward racial equity in 2020.[306] One year later, however, only a mere $250 million had been committed to specific initiatives or actually spent.[307]

This failure by businesses to deliver on their promises is somewhat reminiscent of the problems civil rights activists faced as they fought to desegregate public accommodations. Dr. King and other civil rights leaders negotiated with businesses to secure their commitment to voluntarily desegregate.[308] Yet many businesses either reneged on their promises shortly thereafter or never honored their promises in the first place.[309] The unreliable and inconsistent nature of businesses' pledges to renounce segregation caused civil rights activists to lose faith in the promise of CSR.

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the-most-hypocritical-black-lives-matter-messaging-from-fox-to-facebook [https://perma.cc/9UH8-T4VW] (last updated June 5, 2020).

302. See, e.g., Linette Lopez, Opinion, Mark Zuckerberg Should Keep His Little $10 Million Donation to Racial Justice Groups and Fix Facebook Instead, Bus. Insider (June 2, 2020), https://www.businessinsider.com/mark-zuckerberg-should-keep-donation-fix-facebook-instead-2020-6 [https://perma.cc/SE8P-XA5R] ("[T]his donation isn't about fixing anything. This donation is meant to buy respectability, to buy the appearance of values where they are wanting.").

303. See Fairfax, supra note 109, at 144 ("Some have criticized the deluge of corporate statements based on the notion that they reflect corporate attempts to appeal to particular markets, and hence to increase their economic bottom line.").

304. Id.

305. See Analisa Valdez, Opinion, Companies Only Use Social Justice Movements for Their Own Profit, St. Press (Apr. 14, 2021), https://www.statepress.com/article/2021/04/spopinion-companies-only-use-social-justice-movements-for-their-own-profit [https://perma.cc/GS95-SDMZ] (detailing instances of corporations sending messages regarding social movements as attempts to "us[e] social justice movements in order to gain capital").

306. Gregory Johnson, Corporate America: It's Not Too Late to Honor Your Racial Justice Pledges, Rockefeller Found.: Blog (July 16, 2021), https://www.rockefellerfoundation.org/blog/corporate-america-its-not-too-late-to-honor-your-racial-justice-pledges/ [https://perma.cc/DGC5-4JDU].

307. Id.

308. See supra section II.B.1.

309. See supra section II.B.1.

This skepticism persists, reasonably enough, among racial equity activists today.[310]

While this critique is well supported based on past and present corporate behavior, recent scholarship from Lisa Fairfax calls some of this skepticism into question. According to Fairfax, corporations that issued statements in response to the 2020 protests "have in fact made efforts to follow through on their promise to promote diversity and work to combat racism within the corporate sphere."[311] Per Fairfax's data, close to 90% of companies that issued a corporate statement in support of racial equity appointed a "diverse" director within a year of making the statement.[312] To Fairfax, this indicates that corporations were not wholly engaged in "cheap talk" but rather supported their public statements with, to some extent, "concrete action."[313]

An additional retort to this critique is that Black people have greater influence and market power now than ever before. Undeniably, Black employees overall make less than their white peers,[314] and Black households have significantly less wealth than white ones.[315] But these disparities do not negate that Black consumers, employees, and investors are a significant segment of the economy that companies ignore to their own detriment.[316] While some companies' statements may have been part of a marketing strategy, there is value to their public affirmations of the worth and dignity of Black life, especially in a society that so often devalues it. Indeed, given that companies may try to exploit the moment while making

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310. See Zahn, supra note 278 ("Progressives have criticized [ESG] for imposing vague or weak standards on companies, offering the imprimatur of virtue without the requirement of substantive action.").

311. Fairfax, supra note 109, at 123.

312. Id. at 166. Fairfax uses "diverse" here to mean a director who is Black, a person of color, or a white woman.

313. See id. at 169.

314. See Valerie Wilson & William Darity Jr., Econ. Pol'y Inst., Understanding Black–White Disparities in Labor Market Outcomes Requires Models that Account for Persistent Discrimination and Unequal Bargaining Power 10 (2022), https://files.epi.org/uploads/215219.pdf [https://perma.cc/6GLN-57MT] ("In 2019, the typical (median) [B]lack worker earned 24.4% less per hour than the typical white worker . . . even after controlling for characteristics assumed to be related to productive capacity, like education and experience.").

315. See, e.g., Emily Moss, Kriston McIntosh, Wendy Edelberg & Kristen Broady, The Black–White Wealth Gap Left Black Households More Vulnerable, Brookings Inst. (Dec. 8, 2020), https://www.brookings.edu/articles/the-black-white-wealth-gap-left-black-households-more-vulnerable/ [http://perma.cc/ABN2-KHVE] (detailing the wealth gap and its impact on Black families during the COVID-19 pandemic).

316. Michael Chui, Brian Gregg, Sajal Kohli & Shelley Stewart III, A $300 Billion Opportunity: Serving the Emerging Black American Consumer, McKinsey Q. (Aug. 6, 2021), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/a-300-billion-dollar-opportunity-serving-the-emerging-black-american-consumer [https://perma.cc/QJE6-246C] ("Wooing the Black consumer is a $300 billion opportunity beckoning companies around the world.").

as little change as possible, a healthy level of skepticism is indeed warranted. But rather than dismissing these statements as opportunistic marketing strategies, activists ought to find ways to encourage companies to transform their statements into meaningful, tangible actions.

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The critiques of corporate racial responsibility that dominate legal discourse fail to fully excavate some of the more pernicious aspects of corporate engagement in racial equity. To be clear, the authors count themselves among those who believe that corporations have a role to play in racial equity but do not uncritically accept corporate participation in this sphere. Rather, to achieve a positive, sustainable, and meaningful version of corporate racial responsibility, we must analyze how that corporate participation has been operationalized in the past and is being operationalized today. There are two overarching concerns that the current debate on corporate racial responsibility fails to address. First, corporate racial responsibility is a market-fundamentalist, antiregulatory approach to racial equity that subordinates human dignity to wealth maximization and reifies existing racial hierarchies. Second, corporate racial responsibility is designed to extract value from Black and Brown people without engaging in structural changes needed to achieve meaningful racial equity. These critiques are detailed in sections III.B and III.C, respectively.

B. *Corporate Racial Responsibility as Market Fundamentalism*

Corporate racial responsibility, as currently implemented, is a market-fundamentalist approach that frames racial equity and its pursuit in terms of wealth maximization without government intervention. Market fundamentalism, which rose to prominence in the 1980s in the United States during the Reagan Administration and in the United Kingdom under Prime Minister Margaret Thatcher,[317] dominates the current approach to markets and businesses. "Market fundamentalism" refers to the belief that the free market can solve most economic and social problems and produce the most efficient resource distribution.[318] Under this view, strong property rights and private contracting are the best means of improving overall welfare, which, again, is defined in terms of wealth maximization.[319]

317. See Sally Wheeler, Corporations and the Third Way 14 (2002).

318. Market Fundamentalism, Oxford Eng. Dictionary, https://www.oed.com/dictionary/market-fundamentalism_n (on file with the *Columbia Law Review*) (last visited Mar. 4, 2024). For an argument in favor of global market fundamentalism, see generally George Gilder, The Spirit of Enterprise (1984). For a critique of market fundamentalism, see generally Thomas Frank, One Market Under God: Extreme Capitalism, Market Populism, and the End of Economic Democracy (2000).

319. See Economics & Beyond With Rob Johnson, The Big Myth of Market Fundamentalism, Inst. for New Econ. Thinking, at 06:35 (Mar. 16, 2023), https://www.ineteconomics.org/perspectives/podcasts/the-big-myth-of-market-fundamentalism

Government intervention and regulation are needed only to the extent that there are market failures that the markets cannot correct on their own.[320]

In framing corporate racial responsibility as market fundamentalism, there are two primary drawbacks. First, applying market logic to social issues subordinates human dignity and civil rights to wealth maximization. And second, the belief in markets as the best mechanism to improve welfare embraces an antiregulatory, voluntary approach to racial equity that stymies racial progress and reifies existing racial hierarchies.

1. *Subordination of Human Dignity.* — Despite CSR (and by extension, corporate racial responsibility) being premised in theory on the rejection of shareholder primacy, it nonetheless grounds its justifications in large part on being another—or a better—path to corporate profitability. When dealing with social issues, such as racial equity, this efficiency framing is problematic for several reasons. As discussed in section III.A above, reducing corporate engagement with racial equity to monetary gains (or losses) diminishes the intrinsic value of racial equity.[321] More fundamentally, however, the wealth-maximization framing subjects dignitary concerns to market logic and, in so doing, denigrates civil rights and human dignity.

While all (likely) agree that civil rights and human dignity are essential components to a just rule of law, requiring that Black, Brown, and other marginalized people prove themselves valuable to business interests to be worthy of business consideration and action inherently subordinates dignitary concerns to wealth maximization. Both in the civil rights era and today, Black dignity too often must first prove itself to be valuable to business interests before becoming a worthy pursuit.

For example, even as corporations became more focused on sustainability issues, they have ignored racial equity.[322] Black dignity was not valuable enough to warrant corporate focus and attention. But when faced with a backlash that threatened their profitability, corporations suddenly became interested in rhetorically embracing racial equity.[323] The use of marketing teams to craft corporate racial equity statements further underscores the pecuniary pragmatism that drives corporate racial responsibility—engaging in racial equity is worthwhile only if it can be monetized.

[https://perma.cc/94CN-LWCC] ("[O]ne of the central tenets of market fundamentalism[] [is] th[e] claim that if you allow the government to step in[]to redress market failure, even a serious market failure, it undermines freedom.").

320. See Steven G. Medema, Pigou's "Prima Facie Case": Market Failure in Theory and Practice, *in* No Wealth but Life: Welfare Economics and the Welfare State in Britain, 1880–1945, at 42, 48–49 (Roger E. Backhouse & Tamotsu Nishizawa eds., 2010) (describing Arthur Cecil Pigou's central insight into market failure as creating the need for "governmental measures . . . to deal with the situation").

321. See supra section III.A.2.

322. See supra notes 91–103 and accompanying text.

323. See supra notes 105–110 and accompanying text.

The current discourse on corporate racial responsibility, arguably, is no more attentive to Black civil rights and dignity than the earlier civil rights–era example. Businesses that embraced racial equity platforms in 2020 are quietly retracting support or simply failing to live up to their prior promises.[324] To the extent that corporate racial responsibility continues to be premised on matters of corporate profits over those of human dignity and Black civil rights, it will continue to fail to achieve meaningful progress on questions of race. And we might question if that is, in fact, the point.

Another concerning aspect of the market-fundamentalist approach to corporate racial responsibility is that the business case—that is, the promise of profits—may not be enough to compel action. This was evident in the discourse around CSR and desegregation. During the civil rights era, the appeal to pragmatism to support CSR and voluntary desegregation failed because it relied on a fatal assumption that white business owners cared more about profits than about maintaining their social, economic, and legal dominance over Black people.[325] These arguments engaged not with dignity or dignitary harms but with the assertion that desegregation would help a business's bottom line. This assumption was highly flawed because white business owners had no incentives to voluntarily participate in desegregation or recognize the dignity of Black people. They were the dominant class and had the full benefit of the law and its appendages on their side. Regardless of the potential profitability of desegregation, they chose to preserve racial hierarchies and white privilege. And since the discourse itself did not invoke matters of Black dignity before the law, it failed.

Taking market fundamentalism to its natural conclusion, marginalized groups must endure their lack of rights because there is no wealth-maximization justification for businesses to engage. Appealing to profitability without considering the dignitary harms that marginalized groups face deepens corporate racial responsibility's ineffectiveness and its potential harm to Black people and people of color. As Xavier de Souza Briggs and Richard M. McGahey have stated, "Racial equity, like other forms of equity, must be understood on moral, not just pragmatic, grounds."[326] There isn't always a business case for racial equity, but there is always a moral one. Business leaders must understand and embrace the moral case for racial equity for their efforts to succeed. And corporate racial responsibility advocates are likewise destined to fail today, as they did in the civil rights era, if they subordinate human dignity to corporate profits when they make their case.

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324. See supra notes 306–309 and accompanying text.

325. See supra sections II.A–.B.

326. Xavier de Souza Briggs & Richard M. McGahey, Keeping Promises While Keeping Score: Gauging the Impacts of Policy Proposals on Racial Equity, Brookings Inst. (Oct. 11, 2022), https://www.brookings.edu/research/keeping-score-measuring-the-impacts-of-policy-proposals-on-racial equity/ [http://perma.cc/75E4-A2UU].

2. *Antiregulatory, Market-Based Approach.* — A key feature of corporate racial responsibility is that it is voluntary. This voluntariness is in keeping with market-fundamentalist roots that hold the belief that markets thrive when regulation is kept to a minimum. The current iteration of corporate racial responsibility, which continues to reject governmental intervention, legitimates only the antiregulatory, market-based approach to racial equity. Time and experience have demonstrated that this approach does not work and, indeed, might damage true progress toward racial equity.

The desegregation of public accommodations in Atlanta illustrates this point. As CSR advocates—typically non-Black people—pressed for voluntary desegregation as the path forward, they also hoped to move slowly.[327] What's more, they pointed to the "success" of voluntary desegregation to prove that federal intervention was unnecessary; businesses were handling it, and government involvement would only undercut the progress already made.[328] In the end, civil rights activists recognized that a strategy grounded in voluntary commitments from businesses was insufficient to secure desegregation. Haphazard, piecemeal, and entirely voluntary desegregation on a city-by-city or state-by-state basis was unlikely to result in nationwide desegregation. Even Atlanta, where voluntary desegregation had the most success, had not achieved full desegregation.[329] And cities like Birmingham, Alabama, were recalcitrant to voluntary desegregation, showing the failure of local solutions for nationwide problems.[330] Federal regulation was, therefore, necessary to guarantee the civil rights and dignity of Black citizens.

These antiregulatory arguments reveal the moral and ethical underside of corporate racial responsibility, which has only become more insidious today with the expansion of corporate power in society. As during the civil rights era, corporations' voluntary actions are being used to hinder racial progress. For example, corporations have vigorously resisted ESG disclosures, arguing most prominently that they already voluntarily disclose relevant information.[331] But these voluntary disclosures vary in format and information, among other parameters, making it difficult for shareholders and stakeholders to compare the data being provided or even understand what is being disclosed.[332] Notably, current disclosures

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327. See supra section II.B.2.

328. See supra text accompanying notes 198–201.

329. See supra section II.B.2.

330. See supra section II.B.1.

331. Eric Rosenbaum, There's an ESG Backlash Inside the Executive Ranks at Top Corporations, CNBC (Sept. 29, 2022), https://www.cnbc.com/2022/09/29/the-esg-backlash-inside-the-executive-ranks-at-top-corporations.html [http://perma.cc/75GV-KNBS].

332. See, e.g., Adediran, supra note 36, at 338–47 (describing the multiple steps needed to compare corporate diversity disclosures in the author's study).

do not require companies to improve their actual diversity,[333] but corporations nevertheless resist the imposition of diversity disclosures,[334] even as they purport to support racial equity.[335] Avoiding racial equity mandates allows corporations to delay progress, thereby leaving Black and Brown people to the whims and preferences of corporations and with little recourse should corporations renege on their promises.

Corporations use their "seat at the table" to shape potential racial equity mandates to their benefit. Corporations have always had influence over the legislative process, which provides them with still another avenue to undercut racial progress. In the racial equity context, however, corporate power is especially concerning because corporations are unlikely to be at the vanguard of racial progress. Rather, corporations will more likely aim to limit their legal obligations and maintain the structures that facilitated their dominance. The current iteration of corporate racial responsibility thus allows corporations to set the terms on which they engage in racial equity. In so doing, it ensures that the form of racial equity that results from these efforts is palatable to corporations and others in power even if unsatisfactory to Black people and other people of color.

Importantly, rejecting regulation reifies existing hierarchies, keeping the status quo fixed for those who already benefit from it. In limiting or rejecting government intervention, businesses choose how and whether to engage with racial equity. This optionality means that businesses do so only to the extent it benefits them, which enables them to avoid meaningful and uncomfortable changes. The lack of regulation allows racial inequities to thrive unchecked and with no means of accountability.

C. *Corporate Racial Responsibility as Value Extraction*

Among those who support corporate engagement in racial equity, a prominent critique of corporate racial responsibility is that of corporate disingenuity. As discussed above, recent research shows that most corporations who have committed to racial equity have appointed a director that comes from an underrepresented background in recent years.[336] Despite these gains, closer analysis reveals that this "progress" obscures a problematic aspect of corporate racial responsibility: It extracts value from Black and Brown communities without attempting to change the underlying structures that support and result in racial inequity. Value extraction is not

333. Id. at 348 (noting that Nasdaq and SEC diversity disclosures "merely require[] companies to explain why they lack diversity and would not actually increase board diversity per [Nasdaq] Rule 5605(f)'s 'disclose or explain' provision").

334. See Green et al., supra note 43 (noting that Tesla and Berkshire Hathaway have refused to disclose information regarding the racial diversity of their workforces to investors).

335. See, e.g., id. (stating that companies, such as Target, that have previously embraced diversity disclosures are now claiming that data disclosure is an "imperfect tool").

336. See supra section III.A.3.

a new phenomenon for marginalized people—from the atrocities of slavery, when Black bodies were sold for their labor, to the current practice of exploiting undocumented immigrants for domestic labor, there is no shortage of examples of white people extracting value from Black and Brown people.[337]

The form of value extraction in which businesses are engaging today differs, but it is nonetheless exploitative. In embracing corporate racial responsibility, businesses are commodifying and extracting value from Black racial identities for their own benefit.[338] As Professor Nancy Leong has identified in her work, the legal and social preoccupation with diversity has made relationships or affiliations with nonwhite people valuable for predominantly white institutions. Corporate racial responsibility is a recognition of the economic "value" of nonwhite racial identities[339] and an effort to extract value from Black and Brown people without providing any meaningful benefit in exchange. The value extraction of corporate racial responsibility goes beyond insincere corporate commitments and has damaging consequences for Black and Brown communities.[340]

The extractive nature of corporate engagement with racial equity means that businesses try to get as much from their engagement as they give. To signal their antiracist, antidiscriminatory efforts and their commitment to diversity, businesses may, for example: pledge support for BLM; encourage the creation of race-based affinity groups; lead campaigns featuring Black communities; and promote Black or Brown employees to visible positions.[341] In this regard, corporate racial responsibility can produce a range of benefits for businesses. These commitments enable a business to project a tolerant, welcoming corporate image that will positively influence recruitment efforts in the labor markets.[342] It may also help with

337. See, e.g., Nancy Leong, Racial Capitalism, 126 Harv. L. Rev. 2151, 2155 (2013) ("For centuries, nonwhiteness was used as a basis for withholding value by denying nonwhite people legal rights and privileges." (emphasis omitted)).

338. Nancy Leong has termed this as "racial capitalism," which she defines as "deriving economic and social value from the racial identity of another person." See id. at 2156. This Article relies on Leong's work on racial capitalism, but the authors emphasize the engagement's extractive and economic nature for Black and Brown people.

339. For a critique of assigning monetary or economic "value" to human dignity and civil rights, see supra section III.B.2.

340. See Leong, supra note 337, at 2194–95 ("By showcasing nonwhite employees in prominent positions, employers signal that unsuccessful nonwhite employees are responsible for their own failures, while at the same time maintaining a system in which white employees are in fact preferred.").

341. See Patrick S. Shin & Mitu Gulati, Showcasing Diversity, 89 N.C. L. Rev. 1017, 1034 (2011) (describing employers' efforts to showcase minority employers within their workforces without actually addressing shortcomings in workplace diversity).

342. See, e.g., Tara S. Behrend, Becca A. Baker & Lori Foster Thompson, Effects of Pro-Environmental Recruiting Messages: The Role of Organizational Reputation, 24 J. Bus. & Psych. 341, 347 (2009) (describing the impact of environmental-responsibility language on applicants' intention to pursue a job); C. Maden, E. Arikan, E.E. Telci & D. Kantur,

retaining existing customers and attracting new ones that care about diversity and racial equity.[343] From a legal liability standpoint, such efforts may also help businesses refute racial discrimination suits. By highlighting their diversity and racial equity work, businesses can point to practical, real-world efforts to be nondiscriminatory—at least from a legal standpoint.[344]

Yet despite the value that businesses extract from their affiliation with Black and Brown people, they rarely engage in internal structural changes. A careful examination of many firms that claim to engage in corporate racial responsibility may reveal that, despite their DEI efforts, there is little to no change to workplace culture. This reality ultimately subjects Black and Brown employees to microaggressions—or worse.[345] Similarly, review and promotion policies fail to recognize the additional work women and people of color consistently report doing within the workplace.[346] Indeed, despite the prevalence of diversity initiatives and similar efforts among large public corporations, many of those same corporations have dismal demographic diversity among their employees, especially in high-ranking positions.[347] The one race-related area public corporations have included in their CSR/ESG strategies is increasing boardroom diversity. But the number of Black or Brown directors has not seen significant increases over the past decade, further demonstrating the absence of structural changes that would be needed to grant Black and Brown executives access to boards.

An unsurprising but problematic consequence of the corporate racial responsibility's value-extractive nature is tokenism. Showcasing Black and

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Linking Corporate Social Responsibility to Corporate Reputation: A Study on Understanding Behavioral Consequences, 58 Procedia 655, 662 (2012) (demonstrating results from a behavioral study that suggest "that when job seekers assign a good reputation to a specific firm, they are more likely to seek employment there").

343. See Ahmad Aljarah & Blend Ibrahim, The Robustness of Corporate Social Responsibility and Brand Loyalty Relation: A Meta-Analytic Examination, 26 J. Promotion Mgmt. 1038, 1057 (2020) (presenting an analysis of case studies that suggests CSR practices are linked to brand loyalty). A related benefit may be higher employee retention rates. See Donald F. Vitaliano, Corporate Social Responsibility and Labor Turnover, 10 Corp. Governance 563, 564 (2010) (finding that a firm "can significantly reduce its turnover (quit) rate by adopting policies that lead to it being rated as socially responsible").

344. See Leong, supra note 337, at 2196 (discussing Walmart's initiative to "diversify its own ranks and to insist on diversity in its business partners" as the company faced class action discrimination suits).

345. See id. at 2195.

346. See, e.g., Virginia Gewin, The Time Tax Put on Scientists of Colour, Nature (June 24, 2020), https://www.nature.com/articles/d41586-020-01920-6 (on file with the *Columbia Law Review*) (describing how faculty of color "are routinely asked to undertake extra, uncompensated work to address the issue [of racism] at their institutions").

347. See Tracy Jan, The Striking Race Gap in Corporate America, Wash. Post (Dec. 15, 2021), https://www.washingtonpost.com/business/interactive/2021/black-executives-american-companies (on file with the *Columbia Law Review*) ("[O]nly 8 percent of 'C-suite' executives—the highest corporate leaders, often those reporting to the CEO—are Black.").

Brown faces can give the appearance of racial equity within an organization without changing the workplace conditions that caused the absence of meaningful racial representation.[348] Additionally, for firms, tokenism can provide a way to limit conversations on race. By pointing to prominent Black people who support their firms, condone their minimal efforts, or thrive within their work environment, firms can deflect more demanding expectations—for example, that they demolish existing racial hierarchies—all while maintaining a system that perpetuates the very racial inequities the firm claims to be against.

Lastly, because corporate racial responsibility can facilitate value extraction, racial equity efforts are often deemed nonessential.[349] As Leong aptly puts it: "[W]hite people and predominantly white institutions come to view racial diversity as simply another non-essential item—not unlike catered lunches or technology upgrades . . . ."[350] Viewing corporate racial responsibility as nonessential means that in times of economic hardship, racial equity initiatives will be among the first to be eliminated. Examples abound today. Continued inflation and fears of a recession caused many companies, particularly technology companies, to reduce their workforces in the first quarter of 2023.[351] These layoffs, notably, are decimating diversity and inclusion departments in firms that, back in 2020, had committed to increasing underrepresented groups among their employees and leadership.[352] What's more, the loss of DEI positions at these firms is expected to result in much of this work being passed on to "employee resource groups, which often don't get compensated for that work."[353] It is also significant that firms are scaling back on racial equity commitments even before they have met their goals, which only further

348. See Charisse Jones, Jayme Fraser & Dian Zhang, Racial Justice in the Workplace: In-Depth Look at Diversity's Struggle to Crack Corporate Boardrooms, USA Today (July 18, 2021), https://www.usatoday.com/in-depth/money/business/2021/07/18/workplace-diversity-struggles-break-into-corporate-boardrooms/7906529002/ [https://perma.cc/VL48-GEV5] (last updated July 23, 2021) (discussing the practice of companies "point[ing] to the diversity of their boards of directors to distract from the concentration of white men in their corporate suites" while noting that even these boards often do not reflect either the racial distribution of the companies' workforce or the nation).

349. While this is related to a critique raised above regarding firms' wavering commitment to racial equity if not justified by profitability, it is a different way of understanding why firms may abandon corporate racial responsibility. See supra section III.B.1.

350. Leong, supra note 337, at 2211.

351. See Ashley Capoot & Sofia Blum, Google, Meta, Amazon and Other Tech Companies Have Laid Off More Than 104,000 Employees in the Last Year, CNBC (Jan. 18, 2023), https://www.cnbc.com/2023/01/18/tech-layoffs-microsoft-amazon-meta-others-have-cut-more-than-60000.html [https://perma.cc/N6EQ-LQS9] (last updated Mar. 20, 2023) (describing vast layoffs among large technology companies in 2022 and 2023).

352. See Kelsey Butler, Big Tech Layoffs Are Hitting Diversity and Inclusion Jobs Hard, Bloomberg (Jan. 24, 2023), https://www.bloomberg.com/news/articles/2023-01-24/tech-layoffs-are-hitting-diversity-and-inclusion-jobs-hard (on file with the *Columbia Law Review*).

353. Id.

emphasizes how expendable firms view their corporate racial responsibility to be.

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As currently implemented, corporate racial responsibility is problematic. But this Article's authors firmly believe that corporations have a role to play in achieving racial equity. Doing so requires moving beyond the current paradigm and engaging in meaningful reforms to ensure that businesses participate in dismantling the very hierarchies that they helped to create and from which they have benefited. Part IV begins this conversation by offering a few suggestions on how to move forward with the work of engaging firms in embracing and appreciating racial equity both internally and in broader society.

IV. TOWARD MEANINGFUL CORPORATE RACIAL RESPONSIBILITY: CREATING CORPORATIONS OF CONSCIENCE

There are three major answers to the question of what role corporations should play in the current struggle for racial justice. The first group of answers highlights the promise of corporations in the struggle for racial justice.[354] Although this group offers a welcome embrace of the stakeholder-over-shareholder model of corporate governance, corporate leaders who voiced support for the 2020 racial justice protests have largely failed to produce meaningful racial change.[355] Many corporations made unprecedented financial commitments toward racial justice causes but have not delivered on their antiracist pledges.[356] Other corporations that have publicly condemned structural racism

354. See, e.g., Business Roundtable CEOs Announce Corporate Actions, Public Policy Recommendations to Advance Racial Equity and Justice, Increase Economic Opportunity in America, Bus. Roundtable (Oct. 15, 2020), https://www.businessroundtable.org/business-roundtable-ceos-announce-corporate-actions-public-policy-recommendations-to-advance-racial-equity-and-justice-increase-economic-opportunity-in-america [https://perma.cc/YCD4-MD9C] (announcing corporate initiatives and policy recommendations to "advance racial equity and justice").

355. Compare Tracy Jan, Jena McGregor, Renae Merle & Nitasha Tiku, As Big Corporations Say 'Black Lives Matter,' Their Track Records Raise Skepticism, Wash. Post (June 13, 2020), https://www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter/ (on file with the *Columbia Law Review*) [hereinafter Jan et al., Big Corporations' Track Records Raise Skepticism] ("Corporate America—including Wall Street and Silicon Valley giants—is now pledging to play a bigger role in combating systemic racism across the United States . . . ."), with Jan et al., Corporate America's $50 Billion Promise, supra note 12 ("[A] Washington Post analysis of unprecedented corporate commitments toward racial justice causes reveals the limits of their power to remedy structural problems.").

356. Marco Quiroz-Gutierrez, American Companies Pledged $50 Billion to Black Communities. Most of It Hasn't Materialized, Fortune (May 6, 2021), https://fortune.com/2021/05/06/us-companies-black-communities-money-50-billion (on file with the *Columbia Law Review*).

have avoided taking strong antiracist policy stances.[357] Even worse, some corporations continue to profit from practices or policies that exacerbate racial inequity, even as they espouse antiracist rhetoric.[358] If corporate leaders are serious about advancing racial justice and rooting out racism, they must push past their platitudes and empty statements.

The second major group of answers in this debate argues that corporations should play no role in the struggle for racial justice. Some in this group assert that corporate racial responsibility does not fundamentally restructure race relations and that it is merely "cheap talk" or racial window dressing.[359] These critics have encouraged progressive activists to abandon their corporate-focused efforts and place their energies elsewhere.[360] Others in this group, who are often fiscally conservative, contend that the only social responsibility of corporations is "to use [their] resources and engage in activities designed to increase [their] profits."[361]

Those in this second group—despite their varied ideological orientations—somehow consistently overlook a powerful reality: Whether they like it or not, corporations are already intimately involved in racial issues, and this relationship will no doubt continue in the future. Racial justice issues are at the core of corporate operations, even if corporate leaders are not consciously considering race. Each day, corporations recruit, hire, compensate, promote, retain, and dismiss employees, and far too frequently, the employees who experience the worst working

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357. See, e.g., Chauncey Alcorn, Corporate America Doesn't Want to Talk About Defunding Police, CNN Bus., https://www.cnn.com/2020/06/11/business/corporate-america-defund-police/index.html [https://perma.cc/B3SU-KB3Z] (last updated June 11, 2020) ("As it stands, many businesses are showing broad public support for the Black Lives Matter movement, but they are avoiding taking a stand on specific policy initiatives that would help the movement accomplish its goals.").

358. See, e.g., Davis & Warren, supra note 119.

359. Matthew Boyle, More Workers Ready to Quit Over 'Window Dressing' Racism Efforts, Bloomberg (June 9, 2022), https://www.bloomberg.com/news/articles/2022-06-09/-it-s-window-dressing-firms-battle-trust-gap-on-racism-efforts (on file with the *Columbia Law Review*).

360. See, e.g., Aaron Chatterji & Siona Listokin, Corporate Social Irresponsibility, Democracy, Winter 2007, at 52, 61–63 (arguing that progressives should consider abandoning their efforts targeting Walmart to instead focus on fighting for improvement in national labor rights); Joanna Wuest, The Dead End of Corporate Activism, Bos. Rev. (May 18, 2022), https://bostonreview.net/articles/the-dead-end-of-corporate-activism [https://perma.cc/HKS2-YAQ2] ("There are, thankfully, alternative strategies for social transformation besides heavy reliance on corporate benevolence.").

361. See Friedman, supra note 63, at 126 (internal quotation marks omitted) (quoting Milton Friedman, Capitalism and Freedom 133 (1st ed. 1962)). For a modern expression of this idea, see Paul G. Mahoney & Julia D. Mahoney, 'ESG' Disclosure and Securities Regulation, Regulation, Fall 2021, at 10, 10–12.

conditions and receive the lowest wages are employees of color.[362] Corporate boards notoriously lack racial diversity,[363] and these boards often design policies that disparately affect people of color inside and outside of the corporation.[364] Corporations lobby and support politicians whose legislation and rhetoric that influence race relations.[365] It is a question not of *whether* corporations should be involved in racial justice efforts but of *how* they will be involved, consciously or not. As long as there are corporations, their daily activities will shape race relations, and conversely, race relations will shape their daily activities.

A third major group stakes out a middle ground. This group tends to be skeptical of corporate motives and commitments to racial justice but concedes that corporations should have some intentional role in the struggle for racial justice.[366] This group's practical approach to corporate racial responsibility can help in the struggle, but more historical grounding might sharpen their analysis of race and racism. As this Article illustrates, many of these issues surrounding the corporate racial responsibility debate are not new. Activists during the civil rights movement faced similar dilemmas. Today's racial justice proponents would benefit by drawing insights from civil rights history.

This Part is a first step in a hopefully larger conversation about the future of corporate racial responsibility. It offers three pragmatic principles to guide corporations' roles in racial justice efforts. Each principle takes seriously conservative and progressive criticisms of corporate racial responsibility but urges critics of all stripes not to: whitewash corporate

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362. See Laura Morgan Roberts & Anthony J. Mayo, Toward a Racially Just Workplace, Harv. Bus. Rev. (Special Issue), Fall 2020, at 10, 10 (describing the variety of occupational challenges and inequalities felt disproportionately by people of color in the workforce).

363. See Peter Eavis, Diversity Push Barely Budges Corporate Boards to 12.5%, Survey Finds, N.Y. Times (Sept. 15, 2020), https://www.nytimes.com/2020/09/15/business/economy/corporate-boards-black-hispanic-directors.html (on file with the *Columbia Law Review*) (last updated Sept. 7, 2021).

364. See, e.g., Jan et al., Big Corporations' Track Records Raise Skepticism, supra note 355 ("In addition to hiring and pay disparities, banks have come under fire for allegedly discriminating against minority customers.").

365. See Naila Awan & Liz Kennedy, Demos, The Racial Equity Impact of Secret Political Spending by Government Contractors 2–3 (2015), https://www.demos.org/sites/default/files/publications/RacialEquityImpactSecretPoliticalSpending-Brief.pdf [https://perma.cc/6JWP-PBMB] (describing the substantial political spending of publicly traded federal contractors and the ways in which these contractors have advanced policies that undermine racial equity); Romm, supra note 269 (describing how many large corporations lobbied against "Democrats' proposed overhaul to federal health care, education and safety net programs").

366. See, e.g., Laura Morgan Roberts & Megan Grayson, Businesses Must Be Accountable for Their Promises on Racial Justice, Harv. Bus. Rev. (June 1, 2021), https://hbr.org/2021/06/businesses-must-be-accountable-for-their-promises-on-racial-justice (on file with the *Columbia Law Review*) ("[C]ommunications and statements aren't enough: Companies need to hold themselves accountable for action so they don't simply maintain historical structures and cultures of racism.").

operations; succumb to racial defeatism; or use criticisms of corporate racial responsibility as mere cover for corporate leaders' weak commitments to racial equality. Corporations have never been on the racial sidelines, and, in fact, corporations make and remake race relations each day. Moreover, these principles look to the past to inform present and future racial justice advocacy. Civil rights history shows that social movements use every tool possible to advance their causes—they understand the deep limitations of a particular tool and know that even good solutions may not be perfect solutions. We must take the world as it is, even as we make it what it might one day become.

A. *Change Starts at Home*

If corporations seek to promote racial justice in society, then they must first change themselves. Corporations need not wait for changes in government, shifts in popular opinion, or widespread protests to become more inclusive. They can become more inclusive now. They have broad power over their own operations.[367] Of the three principles proposed in this Part, this recommendation is perhaps the most palatable to stakeholders and the easiest for corporations to implement.

There is no shortage of actions a corporation can take unilaterally to advance racial justice. Corporations can, for example, change the compositions of their boards and management, ensure pay equity, increase philanthropic giving, establish race-based employee resource groups, require antiracism training, develop strategic diversity plans, devise internal dashboards to track the corporation's diversity goals, or create mechanisms to hold management accountable for achieving these goals. It is one thing for a corporation to issue a public statement that Black lives matter. It is more important for the corporation to take actions that reflect this sentiment, starting with actions affecting the people with whom they have direct contact with each day. It is time that corporations walk their own racial justice talk.

Corporations can also advance racial justice by requiring individuals and corporations with which they have indirect contact to advance racial justice. Although a corporation cannot, for example, change the racial demographics of a law firm it contracts with, it can require that the lawyers on the contract be from backgrounds that are typically

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367. Bus. Roundtable, Principles of Corporate Governance, Harv. L. Sch. F. on Corp. Governance (Sept. 8, 2016), https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance [https://perma.cc/8YG3-GLD2] ("These [corporate governance] systems work because they give public companies not only a framework of laws and regulations that establish minimum requirements but also the flexibility to implement customized practices that suit the companies' needs and to modify those practices in light of changing conditions and standards.").

underrepresented in the legal profession.[368] Similarly, corporations can influence their suppliers to be diverse.[369] They can press their peers to adopt new standards and strategies for corporations seeking to reconcile their public statements and internal operations. As one communications executive explained during the 2020 racial justice protests, "Brands are watching other brands and companies are watching other companies to see who's doing it right, who's making missteps and how they can avoid it, because everybody wants to be right and nobody wants to step into a minefield."[370]

Corporate leaders may find implementing antiracist policies to be challenging or even inconvenient. But if corporate leaders find it difficult to transform their corporate practices now, imagine how difficult it was during the civil rights movement. If these leaders find it uncomfortable to shift their corporate climates, imagine the racial discomfort stakeholders of color have endured for many years. True corporate leadership requires positive and decisive action now. As Dr. King proclaimed, "[T]he time is always right to do right."[371]

B. *Support, Not Supplant, Civil Rights Leadership*

In the wake of the 2020 racial justice protests, some corporate leaders fashioned themselves and their corporations as the vanguard of the contemporary struggle for racial justice.[372] Yet these leaders and their corporations should approach this topic with far more humility. Corporate leaders should be mindful that the 2020 calls for racial justice stemmed from popular protests, not corporations. Accordingly, because corporate leaders did not initiate these social changes, they should not lead them. Some

368. See Veronica Root, Retaining Color, 47 U. Mich. J.L. Reform 575, 602 (2014) (describing Walmart's decision to require law firms to submit options for relationship partners that included women and people of color).

369. See Alexis Bateman, Ashley Barrington & Katie Date, Why You Need a Supplier-Diversity Program, Harv. Bus. Rev. (Aug. 17, 2020), https://hbr.org/2020/08/why-you-need-a-supplier-diversity-program (on file with the *Columbia Law Review*) (surveying the history of supplier diversity programs as well as their commercial and social benefits).

370. Jessica Camille Aguirre, "People Are Fed Up With This Level of Virtue Signaling": Corporate America Is in a P.R. Meltdown Over the Black Lives Matter Movement, Vanity Fair (July 22, 2020), https://www.vanityfair.com/news/2020/07/corporate-america-in-pr-meltdown-over-black-lives-matter-movement (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting LaTricia Woods, Founder & President, Mahogany Xan Commc'ns).

371. Martin Luther King, Jr., Speech at Stanford University: The Other America (Apr. 14, 1967), https://www.rev.com/blog/transcripts/the-other-america-speech-transcript-martin-luther-king-jr [https://perma.cc/8SM8-PWTV].

372. See Jan et al., Corporate America's $50 Billion Promise, supra note 12 ("[T]op corporations made broad claims about what they would do, pledging to be a force for societal change and to fight racism and injustice, including violence against Black Americans.").

corporations that now claim to support BLM have undermined and continue to undermine support for the movement.[373]

Corporations should support, not supplant, civil rights leadership. Corporate leaders are not racially diverse, are likely far removed from sophisticated ideas of racial change and racial change agents, and may have even helped produce racial inequities.[374] Many conservatives and progressives alike complain that corporate leaders lack the expertise to lead racial justice reform. They are right. Collaborating with racial justice organizations on racial reform efforts provides a solution to this problem.

Major benefits could flow from partnerships between corporations and racial justice organizations. Racial justice organizations may provide a corporation with fresh insights and innovative solutions. They may help a corporation avoid often-clumsy messaging around racial justice issues and give it more racial credibility both inside and outside of the corporation. Such a partnership would illustrate that urgent social problems should not be left to corporate leaders alone. In fact, it would be ironic to have corporate leaders who have often created or exacerbated racial inequity at the forefront of the campaign to alleviate human suffering.

To be sure, partnerships between corporations and racial justice organizations are not without risk for either corporations or racial justice organizations. Corporate leaders may worry that activists will articulate visions that are too bold, lack expertise in corporate governance, or suggest plans that could reduce shareholder value. Activists might worry that corporate leaders might co-opt their efforts or appropriate and reduce them to mere tokens. Both sets of concerns are valid, and as civil rights history illustrates, neither is novel. It is crucial that corporations and activists truly committed to racial justice seize this moment. Such a collaboration could move corporations to work in closer solidarity with racial justice activists.

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373. Starbucks, for example, prohibited employees from wearing T-shirts supporting the movement. It later reversed its stance only after public shaming and continued protests. Other charges of racial hypocrisy continued. Heather Murphy, Starbucks Will Allow Employees to Wear Black Lives Matter Apparel, N.Y. Times (June 12, 2020), https://www.nytimes.com/2020/06/12/business/starbucks-blm-ban-reversed.html (on file with the *Columbia Law Review*) (last updated Oct. 18, 2021). UNITE HERE, a labor union representing hotel, restaurant, and airport workers, studied pay in twenty-seven U.S. airports and reported that the median pay for Black Starbucks baristas was $1.85 less than for white baristas. See Press Release, UNITE HERE, Median Pay Is Lower for Black Baristas Than for White Baristas Across Starbucks Stores at 27 Airports Operated by HMSHost, New Report Shows (Feb. 25, 2020), https://unitehere.org/press-releases/median-pay-is-lower-for-black-baristas-than-for-white-baristas-across-starbucks-stores-at-27-airports-operated-by-hmshost-new-report-shows/ [https://perma.cc/KGG8-EMQ2].

374. Jan, supra note 347.

C. *From Corporate Racial Responsibility to Corporate Legal Responsibility*

If corporations are sincerely interested in advancing racial justice, they should collaborate with racial justice organizations and work to transform issues of corporate racial responsibility into issues of corporate legal responsibility. This is no doubt this Article's most provocative and important recommendation. Corporate racial responsibility relies solely on corporate generosity; a corporation's commitments to racial justice are discretionary under this model. But when corporate racial responsibility transforms into corporate legal responsibility, racial justice initiatives have greater permanence and legitimacy, and our society becomes more just and democratic.

As the history of Title II illustrated, some corporations will not advance the cause of racial justice unless required to do so.[375] Other corporations have engaged in corporate racial responsibility precisely to avoid legal regulation.[376] Corporations themselves should lobby for new civil rights laws; if they did so, it would spur major structural transformation.

This Article's authors strongly believe that moral arguments for racial justice are more compelling than market arguments for racial justice. Corporations of conscience seek to advance racial justice in *any* situation—regardless of profitability. But while we privilege the ethical demands of racial justice, we also realize that others might show how corporate efforts to advance racial justice can be financially profitable, too. For example, if a corporation lobbies for racial justice, that lobbying effort might enhance the corporation's public image. Recent research demonstrates that most consumers want their brands to take public stances on social justice issues.[377] Corporations should not need a financial incentive to do social good, but here, doing good can lead to doing well.

Joining the push for corporate legal responsibility might improve society—and, subsequently, a corporation's bottom line—in other ways. The relationship between the 2020 racial justice protests and healthcare reform offers an example.[378] During the protests, racial justice activists

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375. See supra section II.B.

376. See Ruth V. Aguilera, Deborah E. Rupp, Cynthia A. Williams & Jyoti Ganapathi, Putting the S Back in Corporate Social Responsibility: A Multilevel Theory of Social Change in Organizations, 32 Acad. Mgmt. Rev. 836, 851 (2007) (arguing that business interest groups are engaging in CSR discourse to "forestall prescriptive government regulation").

377. See Kantaro Komiya, A Majority of Consumers Expect Brands to Take a Stand on Issues Before Purchasing, Survey Finds, Barron's (July 7, 2020), https://www.barrons.com/articles/a-majority-of-consumers-expect-brands-to-take-a-stand-on-issues-before-purchasing-survey-finds-51594143666 (on file with the *Columbia Law Review*) ("Nearly 60% of Americans want the companies they buy products from to have a position about issues such as racial discrimination and social justice, a survey carried out in June [2020] among 1,004 respondents found.").

378. For background on U.S. corporate attitudes toward healthcare access, see generally Phil Galewitz, Why Some CEOs Figure 'Medicare for All' Is Good for Business, KFF Health News (June 7, 2019), https://kffhealthnews.org/news/a-large-employer-frames-the-

often chanted, "I can't breathe," George Floyd's last words.[379] But the chant "I can't breathe" soon took on broader significance. Activists increasingly highlighted how COVID-19 disproportionately infected and killed Black people.[380] The COVID-19 pandemic exposed and exacerbated a much deeper U.S. healthcare crisis. People of color in the United States have lower rates of health insurance and face poorer health outcomes than white people.[381]

In the wake of the racial justice protests, major pharmaceutical companies touted their commitments to health equity.[382] While the depth of these corporate commitments was questionable at that time, these companies' racial resolve may soon be tested again. In 2023, the U.S. government moved its COVID-19 vaccine distribution efforts from the public sector to the private sector.[383] Leading pharmaceutical companies have announced their plans to astronomically increase the costs of their COVID-19 vaccines in response.[384] This dramatic spike in vaccine costs will almost certainly perpetuate health disparities along race and class lines. The uninsured and underinsured have no promise that they will continue to receive free

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medicare-for-all-debate/ [https://perma.cc/4U37-VZWQ] (describing changing attitudes about single-payer healthcare among U.S. employers); Janet Nguyen, Why Don't U.S. Businesses Show More Support for Single-Payer Health Care?, Marketplace (June 10, 2021), https://www.marketplace.org/2021/06/10/why-dont-u-s-businesses-show-more-support-for-single-payer-health-care [https://perma.cc/X6BT-HJSF] (discussing why U.S. business has traditionally opposed single-payer healthcare).

379. See Hannah Hagemann & Scott Neuman, 'I Can't Breathe': Peaceful Demonstrators Continue to Rally Over George Floyd's Death, NPR (June 3, 2020), https://www.npr.org/2020/06/03/869186653/demonstrations-over-george-floyds-death-and-police-brutality-carry-on [https://perma.cc/2LJG-7ZLT] (last updated June 4, 2020).

380. Cf. Maritza Vasquez Reyes, Student Essay, The Disproportional Impact of COVID-19 on African Americans, 22 Health & Hum. Rts. J. 299, 301–03 (2020) (studying the factors contributing to COVID-19's disproportionate impact on Black communities).

381. See Rodney A. Brooks, Hard Hit by COVID-19, Black Americans Are Recovering Slowly, Nat'l Geographic (May 23, 2022), https://www.nationalgeographic.com/history/article/hard-hit-by-covid-19-black-americans-are-recovering-slowly (on file with the *Columbia Law Review*); Latoya Hill, Samantha Artiga & Anthony Damico, Health Coverage by Race and Ethnicity, 2010–2022, KFF, (Jan. 11, 2024), https://www.kff.org/racial-equity-and-health-policy/issue-brief/health-coverage-by-race-and-ethnicity/ [https://perma.cc/R892-SR7R].

382. See, e.g., Poornima Apte, Moderna Executive on Advancing Health Equity in Medical Research and What All Businesses Can Learn, CO—: The Leap (June 5, 2023), https://www.uschamber.com/co/good-company/the-leap/moderna-advancing-health-equity [https://perma.cc/JBM7-WNNK]; Changing the World Through Equity, Pfizer, https://www.pfizer.com/about/responsibility/diversity-and-inclusion/changing-world-through-equity (on file with the *Columbia Law Review*) (last visited Jan. 21, 2024).

383. See Dan Diamond, Coronavirus Vaccine Shots Will Remain Free to Uninsured Under Biden Plan, Wash. Post (Apr. 18, 2023), https://www.washingtonpost.com/health/2023/04/18/coronavirus-vaccines-free-uninsured-biden-bridge-program (on file with the *Columbia Law Review*).

384. See id. (detailing how "vaccine makers [have] plan[ned] to charge as much as $130 per dose").

COVID-19 vaccines.[385] And though the Biden Administration has worked with vaccine makers to develop a temporary program to ease the financial transition to the private distribution system for COVID-19 vaccines, Administration officials have conceded the program's limitations.[386] This new program for the uninsured and underinsured is only temporary, has a limited supply of vaccines available, and relies on manufacturers like Moderna and Pfizer to volunteer their financial assistance to those who need help covering their vaccination costs.[387] Social justice should never be so dependent on corporate largesse.

There are meaningful and tangible ways to transform this issue of corporate racial responsibility into an issue of corporate legal responsibility. One way would be if pharmaceutical companies lobbied for and participated in, if enacted, the proposed Vaccines for Adults (VFA) program. The Biden Administration has requested that Congress create the VFA program to offer vaccines to uninsured adults at no cost.[388] Under the VFA, modeled after the existing Vaccines for Children (VFC) program, the CDC would be authorized to purchase vaccines directly from manufacturers at negotiated prices—significantly lower prices than the vaccines' list price—and provide them to uninsured adults to expand vaccine access.[389] Publicly purchased vaccines incentivize vaccine manufacturing, but more importantly, the passage of the VFA, like the VFC, would be an equitable structural reform and would radically reduce disparities in the vaccination rates of marginalized groups.[390] A second, more radical approach to increasing corporate legal responsibility and vaccine equity would be to require that pharmaceutical companies provide a government-designated quantity of free vaccines to the uninsured and underinsured for a stipulated number of years. The U.S. government provided pharmaceutical companies with billions of dollars in research and development funding to help develop COVID-19 vaccines, and vaccine makers are eager to receive new federal funding to create a new generation of COVID-19

385. See id. ("While vaccine manufacturers Moderna and Pfizer have pledged to create assistance programs to help cover the cost of shots for uninsured Americans, 'those are not guaranteed . . . .'" (quoting Jennifer Kates, Senior Vice President, Kaiser Fam. Found.)).

386. See id. ("Biden officials Tuesday characterized the [bridge access program] as a 'temporary solution.'").

387. See id. As one prominent healthcare industry leader commented about the program, "There's going to be a group of people, those who are uninsured and, frankly, those who are underinsured who will not have a way to get a coronavirus vaccine after that supply is gone." Id. (internal quotation marks omitted) (quoting Jennifer Kates, Senior Vice President, Kaiser Fam. Found.).

388. See Marquisha Johns, The U.S. Needs a Federal Program to Expand Vaccine Access and Equity for Adults, Ctr. for Am. Progress (Apr. 18, 2023), https://www.americanprogress.org/article/the-u-s-needs-a-federal-program-to-expand-vaccine-access-and-equity-for-adults [https://perma.cc/DX7F-F354].

389. Id.

390. Id.

vaccines.[391] Again, although the moral case for health equity should be case enough for any corporation, especially those that seek to provide lifesaving technology, it is also undeniable that financial benefits would flow from accepting this form of corporate legal responsibility.[392]

Establishing mandatory legal frameworks can help avoid the moral collective action problems that accompany a voluntarist model. For instance, Title II forced all covered corporations to recognize and respect core ideas of human dignity.[393] A corporation cannot receive any social benefits from resegregating patrons because this form of segregation is now unlawful.[394] Law created a dignitary baseline, and society benefited because all covered corporations had to conform to this basic standard. Although not our central concern, one might also note that establishing mandatory legal frameworks should appeal to those seeking business cases for justice, too, because law can end the economic collective action problems tied to voluntary racial justice efforts.[395] Some racial justice measures, such as requiring pharmaceutical companies that receive federal research funds to provide free COVID-19 vaccines to the uninsured, might not maximize corporate profits. But if the law requires all pharmaceutical companies receiving federal funds to adopt these measures, then it levels the playing field, and the disincentive to participate in the racial justice measure disappears.

Finally, and most provocatively, the push for greater corporate legal responsibility could remake electoral politics. To be sure, citizens should be deeply concerned about the inordinate power that corporations wield in U.S. politics.[396] But it does not appear that this longstanding issue will

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391. See Benjamin Mueller, Noah Weiland & Carl Zimmer, U.S. Vaccine Program Now Flush With Cash, but Short on Key Details, N.Y. Times (June 26, 2023), https://www.nytimes.com/2023/06/26/health/covid-vaccines-nextgen.html (on file with the *Columbia Law Review*) ("[V]accine makers have hurried to line up for the new federal money . . . .").

392. See id. (explaining that the Biden Administration has freed up $5 billion for new vaccines).

393. See supra section II.C.

394. See supra section II.C.

395. See Robin J. Ely & David A. Thomas, Getting Serious About Diversity: Enough Already With the Business Case, Harv. Bus. Rev., Nov.–Dec. 2020, at 115, 117 ("[O]rganizations have largely failed to adopt a learning orientation toward diversity and are no closer to reaping its benefits. Instead, business leaders and diversity advocates alike are advancing a simplistic and empirically unsubstantiated version of the business case.").

396. See Liz Kennedy, Corporate Capture Threatens Democratic Government, Ctr. for Am. Progress (Mar. 29, 2017), https://www.americanprogress.org/article/corporate-capture-threatens-democratic-government/ [https://perma.cc/C2AK-ZDR5] ("America faces a crisis of corporate capture of democratic government, where the economic power of corporations has been translated into political power with disastrous effects for people's lives.").

recede anytime soon, and the costs of nonparticipation are very high.[397] Corporations are well-resourced and uniquely positioned to influence politics, and this pattern will likely continue. Further, corporations often support politicians and public policies that conflict with their stated positions on racial justice.[398] A sincere effort to reconcile corporations' words and actions would end such corporate hypocrisy and limit the racial tokenism that both conservatives and liberals decry. Such an effort would force corporate leaders to live their politics.

CONCLUSION

Businesses have a long and mostly problematic history of engagement in racial issues in the United States. It therefore makes sense that they have a role to play in furthering racial equity and justice for marginalized people and communities of color. As the history surrounding the passage of Title II demonstrates, CSR failed to achieve desegregation because it did not center the concerns of Black dignity and civil rights. Rather, it emphasized profitability and property rights to make the case for businesses to support desegregation. These lessons are salient today as corporations engage in racial equity work. Sadly, present-day iterations of corporate racial responsibility are repeating many of the mistakes of the past. By grounding its justifications in terms of profitability and rejecting regulation that would ensure accountability, corporate racial responsibility subordinates human dignity to wealth maximization and reifies existing racial hierarchies to the detriment of those it should benefit.

For corporate racial responsibility to be meaningful and effective, it must elevate human dignity, internally improve racial equity, and support meaningful legal changes that further racial equity within society at large. Corporations have long been involved in racial issues. It is now time to make corporate racial responsibility an effective tool in achieving racial equity.

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397. Dorothy S. Lund & Leo E. Strine, Jr., Corporate Political Spending Is Bad Business, Harv. Bus. Rev., Jan.–Feb. 2022, at 130, 136 (discussing the intense pressure on corporations to participate in election spending).

398. Igor Derysh, Big Corporate Donors Claim to Support Racial Justice—But Fund Republicans Pushing Voting Limits, Salon (Apr. 17, 2021), https://www.salon.com/2021/04/17/big-corporate-donors-claim-to-support-racial-justice–but-fund-republicans-pushing-voting-limits [https://perma.cc/6GJ6-SCX4] (detailing how corporate donors that claim to support racial justice are funding candidates that have undermined or are undermining minority voting rights).

NOTES

THE OPTIMAL OPT-IN OPTION: PROTECTING VULNERABLE CONSUMERS IN THE EXPANDING PRIVACY LANDSCAPE

*Morgan Carter**

This Note addresses the ever-growing series of privacy laws being enacted throughout the United States and the danger that the "opt-out" data collection system poses to many populations. There is a disparity in the level of "digital literacy" throughout the United States, and as more consumer data privacy laws emerge and continue to replicate the existing legislation, that disparity deepens.

Patterns among who does and who does not opt out of data collection contribute to algorithmic bias. Access to consumer data can create discriminatory and unequal treatment, which may be exacerbated by disparities in participation in opt-out provisions, increasing the vulnerability of populations less aware of or educated about the potential dangers of data collection. It is crucial that the United States implement a more robust regulatory system regarding its opt-out provisions to protect those who are most vulnerable in the digital world.

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INTRODUCTION

In May 2016, ProPublica found that risk scores used nationwide to predict whether a defendant will commit a crime in the future are biased against Black people.[1] In a study of 7,000 defendants, their risk scores, and their actual recidivism rates, "[w]hite defendants were mislabeled as low risk more often than [B]lack defendants."[2] For-profit companies like Equivant survey and collect data on defendants and then generate these biased risk scores.[3] Like most developers, their goal is to create a more efficient, productive system that prevents the introduction of human errors. "The trick, of course, is to make sure the computer gets it right."[4]

In 2019, Ziad Obermeyer—a professor at the University of California, Berkeley's School of Public Health—and his team were looking into how algorithms inform healthcare management in large hospitals.[5] Their research revealed not only a problem in the healthcare industry but the tip of a systemically racist iceberg. An algorithm that was widely used by hospitals in the United States to help allocate healthcare to the patients visiting the hospital was guilty of "systematically discriminating against [B]lack people."[6] The data from the hospital Obermeyer and his team studied showed that the people who self-identified as Black "were

1. Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, Machine Bias, ProPublica (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/7QDL-SGA4].

2. Id.

3. Id. Equivant previously conducted business under the name "Northpointe" after a 2017 rebrand. Press Release, Equivant, CourtView Justice Solutions Inc., Constellation Justice Systems Inc., and Northpointe, Inc. Announce Company Rebrand to Equivant (Jan. 10, 2017), https://www.einnews.com/pr_news/361378637/courtview-justice-solutions-inc-constellation-justice-systems-inc-and-northpointe-inc-announce-company-rebrand-to-equivant [https://perma.cc/6TD4-QKXT].

4. Angwin et al., supra note 1.

5. Heidi Ledford, Millions Affected by Racial Bias in Health-Care Algorithm, 574 Nature 608, 608 (2019).

6. Id.

generally assigned lower risk scores than equally sick white people."[7] Black patients, though equally sick, were wrongly considered to be in less urgent or immediate need of care than white patients.[8]

The information and data that are collected on people can be twisted and used in discriminatory ways. Now more than ever, "the amount and variety of data that is collected from individuals has increased exponentially, ranging from structured numeric data to unstructured text documents such as email, video, audio and financial transactions."[9] Companies use, sell, and share this information.[10] Further, law enforcement buys these data to build massive and discriminatory police surveillance networks.[11] All these personal datasets are summarized using a collection of methods identified by scholars as "Big Data analytics,"[12] and they can be used to inform companies and institutions on whether to approve a loan, grant parole, or deny a job application, among other things.[13] With access to Big Data, machine learning comes in to help uncover consumer trends and patterns with the help of decisionmaking algorithms.[14] Businesses find it helpful when these algorithms categorize and recognize patterns in the data that they can use.[15] Although the concepts of information and patterns on their own give the impression of impartiality, bias and racism thrive off Big Data analysts sharing and selling data.[16]

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7. Id.

8. See id. ("As a result [of discriminatorily assigned lower risk scores] . . . [B]lack people were less likely to be referred to the programmes that provide more-personalized care.").

9. Maddalena Favaretto, Eva De Clercq & Bernice Simone Elger, Big Data and Discrimination: Perils, Promises and Solutions. A Systematic Review, J. Big Data, Dec. 5, 2019, at 1, 2.

10. See Sarah Lamdan, Defund the Police, and Defund Big Data Policing, Too, Jurist: Acad. Comment. (June 23, 2020), https://www.jurist.org/commentary/2020/06/sarah-lamdan-data-policing [https://perma.cc/8EV2-JCMG] (identifying Thomson Reuters and RELX as massive data analytics corporations engaging in the surveillance and sale of personal data).

11. Id. ("[T]oday's policing infrastructure . . . spends millions of dollars on an invisible, sprawling data surveillance industry[,] . . . form[ing] oppressive systems that discriminate against communities of color, refugees, and migrants.").

12. Favaretto et al., supra note 9, at 2 (defining "Big Data analytics" as "the plethora of advanced digital techniques (e.g.[,] data mining, neural networks, deep learning, profiling, automatic decision making and scoring systems) designed to analyze large datasets with the aim of revealing patterns, trends and associations, related to human behavior").

13. Id.

14. Chithrai Mani, How Is Big Data Analytics Using Machine Learning?, Forbes (Oct. 20, 2020), https://www.forbes.com/sites/forbestechcouncil/2020/10/20/how-is-big-data-analytics-using-machine-learning [https://perma.cc/9NFV-RXHQ].

15. Id.

16. See infra section I.A.

What, then, is being done about this? Only recently has the United States embarked on the journey of building privacy regulations and data-protection laws to protect the people who use varied technologies, social media, and websites.[17] The United States has seen enormous transformation in terms of privacy regulation and steps taken to combat the potential dangers inherent in a society that is interwoven with the online world.[18] States have been stitching together the first wave of defenses against privacy infringements on a state-by-state basis.[19]

Five states have taken necessary steps to strengthen their data privacy laws. These states have created seemingly more robust and comprehensive legislation that establishes a standard for consumer privacy. This legislation is already being enforced in these five states: California, Colorado, Connecticut, Utah, and Virginia.[20] California led the way on these data privacy and consumer laws with the California Consumer Privacy Act (CCPA), and the other four followed suit, even using much of the same verbiage as the CCPA.[21] Much of this language addresses companies that collect data, mandating full disclosure of what data is being taken and whether it is being sold.[22] Additionally, these laws mandate opt-out provisions in an effort to allow people to take further individual control over whether their data can be sold or accessed.[23] Data and consumer privacy concerns are rapidly growing: At least thirty-five states and the District of Columbia introduced or considered almost two hundred consumer privacy bills in 2022.[24]

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17. See infra sections I.B–.C.

18. See infra section I.D.

19. See id.

20. Andrew Folks, US State Privacy Legislation Tracker, Int'l Ass'n of Priv. Pros., https://iapp.org/resources/article/us-state-privacy-legislation-tracker [https://perma.cc/G7WL-8ADZ] (last updated Feb. 23, 2024) (presenting images and descriptions of state privacy legislation as it exists today, as well as when enacted laws will become effective and actually enforced).

21. California Consumer Privacy Laws, Bloomberg L., https://pro.bloomberglaw.com/brief/the-far-reaching-implications-of-the-california-consumer-privacy-act-ccpa/ [https://perma.cc/XEK8-86FH] (last visited Jan. 12, 2023) (stating that the CCPA is the "first comprehensive consumer privacy legislation in the U.S." and may serve as a model for other states).

22. Thorin Klosowski, The State of Consumer Data Privacy Laws in the US (and Why It Matters), N.Y. Times: Wirecutter (Sept. 6, 2021), https://www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us (on file with the *Columbia Law Review*) (explaining that "a company operating under these regulations must tell you if it's selling your data").

23. Id. (describing the "global opt out" requirement).

24. Pam Greenberg, 2022 Consumer Privacy Legislation, Nat'l Conf. of State Legislatures, https://www.ncsl.org/research/telecommunications-and-information-technology/2022-consumer-privacy-legislation.aspx [https://perma.cc/4W9J-3CTY] (last updated June 10, 2022).

As these data privacy concerns and protections morph and transform so rapidly, companies and organizations are keeping a close eye on quickly evolving state regulations to stay on top of how they would need to respond to such shifts. Law enforcement has already begun using data-driven predictive models to zero in on areas and communities likely to be involved in criminal activities.[25] Many of these data, which reflect preexisting biased arrest patterns, perpetuate the problem. Some policing in departments such as the Los Angeles Police Department (LAPD) has moved to "Big Data Policing," also called "data-informed community-focused policing" (DICFP).[26] Under this policy, law enforcement even coordinates directly with tech firms to surveil a person's presence online (social media postings), to investigate crimes, and to monitor what it would deem potential threats.[27] Before many of the consumer privacy regulations, tech companies were under little to no obligation to inform their users about how they were sharing their users' data or the ways their users' actions were being monitored.[28]

The emergence of the opt-out provision, specifically, returned some degree of agency to consumers over their privacy permissions and whether they allow a company to share or sell their data. In 2012, a story emerged detailing how Target was able to predict people's pregnancies before they had so much as told their families.[29] These predictions were possible

25. See Johana Bhuiyan, LAPD Ended Predictive Policing Programs Amid Public Outcry. A New Effort Shares Many of Their Flaws, The Guardian (Nov. 8, 2021), https://www.theguardian.com/us-news/2021/nov/07/lapd-predictive-policing-surveillance-reform [https://perma.cc/H8A4-6N3R] (discussing how new Los Angeles Police Department predictive policing programs "bear[] a striking resemblance" to past data-driven programs that came under immense scrutiny for disproportionately leading to overpolicing in Black and brown communities).

26. Id.; see also Sarah Brayne, Dye in the Cracks: The Limits of Legal Frameworks Governing Police Use of Big Data, 65 St. Louis U. L.J. 823, 826–28 (2021) (describing how the LAPD uses big data to surveil both the general population and suspects).

27. Sam Levin, Revealed: LAPD Officers Told to Collect Social Media Data on Every Civilian They Stop, Guardian (Sept. 8, 2021), https://www.theguardian.com/us-news/2021/sep/08/revealed-los-angeles-police-officers-gathering-social-media [https://perma.cc/4M5B-NL5D] (explaining how LAPD officers were told it was critical to collect civilian social media data for use in "investigations, arrests, and prosecutions") (quoting Memorandum from Michel R. Moore, Chief of Police, L.A. Police Dep't, to All Department Personnel, L.A. Police Dep't 1 (July 22, 2020), https://www.brennancenter.org/sites/default/files/2021-09/I.%20Beck%20FI%20Memo.pdf [https://perma.cc/LWZ9-PSW2])).

28. See Alison Divis, How the CCPA Benefits Consumers and Business Owners, Pac. Data Integrators, https://www.pacificdataintegrators.com/insights/ccpa-benefits [https://perma.cc/MYF3-WA7Q] (last visited Jan. 15, 2023) (explaining how the CCPA was set to change the privacy landscape).

29. Charles Duhigg, How Companies Learn Your Secrets, N.Y. Times (Feb. 16, 2012), https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html (on file with the *Columbia Law Review*).

thanks to a statistician, "predictive analytics," and unfettered access to consumer data.[30] Consumer data privacy and the right to opt out emerged after such events, and those who seek it out may exercise some agency to avoid similar situations. At least, that is the perception. Virtually all the enhanced-privacy and consumer protection regulations relevant here were passed within the previous three years, and countless more are inevitably on the horizon.[31] In the flurry of new laws both passed and upcoming, no one has thoroughly evaluated how effective these regulations are at avoiding these potential avenues of racism and bias. The opt-out provisions found within each of the new regulations contain "antidiscrimination" sections, but the language therein is thin and leaves many questions unanswered.[32] Is allowing for opt-out provisions and providing antidiscrimination language really benefitting diverse and marginalized communities? Or is it merely cementing the position of surveillance and tracking in our society while just making it transparently known that this is the status quo?

These new privacy laws' variety and novelty raise questions about their effectiveness and the impact that they actually have. Since machine learning of people's behaviors and preferences leads to wide-scale algorithmic bias, certain consumers opting out has also impacted the machine learning's algorithmic process. That is to say, there is algorithmic bias based on who *does* opt out versus who *does not*. Access to consumer data can create discriminatory and unequal treatment, which may be exacerbated by disparities in participation in opt-out provisions, increasing the vulnerability of populations less aware of or less educated about the potential dangers. It is crucial that the United States implement a more robust regulatory system regarding its opt-out provisions to protect those who are most vulnerable in the digital world.

This Note starts in Part I with a discussion of the history of discrimination enabled by a lack of data privacy. Part I then turns to state-specific privacy regulations, providing a general overview of the key rights found in these regulations and discussing the regulations' strengths. Part II looks at the laws as they are applied and breaks down the ways that the regulations may generate discrimination based on who decides to opt out. Part III addresses potential remedies in the form of a national privacy framework; mandated opt-in provisions in place of opt-out provisions; and altered presentation of the existing opt-out website pop-ups to make them both easy to understand and unavoidable by consumers.

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30. See id. (identifying these three factors as central reasons for Target's successful predictions).

31. See Greenberg, supra note 24 (providing an overview of the progression of consumer privacy legislation).

32. See infra section I.D.3.

I. CONSUMER PRIVACY AND DISCRIMINATORY ALGORITHMS

A. *Racial Discrimination in Consumer Data Collection and Sharing Practices*

People of color have to fight against bias and systemic racism that have most recently manifested themselves in the form of algorithms and the use of consumer data.[33] There is a distinct trend of Black and brown people being "stripped of equitable opportunities in housing, schools, loans, and employment because of biased data."[34]

Public policy executive and social scientist Dominique Harrison enumerates the ways that Black and brown people have seen the direct and negative impacts of the problematic use of consumer information, including its use in voter suppression and racial targeting. In the 2016 elections, for instance, "[t]he Russian Internet Research Agency (IRA) used voter suppression tactics on online platforms, such as Twitter, Facebook, Instagram, and YouTube[,] to influence African Americans" and spread misinformation to those targeted communities.[35] The bias in corporate algorithms has also been the cause of targeted and racist marketing policies and practices used by tech companies.[36]

In 2019, HUD sued Facebook for permitting advertisers to market to groups characterized by race, gender, and religion with the use of ad-targeting tools and algorithms.[37] As a result of the biased algorithm, "[a]ds about homes for sale were . . . shown to more white users, while ads for rentals were shown to more minorities."[38] Consumer data includes information such as one's age, gender, race, recent purchases, social media engagement, website visits, most viewed pages, and more.[39] The bias comes in during the collection and resulting utilization of this data, and some believe that these algorithms and Big Data are likely "making the world worse by accelerating the problems in the world that make things unjust."[40]

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33. See Dominique Harrison, Civil Rights Violations in the Face of Technological Change, Aspen Inst. (Nov. 2019), https://www.aspeninstitute.org/blog-posts/civil-rights-violations-in-the-face-of-technological-change [https://perma.cc/5ZH8-KMTH] (last updated Oct. 22, 2020) (providing examples and an analysis of the ways that discrimination from technology algorithms impacts communities of color).

34. Id.

35. Id.

36. Id.

37. Karen Hao, Facebook's Ad-Serving Algorithm Discriminates by Gender and Race, MIT Tech. Rev. (Apr. 5, 2019), https://www.technologyreview.com/2019/04/05/1175/facebook-algorithm-discriminates-ai-bias [https://perma.cc/U6SL-977N].

38. Id.

39. Indrajeet Deshpande, What Is Customer Data? Definition, Types, Collection, Validation and Analysis, Spiceworks, https://www.spiceworks.com/marketing/customer-data/articles/what-is-customer-data [https://perma.cc/5KB7-SXTN] (last updated Mar. 16, 2021).

40. Hao, supra note 37 (internal quotation marks omitted) (quoting Christian Sandvig, Director of the Center for Ethics, Society, and Computing at the University of Michigan).

Many perceived the emergence of consumer privacy regulations to be an optimistic opportunity to hold companies accountable for sharing, selling, and using consumer data.[41]

In the consumer rights provisions provided within regulations such as the Biometric Information Privacy Act (BIPA), the CCPA, the California Privacy Rights Act (CPRA), and the Colorado Privacy Act (CPA), there was hope of resolution and additional protections to guard against such injustices as these for marginalized communities. On the other hand, there was also awareness that businesses may instead "find ways around the requirements."[42]

B. *The Evolution of Privacy Regulation in the United States*

The present wave of privacy regulation comes as today's world finds itself increasingly online, be it with social media, shopping, or even banking. The United States lacks one singular, comprehensive data privacy law or framework, like the European Union's General Data Protection Regulation (GDPR). Rather, the United States has regulated data privacy on a state-by-state basis, starting with the CCPA. The sheer number of varying data privacy laws being enacted during such a short period of time might come across as confusing. That being said, it also sends the message to businesses that protecting consumer data is a priority, even if it has to be done in a piecemeal way. Amie Stepanovich of the Silicon Flatirons Center described this process as "raising the water level" and added that "companies often choose 'to apply the stronger, more protective standard across the board for everyone' when legal standards go up."[43] While these legal standards improve, the objective must be to create and also preserve a system that does not create wide inequities and perpetuate discrimination at the same time.

The right to opt out of data sharing and selling is one of the many provisions of the evolving statewide privacy protection framework that has persisted in many states' data privacy regulations following the CCPA.[44] When consumers know about and consequently opt out of the sharing, selling, or use of their personal data, agency is returned to the consumer

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41. See, e.g., Cyrus Farivar & David Ingram, California's New Data Privacy Law Could Change the Internet in the US, CNBC (May 14, 2019), https://www.cnbc.com/2019/05/14/california-consumer-privacy-act-could-change-the-internet-in-the-us.html [https://perma.cc/K9D5-LNAW] ("Consumer advocates say the [California Consumer Privacy Act] could meaningfully improve online privacy without losing what people like best about the internet.").

42. Id.

43. Klosowski, supra note 22.

44. See Robb Hiscock, The Ultimate Guide to US Privacy, OneTrust (Dec. 9, 2022), https://www.onetrust.com/blog/the-ultimate-guide-to-us-privacy [https://perma.cc/XMK4-DEKN] (outlining the opt-out provisions common across six new state privacy laws following the passage of the CCPA).

and a leash is put on corporations that have been known to abuse this access in the past.

C. *The General Consumer Data Privacy Landscape Before More Comprehensive Privacy Regulations*

As the CCPA was being analyzed during its enactment in 2020, discussion arose as to how the new legislation was going to affect consumers' lives.[45] Other camps wondered whether it would even be effective in the fight to protect privacy.[46]

Before the enactment of the CCPA, the internet in the United States was its own version of a Wild West, void of comprehensive data privacy regulations allowing consumers agency in how and why their data were used.[47] In 2019, a research study showed that most Americans navigated their daily lives with the belief that their data were constantly being tracked but the feeling that they had very little or no control over that reality.[48] Additionally, most Americans felt they lacked understanding about what data collection does and how it affects them.[49] Many did not realize the gravity of data privacy protections until the Facebook Senate hearing with Mark Zuckerberg in 2017. The hearing revealed that Cambridge Analytica, along with many other firms working with Facebook, had been allowed to access data and information of up to eighty-seven million Facebook users worldwide without their consent.[50]

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45. See Geoffrey A. Fowler, Don't Sell My Data! We Finally Have a Law for That, Wash. Post (Feb. 19, 2020), https://www.washingtonpost.com/technology/2020/02/06/ccpa-faq (on file with the *Columbia Law Review*) (discussing the CCPA's impact on consumers and common questions about the law); Rachel Lerman, California Begins Enforcing Digital Privacy Law, Despite Calls for Delay, Wash. Post (July 1, 2020), https://www.washingtonpost.com/technology/2020/07/01/ccpa-enforcement-california (on file with the *Columbia Law Review*) ("It gives consumers in the state . . . broad ability to be able to request that companies tell them what personal data they hold on each person and to ask companies to stop selling their personal data to third-party advertisers or others.").

46. See Fowler, supra note 45 (discussing the way in which "[p]rivacy advocates have mixed feelings about the CCPA").

47. See id. (arguing that the CCPA is "America's first broad data privacy law" and gives people the power to control more of how corporations gather and sell consumer data than did previous regimes).

48. See Brooke Auxier, Lee Rainie, Monica Anderson, Andrew Perrin, Madhu Kumar & Erica Turner, Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information, Pew Rsch. Ctr. (Nov. 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information [https://perma.cc/SNG5-LLAY] (polling Americans and finding that a majority feel that most of their online activity is being tracked but they have little-to-no control over their data).

49. Id.

50. Paolo Zialcita, Facebook Pays $643,000 Fine for Role in Cambridge Analytica Scandal, NPR (Oct. 30, 2019), https://www.npr.org/2019/10/30/774749376/facebook-pays-643-000-fine-for-role-in-cambridge-analytica-scandal [https://perma.cc/Y84T-F5VQ].

In the midst of consumers' confusion and misunderstanding, discriminatory practices such as the denial of "credit cards to consumers based on language proficiency and ethnicity" were carried out through "discriminatorily constructed algorithms."[51] Furthermore, marginalized communities felt several other types of harm, "such as abusive lending practices and housing discrimination that has stopped people of color from building wealth through homeownership."[52]

D. *The Emergence of the CCPA, the CPRA, the CPA, and the BIPA*

1. *Origin and Purpose of the Privacy Acts.* — The CCPA was a ballot initiative in 2018 and was continually amended over the course of the next year.[53] Some of the initial amendments included the changing of the definition of "personal information" and exemptions of certain parties from some of the personal information and opt-out obligations of the CCPA.[54] The law went into effect on January 1, 2020, and was enforceable as of July 1, 2020.[55] The CCPA is extensive and far-reaching, with comprehensive definitions of "personal information," "data sharing," and "data selling" and also finds an expansive area of generality in terms of the businesses that it affects. The CPRA builds on the CCPA, closing some of the gaps left by the CCPA while leaving some entities untouched by either law. The legislation went into effect on January 1, 2023, and is enforced by the first, though presumably not last, data privacy protection agency in the country: the California Privacy Protection Agency (CPPA).[56] The primary function of the CPPA is that it "mandates all businesses to audit their data collection, storage, processing and sharing mechanisms."[57] In Colorado, the

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51. Valencia Richardson, Note, Data-Driven Discrimination: A Case for Equal Protection in the Racially Disparate Impact of Big Data, 12 Geo. J.L. & Mod. Critical Race Persps. 209, 210 (2020).

52. Abi Velasco & Remington A. Gregg, Pub. Citizen, Racial Equity & Consumer Protection 4 (2022), https://www.citizen.org/wp-content/uploads/Racial-Equity-Consumer-Protection-Issue-Brief_final_1-19-22-page-numbers.pdf [https://perma.cc/9LSW-LJMS].

53. See California Consumer Privacy Act, PrivacyRights.org (Jan. 6, 2020), https://privacyrights.org/resources/california-consumer-privacy-act [https://perma.cc/6KEQ-4C5E] (providing a history of the CCPA from ballot initiative to passage to subsequent amendment).

54. See id. (observing that the definition of "personal information" was amended to "specifically exclude de-identified and aggregate information" and other exemptions from the law included data indicating illegal activities, employment data, and data protected under other statutory schemes, such as medical information).

55. Id.

56. Anas Baig, California Privacy Rights Act (CPRA), Securiti (Mar. 1, 2022), https://securiti.ai/what-is-california-privacy-rights-act-cpra [https://perma.cc/6KVB-76GP] (last updated Dec. 13, 2023).

57. Id.

CPA was signed on July 7, 2021, and took effect on July 1, 2023.[58] The CPA is said to be "a bit stricter than the [Virginia Consumer Data Privacy Act] and a bit more lenient than the CCPA."[59] In many ways, the CPA borrows pieces from the CCPA, while in others it is a complete departure. For instance, one area of similarity is found in the Act's definition of "sale," wherein a sale occurs when the personal information is exchanged for "monetary or other valuable consideration."[60] "In this sense, the CPA is more similar to the CCPA because controllers will be left to ponder what is 'other valuable consideration.'"[61] Even before these more recent pushes for privacy, the BIPA was enacted in Illinois in 2008.[62] The first enactment of its kind in the nation, the BIPA covers "entities that use and store biometric identifiers" and forces them to "comply with certain requirements" in their process of doing so while also providing a private right of action if the entities do not comply.[63] States like Washington and Texas also have biometric information protection laws, but they lack the private right of action component and are less expansive.[64] These four privacy regulations represent the variety of privacy and consumer data regulations being enacted across the country. In many ways, they overlap and even contain the same language. In many other ways, however, they depart from one another, charting their own paths in the privacy space and leaving future states to pick and choose the regulatory language they adopt. Two crucial provisions found in these regulations are the opt-out provision and the right to nondiscrimination.

2. *The Right to Opt Out.* — The opt-out right was at the heart of California's recent settlement with makeup brand Sephora after the state said the company "failed to follow opt-out requests that its customers made

58. 2021 Colo. Sess. Laws 3445; Colorado Privacy Act (CPA), Phil Weiser: Colo. Att'y Gen., https://coag.gov/resources/colorado-privacy-act [https://perma.cc/252S-E3TX] (last visited Jan. 19, 2024).

59. Sarah Rippy, Colorado Privacy Act Becomes Law, Int'l Ass'n of Priv. Pros. (July 8, 2021), https://iapp.org/news/a/colorado-privacy-act-becomes-law [https://perma.cc/GJM7-24NZ].

60. Colo. Rev. Stat. § 6-1-1303(23)(a)–(b) (2023). "De-identified data" are also defined as data that cannot be reasonably used to draw conclusions about or to link to an identified or identifiable individual. See id. § 6-1-1303(11).

61. Rippy, supra note 59.

62. Is Biometric Information Protected by Privacy Laws?, Bloomberg L. (May 3, 2021), https://pro.bloomberglaw.com/brief/biometric-data-privacy-laws-and-lawsuits [https://perma.cc/WDB4-29VY].

63. Id.

64. See id. (expanding upon the ways in which Illinois, Texas, and Washington biometric privacy statutes differ from one another).

via browser privacy controls."[65] The case came as a shock to many, exhibiting the financial repercussions that companies could risk by violating privacy regulations.

The CCPA includes "opt-out" provisions that permit a consumer to "direct a business that sells personal information about the consumer to third parties not to sell the consumer's personal information."[66] Additionally, when businesses sell consumers' personal information to a third party, they are obligated to provide consumers with explicit notice that the information is being sold, along with the option to opt out of sale.[67] A degree of agency is given back to consumers here, allowing them to revoke businesses' ability to sell their information to a third party. The CCPA's data sharing and selling provisions require that businesses provide "a clear and conspicuous link on the business's internet homepages, titled 'Do Not Sell or Share My Personal Information,' to an internet web page that enables a consumer . . . to opt-out of the sale or sharing of the consumer's personal information."[68] It must be clear and accessible for consumers to find and use said link in order to opt out of the sale of their personal information. The CPRA uses this language while also adding the right to limit a business's use of Sensitive Personal Information (SPI), which "can compel corporations to limit the use of special categories of personal data," and an enhanced right to opt out, wherein the option to opt out of having personal information sold or shared is extended to cross-context behavioral advertising.[69] Furthermore, businesses need to update their privacy policies to let users know "if they plan to 'share' their data in addition to 'selling' their data. Under the CCPA, companies only needed to let users know if they planned on selling their data."[70]

The CPA's opt-out language mirrors that of the CCPA and the CPRA, ensuring that a consumer has the right to opt out of the processing of their personal data for uses outlined within the provision.[71] But the CPA opt-out right contains a provision not found in the CCPA. Consumers have the right to opt out of the processing of personal data for the purposes of targeted advertising, sale of personal data, or "profiling in furtherance of

65. Tom Chavez, Sephora's $1.2 Million Fine Proves Customer Privacy Is an Innovation Imperative, Forbes (Oct. 27, 2022), https://www.forbes.com/sites/tomchavez/2022/10/27/on-privacy-regulators-are-awakening-the-consumerand-its-an-innovation-imperative (on file with the *Columbia Law Review*).

66. Cal. Civ. Code § 1798.120 (2023).

67. Id. § 1798.115.

68. Id. § 1798.135.

69. Baig, supra note 56.

70. Id.

71. See Colo. Rev. Stat. § 6-1-1306(1)(a)(I) (2023) (granting the consumer the right to "opt out of the processing of personal data" related to "[t]argeted advertising," "sale of personal data," or "[p]rofiling in furtherance of decisions that produce legal or similarly significant effects concerning a consumer").

decisions that produce legal or similarly significant effects concerning a consumer."[72] As will be discussed in Part III, the scope and impact of this "profiling" language is largely unclear.[73]

Importantly, the BIPA also prevents the disclosure or dissemination of a person's biometric information to another entity unless: the subject or their legal representative consents to the disclosure; the "disclosure or redisclosure completes a financial transaction requested or authorized by the subject of the biometric identifier or the biometric information"; the disclosure is required by State or federal law; or the disclosure is required pursuant to a valid warrant or subpoena.[74] The BIPA does not have explicit opt-out language, though this is likely because it functions more like an "opt-in" system in which the consumer must explicitly consent for the information to be shared.[75]

3. *The Right to Nondiscrimination.* — With respect to the right to nondiscrimination, the CCPA states:

> (1) A business shall not discriminate against a consumer because the consumer exercised any of the consumer's rights under this title, including, but not limited to, by:
>
> (A) Denying goods or services to the consumer.
>
> (B) Charging different prices or rates for goods or services, including through the use of discounts or other benefits or imposing penalties.
>
> (C) Providing a different level or quality of goods or services to the consumer.
>
> (D) Suggesting that the consumer will receive a different price or rate for goods or services or a different level or quality of goods or services.
>
> . . . .
>
> (2) Nothing in this subdivision prohibits a business . . . from charging a consumer a different price or rate, or from providing a different level or quality of goods or services to the consumer, if that difference is reasonably related to the value provided to the business by the consumer's data.[76]

In addition to the above provisions, a business is allowed to offer consumers a financial incentive for the sale, sharing, or retention of their data, so long as doing so is not unfair, unjust, or coercive.[77] The purpose of the nondiscrimination language found here is to prevent repercussions against consumers who decide to exercise the rights they are allowed

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72. Id.

73. See infra Part III.

74. National Biometric Information Privacy Act of 2020, S. 4400, 116th Cong. § 3(d) (2020).

75. Id.

76. Cal. Civ. Code § 1798.125 (2023).

77. Id. § 1798.125(b).

within these statutes. The CPRA, too, contains this language and sets out to protect these same consumer rights. It also adds that it is permissible for a business to offer loyalty or rewards programs for those who do choose to opt in, so long as the program remains consistent with the rest of the section.[78]

The CPA also includes a duty to avoid unlawful discrimination, but it additionally states that a business may not be prohibited from "offering a different price, rate, level, quality, or selection of goods or services to a consumer . . . if the offer is related to a consumer's voluntary participation in a bona fide loyalty, rewards, premium features, discount, or club card program."[79] So long as the price staggering or quality of service offered is related to the program offered, the separation of services there is lawful.[80] As stated in the CCPA and the CPRA, however, offering these staggered services based on whether a consumer permits the sharing, selling, or collection of their data without having a reasonably related reason for doing so would be unlawful.[81]

Contrary to the CCPA, the CPRA, and the CPA, the BIPA does not contain language around nondiscrimination surrounding the consent of personal biometric data and the exercise of one's rights related to this section. This is due to the nature of the BIPA, which is less about the consent surrounding the biometric data collection, and more about the processes required in obtaining and retaining it.[82]

E. *The Evolution of the Data Privacy Landscape After Additional Privacy Legislation*

In 2020, Facebook agreed to a $650 million settlement, one of the largest consumer data privacy settlements in U.S. history.[83] The claims alleged that Facebook had been subjecting users to facial recognition technology without user consent in violation of the BIPA.[84] The settlement served as a wake-up call that businesses must take privacy regulations seriously and update their processes to be in alignment with the regulations, or they could face monetary consequences. Similarly, the BIPA provision creating a private right of action has been affirmed as applying so that "[a]ny person aggrieved by a violation of th[e] Act shall have a right of

78. Id. § 1798.125(e).

79. Colo. Rev. Stat. § 6-1-1308(1)(d) (2023).

80. Id.

81. Cal. Civ. Code § 1798.120.

82. See Is Biometric Information Protected by Privacy Laws?, supra note 62 (outlining the functionality and purpose of the BIPA).

83. Id.

84. Patel v. Facebook, Inc., 932 F.3d 1264, 1267 (9th Cir. 2019) ("Plaintiffs' complaint alleges that Facebook subjected them to facial-recognition technology without complying with an Illinois statute intended to safeguard their privacy.").

action in a State circuit court."[85] By giving this power back to consumers, businesses are held accountable for the ways they collect, sell, and share data.

The CCPA's inclusion of the right to opt out of data sharing and its mandate that companies provide notice and information of how consumer data are sold and shared in turn allows consumers to make an informed choice to exclude themselves from the process of data collection and sharing. Advertising technology companies have had to comply with the new regulations, and the results of their compliance are apparent.

The Meta Platforms' quarterly report form explained that regulations like the CCPA have impacted the company's ability to generate targeted advertisement materials and revenue through their ads:

> [A]dvertising revenue has been, and we expect will continue to be, adversely affected by reduced marketer spending as a result of limitations on our ad targeting and measurement tools arising from changes to the regulatory environment and third-party mobile operating systems and browsers.
>
> In particular, legislative and regulatory developments such as the General Data Protection Regulation, ePrivacy Directive, and California Consumer Privacy Act have impacted our ability to use data signals in our ad products, and we expect these and other developments such as the Digital Markets Act will have further impact in the future. As a result, we have implemented, and we will continue to implement, changes to our products and user data practices, which reduce our ability to effectively target and measure ads.[86]

While not ideal for the company's bottom line, this response shows that companies like Meta are attempting to abide by the CCPA and other privacy regulations and feeling the heat from moving away from their previous data collecting, selling, and sharing techniques. The loss of profits in the existing privacy landscape could provide an incentive for additional creativity in both interpretation and application of the privacy regulations.[87]

Because the privacy environment will only continue to morph as additional regulations are passed and enforced nationwide, there is the possibility that online platforms and businesses that make use of

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85. Rosenbach v. Six Flags Ent. Corp., 129 N.E.3d 1197, 1207 (Ill. 2019) (holding that "an individual need not allege some actual injury or adverse effect, beyond violation of his or her rights under the Act").

86. Meta Platforms, Inc., Annual Report (Form 10-Q), at 33 (Oct. 26, 2022), https://www.sec.gov/Archives/edgar/data/1326801/000132680123000013/meta-20221231.htm [https://perma.cc/F93S-RSXJ].

87. See, e.g., Sara Quach, Park Thaichon, Kelly D. Martin, Scott Weaven & Robert W. Palmatier, Digital Technologies: Tensions in Privacy and Data, 50 J. Acad. Mktg. Sci. 1299, 1299–300 (2022) (acknowledging the financial burden that privacy regulations place on firms and proposing strategies that balance firm, consumer, and regulatory interests).

consumers' personal information will find and use loopholes. Businesses are increasingly likely to try to "find ways around the requirements."[88] Attempted avoidance is even more likely considering that the total absence of federal data privacy regulations means that businesses need to be "privy to the nuances" of each state's privacy regulations in a "rapidly changing ad tech industry."[89] Motivations like these, coupled with an ability to infer information about the parties who are less likely to opt out of data collection and sale, could create a fertile ground for inequality and exploitation of the data collected.

II. THE IMPACT OF THE RIGHT TO OPT OUT

A. *Who Is Left Behind in the Opt-Out System*

The topic of data privacy is relatively new; details and information about it are constantly updating and evolving. Comprehension of what personal data collection entails varies, and while it may be a cause of anxiety for some, others seem either apathetic or resigned about who has their data and where it goes.[90] Sixty-two percent of American adults believe that it is impossible to navigate daily life without companies collecting their data.[91] Even given this, nearly eighty percent are concerned about the way that companies use their data.[92] When surveyed about six different forms of personal information, only a very small percentage felt that they had a lot of control over who can access their personal information.[93]

Some of this disconnect could likely be attributed to a degree of digital literacy. Digital literacy is "the ability to use information and communication technologies to find, evaluate, create, and communicate information, requiring both cognitive and technical skills."[94] The term encapsulates the way that being able to find, create, and share digital

88. Farivar & Ingram, supra note 41.

89. Meaghan Donahue, What Do State Privacy Laws Mean for the Ad Tech Industry?, New Am. (Aug. 17, 2021), https://www.newamerica.org/oti/briefs/what-do-state-privacy-laws-mean-for-the-ad-tech-industry [https://perma.cc/PJS9-GGNZ].

90. See Auxier et al., supra note 48.

91. Id.

92. Id.

93. Id. The six different forms of personal information inquired about within the survey were: physical location; posts, activities, or social media; private conversations online and text messaging; purchases made online and in person; websites visited; and search terms used online. Id.

94. Liana Loewus, What Is Digital Literacy?, EducationWeek (Nov. 8, 2016), https://www.edweek.org/teaching-learning/what-is-digital-literacy/2016/11 [https://perma.cc/3FQY-ZWFR] (internal quotation marks omitted) (quoting the American Library Association's digital-literacy task force).

content online is a skill of increasing importance today.[95] Digital literacy can also help one to understand online safety, including what to share online and how that can affect one's privacy and reputation.[96]

Recognizing "dark patterns" is one example of digital literacy, and "individuals of high digital literacy are more likely to be able to identify and avoid falling trap to dark patterns."[97] On the other hand, "[s]tudies have shown that certain groups are more susceptible to dark patterns, such as communities of color, lower income individuals, children, older adults, and other historically disadvantaged groups."[98] In the workforce, digital gaps and lack of digital literacy disproportionately affect people of color "in large part due to structural factors that are the product of longstanding inequities in American society, such as income and wealth gaps and uneven access to high-quality K-12 education."[99] Seventeen percent of Black workers, thirty-two percent of Latino workers, and ten percent of Asian American and Pacific Islander workers have no digital skills at all.[100]

As a result of this significant split, there is valid concern that this digital literacy trend extends to other areas of digital privacy, such as taking action to opt out of the sharing, selling, or use of personal information. The Pew Research Center's survey states that only "50% of white Americans feel they have control over who can access information about their on- and offline purchases, compared with 69% of [B]lack adults and 66% of Hispanic adults."[101] Considering this difference in conjunction with the fact that so many people of color also struggle with digital literacy, an important question arises: Are people of color more confident over their online control because they are proactively taking charge in an area of concern; or has a lack of digital literacy has created a sense of false confidence because they do not know that digital privacy is an area where there should *be* concern?

The specific data on who opts out is inherently harder to locate since those who opt out remove their data and personal information from the flow of information. A study published in 2020, however, was able to find

95. See id. (examining the diverse ways in which digital literacy facilitates social engagement).

96. Id.

97. Catherine Zhu, Dark Patterns—A New Frontier in Privacy Regulation, Reuters (July 29, 2021), https://www.reuters.com/legal/legalindustry/dark-patterns-new-frontier-privacy-regulation-2021-07-29 [https://perma.cc/C2QF-Z4Y6]. "Dark patterns," or the purposeful action by a business of manipulating a consumer to obscure or impair their own autonomy, is one of the dangers that consumer privacy laws have sought to remedy. Id.

98. Id.

99. Nat'l Skills Coal., Applying a Racial Equity Lens to Digital Literacy 1 (2020), https://files.eric.ed.gov/fulltext/ED607424.pdf [https://perma.cc/DEW9-VTED].

100. Id. at 1–2.

101. See Auxier et al., supra note 48 (retaining the word "Hispanic" as used in the original source).

that while opt-out rates are generally very high for higher-income individuals, as well as older populations, the opt-out rate "falls with both the Asian- and African-American population shares."[102] Additionally, while there was a higher rate of ad blocker software use in the Asian American group (indicating an alternative form of privacy protection), the data show African Americans were less likely to use ad blocking.[103] African Americans may therefore disproportionately lack any substantive form of privacy protection while also being less likely to opt out of data sharing.

If people of color, and specifically Black people, are not opting out of data sharing, their data increase in importance to businesses profiting off the trade of consumer data. The overall increase in parties opting out means that the remaining consumers who have not opted out are increasingly valuable.[104]

B. *Exacerbating Factors*

As discussed below, businesses have an incentive to find ways to be creative around the opt-out provisions in privacy regulations.[105] In April 2021, Apple released iOS 14.5, which mandated users' permission to utilize certain tracking features as a result of the App Tracking Transparency policy.[106] Ninety-six percent of U.S. users decided to opt out.[107] Consumers who exercise their right to opt out generate fifty-two percent less revenue compared to consumers who do not.[108] The impact of privacy regulation on these companies' data-related profits is being recognized as tremendous.[109]

1. *Dark Patterns.* — Tactics such as dark patterns were previously a means by which businesses would both capture and retain consumer information.[110] Now, the CPRA dictates that an "'agreement obtained through

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102. Garrett A. Johnson, Scott K. Shriver & Shaoyin Du, Consumer Privacy Choice in Online Advertising: Who Opts Out and at What Cost to Industry?, 39 Mktg. Sci. 33, 48 (2020).

103. Id.

104. See Guy Aridor, Yeon-Koo Che & Tobias Salz, The Effect of Privacy Regulation on the Data Industry: Empirical Evidence From GDPR 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26900, 2022), http://www.nber.org/papers/w26900.pdf [https://perma.cc/QY83-M5S7].

105. See infra section II.B.3.

106. Samuel Axon, 96% of US Users Opt Out of App Tracking in iOS 14.5, Analytics Find, Ars Technica (May 7, 2021), https://arstechnica.com/gadgets/2021/05/96-of-us-users-opt-out-of-app-tracking-in-ios-14-5-analytics-find [https://perma.cc/8CDY-C344].

107. Id.

108. Johnson et al., supra note 102, at 34.

109. See Axon, supra note 106 ("It seems that in the United States, at least, app developers and advertisers who rely on targeted mobile advertising for revenue are seeing their worst fears realized . . . .").

110. See supra note 97 for a discussion of dark patterns and the dangers they pose to consumer privacy.

use of dark patterns does not constitute consent[]' and prohibits businesses from employing dark patterns to obtain a user's consent to resume data processing once a user chooses to opt-out."[111] This is the same case for the Colorado Privacy Act.[112] But the definition of "dark pattern" is still emerging, so space exists for businesses to push the boundaries—by making opt-in buttons more aesthetically appealing or obvious than opt-out buttons or otherwise finding means to try to retain more consumers, for example.[113]

As discussed in section II.A, people with higher digital literacy levels are better equipped to evade dark patterns. This would further perpetuate the problem in which those who remain opted in are disproportionately people of color, low-income, or of a marginalized community.[114]

2. *Ambiguous Language*. — A provision found in the CPRA prohibits discrimination between those who opt out and those who do not though a price or service difference can still be permissible "if that difference is reasonably related to the value provided to the business by consumer's data."[115] The determination of "how that value will be calculated is anyone's guess," however.[116]

One example of how this scenario comes into play is if a business were to offer both a free service and a premium, paid service. Antidiscrimination regulations would prohibit a business from permitting only the users who have the premium, paid service to exercise their privacy rights (for example, right to know, right to delete, right to correct).[117] If the business were to claim that the "premium payment is reasonably related to the value of the consumer's data to the business," however, then this would no longer be impermissible.[118] One such means of showing this

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111. John J. Rolecki, Trends in Data Privacy Regulation: Dark Patterns, Nat'l L. Rev. (May 27, 2022), https://www.natlawreview.com/article/trends-data-privacy-regulation-dark-patterns [https://perma.cc/5CYY-2FNT] (quoting Cal. Civ. Code § 1798.140(h) (2023)).

112. Id.

113. David Stauss & Stacey Weber, How Do the CPRA, CPA, and VCDPA Treat Dark Patterns?, Husch Blackwell (Mar. 16, 2022), https://www.bytebacklaw.com/2022/03/how-do-the-cpra-cpa-and-vcdpa-treat-dark-patterns [https://perma.cc/9Q28-54QN] ("Precise definition and regulation of dark patterns is still emerging.").

114. See supra section II.A.

115. See Cal. Civ. Code § 1798.125.

116. CPRA and CCPA Compliance: What You Need to Know, Part & Sum, https://www.partandsum.com/blog/ccpa-compliance-what-you-need-to-know [https://perma.cc/XLY9-76DE] (last visited Dec. 28, 2022).

117. Alysa Z. Hutnik, Aaron J. Burstein & Alexander I. Schneider, The CCPA Non-Discrimination Right, Explained, Kelley Drye (Apr. 29, 2020), https://www.adlawaccess.com/2020/04/articles/the-ccpa-non-discrimination-right-explained [https://perma.cc/B2F6-VK4D]. The California Attorney General has also provided examples of how businesses may calculate the value of consumers' data in order to determine a reasonable price or service difference for users who do allow use of those data. Id.

118. Id.

value would be for a business to "determine that the payment for the premium version offsets the revenue provided by placing ads in the free version."[119] In such a case, the bar on discriminatory practices based on opt-out decisions seems fairly easy for a business to overcome, despite their prohibition.

An additional area of ambiguity rests within the understanding of "profiling" and the applications regarding automated decisionmaking. The CPRA, in amending the CCPA, addressed automated decisionmaking and "profiling consumers based on their 'performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location or movements.'"[120] Consumers can opt out or restrict the processing of their sensitive personal information for the purpose of profiling, but it's still unclear what implementation, or the result of requesting to opt out, would look like.[121] "It's questionable whether, for instance, the CPRA would disallow the infamous Target case," in which the company was able to determine and reveal to a teenager's family that she was pregnant.[122] Furthermore, there is varied understanding as to what would constitute "sensitive" personal information, especially in a world as rapidly evolving as our own.[123] Such confusion in distinguishing sensitive information from other categories of information can be seen in cases such as "emerging advancements in voice analysis that promise to discern an individual's COVID-19 status through the sound of their cough."[124] While the CPRA is designed to protect sensitive personal information, the specific details around what that entails and how far that protection extends are still being decided.

Ambiguities and potentially vague language, coupled with the newness of these regulations, mean that implementation and enforcement are still being configured, and businesses and consumers alike are still navigating how to approach these provisions.[125] State attorneys general will

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119. Id.

120. Shannon Yavorsky & Christina Lee, New State Privacy Laws Zero in on AI, JD Supra (Aug. 12, 2022), https://www.jdsupra.com/legalnews/new-state-privacy-laws-zero-in-on-ai-7686269 [https://perma.cc/TG77-2MT6] (quoting Cal. Civ. Code § 1798.140(z)) (misquotation in original).

121. Katelyn Ringrose, New Categories, New Rights: The CPRA's Opt-Out Provision for Sensitive Data, Int'l Ass'n of Priv. Pros. (Feb. 8, 2021), https://iapp.org/news/a/new-categories-new-rights-the-cpras-opt-out-provision-for-sensitive-data [https://perma.cc/V3KW-P96R].

122. Id.; see also supra text accompanying note 29.

123. Ringrose, supra note 121.

124. Id.

125. Ronald I. Raether & Sadia Mirza, Insight: So the CCPA Is Ambiguous—Now What?, Bloomberg L. (June 14, 2019), https://news.bloomberglaw.com/privacy-and-data-security/insight-so-the-ccpa-is-ambiguous-now-what (on file with the *Columbia Law Review*) (describing how "[o]rganizations seeking to comply with the new privacy law are left in the dark trying to understand not only the intent behind certain CCPA provisions, but also how to comply").

be in charge of enforcement, and both additional privacy regulations and future litigation may help to clarify the significance and application of these provisions.[126]

Here too, this may perpetuate the skew of parties opted in versus opted out of these privacy sales, sharing, or use schemes. One such way is by litigation itself. When a business collects or shares data in a way that a consumer-turned-plaintiff feels is violative of their right to opt out, they may bring litigation against the business to seek their desired remedy. Those who understand privacy regulations enough to notice a breach of their rights are more likely to be found in the digitally literate group who would otherwise have been, and would have exercised, that opt-out right.[127] Thus, this may return to the initial problem of skewing the opt-in and opt-out populations in an unrepresentative or potentially even discriminatory way.

3. *Business Maneuvers.* — Businesses have an incentive to seek out ways around the opt-out provisions found in privacy regulations like the CCPA, the CPA, the CPRA, and the BIPA.[128] In doing so, businesses may find loopholes in the privacy regulations as they currently stand that directly counteract their purpose.

One such area is through the ambiguous language outlined above.[129] Businesses may choose to loosely configure the "reasonably related" language to be favorable to their maintenance of consumer data. Although the business has the burden of providing and justifying the calculus for understanding this relatedness, businesses can construct the relatedness in a way that both suits them and is acceptable under the state privacy acts.

Additionally, the other problematic possibility is that businesses may use an individual's *lack* of opt-out as its own category to use for targeted ads or information collection. It is probable, given the overlap between those who do not opt out and those who fall prey to dark patterns because of that group's lack of digital literacy,[130] that businesses will double down on the populations who do not opt out.[131] Given that these populations have chosen not to opt out and may also lack the media literacy to recognize deceitful consumer practices, they are increasingly at the mercy of the way those businesses choose to use their sensitive, biometric, and personal information.

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126. See, e.g., Cal. Civ. Code § 1798.199.90 (2023) (giving the state Attorney General the power to enforce the CCPA); Colo. Rev. Stat. § 6-1-1331 (2023) (same); Va. Code Ann. § 59.1-584 (2023) (same).

127. See supra section II.A.

128. See supra notes 88–89 and accompanying text.

129. See supra section II.B.2.

130. See supra section II.A.

131. See supra note 104 and accompanying text.

Finally, a tactic that businesses may use to avoid privacy regulations impacting their bottom line is to ignore them altogether. As it stands, most privacy regulations, in large part because of their newness, contain a cure period to allow for a business to remediate any violations they make and come in line with the regulation.[132] In the Sephora case, the company was given a thirty-day warning period that they were in violation of the CCPA, and instead of working to repair the situation, they ignored the notice entirely.[133] Companies have been aware of the CCPA since 2018, yet "many brushed it off, believing it either wouldn't apply to them, hurt their checkbooks, or affect how consumers felt about their brands."[134] The Sephora settlement may serve as a wake-up call to many businesses, realizing that law enforcement made "clear [they would] not hesitate to enforce the law," that "[t]he kid gloves are coming off," and that businesses must either get with the program or face the consequences.[135] That said, newer regulations like the CPA did not undergo enforcement until July 2023.[136] Given this piecemeal enforcement, there is still a chance that businesses will choose to continue their violative practices for as long as they can get away with them before either litigation or enforcement periods come to pass.

III. ROOM FOR REMEDY

The online privacy space, while still constantly developing, runs the risk of being a force for discrimination and harmful practices. Privacy regulations are costing businesses money, and these companies can continue or find new ways to exploit vulnerable populations that may not have the requisite digital literacy to be able to avoid the traps, such as confusingly designed opt-out sections on their webpages. This Part proposes ways to limit the harm that is caused as the privacy landscape continues to evolve and change through moving towards an "opt-in" system, passing federal privacy regulation, or redesigning and orienting the way that opt-out provisions are presented to consumers.

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132. See, e.g., Data Privacy FAQ's: How Do Cure Periods Work Under the New State Privacy Laws?, Bryan Cave Leighton Paisner LLP (Aug. 24, 2022), https://www.bclplaw.com/en-US/insights/data-privacy-faqs-how-do-cure-periods-work-under-the-new-state-privacy-laws.html [https://perma.cc/343B-WUZ2]. The privacy laws of Colorado, Connecticut, Utah, and Virginia contain cure periods. The California law does not, although it does give the enforcement agency discretion in allowing a cure period. Id.

133. Chavez, supra note 65 (discussing "the 30-day warning period given to companies to fix their privacy violations—something California said Sephora received and ignored").

134. Id.

135. Id. (internal quotation marks omitted) (quoting California Attorney General Rob Bonta).

136. See 2021 Colo. Sess. Laws 3445; Colorado Privacy Act (CPA), supra note 58.

A. *Changing "Opt-Out" to "Opt-In"*

The General Data Protection Regulation (GDPR) is the European Union's comprehensive data privacy law,[137] and instead of the "opt-out" regime seen in the state regulations across the United States, the GDPR uses an opt-in format for privacy and data protection.[138] The GDPR requires opting in for any use of online trackers, called "cookies," and, in most cases, also requires asking the user for consent to process their data."[139] This consent must be "given freely, specific, informed, and unambiguous. Otherwise, it doesn't count as an opt-in."[140] The opt-in approach is also used by Brazil's and Thailand's data privacy regulations, demonstrating international acceptance of a framework the United States has not embraced.[141]

Under the GDPR, "a lawful ground is needed for collecting or using any personal data (under Article 6) and where collecting or using sensitive personal information is generally prohibited as a rule (under Article 9(1))."[142] Further, for a business to be permitted to access sensitive personal information, "a specific permission listed under Article 9(2) must be applicable, such as explicit opt-in consent, providing medical services, or for scientific research purposes, only as long as necessity and proportionality conditions are met."[143]

Considering that much of the current skewed representation of those who do not opt out versus those who do is due to lack of knowledge, awareness, or ability to navigate the options to be able to opt out,[144] an opt-in regime would largely remedy this issue. Instead of the default being data sharing or selling, the default would be the refusal of that, with an option to participate if desired. If this solution were adopted on a national scale, it would play a huge role in flipping a discriminatory aspect of the existing laws.

There are arguments that an opt-in privacy system would not offer additional protections for consumers. Although consumers would be

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137. See Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016, 2016 O.J. (L 119) 1, 32 ("This Regulation lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data.").

138. The Difference Between Opt-In vs Opt-Out Principles in Data Privacy: What You Need to Know, Secure Priv., https://secureprivacy.ai/blog/difference-beween-opt-in-and-opt-out [https://perma.cc/4AA3-FLRZ] [hereinafter Opt-In vs Opt-Out Principles in Data Privacy] (last visited Oct. 29, 2023).

139. Id.

140. Id.

141. Id.

142. Ringrose, supra note 121.

143. Id.

144. See supra notes 97–103 and accompanying text.

required to "accept" or "agree" to their data collection, much of the language informing consumers of their rights and the ways the data would be used is lengthy, averaging more than 2,500 words and "carefully drafted to maximize data use and minimize legal exposure."[145] As a result, "[f]ew consumers read these policies before agreeing to give up information, and the practices of ad networks and social media are not clear to most [consumers] when [they] click the 'I agree' button."[146] Even though the opt-in system would permit consumers to opt in, many people may be ignorant, or even indifferent, as to what they are agreeing to, so having an opt-in provision versus an opt-out would have little positive impact.[147]

But regardless of whether people are aware when they choose to opt in, proactively presenting the option to opt in requires an affirmative step to allow a business to collect personal information. This requirement alone may give pause, and as seen with the Apple iOS feature, many will take advantage of the ability to decide outright not to have their data collected, shared, or sold.[148] This forced decision may allow for the less digitally literate to find a way out of being one of the primary demographics left with their data traded by businesses without their understanding.

B. *Implementation of a Federal Data Privacy Law*

Another potential solution, perhaps implemented in conjunction with an opt-in system, is for the United States to implement its first comprehensive national data privacy law. Currently, no data or biometric privacy protection exists at the federal level, as the National Biometric Information Privacy Act proposed by Senators Jeff Merkley and Bernie Sanders in 2020 has since died.[149] In the meantime, state-specific biometric privacy information regulation governs. Although the patchwork system in place has had a ripple effect, spreading the implementation of data privacy laws across the states, it has been done individually, and the regulations are not always in agreement.[150] As it stands presently, "a complex state

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145. Peter M. Lefkowitz, Opinion, Why America Needs a Thoughtful Federal Privacy Law, N.Y. Times (June 25, 2019), https://www.nytimes.com/2019/06/25/opinion/congress-privacy-law.html (on file with the *Columbia Law Review*).

146. Id.

147. See id.

148. See supra note 105–107 and accompanying text.

149. S. 4400 (116th): National Biometric Privacy Act of 2020, GovTrack, https://www.govtrack.us/congress/bills/116/s4400 [https://perma.cc/ZD4G-5D2B] (last visited Dec. 28, 2022) (showing no vote on this bill).

150. Daniel Castro, Luke Dascoli & Gillian Diebold, Info. Tech. & Innovation Found., The Looming Cost of a Patchwork of State Privacy Laws 1 (2022), https://itif.org/publications/2022/01/24/looming-cost-patchwork-state-privacy-laws [https://perma.cc/226P-FL7T] ("Congress should pass federal privacy legislation that preempts states, protects consumers, and promotes innovation.").

privacy patchwork of 50 laws could cost companies over $1 trillion—and $200 billion for small businesses."[151] Privacy legislation functioning as independent, overlapping units instead of as a cohesive system could critically impact the United States, especially in competing in a global market, in which regulations like the GDPR provide comprehensive and inclusive systems of privacy regulation elsewhere.[152] By contrast, in the United States, businesses are forced to navigate and be aware of multiple state privacy regulations and be prepared to face repercussions from any of them. This system can be confusing and muddled.[153]

The FTC says that it has brought "hundreds of enforcement actions against companies over the last two decades for violations of privacy and data security."[154] Among these violations were unauthorized sharing and selling of sensitive personal information and inadequate protections of personal data.[155] Despite the enforcement actions the FTC has brought, the agency recognizes that its impact and ability to "deter illegal conduct is limited because it generally lacks authority to seek financial penalties for initial violations of law. That could change if the comprehensive privacy legislation were to clear Congress."[156] With a federal data privacy law, enforcement could come from the federal level instead of exclusively the state level. The ability for businesses to circumvent violations and perpetuate discriminatory practices could be diminished if they were exposed to additional, and perhaps more serious, ramifications from additional sources.

Yet, if a federal data privacy law is enacted, as may happen with the American Data Privacy Protection Act (ADPPA),[157] questions of effectiveness, preemption, and timeline for both enactment and enforcement arise.[158] For one, the ADPPA would preempt "the majority of state or local

151. Jordan Crenshaw, It's Time to Get Serious About National Data Privacy Legislation, U.S. Chamber of Com. (Jan. 28, 2022), https://www.uschamber.com/technology/data-privacy/its-time-to-get-serious-about-national-privacy-legislation [https://perma.cc/CHS4-WTS7] (citing Castro et al., supra note 148).

152. See Castro et al., supra note 150, at 1.

153. See supra note 43 and accompanying text.

154. Marcy Gordon, FTC Considers Regulating How Tech Companies Collect Your Data, WUSA9 (Aug. 11, 2022), https://www.wusa9.com/article/news/nation-world/ftc-considers-limiting-tech-data-collection/507-680349d7-a106-4af6-90b4-474fbb55f1a7 [https://perma.cc/3URT-92X8].

155. Id.

156. Id.

157. See American Data Privacy and Protection Act, H.R. 8152, 117th Cong. (2022).

158. Emily Catron & Gary Kibel, Federal Data Privacy Legislation: Differences With State Laws Raise Preemption Issues, Reuters (Aug. 10, 2022), https://www.reuters.com/legal/legalindustry/federal-data-privacy-legislation-differences-with-state-laws-raise-preemption-2022-08-10 [https://perma.cc/NU9H-BQZG].

laws, invalidating any similar provisions enacted under state law."[159] State laws like the BIPA would not be preempted by the ADPPA, however.[160] The result of this "strange preemption landscape is a continuation of the patchwork of multiple, non-comprehensive privacy and data protection laws that exists today. For example, many businesses would need to separately comply with the differing requirements of the ADPPA and certain state privacy laws."[161] Finally, in regard to enforcement, the ADPPA would be enforceable by state attorneys general, the FTC, private authorities, and private citizens, though private rights of action would be prohibited in the first two years of its enactment.[162] This enforcement scheme would extend the amount of time before individuals could pursue their own litigation and could mean fewer repercussions for violators in that time period. Under this framework, a possibility still exists that this unified Privacy Act would allow for opt-out provisions to persist and for the existing system to continue in much the same way it presently functions. The populations made most vulnerable by the existing provisions may remain exactly that: vulnerable.

An additional counterargument to having a federal data privacy law is that having "rigid rules about the 'sale of data' and limits on the use of artificial intelligence are not a productive way to prevent abuse and would impact activities essential to our safety and security."[163] To some degree, the sharing of data can assist with "essential activities—including advances in health care, cybersecurity, financial services and fundamental scientific research [which] depend upon large data sets and broad data sharing."[164] Although sharing large amounts of data may assist with matters such as health research, the dangers inherent in giving individual personal information to algorithms and businesses is incredibly high, especially in communities of color.[165]

Despite these counterarguments, implementation of a federal data privacy law could still offer significant protections to consumers, especially those from less-digitally-literate populations. A uniform data privacy law would allow for there to be a more robust list and understanding of the "do's" and "do not's" and a more predictable and consistent means of enforcement. Whereas now the patchwork system allows for businesses to find loopholes and exploit the newness and ambiguity therein, a federally

159. Id.

160. Id. ("[T]he ADPPA does not preempt all state privacy laws, such as the Illinois Biometric Information Privacy Act (BIPA).").

161. Id.

162. Id.

163. Lefkowitz, supra note 145.

164. Id.

165. See supra notes 5–7 and accompanying text.

implemented and strictly enforced regulation would help to clarify expectations and potentially remove some of the systematic manipulation. There is also a likelihood the United States would mimic the GDPR to take advantage of an existing framework spanning multiple countries and regions, which would also potentially mean use of the opt-in versus opt-out system. Further, it would be easier for rights organizations to disperse resources and inform the public of their rights on a national scale, rather than catering to fifty different privacy schemes, thus improving digital literacy and empowering consumers at risk of being targeted by businesses preying on those who do not opt out.

C. *Adjusting the Opt-Out Website Options*

Reformatting the way that websites and businesses present their opt-out options may benefit consumers by granting them tools to make an informed decision in the existing opt-out system. At present, the CCPA, the CPRA, and the CPA all require an obvious and apparent placement of the opt-out option on the webpage.[166] Further, as in the GDPR, entering a website triggers a pop-up that asks visitors if they consent to data collection, sharing, or selling.[167] Those populations who are digitally literate have a higher correlation with finding the aforementioned "opt-out" option and choosing to opt out.[168]

Additionally, as seen with the Apple example, when populations were given an explicit "opt-out" choice, ninety-six percent chose to opt out.[169] Presenting the opt-out option in the same manner that the opt-in has been presented could be beneficial by providing a means for those who are not as digitally literate to still establish whether they would like their data to be collected, shared, or sold. Upon entering a website, a consumer would encounter a pop-up button that would ask if they would like to opt out of data collection, sale, or sharing. While some businesses may already do this, making this pop-up a standard practice and a uniform style across the board could offer more vulnerable populations a fairer opportunity to take control of their data and information.

Including this language in the next wave of privacy regulation would allow for even greater transparency and perhaps an opportunity to avoid the racialized skew resultant from a digital literacy divide.

CONCLUSION

The world of privacy and data privacy regulation is here to stay. As the laws develop and states produce new and more comprehensive versions of

166. See supra section I.C.2.

167. Opt-In and Opt-Out Principles vs Data Privacy, supra note 138.

168. See supra section II.A.

169. Axon, supra note 106.

the regulations that came before them, it is increasingly apparent that questions about discrimination and bias in algorithms and data collection processes will persist, and rightly so. As it stands, there is space for businesses to use loopholes and ambiguities in the regulations to sidestep the mandates, perpetuating a discriminatory system in the process. The CCPA, the CPRA, the CPA, and the BIPA are all representative of the state of privacy regulation and the way that regulations may continue to evolve as time continues. As additional regulations do come about, moving to an opt-in system, creating federal data privacy legislation, or changing the appearance of the opt-out option may help to avoid the perpetuation of problematic business practices that these regulations have permitted in the consumer data privacy space. Privacy rights are more protected than they once were, but "[p]rogress looks like not completely perfect laws; there is no such thing. It looks like fits and starts."[170]

170. Shira Ovide, The Messy Progress on Data Privacy, N.Y. Times (May 12, 2022), https://www.nytimes.com/2022/05/12/technology/federal-data-privacy-law.html (on file with the *Columbia Law Review*) (last updated May 15, 2022).

CONTRACTS AND HOMOPHILE LEGAL STRATEGY

*Jackson Springer**

Law was central to the homophile movement, the main movement for queer rights between World War II and Stonewall. But examinations of this movement's engagement with law have exclusively focused on public law. Private law has received virtually no attention. This Note corrects that oversight. It unearths instances in which groups advocating for queer rights invoked contract law during the 1950s and 1960s. These moments reveal contract law's important—and previously overlooked—role in homophile legal strategy.

Homophile groups' use of contract law changed over the two decades of the movement. During the 1950s, those in the homophile movement used contract law to avoid legal disputes—a sort of "preventative law" that shielded queer people from the outside world's scrutiny. But after the movement's militarization in the early 1960s, queer organizations began making affirmative claims based in contract law. These claims served two purposes. On one hand, they were a tool queer people used to protect their public law rights when those rights were under attack. But organizations also saw the assertion of contract law rights as a goal itself—a key part of queer people's growing rights consciousness.

This Note thus gives contract law its rightful due in the history of homophile legal strategy. Its findings demonstrate that private law should play a larger role in both our study of social movements' legal strategy and our vision of a future in which marginalized groups have full equality under the law.

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INTRODUCTION

In its October 1960 issue, *ONE* Magazine—the United States' first widely distributed queer publication[1]—began promoting a thirty-day, seven-country tour of Europe that it was helping organize.[2] Set to depart in September 1961, the "CRUISE THROUGH EUROPE"[3] aimed to bring *ONE*'s "world-wide readership"[4] together "Under the Wing of the World's Outstanding Ceramic Designer."[5] At a time when law enforcement commonly targeted queer Americans for associating with each other publicly—calling it vagrancy, disorderly conduct, solicitation, or something similarly vague[6]—it is no surprise that over 300 *ONE* readers inquired about the trip[7] in hopes of leaving the country and experiencing the "Gay Capitals of Europe" together.[8]

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1. Rodger Streitmatter, *ONE* Magazine, *in* Gay Histories and Cultures: An Encyclopedia 648, 648 (George E. Haggerty, John Beynon & Douglas Eisner eds., 2d ed. 2012) [hereinafter Streitmatter, *ONE*]. The magazine was founded in the early 1950s by a group of men in Los Angeles and published a collection of personal essays, news stories, and literature related to the queer experience. Id. While the magazine's publication of queer material was radical for the time, it did not represent all queer people—its authors and audience were largely white, middle-class gay men. Mairead Case, *ONE*: The First Gay Magazine in the United States, JSTOR Daily (July 15, 2020), https://daily.jstor.org/one-the-first-gay-magazine-in-the-united-states/ [https://perma.cc/4E4M-9A4S] (last updated May 7, 2021).

2. Cruise Through Europe, ONE, Oct. 1960, at 32, 32.

3. Id. The advertisement's double entendre surely wasn't lost on the magazine's readership.

4. Letter from Bd. of Dirs., ONE, to the Readers of *ONE*, *in* ONE, Nov. 1961, at 4, 4 [hereinafter ONE Board Letter].

5. Cruise Through Europe, supra note 2, at 32.

6. See Risa Goluboff, Vagrant Nation 46–52 (2016) (discussing police use of vagrancy laws to arrest queer people); see also Anna Lvovsky, Vice Patrol: Cops, Courts, and the Struggle Over Urban Gay Life Before Stonewall 101–04 (2021) ("[V]ice squads in the 1950s turned their attention to the more public pockets of queer life. And, conveniently, they found themselves armed with a number of laws to enforce against them."); Patricia A. Cain, Litigating for Lesbian and Gay Rights: A Legal History, 79 Va. L. Rev. 1551, 1564–65 (1993) ("Various sorts of laws have been used to harass gay people."). Police could also target private queer conduct using sodomy laws, John D'Emilio, Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940–1970, at 14 (2d ed. 1998), which carried harsh penalties but also high "evidentiary burdens," Lvovsky, supra, at 104. Sodomy laws were on the books in every state until Illinois repealed its law by adopting the Model Penal Code in 1961. William N. Eskridge, Jr., Dishonorable Passions: Sodomy Law in America, 1861–2003, at 111 (2008) [hereinafter Eskridge, Dishonorable Passions].

7. See ONE Board Letter, supra note 4, at 4; see also Let's Cruise Through Europe, ONE, May 1961, at 32, 32 (noting "Only a Few Reservations Still Available").

8. Calendar of Events, ONE (Dec. 1969) (on file with the *Columbia Law Review*). This document, and many others this Note relies on, come from the extensive Gale Archives of Sexuality and Gender. Archives of Sexuality and Gender, Gale, https://www.gale.com/primary-sources/archives-of-sexuality-and-gender [https://perma.cc/MZ8J-BMAT] (last visited Oct. 25, 2023). Some of the sources related to this dispute come from the ONE

Four days before the group's scheduled departure, however, Continental Travel Service—the travel agency helping ONE, Inc. organize the trip—abruptly canceled it[9] "on the pretext that too few had signed up to make the tour profitable."[10] After the cancellation, ONE's Board of Directors published a letter that both accused the travel agency of "grossly violat[ing] . . . standards of honorable conduct" and urged the magazine's readers to "completely shun[]" the service "as unreliable."[11]

But the Board did more than express anger; it countered Continental Travel Service's actions using the law of contracts. The Board alleged that the travel agency sent ONE a signed statement saying that "the tour would take place in any event, even should registrations fall below the hoped-for quota."[12] The Board then asserted: "[T]he above constitutes a contract. . . . It is our intention to prosecute this view to the fullest possible extent."[13] In private correspondence to the travel agency, the Board demanded either that a ONE representative be sent "on the identical itinerary specified . . . at no cost" or that Continental Travel Service compensate ONE $5,000 for its losses.[14]

Engaging with legal concepts was not new to ONE. Its magazine discussed the law in nearly every published issue.[15] It even litigated a case before the Supreme Court and won a seminal ruling declaring its queer

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Archives. ONE Archives at the USC Libraries, Univ. of S. Cal., https://one.usc.edu/ [https://perma.cc/4HND-J6MD] (last visited Feb. 3, 2024).

9. See Bd. of Dirs., Let's (Not) Cruise Through Europe, ONE, Oct. 1961, at 32, 32.

10. ONE Board Letter, supra note 4, at 4.

11. Id.

12. Id. The actual contract involved a question ONE posed to Continental Travel Service asking about "[t]he obligations of the Corporation, or its representative, should fewer than the thirty-two persons you have designated as the quota sign up for the tour." Letter from William Lambert, Bus. Manager, ONE, to Continent Tour (June 7, 1961) (on file with the *Columbia Law Review*). The agency responded: "If fewer than 32 sign up, the tour will still go." Letter from Newt Deiter, Exec. Vice-President, Cont'l Travel Serv., Inc., to William Lambert, ONE (June 14, 1961) (on file with the *Columbia Law Review*).

13. ONE Board Letter, supra note 4, at 4.

14. Letter from George Mortenson, Chairman, ONE, to William Kraker (Sept. 21, 1961) (on file with the *Columbia Law Review*).

15. For some of the magazine's notable discussions of law, see, for example, Lyn Pedersen, An Open Letter: Do Constitutional Guarantees Cover Homosexuals?, ONE, Jan. 1956, at 6, 6–8 (arguing for protection of queer people's "basic legal rights"); E.B. Saunders, Reformer's Choice: Marriage License or Just License?, ONE, Aug. 1953, at 10, 10 (wondering—in an issue whose cover read "Homosexual Marriage?"—if queer people would be "subject to marriage laws" in 2053 if "homosexuality were accepted to the point of being of no importance"); Don Slater, Victory! Supreme Court Upholds Homosexual Rights, ONE, Feb. 1958, at 16, 16–17 (explaining the recent Supreme Court case, One, Inc. v. Olesen, 355 U.S. 371 (1958), in which the Supreme Court found the magazine was not obscene); The Law, ONE, Jan. 1953, at 21, 21 (discussing the law of entrapment in its very first issue); Your Rights in Case of Arrest, ONE, Mar. 1953, at 16, 16 (conveying queer people's criminal procedure rights to readers).

material not obscene.[16] And ONE wasn't alone. Engagement with the law was a crucial component of the homophile movement, the main movement for queer rights during the 1950s and 1960s.[17]

What was new in ONE's response to the canceled Europe tour, however, was the Board's decision to frame its response in terms of contract law. Homophile groups usually focused exclusively on public law topics like administrative law, constitutional law, and criminal law in their engagement with the law.[18] ONE's Board, however, recognized both the importance and novelty of using contract law: "Our intention . . . is to make it as clear regarding commercial matters, as ONE has for years been doing concerning civil . . . rights, that homosexuals cannot be trampled under foot with impunity."[19] With this, the magazine announced contract law as an important legal tool queer people could use to assert their rights.

ONE's response to the cancellation of the 1961 "Gay Tour of Europe"[20] invites us to turn our attention to the role of contract law (and private law more broadly) in the fight for queer rights. How did queer people use private law, and specifically contract law, in their fight for equality and dignity under the law? How effective was contract law in this fight? What are the implications for queer people today?

Reading the archive's statements and its silences, this Note unearths previously unstudied instances of homophile groups invoking contract law in their fight for queer rights. These moments reveal contract law's important role in homophile legal strategy. Over the course of the two-decade movement, however, homophile groups' use of contract law changed. During the 1950s, homophile groups urged queer people to use contract law to avoid legal disputes and keep the outside world from invading their private lives.[21] But after the movement's militarization in the early 1960s, queer organizations began making affirmative claims—

16. *One, Inc.*, 355 U.S. at 371; see also Gregory Briker, The Right to Be Heard: *ONE* Magazine, Obscenity Law, and the Battle Over Homosexual Speech, 31 Yale J.L. & Humans. 64, 69–70 (2020) (outlining the history of the case); Slater, supra note 15, at 17 ("By simply not finding ONE Magazine obscene, the Supreme Court has completely and unanimously reversed the Post Office ban on the mailing of our October 1954 issue . . . .").

17. See D'Emilio, supra note 6, at 2 (periodizing the homophile movement); Cain, supra note 6, at 1559–64 (highlighting litigation that organizations at the time brought); see also infra section I.B. For an explanation of why the leaders of the movement chose the term, see Cain, supra note 6, at 1558 n.42; see also Donald Webster Cory, History of the Homophile Movement, *in* East Coast Homophile Organization Conference '64, at 1, 1–2 (1964) (on file with the *Columbia Law Review*) (using the term "American homophile movement" to describe the broad movement for queer rights at the time); The Ladder, The Ladder, Oct. 1956, at 1, 2 (using the term "female homophile").

18. See supra note 15 and accompanying text.

19. ONE Board Letter, supra note 4, at 4.

20. The magazine adopted this name for the tour a few years later. See Gay Tour Triumphs, ONE, Jan. 1965, at 21, 21.

21. See infra section II.A.

like ONE's—based in contract law, some of which had limited success.[22] These contract claims served two purposes. On one hand, they were a tool queer people used to create space to exercise and advocate for their public law rights.[23] But queer people also sought to advance and protect contract rights for their own sake, mirroring their approach to advocating for public law rights.[24] Contract law was thus a key part of queer people's growing rights consciousness.[25]

This Note gives contract law its rightful due in the homophile movement's story. Imbuing contract law into the existing narrative both nuances our understanding of homophile legal strategy and calls attention to the porous divide between doctrines of law commonly studied in social movement histories (public law) and those often neglected (private law).[26] These lessons suggest that private law should play a larger role in our vision for a future in which queer people have full equality under the law.[27]

This Note is the first study to examine queer people's assertion of their contract law rights in the pre-Stonewall era.[28] Part I surveys previous scholarship on homophile legal strategy, uncovers blind spots that arise from the field's almost exclusive focus on public law, and explains this Note's novel approach. Part II then illustrates the role of contract law in homophile legal strategy, beginning with the 1950s and continuing to the 1960s. Part III considers the present-day implications of these findings, offering potential avenues for further research and inviting today's movement lawyers to increase their focus on private law as a tool to serve the queer community.

I. SITUATING CONTRACT LAW IN LEGAL HISTORIES OF THE HOMOPHILE MOVEMENT

Nearly all scholarship on queer legal history—especially scholarship examining the homophile movement—has focused on public law topics

22. See infra section II.B.

23. See infra section II.B.2.

24. See infra section II.B.3.

25. Rights consciousness is usually considered in the constitutional context, but this Note injects contract law into the discourse. For a foundational work on the topic, see Hendrik Hartog, The Constitution of Aspiration and "The Rights That Belong To Us All", 74 J. Am. Hist. 1013, 1014–16 (1987) [hereinafter Hartog, Constitution of Aspiration] (outlining what it means to study "constitutional rights consciousness" and calling it "the mark of groups engaged in constitutional struggles"); see also Ely Aaronson & Arianne Renan Barzilay, Rights-Consciousness as an Object of Historical Inquiry: Revisiting the Constitution of Aspiration, 44 L. & Soc. Inquiry 505, 506 (2019) (reflecting on how Hartog's foundational work has shaped the field). Studying rights consciousness involves locating "law[] in the changing aspirations of diverse groups within the society," which this Note applies to the homophile movement. See Hartog, Constitution of Aspiration, supra, at 1034.

26. See infra Part I.

27. See infra Part III.

28. See infra section I.B.

such as administrative law, constitutional law, and criminal law. Part I problematizes existing scholarship's fixation on public law and explains this Note's contributions. It begins by explaining what it means to study homophile legal strategy within the broader field of queer legal history. It then provides an overview of existing studies on this era of queer legal history. It concludes by describing this Note's methods and primary sources and the limits associated with its approach.

A. *Studying Homophile Legal Strategy*

It is important to first explain the field of queer legal history and position this Note within the field. Queer legal history analyzes the mutually constitutive interactions between queer people and law.[29] This Note looks at how queer people used contract law as part of their legal strategy[30] during the homophile movement and how this use of law shaped the movement. This Note uses the word "queer" to refer to both the

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29. For further explanation of what the field entails, see Marc Stein, Crossing the Border to Memory: In Search of Clive Michael Boutilier (1933–2003), 6 Torquere 91, 111–12 (2004) (stating that "what might be called queer legal history" involves "examin[ing] LGBT subjects who are regulated by the law . . . [and] explor[ing] the law's constitution of LGBT and heteronormative subjects"). For a discussion of legal history as a broader field, see Hendrik Hartog, Four Fragments on Doing Legal History, or Thinking With and Against Willard Hurst, 39 Law & Hist. Rev. 835, 856 (2021) ("[T]o do . . . legal history . . . is to imagine the intersections of diverse doctrinal streams and legal cultural streams at particular historical moments, as they became manifested and helped produce and reproduce the formations and structures in our legal histories."). Hartog says part of doing legal history is looking at a group's "own legal consciousness," which I intend to do here. Id. at 864.

30. This Note uses the term "legal strategy" to refer to the plan and goals queer people had when deciding whether and how to interact with the law. Other scholars use the term "legal strategy" similarly. See, e.g., Marie-Amélie George, The LGBT Disconnect: Politics and Perils of Legal Movement Formation, 2018 Wis. L. Rev. 503, 570 (critiquing queer rights organizations' "assimilationist legal strategy"); Kate Redburn, Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963–86, 40 Law & Hist. Rev. 679, 682–87 (2022) [hereinafter Redburn, Before Equal Protection] ("[G]ender outlaws across the country developed their own legal strategy to decriminalize cross-dressing, and in some cases, constitutionalize protections for gender nonconformity."). "Interactions" or "confrontations" with the law involve any time a subject comes into contact with the law, whether using the law to their advantage or resisting others' use of the law as a mechanism of control. See, e.g., Lvovsky, supra note 6, at 2 (explaining queer legal history involves studying "[t]he law's confrontations with gay life" and "the types of interactions that most commonly defined gay individuals' encounters with state power"). This Note's focus is on how queer people chose to interact with the law as part of a strategic plan, but it leaves considerations of how those interactions shaped internal identity to other scholars. For scholarship that tracks the creation of a distinct queer identity through law during this period, see generally Margot Canaday, The Straight State (2009) [hereinafter Canaday, The Straight State] ("[T]he state's identification of certain sexual behaviors, gender traits, and emotional ties as grounds for exclusion . . . was a catalyst in the formation of homosexual identity."); Craig J. Konnoth, Note, Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s–1970s, 119 Yale L.J. 316, 318–24 (2009) (explaining how gay legal identity during this time was "constructed" as an analogy to the racial justice movement).

people in this story (even though they would not have preferred that term[31]) and the organizations that represented and defended their interests. The term "queer" intends to unify the diverse identities of people in this story who made legal arguments to advance the rights of those marginalized due to their gender identity or sexuality.[32]

Within the broader history of queer people's legal strategy, this Note focuses on the homophile movement of the pre-Stonewall 1950s and 1960s.[33] While problems arise from any attempt to neatly periodize history,[34] most historians agree that World War II was a watershed moment in the formation of organized, politically engaged, and visible queer communities.[35] But an increase in visibility and numbers did not translate into societal acceptance. Instead, postwar anticommunist sentiment triggered widespread legal targeting of queer people and their communities.[36] This

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31. See, e.g., David L. Freeman, The Homosexual Culture, ONE, May 1953, at 8, 8 (preferring the term "homosexual"); The Ladder, supra note 17, at 2 (preferring the terms "Lesbian" and "homophile").

32. Additionally, because the goal of this Note is to track a legal strategy rather than explain the development of a unique identity, it makes sense to use a term that unifies all the study's subjects and is recognizable to readers.

33. Despite declining to use era-appropriate terms to refer to queer individuals' identity, see supra notes 31–32 and accompanying text, this Note uses the era-appropriate term "homophile" to describe the activism of the era. See supra note 17 and accompanying text.

34. See, e.g., Jerry H. Bentley, Cross-Cultural Interaction and Periodization in World History, 101 Am. Hist. Rev. 749, 749 (1996) ("Periodization ranks among the more elusive tasks of historical scholarship.").

35. See Allan Bérubé, Coming Out Under Fire: The History of Gay Men and Women in World War II, at 6–7 (twentieth anniversary ed. 2010) (describing World War II as a widespread "coming out" event that also forced queer people to recognize the government's hostility toward them); D'Emilio, supra note 6, at 23–39 (describing how World War II "created something of a nationwide coming out experience" and helped queer people create a group identity). D'Emilio specifies that the demands of World War II forced young people to leave their rural hometowns and go to places—either cities or the armed forces—where they were previously unknown and surrounded by people of the same sex. D'Emilio, supra note 6, at 23–24. This then allowed them to explore their same-sex desires and form connections and a sense of community with others like them. Id. at 24. For an explanation of how the war years facilitated male and female same-sex sexual intimacy in different ways, compare id. at 24–27 (explaining how experiences in the armed forces shaped men's experiences), with id. at 27–31 (explaining how the armed forces also shaped women's experiences but were less influential than "the economy's production requirements").

Of course, this openness didn't arise out of nowhere. Historians have uncovered the existence of a remarkably dynamic and self-conscious queer world in early twentieth-century America. See, e.g., Nan Alamilla Boyd, Wide-Open Town: A History of Queer San Francisco to 1965, at 25–62 (2003) (describing San Francisco's open queer male community of the early twentieth century); George Chauncey, Gay New York: Gender, Urban Culture, and the Making of a Gay Male World, 1890–1940, at 1–6 (1994) (unearthing a highly complex "gay male world" in New York before World War II); Lillian Faderman, Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America 62–117 (1992) (describing the lesbian world of the 1920s and 1930s).

36. See D'Emilio, supra note 6, at 40–41 ("The Cold War and its attendant domestic anticommunism provided the setting in which a sustained attack upon homosexuals and

involved increased policing of queer spaces,[37] shutting down queer bars,[38] purging queer people from federal employment,[39] denying queer veterans welfare benefits,[40] and barring queer immigrants from entering or remaining in the country.[41] In short, queer people were "smothered by law."[42]

Facing unprecedented legal attacks, queer people created a handful of grassroots organizations fighting for a common goal: to secure queer people's rights and inclusion in society.[43] Thus the homophile movement, a (relatively) unified "gay emancipation movement," was born.[44] Unsurprisingly, law was a central topic within the movement—

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lesbians took place."); Walter Frank, Law and the Gay Rights Story 9–18 (2014) ("The postwar campaign against homosexuals was stunning both in its scope and callousness."); Cain, supra note 6, at 1565–67 (explaining that postwar McCarthyism elevated suspicion and targeting of queer people).

37. See William N. Eskridge, Jr., Gaylaw: Challenging the Apartheid of the Closet 60–67 (1999) [hereinafter Eskridge, Gaylaw] (explaining that during the 1950s "the criminal law targeted [queer people] for an increasing variety of conduct" including "consensual adult intercourse, dancing, kissing, or holding hands," and violations came with "escalating penalties"); Lvovsky, supra note 6, at 2 (explaining the tactics police officers used to enforce laws aimed at suppressing queer communities); William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 100 Mich. L. Rev. 2062, 2161 (2002) [hereinafter Eskridge, Effects of Identity-Based Social Movements] ("[T]he postwar anti-homosexual terror . . . landed many lesbigay people in prison, outed them and others, and triggered a moderate 'homophile' politics seeking constitutional protection of private gay spaces."); see also supra note 6 and accompanying text.

38. See Eskridge, Gaylaw, supra note 37, at 93–94 (discussing state governments' revocation and suspension of liquor licenses for observing "tone of voice, bodily movements, gestures, and other mannerisms [that are] common characteristics of homosexuals" (internal quotation marks omitted) (quoting William Wright, Lillian Hellman 101 (1986))).

39. See David K. Johnson, The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government 2, 13–14 (2004) (explaining the Lavender Scare, a "witch hunt[]" of queer people working in the federal government).

40. See Canaday, The Straight State, supra note 30, at 137–73 (discussing the government's policy of denying benefits to veterans who were caught in "homosexual acts or tendencies" (emphasis omitted)).

41. See id. at 214–54 (explaining how immigration law adopted tools from the military to police homosexuality).

42. Eskridge, Gaylaw, supra note 37, at 98.

43. See Cain, supra note 6, at 1558–64 (describing the earliest grassroots organizations to form during the homophile movement); see also Frank, supra note 36, at 23–26 (describing these early organizations as "respon[ding] to the status quo").

44. D'Emilio, supra note 6, at 5; see also id. at 103–05 (describing how the different homophile organizations cooperated but noting "tensions between male and female homophile groups" due to "[d]ifferences in the experiences and concerns of gay women and men, the prior presence of men in the movement, and male attitudes of superiority"). For an account from the 1960s, see Cory, supra note 17, at 1 (identifying "the breakdown of traditional sexual standards during and after the Second World War" as a force that contributed to the formation of "what has come to be known as the American homophile movement").

organizations held conversations about the law's effect on queer communities and brought lawsuits on behalf of queer individuals and causes.[45]

After a more militant faction of the movement—inspired by Black activists in the civil rights movement[46] and responding to increasingly invasive police tactics[47]—emerged on the East Coast in the early 1960s, homophile groups began staging organized, large-scale confrontations with the law.[48] This involved publicly making legal arguments based in equality,[49] directly protesting unjust laws,[50] and coming together to form a visible and radical cooperative—East Coast Homophile Organizations (ECHO)—to discuss and fight for queer rights.[51] These developments make the homophile movement a rich moment in history to investigate queer people's legal strategy.[52] By looking at homophile legal strategy, this

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45. See supra notes 15–17 and accompanying text. While law was a central topic in the homophile movement, no homophile organization focused exclusively on legal issues. Cain, supra note 6, at 1564.

46. D'Emilio, supra note 6, at 150.

47. See Lvovsky, supra note 6, at 142–79 (describing a new "ethnographic approach" to policing during the late 1950s and early 1960s).

48. See D'Emilio, supra note 6, at 149–75 (explaining this new militant approach and the background of its leader, Frank Kameny); see also Eskridge, Gaylaw, supra note 37, at 98–101 (calling the homophile movement in the early 1960s "invigorated" due to the formation of the Mattachine Society of Washington and the Society for Individual Rights in San Francisco). For accounts of the new militancy from the period, see Warren D. Adkins & Kay Tobin, Part One: Sidelights of ECHO, The Ladder, Jan. 1965, at 4, 4 (quoting an attendee at the 1964 East Coast Homophile Organizations (ECHO) conference as saying "there seems to be a militancy about the new groups and new leaders" (internal quotation marks omitted)).

49. D'Emilio, supra note 6, at 150; see also William N. Eskridge, Jr., January 27, 1961: The Birth of Gaylegal Equality Arguments, 58 N.Y.U. Ann. Surv. Am. L. 39, 40–42 (2001) [hereinafter Eskridge, Gaylegal Equality Arguments] (noting how Kameny advanced queer legal arguments by demanding equal treatment rather than just tolerance).

50. D'Emilio, supra note 6, at 154–57 (describing the protests and tactics of the Washington Mattachine Society, which Kameny led).

51. Id. at 161–62; see also Cain, supra note 6, at 1562 (calling ECHO "an umbrella group" of homophile organizations). These new tactics drastically increased membership. D'Emilio, supra note 6, at 173–75.

52. A final justification for focusing on the 1960s is that scholars who have looked at queer people's interactions with private law have almost exclusively examined the post-Stonewall era. See infra note 82. Stonewall vastly increased the size of the movement for queer rights and changed activists' approach. See D'Emilio, supra note 6, at 1–3 (describing how, while the homophile movement of the 1950s and 1960s "open[ed] a debate," queer emancipation didn't become a "mass movement" until after Stonewall); id. at 239 ("Stonewall . . . marked a critical divide in the politics and consciousness of homosexuals and lesbians."); Frank, supra note 36, at 36–39 ("Before Stonewall, magma had been building up among gay people for at least a decade below the slowly thinning crust of oppression. With Stonewall, it burst forth, consuming the fears of many and for the first time creating a real sense that the future might be different."). After Stonewall, new organizations informed by the more radical activism of the decade's civil rights, feminist, and antiwar movements supplanted homophile organizations in the fight for queer rights. See Frank, supra note 36, at 34 (contrasting the values and ideals of the new generation of activists with the old); see

Note focuses on interactions with law that further homophile goals or relate to homophile organizations, including the Daughters of Bilitis,[53] ECHO,[54] Janus,[55] *The Ladder*,[56] the Mattachine Society,[57] *ONE*,[58] and *Tangents*.[59]

B. *Problematizing Public Law's Predominance in Homophile Legal Histories*

While this Note focuses on the role of contract law in homophile legal strategy, nearly all scholarship focusing on homophile legal strategy up to this point centers what has traditionally been called public law.[60] Public law is the body of law that deals with "relations between private individuals and the government."[61] It includes fields such as administrative law, constitutional law, and criminal law, all of which have been the subject of queer legal histories of the homophile movement.[62] Private law, on the other hand, deals with relationships between private parties and includes the fields of contract law, property law, and tort law.[63] This subsection provides an

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also D'Emilio, supra note 6, at 233–38 ("Numerical strength allowed the new breed of liberationists to compile a list of achievements that could only have elicited awe from homophile activists."); Cain, supra note 6, at 1581–82 (explaining how Stonewall prompted queer rights activists to make a "symbolic radical shift" away from demanding equality and tolerance toward "demanding respect and . . . the right to be different").

53. See Kristin G. Esterberg, Associations and Organizations, *in* Lesbian Histories and Cultures 76, 76 (Bonnie Zimmerman ed., 2d ed. 2012) ("Daughters of Bilitis . . . was the first national lesbian organization in the United States. Founded in San Francisco in 1955, . . . it quickly became a social and political organization . . . .").

54. See supra note 51 and accompanying text.

55. See Marc Stein, Janus Society, *in* 2 Encyclopedia of Lesbian, Gay, Bisexual, and Transgender History in America 93, 93 (Marc Stein, Brenda Marston, Leisa Meyer, Robert Reid-Pharr, Leila Rupp & Nayan Shah eds., 2004) (noting that Janus was a Philadelphia-based homophile organization that published *Drum* and catered to lesbians, bisexuals, and gay men).

56. See Rodger Streitmatter, Gay and Lesbian Press, *in* Gay Histories and Cultures: An Encyclopedia, supra note 1, at 366, 366 (noting *The Ladder*'s founding in 1956, making it the third widely distributed queer publication and the first one specifically "for lesbians").

57. See D'Emilio, supra note 6, at 58 ("The founding of the Mattachine Society in Los Angeles in 1951 marked the beginning of what would grow into a nationwide [homosexual emancipation] effort.").

58. See supra note 1.

59. *Tangents* was an offshoot magazine of *ONE*. Streitmatter, *ONE*, supra note 1, at 648.

60. This is mostly true in other fields focused on telling the stories of oppressed groups. See, e.g., Brittany Farr, Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South, 69 UCLA L. Rev. 674, 680 (2022) ("The majority of scholarship about . . . systems [of racial and economic oppression] examines them within the rubric of public law.").

61. Public Law, Black's Law Dictionary (11th ed. 2019).

62. See infra notes 66–79 and accompanying text.

63. Private Law, Black's Law Dictionary (11th ed. 2019). Scholars have critiqued the distinction between public law and private law. See, e.g., Catharine A. MacKinnon, Toward a Feminist Theory of the State 191 (1989) (noting that feminism has "explode[d] the private"); Leon Green, Tort Law Public Law in Disguise, 38 Tex. L. Rev. 1, 1–2 (1959) ("'We the People' are

overview of previous scholarship on the queer legal history of the homophile movement. It then illuminates the blind spots that arise from the field's almost exclusive focus on public law.

1. *Public Law in Histories of Homophile Legal Strategy.* — There is a near universal focus on public law in queer legal histories, especially those focused on the homophile movement. This is not entirely surprising: A main project of the movement—like many other social movements—was the transformation of public law and the protection of queer people's public law rights.[64] Homophile organizations' explicit focus on administrative law, constitutional law, criminal law, and other fields of public law has invited scholars to turn their attention to those areas of law when studying homophile legal strategy.[65]

On the topic of constitutional law, scholars have shown that queer people of the homophile movement (1) gained First Amendment protection to both publish queer content[66] and gather in queer spaces[67] (though

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a party to every lawsuit . . . ."); Morton J. Horwitz, The History of the Public/Private Distinction, 130 U. Pa. L. Rev. 1423, 1426 (1982) (noting the history of attacks on the public/private distinction and the legal realists' conclusion that all law is "a delegation of coercive public power . . . and could only be justified by public policies"). But see Randy E. Barnett, Foreword: Four Senses of the Public Law–Private Law Distinction, 9 Harv J.L. & Pub. Pol'y 267, 267 (1986) (arguing for at least four "ways to distinguish between public law and private law"). This Note, on the other hand, accepts this distinction to problematize it.

64. See William N. Eskridge, Jr., Channeling: Identity-Based Social Movements and Public Law, 150 U. Pa. L. Rev. 419, 420–22, 521 (2001) (arguing that public law was of central importance to social movements of the second half of the twentieth century and that these social movements both "flourished . . . and transformed American public law" during that period). For specific attempts by queer rights organizations to transform public law, see supra notes 15–17 and accompanying text.

65. As Professor Adrienne Davis points out, scholars often respond to the fact that it is "easiest . . . to be upset" by public law attacks on marginalized groups "because [they] present[] us with the ultimate violation of liberal political morality." See Adrienne D. Davis, The Private Law of Race and Sex: An Antebellum Perspective, 51 Stan. L. Rev. 221, 287 (1999) (discussing the context of interracial marriage). Public law arguments are "easiest to make within the language of liberal legalism" and thus receive much of scholars' attention. Id.

66. See, e.g., Carlos A. Ball, The First Amendment and LGBT Equality 1–2 (2017) ("One of this book's objectives is to give the First Amendment the credit it deserves for making possible many of the LGBT movement's successes."); Eskridge, Gaylaw, supra note 37, at 95–96, 116–23 (explaining that the Supreme Court's obscenity decisions of the 1950s and 1960s "contributed to the growth of lesbian and gay subcultures" because they "gave nationwide protection against" censorship of various forms of queer expression); Carlos A. Ball, Obscenity, Morality, and the First Amendment: The First LGBT Rights Cases Before the Supreme Court, 28 Colum. J. Gender & L. 229, 229–30 (2014) [hereinafter Ball, Obscenity] (pointing out that the Supreme Court declared queer speech not obscene in the first two cases involving queer rights it heard, One, Inc. v. Olesen, 355 U.S. 371 (1958), and Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962)); Eskridge, Effects of Identity-Based Social Movements, supra note 37, at 2161–65 (explaining that common censorship of queer material led queer people to resort to the First Amendment to protect their right to express themselves as they pleased); see also supra note 16 and accompanying text.

67. See Eskridge, Gaylaw, supra note 37, at 93–95 ("The first amendment . . . assure[d] [queer people] some breathing room to socialize and organize."); Cain, supra note 6, at

the protection was limited[68]); (2) began arguing for civil rights in equality-based terms[69] (though courts rejected these arguments[70]); and (3) actively learned and argued for due process rights[71] (though due process had little "bite" as a protection measure[72]). Trans subjects, related to but distinct from gay homophile activists, also began challenging the constitutionality of cross-dressing bans.[73]

On the topic of criminal law, scholarship has pointed out that homophile groups (1) began agitating for the repeal of consensual sodomy laws[74] (though disorganization and the immense whiteness and maleness

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1567–69 (recounting state court victories that protected queer people's right to gather in queer bars).

68. See Eskridge, Gaylaw, supra note 37, at 93–96 (arguing that "[t]he first amendment was not *that* empowering to homosexuals" and pointing out that "lower federal and state courts did not read [the Supreme Court's obscenity rulings] liberally"); Frank, supra note 36, at 18–19 (noting that queer people remained "vulnerable to obscenity charges" even after *Olesen* and *Day*); Cain, supra note 6, at 1569–72 (pointing out that queer people's right to associate in public was limited because queer conduct was still criminalized). Still, scholar Carlos Ball argues that queer people's First Amendment victories affected First Amendment doctrine, pushing it toward a more unbiased, less normative baseline. See Ball, Obscenity, supra note 66, at 230.

69. Eskridge, Gaylegal Equality Arguments, supra note 49, at 40–42 (calling a brief written by Kameny, which used the language of equality to challenge his dismissal from federal employment, "a landmark in the history of gay rights and sensibility"); see also Eskridge, Effects of Identity-Based Social Movements, supra note 37, at 2169–71 ("The ideas in Kameny's brief were revolutionary and important. The brief was an announcement that the objects of the postwar anti-homosexual *Kulturkampf* were insisting on equal citizenship and not just an easing of persecution.").

70. Eskridge, Gaylegal Equality Arguments, supra note 49, at 42. The Supreme Court denied Kameny's petition for a writ of certiorari. Kameny v. Brucker, 282 F.2d 823 (D.C. Cir. 1960), cert. denied, 365 U.S. 843 (1961).

71. Eskridge, Gaylaw, supra note 37, at 101–03; see also Eskridge, Effects of Identity-Based Social Movements, supra note 37, at 2165–69 (describing due process arguments made by queer people in the pre-Stonewall years).

72. Eskridge, Effects of Identity-Based Social Movements, supra note 37, at 2165; see also Eskridge, Gaylaw, supra note 37, at 88–90 (noting that these procedural rights did little to "slow down the antihomosexual juggernaut"). Scholar William Eskridge notes, however, that due process arguments had some success in state courts, which were more willing to strike down or limit antiqueer laws. Eskridge, Effects of Identity-Based Social Movements, supra note 37, at 2166.

73. See Redburn, Before Equal Protection, supra note 30, at 683–87 (describing the emergence of the "trans legal subject" through these challenges). These trans subjects "sprouted from the . . . root" of the homophile movement but operated separately from gay rights campaigns. Id. at 685–86.

74. Eskridge, Dishonorable Passions, supra note 6, at 139–41, 148–49 (demonstrating that various players in New York, Philadelphia, San Francisco, and Washington formed a consensus "that consensual sodomy laws must be repealed"). The agitation for repeal, however, wasn't uniformly strong. When New York considered a sodomy bill that "only concerned homosexuals, [homophile groups] did no lobbying in Albany." Id. at 146.

of the homophile movement compromised efforts[75]) and (2) used criminal defense litigation to expand their reach and create a unified legal strategy.[76]

On the topic of administrative law, scholars have shown how homophile groups fought legal rules used to purge queer people from federal employment[77] (sometimes successfully[78]). Scholars have generally centered public law when focusing on queer subjects from the era—even when the queer subjects were not explicitly affiliated with the homophile movement.[79]

Each of these studies has made an invaluable contribution to our understanding of the queer legal subject during this era. But they all assume that public law provides both the source of and potential escape from queer people's legal persecution. This Note complicates that assumption, arguing that private law has served as both a mechanism to oppress queer people and a tool for queer people to combat that oppression.

2. *Private Law in Histories of Homophile Legal Strategy.* — While a rich set of scholarship has looked at public law to uncover queer legal strategy during the 1950s and 1960s, studies of the era have not examined private law in depth. No studies focus on private law exclusively, and most don't

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75. Id. at 141–43 (arguing that the Mattachine Society of Washington's activism was "marginal[] during the most liberal decade of American history" because of "its inability to form coalitions with other progressive civil rights groups").

76. See Eskridge, Gaylaw, supra note 37, at 87 ("[T]he entrapment defense helped establish the [Mattachine] Society as the nation's premier homophile group."); Frank, supra note 36, at 23 (recounting how the Mattachine Society's ultimately successful defense of Dale Jennings, who was later the editor of *ONE*, led to "the proliferation of more Mattachine discussion groups").

77. See Eskridge, Gaylaw, supra note 37, at 125–28 (describing attempts by the Mattachine Society of Washington to challenge the exclusion of queer people from government employment); Eskridge, Gaylegal Equality Arguments, supra note 49, at 40 (calling Kameny's response to being fired by the government "unusual" because "he sued the federal government to get his job back").

78. See Cain, supra note 6, at 1576–79 (noting that after Kameny's termination, some queer people won lawsuits declaring their terminations from government employment improper (citing Norton v. Macy, 417 F.2d 1161, 1164–65 (D.C. Cir. 1969); Scott v. Macy, 349 F.2d 182, 184–85 (D.C. Cir. 1965))).

79. Scholars have shown (1) that queer defendants participated in legal battles about policing that "meaningfully alter[ed] . . . debates" surrounding the policing of queer people and their place in society. See Lvovsky, supra note 6, at 3, 14. They have shown (2) that people were denied welfare benefits based on their queer activity or identity. See Canaday, The Straight State, supra note 30, at 137–73 (describing how veterans discharged due to same-sex sexual activity combated the denial of welfare benefits that accompanied such a discharge). They have shown (3) how immigration laws prevented queer people "from entering or remaining in the country." See id. at 214–54. And they have shown (4) how military policies prevented queer people from openly serving. See id. at 174–213.

mention it at all.[80] Although some works allude to queer people's use of private law during the period, they all lack in-depth analysis.[81] While there is a somewhat greater focus on queer people's use of private law after the homophile movement,[82] this Note is the first in-depth analysis of private law's role in homophile legal strategy.

3. *Blind Spots in the Current Approach.* — An almost complete focus on public law has left some blind spots in our understanding of what it meant to be a queer person within the legal system of the 1950s and 1960s. First, focusing only on public law obscures how queer people—and homophile groups representing them—used law in their daily lives.[83] Private law governs where people live, what they produce and purchase, and who they do business with. And these experiences can be especially formative for

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80. In fact, Eskridge's *Gaylaw*, a comprehensive study of "the ongoing history of state rules relating to gender and sexual non-conformity," only briefly mentions private law doctrine in its roughly 120-page survey of interactions between queer people and the law before 1981. See Eskridge, Gaylaw, supra note 37, at 1, 134–37 (discussing private contracting within the family).

81. This mostly appeared in the employment context. For example, Eskridge remarks that during the 1950s it was "nothing new" to lose a job "over a minor incident suggesting . . . homosexuality." Eskridge, Gaylegal Equality Arguments, supra note 49, at 39; see also Margot Canaday, Queer Career: Sexuality and Work in Modern America 39 (2023) [hereinafter Canaday, Queer Career] (describing how queer people could lose their jobs in what Canaday calls the "straight work world" and be forced to look for temporary work with low pay and low status (internal quotation marks omitted)); D'Emilio, supra note 6, at 119–24 (describing the "job discrimination" that queer people faced). The observation that people lost private employment because of their sexual identity did not directly analyze queer people's use of private law, but it implied an interaction with contract law. For example, private law seems to be lurking in the background of historian Margot Canaday's recent work, *Queer Career*. Canaday describes how homophile organizations helped queer people find work. See Canaday, Queer Career, supra, at 47–48. She also outlines the unspoken "agree[ments]" by straight employers "to try not to 'see'" and gay employees "to try not to be 'seen.'" See id. at 60.

82. Scholars have shown (1) how certain tort law doctrines have disadvantaged or excluded queer people since the 1980s. See Geoffrey Christopher Rapp, LGBTQ+ Rights, Anti-Homophobia and Tort Law Five Years After *Obergefell*, 2022 U. Ill. L. Rev. 1103, 1109–33. They have shown (2) how municipalities have used property law, and specifically zoning ordinances, to exclude queer (and other nontraditional) families from living in communities since the 1970s. See Kate Redburn, Note, Zoned Out: How Zoning Law Undermines Family Law's Functional Turn, 128 Yale L.J. 2412, 2448–52 (2019). And they have shown (3) how queer people have used contract law and family law since the late 1960s to "create and sustain families." See Martha Ertman, Love's Promises: How Formal and Informal Contracts Shape All Kinds of Families, at xi–xiii (2015).

83. The "daily lives" verbiage follows scholars, especially Davis, who examine the "law of daily life"—how contracts, torts, and property shape people's daily experiences and identities. See Law of Slavery: Course Examines Slavery Through the 'Lens of the Law of Daily Life', Duke L. News (Aug. 22, 2013), https://law.duke.edu/news/law-slavery-course-examines-slavery-through-lens-law-daily-life/ [https://perma.cc/E94U-2URC] (explaining a course Davis taught that examines slavery through the law of daily life); see also Dylan C. Penningroth, Before the Movement: The Hidden History of Black Civil Rights, at xiv (2023) (exploring "how ordinary Black people used law in their everyday lives," which mostly involved private law).

marginalized groups like queer people.[84] Public law governs only moments when people come into contact with the government, like in cases of arrest. Of course, the government is ever-present in people's lives, especially the lives of federal employees[85] and heavily surveilled groups like queer people and people of color.[86] But focusing solely on interactions with the state can lead us to overlook the law's role in queer people's daily lives.

Second, focusing solely on public law overlooks the symbiotic relationship between public law and private law.[87] Looking only at one realm can obscure key details shaping or motivating queer people's overall legal strategy. The series of events that provoked Frank Kameny's impassioned arguments for equal rights,[88] which radicalized the homophile movement[89] and landed him the unofficial title "[f]ather of the gay rights movement,"[90] illustrate this point.

When Kameny lost his federal government job after soliciting sex from an undercover police officer, the Civil Service Commission not only barred him from working in the federal government ever again but also prohibited him from obtaining the security clearances necessary

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84. See Karen Engle, Elizabeth M. Schneider, Vicki Schultz, Nathaniel Berman, Adrienne Davis & Janet Halley, Round Table Discussion: Subversive Legal Moments?, 12 Tex. J. Women & L. 197, 218 (2003) (featuring Davis's statement that "much of women's lives and much of gender generally is shaped through private law" because private law "allocates economic rights and duties between individuals" and "shapes . . . the ability to engage in economic relations of production, control, and ownership versus mere consumption").

85. This may explain the attention that scholars have paid to the law governing federal employment—it is a context in which a government and its subjects interact closely. See supra notes 77–78 and accompanying text.

86. Policing of queer people after World War II was especially unsettling because queer people knew neither when they were interacting with law enforcement nor what conduct constituted a violation of the law. See Eskridge, Gaylaw, supra note 37, at 108–11 (highlighting the vagueness of criminal laws targeting queer people); Lvovsky, supra note 6, at 2 (highlighting tactics police officers used to entrap queer people). For a modern analysis, see Michele Gilman & Rebecca Green, The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization, 42 N.Y.U. Rev. L. & Soc. Change 253, 255 (2018) ("[M]arginalized people experience . . . privacy extremes—being seen or tracked too much or too little.").

87. Cf. Canaday, Queer Career, supra note 81, at 13 (describing how private capital "t[ook] advantage of . . . aggressive state policing" to further oppress queer subjects).

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

89. See supra notes 48–51 and accompanying text.

90. Brooke Sopelsa, #Pride50: Frank Kameny—Father of the Gay Rights Movement, NBC News (June 3, 2019), https://www.nbcnews.com/feature/nbc-out/pride50-frank-kameny-father-gay-rights-movement-n1005216 [https://perma.cc/PT34-PH7L]; see also Lisa Rein, Frank Kameny's Legacy: A Reminder of the Federal Government's History of Unfriendliness to Gays, Wash. Post (Oct. 12, 2011), https://www.washingtonpost.com/blogs/federal-eye/post/frank-kamenys-legacy-a-reminder-of-the-federal-governments-history-of-unfriendliness-to-gays/2011/03/23/gIQACACzfL_blog.html (on file with the *Columbia Law Review*) (recounting Kameny's legacy). For a thorough history of Kameny's contribution to the queer rights movement, see generally Eric Cervini, The Deviant's War: The Homosexual vs. the United States of America (2020).

for private-sector employment.[91] Soon Kameny had no money and depended on Salvation Army handouts for food.[92] Only vaguely aware of the homophile movement before losing his job, Kameny's lack of job prospects compelled him to push the homophile movement's public law demands in a radical new direction.[93] Kameny's response to losing his job likely would not have been the same had he retained the ability to find another job.[94] The undermining of Kameny's private contracting rights, just as much as his initial firing, motivated and informed his strategy for his future confrontations with public law. Kameny's story demonstrates that understanding queer people's legal strategy requires contemplating how their interactions with public law and private law are interrelated.[95]

Third, focusing exclusively on public law does not fully capture queer people's agency. When queer people interacted with public law, they did so from an unequal position. The party they opposed—the government—was immensely powerful and resistant to change.[96] Queer people, in opposition, were social and moral outcasts defending against criminal charges[97] or attempting to claim unrecognized civil rights.[98] This dynamic made it unsurprising that, despite some victories,[99] many queer people felt powerless vis-à-vis the government[100] and were

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91. Eskridge, Gaylegal Equality Arguments, supra note 49, at 39.

92. D'Emilio, supra note 6, at 151.

93. Id.; see also supra notes 48–51, 60–61 and accompanying text.

94. See D'Emilio, supra note 6, at 151 (explaining that Kameny looked for work but couldn't find any because of his inability to obtain a security clearance).

95. For an explanation of this in a different context, see Penningroth, supra note 83, at 348 ("Th[e] private-law tradition of civil rights helped pave the way for the more familiar modern vision of civil rights that finally began to tear down discrimination in voting, schools, the workplace, and public accommodations.").

96. See John C. Reitz, Political Economy as a Major Architectural Principle of Public Law, 75 Tul. L. Rev. 1121, 1142 (2001) ("One common . . . dividing line between private and public law states that private law governs relationships among equals, but public law governs the relationship between the state and its citizens when they are not in a relation of equality . . . .").

97. See Eskridge, Dishonorable Passions, supra note 6, at 85–99 (explaining how social panic led to increased policing of queer activity through the criminal law); Goluboff, supra note 6, at 46–52 (explaining how queer people often were charged with vagrancy and lewdness).

98. See Eskridge, Gaylegal Equality Arguments, supra note 49, at 44 (explaining that Kameny's arguments for civil rights in his brief "were almost unimaginable in 1961").

99. See supra notes 66–67, 76, 78 (describing wins in the areas of free speech, criminal defense, and government employment).

100. Frank Kameny said of his fight to keep his job: "The mills of justice in this country grind slow and exceedingly expensive, and unless the Government decides to surrender, there will be much time and money needed before victory is ours." D'Emilio, supra note 6, at 151 (quoting Letter from Frank Kameny to *ONE* (Aug. 27, 1960)). Of course, the immense power of the government did not keep all queer people from fighting back, including Kameny. Legal historian Anna Lvovsky said of this "dark chapter of American history": "[It] is frequently heartbreaking and appalling but also full of resistance, of surprising alliances and remarkable legal gambits, of courage, perseverance, and humor in the shadow of the law." Lvovsky, supra note 6, at 3.

forced into the closet.[101] This immense power imbalance was not as present in the private law context. Queer people had more choice over what claims to make—and when they made claims, they did so not as presumed criminals or outcasts but as equal subjects of private law doctrine. Focusing on private law claims can thus reveal instances of agency in queer people's interactions with the law that may not be evident in the imbalanced public law context. With the government tilted so strongly against queer people,[102] focusing on private law may also reveal hope that is invisible in the public law archive.

Additionally, legal historian Kenneth Mack has pointed out that "perform[ing]" legal acts—such as making arguments, defending rights, and appearing in court—is an important manifestation of agency, especially for marginalized groups.[103] To the extent that a legal act is a site for understanding queer people's agency, it is useful to look at all types of claims rather than restrict inquiry to one realm of law.

C. *An Approach to Studying Contract Law's Role in Homophile Legal Strategy*

The key contribution this Note makes to the field of queer legal history is positioning private law, specifically contract law, as an important part of homophile legal strategy. This intervention follows the work of recent scholars who have uncovered the key role private law played in Black people's drive for equality,[104] including during the mid-twentieth

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101. See Eskridge, Gaylaw, supra note 37, at 57–97 (describing how the postwar campaign against queer people forced them into "an *apartheid of the closet*, whereby homosexuals were segregated from civilized society, not physically, but psychically and morally").

102. See supra notes 36–42 and accompanying text.

103. Kenneth Mack, Representing the Race: The Creation of the Civil Rights Lawyer 6–7 (2012) ("In every action that black lawyers [during the civil rights movement] took in their professional lives, but particularly so in their performances inside the courtroom, they remained powerful symbols of the fragility of racial boundaries in a nation committed to maintaining them."); see also Penningroth, supra note 83, at xxii ("African Americans' property and contracts had legal meaning . . . .").

104. This Note is influenced by the work of scholar Brittany Farr, who examines formerly enslaved people's use of contract law in the post-slavery South. Farr, supra note 60, at 680 (using "the lens of private law to provide new insights into this history of racial and economic exploitation."). It also draws on the work of Professor Davis, who argues that property law played a central role in the formation of racial and sexual relationships between Black women and white men in the nineteenth-century South. Davis, supra note 65, at 223–25. Finally, it is inspired by the recent work of legal historian Dylan Penningroth, who has unearthed a rich history of Black people using private law "at every step of their lives" since the 1830s. See Penningroth, supra note 83, at xiv ("These civil rights are like an invisible thread woven into the fabric of Black people's lives since before they even had rights, patterning how they loved, worshiped, worked, learned, and played."). For an example of Penningroth's extensive findings about private law and Black life, see id. at 196–201 (describing how Black people used contract law—and even took advantage of some of its racist doctrines—to engage in credit transactions during the Jim Crow era).

century.[105] This section begins by describing the methods and sources employed in Part II to surface the important connections between private law and homophile legal strategy that are the subject of this Note. It then identifies the blind spots arising from its approach and relays the resulting limits in its findings.

1. *Methods and Sources.* — On the broadest level, this Note analyzes queer people's use of contract law during the homophile movement. Because of the nature of where queer people formed, expressed, and manifested their legal strategy, this Note relies heavily on archival sources not typically considered formal legal documents. For example, engagement with contract law may appear in magazines and newsletters, as evidenced by ONE's response to the canceled Europe tour.[106] This Note relies heavily on homophile magazines such as *ONE* and *The Ladder*[107] and other archival documents from the Gale Archives of Sexuality and Gender[108] and the ONE Archives at the USC Libraries.[109] By highlighting events and sources absent from previous studies,[110] this Note serves to recover stories about queer people that had been previously lost to history.

When reading sources that hint at the role of contract law in the homophile movement, I focus not only on doctrine but also on the motivations, intentions, and social implications lurking in the background. This approach hopes to provide a deeper understanding of how contract law fit into homophile legal strategy.

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105. See, e.g., Richard R.W. Brooks & Carol M. Rose, Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms 168–210 (2013) (describing how, after the Supreme Court prohibited enforcement of racially restrictive covenants in 1948, white people still attempted to find substitutes to keep their neighborhoods all white); Hendrik Hartog, Nobody's Boy and His Pals: The Story of Jack Robbins and the Boys' Brotherhood Republic (forthcoming 2024) (manuscript at 6–7) (on file with the *Columbia Law Review*) (discussing how one man, Jack Robbins, created a will that benefitted the children of Black activists who resisted McCarthyism and were convicted of political crimes); Penningroth, supra note 83, at 316–20 (discussing how civil rights movement activism heavily "relied on the ordinary tools of property and contract and the law of associations"); Gina-Gail S. Fletcher & H. Timothy Lovelace, Jr., Corporate Racial Responsibility, 124 Colum. L. Rev. 363, 382–85 (2024) (discussing how sit-ins and other activism against public accommodation segregation appealed to private corporate interests).

106. See supra notes 11–19 and accompanying text.

107. *The Ladder* was a magazine published by the Daughters of Bilitis. D'Emilio, supra note 6, at 101–04.

108. This archive has combined and digitized various collections related to sexuality and gender from around the world. See supra note 8.

109. See supra note 8.

110. See, e.g., Marcia M. Gallo, Different Daughters: A History of the Daughters of Bilitis and the Rise of the Lesbian Rights Movement 112 (2007) (telling the story of the 1964 ECHO Conference, which this Note discusses, without focusing on the contract dispute that emerged while planning the conference).

2. *What These Methods and Sources Miss.* — This Note's approach results in some blind spots that limit what it can say about queer people's relationship to law. First, focusing on contracts may preclude capturing the stories of people who were excluded from systems of contract law that tend to appear in the archive. Forming and contesting formal contracts (especially those appearing in the archive[111]) requires social and economic capital,[112] which many queer people—especially queer women and queer people of color—did not have.[113] Even if they could engage with formal contract law, working-class queer people may have avoided it because they perceived contract law as an ineffective redistribution tool.[114]

Additionally, some queer people used their agency to avoid engaging with formal law altogether.[115] Their actions (and inactions) are difficult to discern, but the archive provides subtle hints. In a May 1959 interview, for example, a teacher pridefully called the ability of queer couples to stay together with "no legal ties" "a merit badge."[116] Decisions to avoid interacting with contract law were an important assertion of agency that said something about queer people's relationship to law, but these decisions are difficult to detect in the archive.

Even if queer people did openly engage with contract law, it is still challenging to detect these interactions in the archive. This is because, while public law interactions were often directly tied to a person's queer activity or identity,[117] queer people could—and presumably did[118]—interact with private law without explicitly mentioning their sexuality. As a result, many private law claims involving queer people are hiding in plain sight—queerness obscured

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111. Many queer people's interactions with contract law might not appear in the archive because they were likely often discussed in private correspondence, much of which is not saved in archives at all.

112. See Kevin E. Davis & Mariana Pargendler, Contract Law and Inequality, 107 Iowa L. Rev. 1485, 1537 (2022) ("[R]elying on contract law to achieve distributive objectives presupposes a minimum degree of access to formal markets and courts.").

113. See Eskridge, Gaylaw, supra note 37, at 135 (pointing out that contracting to create "rights of spousehood" was often "not available for working-class gays" because of the money required to create the contracts); cf. Keeanga-Yamahtta Taylor, Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership 22–23, 30–37 (2019) (discussing Black people's difficulty in securing housing in the mid-twentieth century and the government and private sector's efforts to undermine it when they did secure it).

114. See Anthony T. Kronman, Contract Law and Distributive Justice, 89 Yale L.J. 472, 474 (1980) (critiquing contract law's ability to operate as a system of distributive justice).

115. See infra section II.A.

116. Chuck Taylor, The Successful Homosexual, ONE, May 1959, at 5, 6.

117. See supra section I.B.1.

118. There is evidence that queer people received legal help in all areas of law. See Dir. of Soc. Serv., Case History, ONE, Feb. 1961, at 27, 27 (describing the creation of ONE's Social Service Division, which helped queer people deal with their daily concerns, including when they were "in trouble with the law"); Do You Know an Attorney?, ONE, Sept. 1955, at 7, 7 [hereinafter Sept. 1955 Do You Know an Attorney?] ("We often have inquiries from those needing legal services, and would like to have names in ALL areas.").

from detection. This is less of a problem when examining the 1960s, when queer people and homophile groups often publicly acknowledged their queer identity in their activism.[119] During the 1950s, however, homophile activism was not as assertive,[120] so many instances of queer people engaging with private law likely go undetected.[121]

Finally, any history of the homophile movement will struggle to tell the stories of nonwhite queer people and trans and gender-nonconforming people. Membership in homophile organizations was largely cisgender,[122] middle-class, and white.[123] Cleo Bonner, Daughters of Bilitis president from 1963 to 1966, was one of the homophile movement's few Black leaders.[124] Unfortunately, Bonner was out of town when her organization became involved in a 1964 contract dispute that is central to this Note.[125] The racial makeup of homophile organizations, paired with the happenstance of Bonner's travel, means that homophile groups' interactions with contract law (and thus the events in this Note) centered middle-class, white, cisgender people.[126]

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119. See supra notes 48–51 and accompanying text.

120. D'Emilio, supra note 6, at 57–91; see also supra notes 36–42 and accompanying text.

121. For a discussion of a related problem in a different context, see Penningroth, supra note 83, at xix–xx (describing the difficulty of uncovering sources revealing Black people's interactions with law in their daily lives).

122. For background on the exclusion of trans and gender-nonconforming people from the mainstream homophile movement, see Shannon Price Minter, Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement, 17 N.Y.L. Sch. J. Hum. Rts. 589, 601–03 (2000) (describing the splintering between middle-class, gender-conforming homophiles and other working-class gender-nonconforming people); Redburn, Before Equal Protection, supra note 30, at 682–85 (describing the distinct development of a "trans legal subject" during the 1960s who was separate from their gay male and lesbian counterparts who "believed that social inclusion and legal recognition required a more respectable image"). But see Susan Stryker, Transgender History 94 (2008) (noting that while "transgender politics" and the homophile movement were distinct, they "r[a]n alongside one another and sometimes intersected throughout the 1950s and '60s").

123. See D'Emilio, supra note 6, at 106–07 (describing class prejudice and the policing of gender identity within the Daughters of Bilitis); Allen Drexel, Before Paris Burned: Race, Class, and Male Homosexuality on the Chicago South Side, 1935–1960, *in* Creating a Place for Ourselves: Lesbian, Gay, and Bisexual Community Histories 119, 119–21 (Brett Beemyn ed., 1997) (pointing out that "bourgeois homophile organizations" were "small, overwhelmingly white, [and] middle-class"); Kent W. Peacock, Race, the Homosexual, and the Mattachine Society of Washington, 1961–1970, 25 J. Hist. Sexuality 267, 268 (2016) (calling the homophile movement "almost completely white"); supra note 1.

124. Gallo, supra note 110, at xxii.

125. See Letter from Del Martin to Governing Bd. Members, Daughters of Bilitis (Aug. 26, 1964) (on file with the *Columbia Law Review*) ("In the absence of Cleo [Bonner], president of DOB, who is out of town for a week, Phyllis and I agreed with Marge that some such action should be taken . . . ."); infra notes 160–191 and accompanying text (discussing ECHO's efforts to find accommodations for its second annual conference).

126. Another group of queer people whose interactions with contract law do not appear in the archive are those who may have been blackmailed or feared extralegal repercussions, such as being outed or fired. For a discussion of blackmail against queer

In sum, the sources this Note relies on capture only some queer people's interactions with contract law. One way this Note deals with these blind spots in the archive is to make a narrow claim about homophile legal strategy, recognizing that the subset of queer contract claims legible in the archive are likely closely related to the larger queer rights movement and the organizations leading it. Another way, especially when dealing with sparse evidence of legal strategy in the 1950s, is to remember Saidiya Hartman's teachings from *Venus in Two Acts*.[127] This Note aims to do a "critical reading of the archive" that reads meaning into its silences and honors queer people's agency in the stories that do appear.[128]

II. CONTRACT LAW'S CENTRAL ROLE IN HOMOPHILE LEGAL STRATEGY

This Part turns to the meat of the study, examining how the homophile movement of the 1950s and 1960s used contract law. Section II.A begins in the 1950s, finding that homophile groups at the time saw contract law as a way to avoid legal disputes—a sort of "preventative law." Section II.B shows how this changed in the 1960s when queer organizations began making affirmative claims based in contract law that even found some success. During this later era, contract law transformed from a defensive tactic that kept the outside world removed from queer people's private lives to an offensive tool that helped queer people bring their activism to the outside world. Section II.C recognizes the limits of relying too much on contracts. But despite these limits, this Part's overall story reveals the immense importance of contract law to homophile legal strategy.

A. *Contract Law as "Preventative Law" in the 1950s*

Before the homophile movement's radicalization in the early 1960s,[129] homophile groups and their members tried to avoid legal disputes whenever possible. For example, a January 1960 letter in *ONE* identified

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people in the 1950s and 1960s, see D'Emilio, supra note 6, at 51 & n.19 ("Blackmail became a profitable racket, sometimes engaged in by nationwide rings . . . ."). In a different context, Farr has recounted how formerly enslaved people who brought contract claims faced the threat of violence. Farr, supra note 60, at 718–23.

127. Saidiya Hartman reminds us that the archive is a "scene of loss" for marginalized, and especially enslaved, populations. Saidiya Hartman, Venus in Two Acts, Small Axe, June 2008, at 1, 11 (internal quotation marks omitted) (quoting Lisa Lowe, The Intimacies of Four Continents, *in* Haunted by Empire: Geographies of Intimacy in North American History 190, 208 (Ann Laura Stoler ed., 2006)). She also suggests that—both to call attention to the archive's silence and to honor those who have been silenced—scholars should create stories "to amplify the impossibility of [their] telling." Id.

128. See id. at 10–11.

129. See D'Emilio, supra note 6, at 150 ("By 1962 the relatively quiescent, privatized mood of the 1950s was already rapidly yielding to a spirit of active, militant engagement . . . ."); Eskridge, Gaylegal Equality Arguments, supra note 49, at 98–100 (identifying 1961 as a key turning point).

the magazine's "first duty" as avoiding "legal entanglements."[130] A January 1954 article in *ONE* reported that someone at the Mattachine Society's convention advocated for the organization to establish a private space where members could "let down hair after hair . . . and commit unconventional, if not unlawful acts."[131] Queer people just wanted to live their lives in relative peace, free from constant intervention and surveillance. This goal was not surprising given the targeting they faced from the outside world.[132] Thus while public law created the closet and shut its door,[133] this section explains how 1950s homophile groups deployed contract law to help queer people create space within that closet to shield their private lives from the outside world's scrutiny.[134]

Homophile groups recognized contract law's role in helping queer people avoid legal disputes with the outside world. This appreciation for contract law is illustrated in a speech that attorney Herb Selwyn gave at the Los Angeles Mattachine Society's monthly dinner in February 1957. The talk was a part of a series on "Preventative Law"[135]—a title suggesting that Selwyn hoped to teach attendees how to use law to prevent disputes. In the discussion, Selwyn provided an overview of contract law and talked about the importance of the "fine print."[136] He then urged Mattachine members to "consult an attorney when entering into a business or deal,"[137] presumably to ensure a fair transaction and prevent future disputes.

The preventative law strategy in contract law protected queer people from legal disputes on two levels. Directly, preventative law called on queer people to form ironclad contractual relationships that shielded them from potential liability and prevented nonqueer parties from breaching if they realized they contracted with a queer person. Unfortunately, reactionary breaches were likely common.[138] But in those cases, the deliberate approach to contracting hopefully kept disputes straightforward and out

130. Letter from Edward Denison to *ONE*, *in* Readers on Writers, ONE, Jan. 1960, at 6, 6.

131. Jeff Winters, A Frank Look at the Mattachine: Can Homosexuals Organize?, ONE, Jan. 1954, at 4, 6–7. Letting one's hair down was a common euphemism queer men used to describe being able to express their queer identity in certain spaces. Chauncey, supra note 35, at 6.

132. See supra notes 36–42 and accompanying text.

133. See supra note 101 and accompanying text; see also Canaday, The Straight State, supra note 30, at 170–72 (describing how the GI Bill "create[d] a closet" and "institutionalized heterosexuality").

134. For a discussion of the closet as an organizing feature of queer life, see Eve Kosofsky Sedgwick, Epistemology of the Closet 67–69 (2d ed. 2008) (calling the closet "a shaping presence" in nearly all queer people's lives even today).

135. Bob Bishop, Selwyn Speaks Again at Our Monthly Dinner, March Newsl. (Mattachine Soc'y, Inc., Los Angeles., Cal.), Mar. 1957, at 15 (on file with the *Columbia Law Review*).

136. Id.

137. Id.

138. For examples of this happening in the 1960s, see infra section II.B; see also William Parker, Homosexuals and Employment 14 (around 1970) (on file with the *Columbia Law Review*) (unpublished manuscript) ("[M]any employers . . . remove employees discovered to be homosexual . . . even from anonymous accusations."); supra note 81.

of the public eye. In this way, the preventative law approach placed queer people in a strong bargaining position and kept outside parties from having incentives to prod into queer parties' private lives. The result was hopefully that queer people could live more freely.

But the preventative law strategy had a secondary function that extended beyond the four corners of the contract. Contracts could secure physical space for queer people to retreat from the public eye.[139] The simple act of contracting for living or gathering spaces unlocked other rights, including property law's right to exclude.[140] These contracts thus provided queer people with physical space that separated them from the outside world, likely preventing run-ins with the police (and homophobic private citizens) that were so common for queer people in public.[141] Thus, preventative law not only protected queer people from potential contract disputes but also shielded them from public policing.

While it is difficult to detect when queer people explicitly implemented the preventative law strategy, Hartman teaches us that something's absence in the archive does not mean it didn't exist, especially when searching for stories of marginalized subjects.[142] In fact, the lack of evidence in the archive may demonstrate that the preventative law approach had some success.

The preventative law approach called for careful contracting, and the archive does present evidence that queer people in the 1950s received careful legal help in all areas of law. This likely included contracts. In 1955, *ONE* twice solicited the names of lawyers "in ALL areas" because the magazine "often ha[d] inquiries from those needing legal services."[143] Additionally, throughout the 1950s, ONE ran a Social Service Division that helped queer people deal with their living concerns, including through providing "legal assistance."[144] Many homophile organizations established employment bureaus that not only helped queer people find employment but also served as useful intermediaries that acted with discretion while

139. See infra section II.B.2.

140. See Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730, 734 (1998) (noting that a person with property "will have at least some right to exclude others from using or interfering with that resource" but acknowledging disagreement about what that right to exclude entails).

141. See Goluboff, supra note 6, at 46–52 (describing the police's targeting of queer people in public spaces). For a discussion of how police have historically targeted all marginalized groups in public, see Jamelia N. Morgan, Policing Marginality in Public Space, 81 Ohio St. L.J. 1045, 1047–55 (2020).

142. See Hartman, supra note 127, at 10–11 (noting the importance of "straining against the limits of the archive").

143. Sept. 1955 Do You Know an Attorney?, supra note 118, at 7; Do You Know an Attorney?, ONE, Nov. 1955, at 11, 11 (reprinting the same solicitation two months later).

144. Dir. of Soc. Serv., supra note 118, at 27.

facilitating a connection—likely often a contractual one—between potential employee and employer.[145] During the 1950s, some queer people must have received contract assistance through these homophile programs. And this assistance likely enabled queer people to avoid disputes that otherwise would have arisen.

While the lack of explicit applications of the preventative law approach in the archive may actually indicate the strategy's effectiveness, this conclusion isn't foolproof. The silence in the archive may also reflect that queer people were too scared to raise disputes and were routinely exploited in their bargaining.[146] If the preventative law approach worked, however, it would have made queer people's daily lives easier. In fact, the Social Service Division reported helping many queer people "liv[e] busy, useful lives"[147]—perhaps some of them through assistance they received forming or negotiating a contract.

In sum, contract law had a key role in 1950s homophile legal strategy. Through the preventative law approach, contract law likely helped at least some avoid humiliating and harmful run-ins with both bargaining partners and the police, increasing the ease with which queer people could live their lives.

B. *Contract Law as an Affirmative Tool in the 1960s*

The use of contract law as solely a preventative law tool made sense when the overall goal of the homophile movement was to avoid legal disputes. In the 1960s, however, when the movement adopted a more militant approach,[148] queer organizations leaned into contract disputes and made contract claims as part of their more confrontational legal strategy, even winning some victories. This shift built on the strategy of the 1950s: Learning to form airtight contracts made it easier for queer people and organizations to frame and argue their claims when they were ready.[149]

Affirmative contract claims in the 1960s served two related purposes. On one hand, they provided a practical way for queer people to create space to assert and defend their public law rights. But asserting contract rights was not just a means to an end; it was a goal itself. Queer people conceptualized and claimed contract rights themselves as part of their toolbox of legal rights, positioning contract law as a key part of their developing rights consciousness.[150] This section begins by highlighting

145. Canaday, Queer Career, supra note 81, at 47–48.

146. See id. at 64–65 (discussing how queer workers' "vulnerability and their low expectations" made it easy to take advantage of them).

147. Dir. of Soc. Serv., supra note 118, at 28.

148. See supra notes 48–51 and accompanying text.

149. See supra section II.A.

150. Scholars have demonstrated the growth in queer people's rights consciousness at the time but have only considered public law rights. See supra notes 25, 66–79 and

interactions with contract law that began to crop up in the 1960s. It then explains how these claims, when successful, created space for queer people to assert and defend their public law rights. It closes by showing how queer people intentionally claimed these contract rights as part of their growing rights consciousness.

1. *Contract Claims in the 1960s Homophile Movement.* — Before explaining the role of contract claims in homophile legal strategy, it is necessary to recount what those claims were and how they came to be. Contract law emerged as an affirmative tool in homophile legal strategy because parties often breached the conditions of an agreement after discovering they had contracted with a queer person or organization. These breaches created embarrassment, hardship, harassment, and inconvenience for the queer people involved. Nearly all the contract claims queer people or organizations made in the 1960s are versions of this common story.

a. *ONE v. Continental Travel Service.* — The first contract claim, ONE's against Continental Travel Service, was partially recounted in the Introduction,[151] so it calls only for a reminder and brief extension. After having planned to take *ONE*'s readers to Europe for almost a year,[152] Continental Travel Service abruptly canceled the trip four days before departure.[153] In response, ONE alleged that Continental Travel Service violated a signed statement confirming "that the tour would take place in any event, even should registrations fall below the hoped-for quota."[154] ONE's actions here evidence the success of the 1950s "Preventative Law" approach. The magazine had focused on the "fine print" as attorney Selwyn had recommended[155] by including in the contract a provision protecting against insufficient registration numbers. Leaning into the dispute, ONE pledged to "prosecute . . . to the fullest possible extent" the alleged statement as a valid "contract."[156] Selwyn—the same attorney who spoke on using contract law as "preventative law"[157]—served as the Board's attorney.[158]

b. *ECHO v. Gramercy Inn and Manger Hamilton.* — The second and third contract claims, both related, stem from ECHO's attempts to find

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accompanying text. At the time, however, people across society were expanding their idea of what constituted a private right. See, e.g., Charles A. Reich, The New Property, 73 Yale L.J. 733, 785–86 (1964) (arguing that government largess should be considered private property).

151. See supra notes 9–13 and accompanying text.

152. Cruise Through Europe, supra note 2, at 32.

153. Bd. of Dirs., supra note 9, at 32.

154. ONE Board Letter, supra note 4, at 4.

155. See supra note 136 and accompanying text.

156. ONE Board Letter, supra note 4, at 4.

157. See supra notes 135–137 and accompanying text.

158. See Letter from William Lambert to Herbert Selwyn (Apr. 26, 1962) (on file with the *Columbia Law Review*) (asking Selwyn for advice about the dispute with Continental Travel Service).

accommodations for its second annual conference, set for October 1964.[159] ECHO claimed that both the Gramercy Inn and Manger Hamilton hotels in Washington, D.C. breached a condition of their contracts by refusing to host ECHO's conference that year.

ECHO, an affiliation of four homophile organizations,[160] was created in 1962 to increase cooperation in the movement's attempts to militarize.[161] One of its main functions was sponsoring a yearly conference.[162] In just its second year, however, the groundbreaking conference became "beset by an almost unbelievable set of external adversities" in its attempts to secure accommodations.[163] In February 1964, eight months before the conference, ECHO found accommodations at the International Inn.[164] ECHO secured the space with a verbal agreement and by sending a reservation deposit.[165] In June, about four months before the conference, the International Inn canceled.[166] ECHO decided not to assert a contract claim against the International Inn, which sources attribute to (1) ECHO being pressed for time,[167] (2) the fact that "a formal contract was never obtained,"[168] or (3) the lack of damages due to the presence of alternative options at another hotel.[169]

That other hotel was the Gramercy Inn, which quickly signed a written contract granting ECHO space to host the conference after the International Inn canceled.[170] But in late August—about six weeks before

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159. See Joan Frazer, A History of ECHO, *in* East Coast Homophile Organization Conference '64, at 5, 5 (1964) (on file with the *Columbia Law Review*) (noting the conference's date).

160. The four organizations that formed ECHO were the Daughters of Bilitis, the Mattachine Society of Washington, the Mattachine Society of New York, and Janus. Id.

161. Id.; see also D'Emilio, supra note 6, at 161 ("ECHO played a critical role in solidifying a militant wing of the [homophile] movement.").

162. Frazer, supra note 159, at 5.

163. C.P., ECHO, Drum, Nov. 1964, at 14, 14 (on file with the *Columbia Law Review*); see also East Coast Homophile Organizations, Daughters of Bilitis, Inc. Newsl. (Daughters of Bilitis, New York, N.Y.), Oct. 1964 (on file with the *Columbia Law Review*) ("The main problem experienced in the planning of this year's Conference has been that of accommodation.").

164. Renée Cafiero, E.C.H.O. '64, N.Y. Mattachine Newsl. (Mattachine Soc'y, New York, N.Y.), Nov. 1964, at 19, 19 (on file with the *Columbia Law Review*).

165. Id.

166. East Coast Homophile Organizations, supra note 163. Another source claims that the International Inn's cancellation occurred six weeks before the conference. C.P., supra note 163, at 14. This, however, is less likely given the cancellation timeline of the Gramercy Inn discussed later. See infra notes 170–172 and accompanying text.

167. C.P., supra note 163, at 14.

168. East Coast Homophile Organizations, supra note 163.

169. Franklin E. Kameny, Hamilton Hotel Settles, Homosexual Citizen, June 1966, at 3, 3 (on file with the *Columbia Law Review*).

170. East Coast Homophile Organizations, supra note 163; see also Kameny, supra note 169, at 3 (identifying the Gramercy Inn as the hotel that provided alternative arrangements when the International Inn canceled).

the conference—the Gramercy Inn canceled as well.[171] Del Martin, a leader of the Daughters of Bilitis, intuited that the cancellation was due to "the nature of the conference."[172] She was proven right when the Gramercy Inn justified its cancellation on the grounds that "unpopular ideas" discussed at the conference "would injure business."[173] After the Gramercy Inn's cancellation, unlike the International Inn's, ECHO contacted a lawyer with expertise in contract law[174] to determine whether it had a strong claim that the Gramercy Inn breached.[175] The organizations dedicated $500 to the endeavor.[176]

Just days later, and about a month before the conference, ECHO secured accommodations at another hotel, the Manger Hamilton.[177] Informed by its experiences with the International Inn and Gramercy Inn, ECHO provided the Manger Hamilton with "full and complete details" about the organization and the plan for the conference.[178] The Manger Hamilton had a "warm reception"[179] to this information and "accepted unconditionally," both orally and in writing.[180]

Unbelievably, three weeks later—and less than two weeks from the start of the conference—the Manger Hamilton returned ECHO's deposit and revoked its offer to host.[181] A third hotel had canceled, leaving ECHO without accommodations.[182] ECHO immediately alleged that the Manger

171. Cafiero, supra note 164, at 19; Letter from Del Martin to Governing Bd. Members, supra note 125.

172. Letter from Del Martin to Governing Bd. Members, supra note 125.

173. Cafiero, supra note 164, at 19 (internal quotation marks omitted) (quoting the Gramercy Inn).

174. C.P., supra note 163, at 14; see also Letter from Del Martin to Governing Bd. Members, supra note 125 (noting that "Dr. Kameny of Washington Mattachine had recommended that the matter be turned over to their attorney for action against such discrimination").

175. East Coast Homophile Organizations, supra note 163; see also Letter from Marjorie McCann, Corresponding Sec'y, Daughters of Bilitis, to Governing Bd., Daughters of Bilitis (Aug. 26, 1964) (on file with the *Columbia Law Review*) (asking Del Martin for "written confirmation of authorization to proceed with litigation against the Gramercy Inn in Washington, D.C., if such litigation is deemed advisable by Washington Mattachine's attorney, Monroe H. Freedman").

176. East Coast Homophile Organizations, supra note 163; see also Letter from Del Martin to Governing Bd. Members, supra note 125 (noting that Del Martin had committed the Daughters of Bilitis "to pick up [its] portion of the tab for any costs incurred").

177. East Coast Homophile Organizations, supra note 163; see also C.P., supra note 163, at 14 ("In the interim, the Manger Hamilton was contacted and they agreed to permit the conference.").

178. Cafiero, supra note 164, at 19.

179. C.P., supra note 163, at 14.

180. Cafiero, supra note 164, at 19.

181. Id.; see also C.P., supra note 163, at 14 ("Ten days before the Conference, the Manger Hamilton also cancelled, again leaving ECHO homeless."); East Coast Homophile Organizations, supra note 163 (reporting that "less than two weeks before the Conference, the [Manger Hamilton] cancelled [its] agreement").

182. Cafiero, supra note 164, at 19.

Hamilton had breached a condition of its contract[183] and sought compensatory damages.[184] In the meantime, Frank Kameny reported to the Daughters of Bilitis secretary that Monroe Freedman,[185] the attorney consulted on the Gramercy Inn case, "feels we have [an] excellent case & could very easily win."[186] Freedman told the Gramercy Inn that ECHO planned to sue for $50,000.[187] ECHO now had two pending claims for breach.

While ECHO raised its breach of contract claims against the Gramercy Inn and Manger Hamilton, it secured accommodation at the Sheraton-Park Hotel, "the largest, and probably the best hotel in the District of Columbia."[188] Attendees and organizers braced for another cancellation until days before the conference,[189] but the Sheraton-Park honored its commitment and "was gracious and cooperative."[190] The conference was a "success."[191]

ECHO's trouble finding a hotel, though outrageous, was not entirely surprising. *ONE* reported that "East Coast hostelries seem to be singularly inhospitable to the local homophile organizations."[192] Remarkably, the 1964 conference, only ECHO's second, was also ECHO's second time struggling to secure accommodations. Just one day before the 1963 conference, the Drake Hotel in Philadelphia, the conference's planned location, "insisted that the whole affair be cancelled" when it discovered the "taboo" topic of the conference.[193] But when ECHO "scrounge[d] up the payment for the entire bill in advance[,] [t]he conference was on."[194]

This two-year saga culminating in ECHO's assertion of contract claims against the Gramercy Inn and Manger Hamilton hotels illustrates the

183. Id.

184. East Coast Homophile Organizations, supra note 163.

185. Monroe Freedman was a notable civil rights and civil liberties lawyer who was a consultant to the United States Commission on Civil Rights in addition to working with the Mattachine Society; he ended up becoming dean of Hofstra Law School. Margalit Fox, Monroe Freedman, Influential Voice on Legal Ethics, Dies at 86, N.Y. Times (Mar. 2, 2015), https://www.nytimes.com/2015/03/03/nyregion/monroe-freedman-expert-on-legal-ethics-dies-at-86.html (on file with the *Columbia Law Review*). Freedman's role in this case as an expert on contract law is further evidence of the interconnectedness of public and private law at the time.

186. Letter from Marjorie McCann to Governing Bd., supra note 175. The note about Freedman was written on the paper of the initially typed letter and was labeled "P.S. Later." Id.

187. Id.

188. Cafiero, supra note 164, at 19.

189. See C.P., supra note 163, at 14 ("At this writing (six days before the Conference), it is scheduled for the Sheraton-Park Hotel . . . .").

190. Cafiero, supra note 164, at 19.

191. Id.

192. Tangents, ONE, Dec. 1965, at 18, 25.

193. John P. LeRoy, ECHOs of ECHO, Mattachine Newsl. (Mattachine Soc'y, New York, N.Y.), Oct. 1963, at 3, 3.

194. Id.

importance of contract law to 1960s homophile legal strategy. Because parties were so resistant to contract with queer people, it became especially important for them to be explicit in negotiating and drafting contracts, furthering their learnings from the 1950s.[195] In many cases, opposing parties still breached, and contract law was the only possible redress.

c. *Haight Theater v. KMPX-FM.* — The next contract dispute is the Haight Theater's[196] claim that KMPX-FM breached a condition of its contract by cutting off the broadcast to the Theater's nightly radio show, "The Gay Hour," in July 1964. The Haight opened on July 17, 1964, as the first theater unabashedly catered to queer people in the country.[197] In addition to showing queer-themed movies and hosting drag contests,[198] the theater began broadcasting a late-night radio show, "The Gay Hour," on the night of August 4 using the station KMPX-FM.[199] Immediately the broadcast brought "[f]uror" to the neighborhood and "pickets to the theater."[200] When KMPX-FM received "beefs from listeners" and "threats to bring in the FCC," the station "cut 'em off the air."[201] The "Haighters" responded by threatening to "sue the station on a $250,000 breach-of-contract suit."[202]

d. Odorizzi v. Bloomfield School District. — The final contract claim is the only one that resulted in a published court opinion.[203] It involved a schoolteacher, Donald Odorizzi, who was arrested for same-sex sexual activity in June 1964.[204] Immediately after Odorizzi returned home after his arrest, the district superintendent and school principal visited his apartment and demanded his resignation, threatening to fire him and "publicize the proceedings" if he refused to quit.[205] Odorizzi signed the resignation letter.[206] After signing, however, the criminal charges were

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195. See supra section II.A.

196. While the Haight Theater isn't traditionally recognized as a homophile organization, this Note analyzes it as such because it was an organization fighting on behalf of queer people during the 1960s.

197. Cross-Currents, The Ladder, Oct. 1964, at 21, 21; see also Unidentified News Clipping, S.F. Chron., Aug. 4, 1964 (on file with the *Columbia Law Review*) [hereinafter Aug. 4 Clipping] ("The town's homosexuals . . . now have a theater of their very own (the Haight) . . . .").

198. Cross-Currents, supra note 197, at 21.

199. Aug. 4 Clipping, supra note 197.

200. Cross-Currents, supra note 197, at 21.

201. Unidentified News Clipping, S.F. Chron., July 7, 1964 (on file with the *Columbia Law Review*) [hereinafter July 7 Clipping].

202. Id.

203. See Odorizzi v. Bloomfield Sch. Dist., 54 Cal. Rptr. 533 (Cal. Dist. Ct. App. 1966).

204. Id. at 537.

205. Id. at 537–38.

206. Id. at 538.

dismissed, and Odorizzi sought reinstatement at his former school.[207] When the school district declined, he brought suit.[208]

Odorizzi alleged that because the district superintendent and school principal requested his resignation after a long night of police questioning (he hadn't slept for forty hours), his initial "resignation was invalid"—"obtained through duress, fraud, mistake, and undue influence."[209] Ultimately, the California District Court of Appeal sided with Odorizzi, rejecting his claims of duress, menace, fraud, and mistake but finding that he alleged facts sufficient to support a claim of undue influence.[210] Odorizzi's case has been frequently cited[211] and even appears in foundational textbooks.[212]

But reading the published opinion does not reveal any connection between the case and homophile legal strategy at the time. The court makes no mention of homophile organizations and declines to connect the plaintiff's case to a larger queer rights discussion.[213] Behind the scenes, however, homophile groups guided Odorizzi. Odorizzi's friend worked for the homophile publication *Tangents*, and he urged Odorizzi to press his case "to advance the rights" of queer teachers.[214] *Tangents* became heavily involved in the case, finding Odorizzi both a criminal attorney who helped get his charges dropped[215] and a contracts attorney who represented him against his former employer.[216] The magazine even paid some of the legal fees.[217] This confirms that homophile groups played a key role in helping queer people secure legal services, including for contract disputes.[218] The ACLU of Southern California then joined Odorizzi's case, marking an

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207. Id. at 537.

208. Id.

209. Id. at 537–38.

210. Id. at 538.

211. See Westlaw, https://westlaw.com/ (last visited Feb. 4, 2024) (open the case *Odorizzi*, 54 Cal. Rptr. 533 and select "Citing References"; then select "Cases" within the "Content types" tab).

212. See, e.g., *Odorizzi*, 54 Cal. Rptr. 533, reprinted in Contracts: Cases and Doctrine 1012 (Randy E. Barnett ed., 4th ed., 2008).

213. *Odorizzi*, 54 Cal. Rptr. at 543 ("We express no opinion on the merits of plaintiff's case, or the propriety of his continuing to teach school . . . .").

214. Kellye Y. Testy, Relational Background: Donald Odorizzi's Story, *in* Contracts: Cases and Doctrine, supra note 212, at 1018, 1020.

215. Editorial, Tangents, Jan. 1966, at 2, 2.

216. See Justin Wm. Moyer, Forgotten Court Case Shows How a California Schoolteacher Was Persecuted for Being Gay, Wash. Post (Dec. 29, 2020), https://www.washingtonpost.com/history/2020/12/29/donald-odorizzi-gay-rights/ (on file with the *Columbia Law Review*) (noting that "a local homosexual organization" reached out to attorney Stuart Simke to take Odorizzi's contracts case (internal quotation marks omitted) (quoting Simke)).

217. See id. (noting that the homophile group "w[as] going to pay [the lawyer]" (internal quotation marks omitted) (quoting Simke)).

218. See supra notes 143–145 and accompanying text.

initial step in the organization's implementation of its 1965 policy supporting queer legal reform.[219] Odorizzi then won his case before the California appellate court.[220]

This case reflects how important contract law had become to homophile legal strategy. *Tangents* called Odorizzi's case so "significan[t] that no retrospective of 1965 would be complete without it."[221] And *Odorizzi* wasn't singular. Each dispute and resulting claim from this section illustrates the changing role of contract law in 1960s homophile legal strategy—it was an affirmative, offensive tool, not just a preventative measure.

2. *Contract Law as a Space-Creating Tool.* — At the beginning of the 1960s, the homophile movement left its nonconfrontational approach behind and adopted one focused on widespread vocal activism.[222] With this change in the movement, contract claims became key tools to facilitate the homophile project of asserting and demonstrating public law rights. These claims did so by seeking to protect the space homophile groups needed for their activities. In a way, homophile groups taught their members how to use contract law to protect private spaces in the 1950s[223] and then applied these learnings in the 1960s to protect their own public activities.

a. *ONE v. Continental Travel Service.* — First, ONE's private law claim against Continental Travel Service attempted to enable queer people to assert their public law association rights. The proposed "CRUISE THROUGH EUROPE"[224] cannot be understood outside the context of queer people's association rights at the time. Queer people had just won the right from the Supreme Court of California to associate with each other in queer bars.[225] But this right was nonexistent in other states, where liquor authorities closed establishments just because they served queer clientele.[226] Even the right secured in California—ONE's home state—was

219. Editorial, supra note 215, at 2.

220. See Odorizzi v. Bloomfield Sch. Dist., 54 Cal. Rptr. 533, 543 (Cal. Dist. Ct. App. 1966) (holding that Odorizzi "states a cause of action for rescission of a transaction to which his apparent consent had been obtained through the use of undue influence").

221. Editorial, supra note 215, at 2.

222. See supra notes 48–51 and accompanying text.

223. See supra notes 139–141 and accompanying text.

224. Cruise Through Europe, supra note 2, at 32.

225. Vallerga v. Dep't of Alcoholic Beverage Control, 347 P.2d 909, 912 (Cal. 1959) (holding that the state's Department of Alcoholic Beverage Control could not suspend a bar's liquor license just because it catered to queer patrons); see also Cain, supra note 6, at 1567–71 (discussing the leadup to and decision in *Vallerga*). A few other states joined California but not until later in the 1960s. Id. at 1571–72 (citing One Eleven Wine & Liquors, Inc. v. Div. of Alcoholic Beverage Control, 235 A.2d 12, 18 (N.J. 1967); Kerma Rest. Corp. v. State Liquor Auth., 233 N.E.2d 833, 834–35 (N.Y. 1967)).

226. Eskridge, Gaylaw, supra note 37, at 93–94 (explaining that most states permitted the closing of bars "that became regular resorts of homosexuals" and that California was an outlier).

heavily limited. Catering to queer patrons wasn't enough to shut down a bar, but allowing queer conduct was.[227]

In this context, a trip to Europe was an appealing way for queer people to assert their association rights despite widespread attacks on them at home. Unsurprisingly, excitement for the tour was palpable; over 300 people inquired.[228] ONE recognized the importance of the tour for queer people's ability to associate. While there is no evidence of specific plans for the 1961 tour, an announcement for the 1972 tour demonstrates this point. The announcement made clear that, while the tour would involve visiting "prime tourist attractions," "a Gay Tour is not just another tour."[229] Instead, this tour included plans to meet with overseas *ONE* readers, visit European homophile groups, and explore cities' queer establishments.[230] The sparse evidence about the 1961 tour suggests a similar program: Queer people representing homophile groups from all over Europe wrote to *ONE* to offer to host the tour group in their cities.[231] Associating with a "cross-section of the Gay Community" was the trip's primary goal, and contract law could help facilitate that.[232]

When Continental Travel Service canceled the trip, then, it was about more than just missing out on fun; it was a threat to queer people's right to associate with each other and their European counterparts. ONE, in its response, accused Continental Travel Service of "prey[ing] upon the loyalty of ONE's world-wide readership" and noted the "offers of hospitality" from European groups.[233] These statements indicate a worry that Continental Travel Service was depriving *ONE*'s readers of the ability to associate with others like them.

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227. See, e.g., *Vallerga*, 347 P.2d at 912 (noting that a liquor license could still be revoked due to the presence of queer people "seeking sexual gratification in a public tavern with another of the same sex" because this act "would offend the moral sense of the general public"); see also Eskridge, Gaylaw, supra note 37, at 94–95 (noting that queer people "had a theoretical right to congregate but not if they touched or kissed one another"); Cain, supra note 6, at 1569–72 (explaining that queer conduct could still be cause for the revocation of a liquor license).

228. ONE Board Letter, supra note 4, at 4.

229. European Tour 1972: Cruise Through Europe, ONE Letter, Apr. 1972, at 1, 1 (on file with the *Columbia Law Review*).

230. Id.

231. See Letters, ONE, Sept. 1961, at 29, 30–31 (documenting numerous letter submissions from enthusiastic hosts in Europe); see also ONE Board Letter, supra note 4, at 4 (noting that "generous offers of hospitality were received from European homophile groups"). This evinces the transnational nature of the homophile movement. For background on this topic, see generally Leila J. Rupp, The Persistence of Transnational Organizing: The Case of the Homophile Movement, 116 Am. Hist. Rev. 1014 (2011) (exploring the development of "a transnational homophile identity").

232. European Tour 1972: Cruise Through Europe, supra note 229, at 1; see also Tangents, ONE, Nov. 1964, at 16, 16 [hereinafter Tangents Nov. 1964] (expressing the annual Europe trip's goal of "sharing of homophile viewpoints between friends in different countries").

233. ONE Board Letter, supra note 4, at 4.

ONE's contract claim sought to protect queer people's ability to assert this public law right. In the short term, ONE appeared to be unsuccessful in this pursuit, seeing as the 1961 tour never departed.[234] Behind the scenes, however, the story was a bit more complicated. After the public denouncement, the travel agency contacted ONE and offered, instead of canceling the tour, to "merely . . . postpone[]" it to the following summer.[235] This indicated some potential success. Ultimately, however, further challenges derailed the rescheduled tour, and the Board doubled down on its negative assessment of the travel agency.[236] It is unclear if the Board ever received compensation from Continental Travel Service.[237]

Even if ONE never received compensation, the 1961 dispute precipitated the creation of a structure that allowed queer people to assert their association rights in the future. In October 1964, three years after Continental Travel Service canceled ONE's initial tour, a group of *ONE* readers departed on a three-week European adventure[238]—"the first all-gay excursion ever to be undertaken."[239] Informed by the contract dispute with Continental Travel Service, ONE organized the trip in-house.[240] Asserting association rights was a key component of the trip, of course. *ONE* reported that "[t]he highlight . . . was [the] opportunity to meet homophile organizations throughout Europe."[241] The trip was a "tremendous success."[242] European tours continued under ONE well into the 1970s, advertising to readers: "A GAY TIME IS IN STORE FOR YOU!"[243]

b. *ECHO v. Gramercy Inn and Manger Hamilton.* — The use of affirmative contract claims to create space to assert and discuss public law rights is especially evident in the context of ECHO's 1964 dispute with the Gramercy Inn and Manger Hamilton hotels. First, the contract claims

234. See Gay Tour Triumphs, supra note 20, at 21 (indicating that the first tour of Europe occurred in 1964).

235. Letter from ONE to the Readers of *ONE* (July 1962) (on file with the *Columbia Law Review*).

236. Id. (alleging that further "misstatements" have plagued attempts to put on a rescheduled tour).

237. See Letter from William Lambert, Bus. Manager, ONE, to Newton E. Deiter, Tour Coordinator, Cont'l Travel Serv. (May 29, 1962) (on file with the *Columbia Law Review*) (demanding $1,745 for losses arising out of the mishandling of the rescheduled tour). There was no response to this letter in the archive.

238. European Tour 1972: Cruise Through Europe, supra note 229, at 1.

239. Tangents Nov. 1964, supra note 232, at 16.

240. See id. (indicating the tour was "conducted under the auspices of ONE's Social Service Division").

241. Gay Tour Triumphs, supra note 20, at 21.

242. Id.

243. ONE World Travel Club, ONE's 1975 12th Annual International Gay Tour 1 (1975) (on file with the *Columbia Law Review*); see also European Tour 1972: Cruise Through Europe, supra note 229, at 1–5 (summarizing the pre-1972 trips and the providing the plan for the 1972 tour).

sought to help queer people assert their association rights, much like ONE's claim against Continental Travel Service. One of the functions of the 1964 ECHO Conference was to give queer people a place to congregate and socialize. A recap of the tour celebrated, in addition to the content of the convention, how "jolly" the community was.[244] ECHO's contract claims against the Gramercy Inn and Manger Hamilton hoped to secure the right of queer people to be together as a group.[245]

Even more directly, ECHO asserted its contract claims so it could host a conference that explicitly discussed public law rights. The theme of the conference was "Homosexuality: Civil Liberties and Social Rights."[246] It included speeches on topics like "Official Discrimination," "Politics," "Civil Liberties," "Criminal Sanction," "Civil Rights," and "Government Regulation."[247] As one recap described it: "The content of the ECHO '64 conference revolved around ACTION."[248] Quite literally, the function of ECHO's contract claims was to secure the space for queer people to assert and debate their public law rights.

In the claim against the Gramercy Inn, Freedman, ECHO's counsel, assessed that ECHO "ha[d] an excellent case & could very easily win."[249] He must have been right; the Gramercy Inn immediately "offered to compromise for half the time previously contracted for, then capitulated completely,"[250] "recogniz[ing] its original contract."[251] Obscured by ECHO's ultimate decision to have the conference elsewhere is the fact that this was the best possible result in the case against Gramercy Inn, especially before ECHO secured alternate accommodations.[252] While the Sheraton-Park ended up hosting the conference, Gramercy Inn's recognition of the contract provided ECHO at least with a backup space and may have provided bargaining power in negotiations with the Sheraton-Park.

The contract claim against the Manger Hamilton was similarly successful. About eighteen months after the conference, Kameny reported that "[i]n an out-of-court settlement, the Manger Hamilton

244. Adkins & Tobin, supra note 48, at 6–7.

245. For a discussion of the significance of this right, see supra notes 225–227 and accompanying text.

246. ECHO Report '64, The Ladder, Jan. 1965, at 4, 4 (internal quotation marks omitted).

247. Program, ECHO, East Coast Homophile Organizations Presents E.C.H.O. Conference 1964 (Oct. 1964) (on file with the *Columbia Law Review*).

248. Lily Hansen & Barbara Gittings, Part Two: Highlights of ECHO, The Ladder, Jan. 1965, at 7, 7.

249. Letter from Marjorie McCann to Governing Bd., supra note 175.

250. Cafiero, supra note 164, at 19; see also C.P., supra note 163, at 14 ("The pressure on the Gramercy Inn was sufficient and they capitulated . . . .").

251. Kameny, supra note 169, at 3.

252. This remedy looks a lot like specific performance, which wouldn't even be available in formal proceeding against the Gramercy Inn here. See 24 Williston on Contracts § 64:1 (4th ed. 2023) (explaining that specific performance is a remedy when "only equitable relief is available").

Hotel . . . ha[d] paid $500.00 . . . for damages [that] ar[ose] from their last-minute cancellation of hotel accommodations for the 1964 ECHO Conference."[253] Kameny heralded this settlement as a "vindicat[ion]" of ECHO.[254] While any victory for queer rights was notable, Kameny's assessment might seem overzealous given the $500 settlement. But further analysis suggests that this result was, in fact, a substantial victory.

Damages are calculated to put the nonbreacher in the position they would have been in had the promise been performed.[255] It is doubtful that ECHO would have been in a better position had Manger Hamilton performed the contract. Based on reports, the Sheraton-Park was "nicer" than the Manger Hamilton, and "the prices were in the same range"[256]—ECHO had completely mitigated its expectation damages.[257] Additionally, damages based on reliance or restitution were unlikely: ECHO doesn't appear to have had a reliance interest in holding the event at the Manger Hamilton, and the Manger Hamilton received no obvious benefit for its breach.[258] In short, ECHO didn't have a strong argument for substantial damages, especially given that expectation damages net mitigation appeared to be $0. Receiving any sum at all, perhaps to repay the $500 that organizations contributed to the legal fight,[259] can be described as nothing short of a substantial victory.

Thus, even though the 1964 conference—with a focus on queer people's legal rights[260]—did not include contract law as a subject, contract law was integral in providing ECHO with space to put it on. ECHO's contract disputes thus exemplify the intimate connection between public law and private law in homophile legal strategy.

c. *Haight Theater v. KMPX-FM.* — The Haight Theater's 1964 contract claim against KMPX-FM had a similar potential to create space for queer people to manifest their public law rights, but it illustrates that not every contract claim led to a legal victory. In the years before the Haight's claim, the Supreme Court held that queer people had a First Amendment right

253. Kameny, supra note 169, at 3.

254. Id.

255. 24 Williston on Contracts, supra note 252, § 64:2.

256. Cafiero, supra note 164, at 19.

257. See 24 Williston on Contracts, supra note 252, § 64:31 (noting that a party "cannot recover those damages that it could have avoided").

258. See id. at § 64:2 (noting that, besides expectation interests, parties may be able to recover for "interest in being reimbursed for loss caused by reliance on the contract" or "interest in having restored . . . any benefit that he has conferred on the other party" (internal quotation marks omitted) (quoting Restatement (Second) of Contracts § 344 (Am. L. Inst. 1981))).

259. See supra note 176 and accompanying text.

260. See supra notes 246–248 and accompanying text.

to publish queer content,[261] though these rights were curbed in important ways.[262]

The Haight's $250,000 claim against KMPX-FM for removing "The Gay Hour" from air[263] intended to secure the space for queer broadcasters to actualize their First Amendment rights. Unfortunately, the "bold experiment . . . ended sadly": About a month after they opened the Haight, the "co-owners reportedly blew town, leaving behind unpaid debts and a bench warrant for the arrest of one of them."[264]

While the Haight's claim was not successful like ECHO's, it still affirms the importance of contract law in 1960s homophile legal strategy. Eskridge points out that the First Amendment provided queer people some "breathing room to socialize and organize."[265] Taken together, the disputes recounted in this section reveal that, without contract law, that breathing room would collapse. The First Amendment may have given queer people the right to organize and socialize, but contract law gave them the space to do so.

3. *Contract Law Rights in Queer People's Growing Rights Consciousness.* — The role of private law in homophile legal strategy was not only to aid in the assertion of public law rights. Asserting private contract law rights was a goal in itself, a key part of queer people's increasing consciousness of their toolbox of legal rights.

a. *ONE v. Continental Travel Service.* — The central role of contract law in queer people's growing rights consciousness is evident in ONE's contract dispute with Continental Travel Service. As discussed in this Note's Introduction, ONE responded to Continental Travel Service using terms that invoked contract law.[266] It first expressed "the utmost contempt for anyone who would attempt to victimize homosexuals or try to reap financial gain at their expense."[267] It then signaled that "[t]he homosexual public will no longer tolerate any lower standards of honesty and fair-dealing than those demanded by other segments of the population."[268] In private notes, the Board lamented not only the lost time in preparing for the trip—"worth thousands of dollars"—but also the lost reliability the

261. One, Inc. v. Olesen, 355 U.S. 371, 371 (1958); see also Manual Enters., Inc. v. Day, 370 U.S. 478, 491 (1962) (holding that male physique magazines do not qualify as obscene, so the post office could not refuse to mail them on this premise).

262. See Eskridge, Gaylaw, supra note 37, at 96 ("[L]ower federal and state courts did not read [*Olesen* and *Day*] liberally . . . ."); Frank, supra note 36, at 19 ("Publishers were still vulnerable to obscenity charges and could face prison sentences for publishing magazines deemed obscene. Much depended on the attitudes of local police and prosecutors.").

263. See supra notes 197–202 and accompanying text.

264. Cross-Currents, supra note 197, at 21.

265. Eskridge, Gaylaw, supra note 37, at 93.

266. See supra note 19 and accompanying text.

267. ONE Board Letter, supra note 4, at 4.

268. Id.

magazine would have with advertisers.[269] In these statements, ONE's Board of Directors indicated that its contract claim against Continental Travel Service served to protect and assert the right of queer people not only to associate and travel with each other[270] but also to contract as reliable and equal bargaining partners.

In its public proclamation, the Board then explicitly put the goal of securing contract rights in the context of the fight for public law rights: "Our intention further is to make it as clear regarding commercial matters, as ONE has for years been doing concerning civil and legal rights, that homosexuals cannot be trampled under foot with impunity."[271] This statement is emphatic: Protecting and asserting queer people's contract rights was part of the magazine's overall mission to advance queer rights.

b. *ECHO v. Gramercy Inn and Manger Hamilton.* — Contract rights' position as a part of queer people's rights consciousness is also evident in ECHO's dispute with the Gramercy Inn and Manger Hamilton. The Daughters of Bilitis, one of the four ECHO organizations,[272] reported that ECHO hired a lawyer to raise claims against the two hotels because leaders were "tired of being treated in this way."[273] This indicates the group's goal was not just to put on its conference;[274] it was to contract more easily with outside parties.

Kameny's account of the disposition with the Manger Hamilton substantiates this view. He remarked that the hotel "apparently felt that a formal contract, entered into with a homophile organization, could be violated with impunity. They have been shown otherwise."[275] The goal of the lawsuit was thus to show that queer parties had contract rights and were willing to enforce them. Kameny then tied the assertion of this contract law right to the larger goal of standing up to the "abrogation of [queer people's] rights, or treatment as second-class persons."[276] Kameny hoped to upend the structure that made queer people second-class citizens, and he realized that structure operated in private law as much as public law.

c. Odorizzi v. Bloomfield School District. — Odorizzi's claim against his former employer also demonstrates the importance of contract rights themselves in the homophile legal movement. The ACLU of Southern California saw the rights at stake in Odorizzi's case as so foundational that the organization chose the case as one of its first forays

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269. Memorandum from the Bd. of Dirs., ONE, on The Responsibility of Homosexuals to Homosexuals (on file with the *Columbia Law Review*).

270. See supra notes 224–243 and accompanying text.

271. ONE Board Letter, supra note 4, at 4.

272. See supra note 160.

273. East Coast Homophile Organizations, supra note 163.

274. See supra notes 246–248 and accompanying text.

275. Kameny, supra note 169, at 3.

276. Id.

into litigation protecting queer people.[277] The ACLU's involvement—lauded at the time as "a giant step in the fight to end discrimination against homosexuals"[278]—reveals just how central contract law rights were to the broader project of queer people's legal equality.

Odorizzi himself viewed his contract law rights as key to his future as a queer teacher. He wrote to his lawyer: "I am FIGHTING FOR MY LIFE and would never really be satisfied until the Supreme Court has ruled . . . ."[279] Like other queer people, Odorizzi was a vulnerable bargainer susceptible to duress and undue influence from other parties.[280] It was integral for him to ensure that the doctrines of contract law protected him from his former employer's tactics.

Overall, these claims indicate that contract law was more than just a tool to aid in expressing and discussing public law rights. As a letter sent to *ONE* stated, queer people were fighting for "the right to live peacefully and within the law as orderly and useful citizens"[281]—protecting contract rights was essential to that goal.

C. *The Limits of Contract Law*

This Part has shown the importance of contract law during the homophile movement. Contract law was a framework for queer people and the organizations representing them to make arguments about their rights and an avenue to receive some compensation for violations of those rights. But this section explains how contract law's limitations in both its applicability and remedial scope meant it could not completely protect queer people from the immensely homophobic Cold War society.[282]

Contract law protects only certain agreements. It declines to enforce contracts that are against public policy.[283] This includes bargains to commit illegal acts[284] or even bargains with a probability of promoting illegal acts.[285] The Haight Theater's breach claim against KMPX-FM may

277. Editorial, supra note 215, at 2.

278. Id.

279. Testy, supra note 214, at 1022 (internal quotation marks omitted) (quoting Letter from Donald Odorizzi to Stuart Simke (Dec. 1965)).

280. See supra note 146 and accompanying text.

281. Letter from H.S. to Blanche M. Baker, M.D., *in* Toward Understanding, ONE, Feb. 1960, at 26, 26.

282. Farr also recognized contract law's limits in the context of private lawsuits by Black sharecroppers and tenant farmers in the post-slavery South. Farr, supra note 60, at 718–31. Immense anti-Black violence at the time made Black farmers' private lawsuits far riskier than the contract claims discussed in this Note. See id. at 722–24 (discussing the racial terrorism that followed Black farmers' contract negotiations and claims).

283. 5 Williston on Contracts § 12:1 (4th ed. 2023).

284. Id. § 12:4.

285. 8 Williston on Contracts § 19:10 (4th ed. 2023).

have been defeated by this doctrine.[286] The station removed "The Gay Hour" after it was threatened with FCC involvement.[287] If broadcasting "The Gay Hour" was illegal, the agreement the radio station made to broadcast it was unenforceable, and the Haight could not recover.[288] Given that criminal law targeted queer people's very existence,[289] many agreements queer people wished to make—like the Haight's—were likely unenforceable on grounds of public policy.

While queer people were limited in what they could bargain for, they could enter into agreements for access to physical space, as ECHO did to plan its yearly conference.[290] But contracts for space could not protect queer people from criminal enforcement.[291] Instead, they could only block outside prejudice and surveillance by providing sheltered rooms somewhat separated from the public.[292] At best, contract law created a zone of privacy that the outside world was less likely to breach. But it did not prevent the state from intervening if it wanted. Police repeatedly raided homophile events without mind for whether a contract had properly secured the venue.[293]

Even if queer people entered into valid contracts, available remedies for breach are limited in scope and usually cannot compensate for any harms caused by actions motived by homophobia or prejudice. Punitive damages are generally not available in breach of contract claims.[294] And while the law is evolving, mental and emotional suffering is generally not

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286. See supra notes 196–202, 261–264 and accompanying text.

287. July 7 Clipping, supra note 201.

288. See 8 Williston on Contracts, supra note 285, § 19:75 (explaining that courts cannot order damages for the breach of a bargain that violates the law).

289. See supra note 6 and accompanying text.

290. See supra notes 159–195 and accompanying text.

291. This is true because courts refuse to enforce not only bargains to violate criminal laws, see supra notes 283–285 and accompanying text, but also bargains with the purpose of concealing a crime, 7 Williston on Contracts § 15:8 (4th ed. 2023). So even when queer groups contracted for space, they had to be careful about what they claimed the purpose of the contract was.

292. See supra sections II.A–.B.

293. Perhaps the most famous example is the police's raid of a Mardi Gras ball organized by the Council on Religion and the Homosexual, a San Francisco homophile group, on New Year's Day 1965. For accounts of the raid, see Kay Tobin, After the Ball, The Ladder, Feb.–Mar. 1965, at 4, 4–5. The police raided the ball even though there is no indication that the people were in the space unlawfully. See Tobin, supra, at 5 (reporting that the police's justification for intruding was their (contested) observation that "tickets . . . were being sold at the door"). The raid has been called "San Francisco's Stonewall." See, e.g., Nora Neus, San Francisco's Stonewall: The New Year's Ball that Sparked a Queer Power Movement, The Guardian (Dec. 30, 2023), https://www.theguardian.com/us-news/2023/dec/30/california-hall-ball-police-raid-lgbt-rights-activist-history-san-francisco [https://perma.cc/J6FE-GECF].

294. See 24 Williston on Contracts, supra note 252, § 64:1 ("The fundamental principle that underlies the availability of contract damages is that of compensation."); id. § 64:12 ("Punitive damages are not ordinarily recoverable in actions for breach of contract . . . .").

compensable in contract claims.[295] Any remedy a plaintiff can receive for a breach corresponds to the contract's monetary value.[296] This likely explains the $500 settlement in ECHO's claim against the Manger Hamilton.[297] Queer people likely experienced shame, violence, harassment, and decline in morale when they were victims of a contract breach based in homophobia.[298] But damages could not compensate for these dignitary harms.[299]

Furthermore, as Odorizzi's case illustrates, public law actions can render contract claims valueless, thus negating any claim for damages. Although Odorizzi won his contract law case,[300] he never received damages and never got his job back. After his arrest, California revoked his teaching license in an administrative action.[301] In response, Odorizzi dismissed his suit against the school district[302] and never returned to teaching.[303] The administrative action had rendered his contract claim worthless, so he dropped it.[304] As scholar Kellye Testy noted: "It seems like in the contracts book that [Odorizzi] won," but "no man who went through this won in any sense that mattered."[305] Odorizzi's case warns us that public law reactions can override, reverse, and undermine even a complete victory in the arena of private law. And yet, despite contract law's limits, this Part has shown that homophile groups recognized it as a powerful tool for queer people at a time when their public law rights were under attack.[306]

III. QUEER PEOPLE AND CONTRACT LAW: LOOKING FORWARD

This Part turns to the implications of Part II's findings, arguing that future scholars and practitioners should pay attention to private law broadly and contract law specifically when researching and advocating for

295. Id. § 64:11. Plaintiffs can, however, bring tort claims related to mental and emotional injury in conjunction with their contract claims. Id.

296. See id. § 64:1 (noting that plaintiffs "should be placed, as nearly as is possible through an award of money damages, in the position [they] would have been in had the defendant-promisor fully performed the contract").

297. See supra notes 253–259 and accompanying text.

298. See F. Andrew Hessick, Standing and Contracts, 89 Geo. Wash. L. Rev. 298, 321–24, 322 n.156 (2021) (noting that broken promises may result in moral, dignitary, and psychological harms). These harms are likely exacerbated when the breach is due to a party's immutable characteristic.

299. Farr uncovered a similar trend. See Farr, supra note 60, at 729 ("Without the possibility of punitive damages for breach of contract, damages awarded for violent breaches would be the same as the damages awarded for nonviolent ones.").

300. See supra notes 204–210 and accompanying text.

301. Testy, supra note 214, at 1022–23.

302. Id. at 1023.

303. Moyer, supra note 216.

304. Testy, supra note 214, at 1023.

305. Moyer, supra note 216 (internal quotation marks omitted) (quoting Testy).

306. See supra sections II.A–.B.

queer rights. This Part begins by providing avenues for potential future academic research that will help further develop our understanding of queer people's relationship to law. It then exits the academy, discussing the importance of this research for on-the-ground movement lawyers.

A. *Private Law and Queer Legal Scholarship*

In looking at the way a specific political movement (the homophile movement) interacted with a specific body of private law (contract law), this Note opens the door to further exploration of private law's role in the development of legal subjects. There are multiple directions scholars can push this research.

First, researchers may focus on different legal acts, turning away from contract law toward another area of private law. Just within the homophile movement, there are hints in the archive (and specifically in *ONE*) of queer people using property law,[307] tort law,[308] and corporate law[309] as part of their legal strategy. Each area of law will imbue our understanding of queer people's relationship to the law with new meaning.

Second, this Note invites researchers to focus on a different set of subjects. They may look at other marginalized groups, as scholars such as Brittany Farr and Dylan Penningroth have done.[310] Of course, more research remains to be done regarding queer subjects as well. The truth is that relatively few queer people, even during the 1960s, were involved in

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307. See, e.g., Alden Kirby, More Life Among the Dunes, ONE, May 1960, at 26, 27 (discussing how property ownership enabled the "integrat[ion]" of queer people's lives on Fire Island); Dale Mallory, An Income Tax Guide for Homosexuals, ONE, Feb. 1962, at 6, 7 (informing queer people about the possibilities of joint tenancy and joint ownership); Wilfran Nicols, The Older Homosexual, ONE, June–July 1957, at 5, 7 (mentioning an older lesbian couple who share property as a symbol of long-term commitment); Charles K. Robinson, A Home of Your Own, ONE, Mar. 1960, at 5, 5–6 (discussing the process of jointly owning property and the benefits, including privacy, of having "a home of your own"); Charles K. Robinson, Plan for Financial Freedom, ONE, Sept. 1959, at 22, 23 (urging queer people to invest in real estate, especially to overcome the "punish[ment]" of being forced to identify as single for tax purposes); Letter from C.L.R. to Dr. Blanche M. Baker, *in* Toward Understanding, ONE, Dec. 1959, at 23, 23 (noting that landlords are reluctant to rent to two single men).

308. See, e.g., Letters, ONE, Nov. 1962, at 29, 29 (printing a letter that informs queer people that they can sue public health officials if they suffer a tort from the official revealing STI results); James Whitman, The Answer to Homosexuality, ONE, July 1953, at 14, 16 (identifying the bringing of invasion of privacy tort claims as an "immediate goal[] of the Mattachine [Society]").

309. See Letter from William Lambert to Continent Tour, supra note 12 (noting that *ONE*'s attorney is "very watchful that [staff] in no way overstep the proper boundaries of the functions [they] are chartered to perform and so in any way jeopardize [the corporate] charter").

310. See supra notes 104–105 and accompanying text.

the homophile movement.[311] Looking at how queer people utilized and shaped private law outside the movement—and outside the 1950s and 1960s—will enrich our view of queer people as legal subjects. Looking outside large-scale movements may also do a better job of highlighting law's role in subjects' daily lives,[312] a task that is difficult when looking at the strategy of large organizations.

Third, researchers may change the questions they ask when looking at queer people's private law interactions. Instead of looking at how private law contributes to legal strategy—as this Note does—potential future studies may consider how private law contributes to the development of identity.[313] This would likely be a fruitful inquiry given the role of private law in shaping people's everyday interactions with the world around them.[314]

Finally, there is no reason to limit this line of inquiry to the past. Some scholars have begun to study private law's role in contemporary queer movements.[315] But further research remains to be done.

B. *Private Law and Queer Movement Lawyering*

The relative lack of focus on private law in queer legal studies mirrors the relative lack of focus on private law as a way of supporting queer people

311. In 1961, the Mattachine Society had 230 members nationwide, while the Daughters of Bilitis had 115. Eskridge, Dishonorable Passions, supra note 6, at 131. Readership of *ONE* and *The Ladder* was fewer than 1,000. Id. This contrasts with the tens of thousands who "flocked to lesbian and gay bars that year." Id.

312. See supra notes 83–86 and accompanying text.

313. See supra note 30 and accompanying text.

314. See supra notes 83–86 and accompanying text.

315. See, e.g., Allison S. Bohm, Samantha Del Duca, Emma Elliott, Shanna Holako & Alison Tanner, Challenges Facing LGBT Youth, 17 Geo. J. Gender & L. 125, 139 (2016) ("[P]laintiffs seeking redress for gender identity or sexual orientation-based discrimination in schools have alleged a number of tort law violations with varying levels of success . . . ."); Hila Keren, Beyond Discrimination: Market Humiliation and Private Law, 95 U. Colo. L. Rev. 87, 140, 149–65 (2024) [hereinafter Keren, Beyond Discrimination] (arguing that the "market humiliation" that results from discrimination should be remedied through private law); Hila Keren, Separating Church and Market: The Duty to Secure Market Citizenship for All, 12 U.C. Irvine L. Rev. 911, 958–71 (2022) (discussing ways for queer people to secure participation in the market, including through corporate law and contract law); Rapp, supra note 82, at 1147–48 (raising, but not answering, questions about how tort law should accommodate and adapt to the specific experiences of queer people); Carlos A. Figueroa, Comment, "Oh [Yes], She Betta [Should]!": Dolling Up Drag Queens' Intellectual Property Rights, 28 UCLA Ent. L. Rev. 127, 142–45 (2021) (arguing for alterations to intellectual property laws to better protect drag performers). For a related but distinct line of inquiry, see Noah M. Kazis, Fair Housing for a Non-Sexist City, 134 Harv. L. Rev. 1683, 1685–89 (2021) (advocating for a broader application of antidiscrimination laws to "systematically . . . uproot" sex discrimination in housing).

living today.[316] This Note's historical findings implore movement lawyers[317] fighting to advance the rights of queer people to consider the role of contract law, and private law more broadly, in their work. While some have begun to take note of private law's importance,[318] this section provides an example of a specific way that contract law can ameliorate challenges that queer people currently face. It closes with a discussion about contract law's renewed relevance in the wake of the Supreme Court's decision in *303 Creative LLC v. Elenis*.[319]

1. *Using Contract Law to Support Queer Youths Experiencing Homelessness.* — As an example of contract law's utility, this section considers the needs of queer youths experiencing homelessness. Queer (and especially trans and gender-nonconforming) youths experience homelessness at alarming rates.[320] And as scholar Libby Adler points out, private law plays a large role in keeping queer youths unhoused.[321] Minors have diminished ability to contract. Contracts they enter into are voidable[322] and unenforceable,[323] making minors undesirable bargaining partners. As a result, queer youths experiencing homelessness are often unable to bargain to improve their economic and social condition.

But movement lawyers can use contract law to support queer youths experiencing homelessness. Minors' contracts for necessaries—often including housing—are enforceable.[324] Lawyers can help queer youths form contracts to secure some of their needs. Furthermore, voidability is intended as a protection for minors,[325] so it may be a tool that lawyers can help queer youths take advantage of if they do enter contracts.

Lawyers can also argue for a change in the doctrine to allow queer youths broader latitude to make enforceable contracts.[326] In fact, a 1965 *ONE* article

316. See, e.g., Carlos A. Ball, Introduction: The Past and the Future, *in* After Marriage Equality: The Future of LGBT Rights 1, 1–13 (Carlos A. Ball ed., 2016) (mentioning only public law areas as future sites for developing queer people's rights).

317. Movement lawyering is "lawyering in solidarity with social movements." Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, Movement Law, 73 Stan. L. Rev. 821, 826 (2021).

318. See supra note 315.

319. 143 S. Ct. 2298 (2023).

320. See Jaimie Seaton, Homeless Rates for LGBT Teens Are Alarming, but Parents Can Make a Difference, Wash. Post (Mar. 29, 2017), https://www.washingtonpost.com/news/parenting/wp/2017/03/29/homeless-rates-for-lgbt-teens-are-alarming-heres-how-parents-can-change-that/ (on file with the *Columbia Law Review*) (noting the staggering number of queer youths who experience homelessness); see also John Ecker, Queer, Young, and Homeless: A Review of the Literature, 37 Child & Youth Servs. 325, 325–26 (2016) (compiling studies discussing the disproportionate number of queer youths affected by homelessness).

321. Libby Adler, The Gay Agenda, 16 Mich. J. Gender & L. 147, 203–04 (2009).

322. 5 Williston on Contracts, supra note 283, § 9:5.

323. 25 Williston on Contracts § 67:47 (4th ed. 2023).

324. 5 Williston on Contracts, supra note 283, § 9:18–19.

325. Id. § 9:5.

326. See Adler, supra note 321, at 200 (suggesting a possible future route as "addressing common law limits on a minor's capacity to contract"). In addition, there are other areas of

by Manuel Boyfrank previously floated this idea.[327] The article advocated for securing the right to contract for boys between fifteen and twenty-one years old.[328] This would give them the chance to work and prepare for adulthood, an especially vital ability for young queer people without supportive families.[329] Boyfrank's concerns ring true today, and his call to action echoes Adler's assessment—which this Note also adopts—that movement lawyers can use contract law to "open up some avenues for change."[330]

2. *Contract Law's Increasing Importance After* 303 Creative. — Contract law is only growing in importance for the queer movement. In 2023, the Supreme Court held in *303 Creative LLC v. Elenis* that the First Amendment permitted a graphic designer to refuse to create wedding websites for same-sex couples despite a Colorado statute that prohibited discrimination on the basis of sexual orientation in public accommodations.[331] Public accommodations laws like Colorado's have proliferated since the 1970s.[332] And before *303 Creative*, they were understood to protect queer people from discrimination such as by a website designer (as in *303 Creative*) or a travel agency/hotel (as discussed in this Note).[333] It would have been tempting to think that antidiscrimination laws had supplanted contract law in importance because they protected queer people from acts like a hotel's refusal to rent space to a queer advocacy group.[334] But *303 Creative* has opened the door again for private parties to discriminate in who they allow to access the public accommodations they provide.[335]

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contract law doctrine that lawyers can advocate to change based on this Note's lessons. For example, dignitary or emotional harms may be incorporated into damages calculations. See supra notes 294–299 and accompanying text.

327. Manuel Boyfrank, Our Situation Today, ONE, Aug. 1965, at 16, 20.

328. Id.

329. Id.

330. Adler, supra note 321, at 204.

331. 143 S. Ct. 2298, 2307–08, 2321–22 (2023) (citing Colo. Rev. Stat. § 24-34-601(2)(a) (2022)).

332. See id. at 2314 n.2 (listing state statutes like Colorado's); Eskridge, Gaylaw, supra note 37, at app. B2 (listing state and local laws that prohibit discrimination based on sexual orientation).

333. See Kenji Yoshino, Rights of First Refusal, 137 Harv. L. Rev. 244, 244, 265–69 (2023) (arguing that *303 Creative* has "cast doubt" on previous jurisprudence that did not allow businesses to use compelled affirmations to circumvent antidiscrimination laws).

334. See supra notes 159–195 and accompanying text. Note, however, that not all states provide protections for queer people in public accommodations like Colorado. See Nondiscrimination Laws, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/non_discrimination_laws [https://perma.cc/QWG9-DHFU] (last visited Feb. 4, 2024) (noting that twenty-two states and four territories do not explicitly prohibit discrimination based on sexual orientation or gender identity in public accommodations).

335. See Yoshino, supra note 333, at 244 ("In the wake of *303 Creative*, any business engaged in sufficiently expressive conduct will be able to assert . . . an exemption [to anti-discrimination laws]."). But see Carlos A. Ball, First Amendment Exemptions for Some, 137 Harv. L. Rev. Forum 46, 46–47 (2023), https://harvardlawreview.org/wp-content/uploads/2023/11/137-Harv.-L.-Rev.-F.-46.pdf [https://perma.cc/P8L4-7NNH] (responding to

Thus, the post–*303 Creative* world resembles the world of this Note. In fact, discrimination eerily similar to that which queer groups faced in the 1960s has begun to crop up again.[336] In 2021, just before the Court's decision in *303 Creative*, a Montgomery Marriott asked the Knights & Orchids Society—an Alabama-based health advocacy group founded by Black trans and queer people[337]—to abandon its work retreat, which the hotel was hosting, after the queer group reported a transphobic incident instigated by an unaffiliated guest.[338]

The parallels between this event and homophile groups' struggles nearly sixty years earlier are obvious.[339] But unlike ECHO,[340] *ONE*,[341] the Haight Theater,[342] and Odorizzi,[343] Knights & Orchids did not mention contract law in its response to the event.[344] Perhaps this was a missed opportunity. As *303 Creative* provides cover for establishments like the Montgomery Marriott to discriminate once again, it has become even more important for queer movements to think about contract law.[345] Like in the 1960s, contract law may provide tools for queer people to counter society's growing animus toward them[346] and public law's increasingly hands-off approach to that animus.

Yoshino by expressing faith that the Supreme Court will be able to distinguish between "sincere and reasonable" requests for exemptions and those that are "grounded in bigoted and prejudiced views").

336. Hila Keren, Homophobic Business Owners Are Having a Field Day Since Last Month's Supreme Court Decision, Slate (July 25, 2023), https://slate.com/news-and-politics/2023/07/homophobic-business-owners-supreme-court-decision.html [https://perma.cc/6CA2-KSZP] (describing the immediate push to extend *303 Creative* "beyond web designing, outside of the wedding industry, and to more than same-sex couples").

337. Our Story, Knights & Orchids Soc'y, https://www.tkosociety.org/about [https://perma.cc/W37Y-D5T9] (last visited Jan. 18, 2024).

338. John Riley, Transgender Group Kicked Out of Marriott Hotel After Reporting Harassment, Metro Wkly. (Dec. 28, 2021), https://www.metroweekly.com/2021/12/transgender-group-kicked-out-of-marriott-hotel-after-reporting-harassment/ [https://perma.cc/D7S8-MAW3].

339. Cf. supra notes 159–195 and accompanying text.

340. See supra notes 174–175, 184–186 and accompanying text.

341. See supra note 19 and accompanying text.

342. See supra note 202 and accompanying text.

343. See supra notes 208–209 and accompanying text.

344. See The Knights & Orchids Inc.—TKO, Facebook (Dec. 19, 2021), https://www.facebook.com/TKOSociety/posts/1835112473357984 [https://perma.cc/4MQ3-M4JV] (discussing the transphobic attack and the hotel's response without mentioning the contractual relationship between the hotel and the group).

345. In a recent article, scholar Hila Keren has argued that discrimination arising from post–*303 Creative* discriminatory practices should be countered with the contract law "principle of good faith." Keren, Beyond Discrimination, supra note 315, at 154.

346. See Scott Skinner-Thompson, Trans Animus, 65 B.C. L. Rev. (forthcoming 2024) (manuscript at 1–6), https://ssrn.com/abstract=4563643 [https://perma.cc/X75Z-V2UH] (describing the recent antitrans agenda as "animus"); Minami Funakoshi & Disha Raychaudhuri, The Rise of Anti-Trans Bills in the US, Reuters (Aug. 19, 2023), https://www.

CONCLUSION

The goal of this Note is to position contract law as an important tool in queer people's fight for equality under the law. Its main method is historical. Focusing on the homophile movement of the 1950s and 1960s, this Note uncovers the key—and previously unrecognized[347]—role that contract law played in the movement's legal strategy.[348] In the 1950s, homophile groups used contract law as "preventative law," a way to avoid legal disputes and maintain the discretion that defined queer life at the time.[349] But a new militancy emerged in the movement in the 1960s, and with it came a more affirmative role for contract law. During that decade, homophile groups repeatedly asserted their contract rights, disputed bargaining partners' breaches, and even secured remedies.[350]

This history suggests that today's scholars and practitioners should focus more on contract law when contemplating queer people's interactions with the law. The time has come to resuscitate from the past what Penningroth calls "alternative traditions of civil rights, including ones rooted in contract law."[351] A future in which queer people have full equality and dignity under the law will be not only free from state-sanctioned discrimination but full of private contracting.

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reuters.com/graphics/USA-HEALTHCARE/TRANS-BILLS/zgvorreyapd/ [https://perma.cc/5PPY-X866] (detailing the recent spate of antitrans bills).

347. See supra sections I.A–.B.

348. See supra Part II.

349. See supra section II.A.

350. See supra section II.B.

351. Penningroth, supra note 83, at 341.

ESSAY

DISTINGUISHING PRIVACY LAW: A CRITIQUE OF PRIVACY AS SOCIAL TAXONOMY

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What distinguishes privacy violations from other harms? This has proven a surprisingly difficult question to answer. For over a century, privacy law scholars labored to define the elusive concept of privacy. Then they gave up. Efforts to distinguish privacy were superseded at the turn of the millennium by a new approach: a taxonomy of privacy problems grounded in social recognition. Privacy law became the field that simply studies whatever courts or scholars talk about as related to privacy.

Decades into privacy as social taxonomy, the field has expanded to encompass a broad range of information-based harms—from consumer manipulation to algorithmic bias—generating many rich insights. Yet this approach has come at a cost. This Essay diagnoses the pathologies of a field that has abandoned defining its core subject matter and offers a research agenda for privacy in the aftermath of social recognition.

Our critique is overdue. It is past time to think anew about exactly what work the concept of privacy is doing in a complex information environment and why a given societal problem—from discrimination to misinformation—is worthy of study under a privacy framework. Only then can privacy scholars articulate what we are expert in and participate meaningfully in global policy discussions about how best to govern information-based harms.

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INTRODUCTION

A police drone peers through a second-story apartment window to inspect whether an armed robbery suspect is there.[1] Facebook withholds advertising for financial services from older users and female users.[2] A consumer is tricked into sharing more personal information than they intended.[3] A family living in a predominantly Asian American neighborhood is charged a higher price for SAT test preparation.[4] Farm robots outfitted

1. See Cindy Chang, LAPD Deploys Controversial Drone for the First Time, L.A. Times (Jan. 15, 2019), https://www.latimes.com/local/lanow/la-me-lapd-drone-20190115-story.html (on file with the *Columbia Law Review*).

2. See Jonathan Stempel, Facebook Sued for Age, Gender Bias in Financial Services Ads, Reuters (Oct. 31, 2019), https://www.reuters.com/article/us-facebook-lawsuit-bias/facebook-sued-for-age-gender-bias-in-financial-services-ads-idUSKBN1XA2G8 [https://perma.cc/6GUT-VGJ7].

3. See Alicia Adamczyk, These Are the 'Potentially Unlawful' Tactics Retailers Use to Trick Customers Into Spending More Money, CNBC (Nov. 27, 2019), https://www.cnbc.com/2019/11/27/how-retailers-trick-customers-into-buying-more.html [https://perma.cc/F3ZL-XU5F].

4. See Julia Angwin, Surya Mattu & Jeff Larson, The Tiger Mom Tax: Asians Are Nearly Twice as Likely to Get a Higher Price From Princeton Review, ProPublica (Sept. 1, 2015), https://www.propublica.org/article/asians-nearly-twice-as-likely-to-get-higher-price-from-princeton-review [https://perma.cc/588H-PEHK].

with cameras and data processors collect and crunch data to optimize farming.[5] A pregnancy-tracking app grants pregnant users' employers a royalty-free license to mine their de-identified personal information.[6] A renter is denied an apartment after the screening company's automated background check system incorrectly pulls in criminal records for women with different middle names, races, and birth dates.[7]

Each of these scenarios, and countless others, have been recognized as problems involving "privacy." Are they? This vibrant, interdisciplinary field with decades of history possesses no real sense of what constitutes a privacy problem and what does not. Though these scenarios implicate different values and arise from different contexts, none would be out of place at a privacy law conference. Yet other types of information-based harms—TikTok users sharing a fake screenshot of a nonexistent CNN headline suggesting that climate change is seasonal,[8] for example—would be out of place. Why? No one can say.

Throughout the twentieth century, scholars sought to define and distinguish the concept of privacy. A parade of articles and books, from *The Right to Privacy* onward, offered varying definitions for this elusive idea.[9] Privacy amounts to a right "to be let alone,"[10] these works argued, or "the control we have over information about ourselves."[11] Privacy involves access to the self or self-determination.[12] Over one

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5. Amanda Little, Opinion, Farm Robots Will Help Feed the World During Climate Change, Bloomberg L. (June 2, 2022), https://www.bloomberglaw.com/bloombergterminalnews/bloomberg-terminal-news/RCUO2CDWX2QK (on file with the *Columbia Law Review*).

6. Drew Harwell, Is Your Pregnancy App Sharing Your Intimate Data With Your Boss?, Wash. Post (Apr. 10, 2019), https://www.washingtonpost.com/technology/2019/04/10/tracking-your-pregnancy-an-app-may-be-more-public-than-you-think/ (on file with the *Columbia Law Review*).

7. Lauren Kirchner & Matthew Goldstein, How Automated Background Checks Freeze Out Renters, N.Y. Times (May 28, 2020), https://www.nytimes.com/2020/05/28/business/renters-background-checks.html (on file with the *Columbia Law Review*).

8. Tiffany Hsu, Worries Grow that TikTok Is New Home for Manipulated Video and Photos, N.Y. Times (Nov. 4, 2022), https://www.nytimes.com/2022/11/04/technology/tiktok-deepfakes-disinformation.html (on file with the *Columbia Law Review*).

9. See infra Part I.

10. Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 195 (1890) (internal quotation marks omitted) (quoting Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract 29 (2d ed. 1888)).

11. Charles Fried, Privacy, 77 Yale L.J. 475, 482 (1968) (emphasis omitted).

12. See, e.g., Anita L. Allen, Uneasy Access: Privacy for Women in a Free Society 13–17 (1988) [hereinafter Allen, Uneasy Access] ("[P]ersonal privacy is a condition of inaccessibility of the person, his or her mental states, or information about the person to the senses or surveillance devices of others."); Edward J. Eberle, Human Dignity, Privacy, and Personality in German and American Constitutional Law, 1997 Utah L. Rev. 963, 1000 (defining "informational self-determination" as a conception of privacy that seeks to "preserve the integrity of human personality against the onslaught of the technological age and of prying eyes"); Ruth Gavison, Privacy and the Limits of Law, 89 Yale L.J. 421, 423 (1980)

hundred years of debating solitude[13] yielded no universally agreed-upon definition. But that did little to deter privacy scholars from trying.

At the turn of the millennium, a new voice arose that would come to shape the field of American privacy scholarship for decades. In a series of articles and books, Professor Daniel J. Solove dismissed attempts to define privacy as invariably over- or underinclusive.[14] Embracing a pragmatism similar to that of Justice Oliver Wendell Holmes, Jr.,[15] Solove exhorted the field to abandon the quixotic quest to attach a single definition to privacy.[16] In its place, Solove offered a taxonomy of "the specific activities that pose privacy problems," a loosely correlated set of concerns and concepts that have come to be associated with privacy in its many forms.[17]

The taxonomizing of privacy was not without precedent. Professor William Prosser famously distilled four privacy torts from decades of case law,[18] and Professor Alan Westin compiled a taxonomy of privacy attitudes.[19] Nor has the taxonomy of privacy entirely evaded critique.[20] But

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[hereinafter Gavison, Privacy and the Limits of Law] (arguing that privacy "is related to our concern over our accessibility to others").

13. See Gabriel García Márquez, One Hundred Years of Solitude (Gregory Rabassa trans., Harper & Row 1970).

14. See Daniel J. Solove, Understanding Privacy 8 (2008) (criticizing privacy theories that characterize privacy as a "unitary concept with a uniform value that is unvarying across different situations" and explaining that the "attempt to locate the 'essential' or 'core' characteristics of privacy has led to failure"); Daniel J. Solove, Conceptualizing Privacy, 90 Calif. L. Rev. 1087, 1124 (2002) [hereinafter Solove, Conceptualizing Privacy] (arguing that settling on any of the six common conceptions of privacy described in the article would result in "either a reductive or an overly broad account of privacy"); Daniel J. Solove, A Taxonomy of Privacy, 154 U. Pa. L. Rev. 477, 485–86 (2006) [hereinafter Solove, Taxonomy of Privacy] (claiming that attempts to find a single essence of privacy are usually "too broad and vague").

15. See Louis Menand, The Metaphysical Club: A Story of Ideas in America 339–47 (2001) (describing Holmes's theory of the law, which claimed that decisions are fundamentally dictated by experience, not formal doctrinal logic).

16. See Solove, Taxonomy of Privacy, supra note 14, at 481–82 (arguing for a framework to evaluate privacy issues based on specific harmful activities instead of defaulting to a single definition that is too vague to be useful for effective policymaking and lawmaking).

17. Id. at 482, 489–91.

18. See William L. Prosser, Privacy, 48 Calif. L. Rev. 383, 389 (1960) (proposing "four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . 'to be let alone'" (quoting Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract 29 (2d ed. 1888))).

19. See Alan F. Westin, Privacy and Freedom 31–32 (1967) (identifying four psychological conditions or states of individual privacy).

20. See, e.g., Jeffrey Bellin, Pure Privacy, 116 Nw. U. L. Rev. 463, 465–68 (2021) (listing the drawbacks of not being able to define the term "privacy"); M. Ryan Calo, The Boundaries of Privacy Harm, 86 Ind. L.J. 1131, 1140–42 (2011) [hereinafter Calo, Boundaries of Privacy Harm] (highlighting the limitations of the taxonomic approach and the pressing need for principles that delimit privacy harm); David E. Pozen, Privacy–Privacy Tradeoffs, 83 U. Chi. L. Rev. 221, 226–27 (2016) (pointing out how the "capaciousness" of Solove's taxonomic approach "exacerbates the dilemma of privacy-privacy tradeoffs").

Solove's specific rejection of privacy conceptualization in favor of a taxonomic approach continues to exert a profound influence on the shape of contemporary privacy scholarship. As Professor Woodrow Hartzog recently explained, abandoning definition in favor of taxonomy helped breathe new life into the field.[21] Unburdened by a need to define privacy, the past two decades have seen a Cambrian explosion in the arguments and issues at the heart of mainstream privacy scholarship.

This Essay argues that the long-dominant social-taxonomic approach to privacy and privacy law is no longer serving the field. There are several important reasons why. First, social recognition alone is not—and never has been—a sufficient criterion for what counts as a privacy problem. Instead of comparing an information-based harm to a set definition of a privacy harm, the taxonomic approach asks whether the right people or institutions—typically courts, public officials, and established scholars—talk about the harm as involving privacy.[22] In and of itself, this approach raises critical questions about authority, legitimacy, and whose voices should be heard and valued when it comes to identifying new privacy harms.

The social-taxonomic approach also omits, and arguably impedes, the development of a sophisticated framework for interrogating the tension *between* the various values under the privacy umbrella. For example, many free speech scholars see privacy as an impediment to self-expression.[23] Other scholars in the critical tradition have explored how privacy is deployed as cover for subordination.[24] And a decade or more of work in

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21. See Woodrow Hartzog, What Is Privacy? That's the Wrong Question, 88 U. Chi. L. Rev. 1677, 1687 (2021) ("By getting us past the threshold question of what privacy is, Solove's work provides room for scholars and lawmakers to tackle bigger phenomena . . . .").

22. See Calo, Boundaries of Privacy Harm, supra note 20, at 1141 ("Solove's criteria for inclusion involve recognition by the right sorts of authorities.").

23. See, e.g., Solveig Singleton, Privacy Versus the First Amendment: A Skeptical Approach, 11 Fordham Intell. Prop. Media & Ent. L.J. 97, 97 (2000) ("The courts should think twice before sacrificing the mature law of free speech to the less coherent concerns about privacy."); Eugene Volokh, Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You, 52 Stan. L. Rev. 1049, 1051 (2000) ("While privacy protection secured by contract is constitutionally sound, broader information privacy rules are not easily defensible under existing free speech law.").

24. See, e.g., Catharine A. MacKinnon, Privacy v. Equality: Beyond *Roe v. Wade*, *in* Feminism Unmodified 93, 102 (1987) [hereinafter MacKinnon, Privacy v. Equality] (describing the right to privacy as "a right of men 'to be let alone' to oppress women one at a time" (footnote omitted) (quoting Warren & Brandeis, supra note 10, at 205)); Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 Colum. L. Rev. 1118, 1119 (1986) ("The notion that the world of remunerative work and the world of home—or the realms of production and reproduction—are separate, has fostered the economic and social subordination of women . . . ."); Elizabeth M. Schneider, The Violence of Privacy, 23 Conn. L. Rev. 973, 975 (1991) [hereinafter Schneider, Violence of Privacy] ("The notion of marital privacy has been a source of oppression to battered women and has helped to maintain women's subordination within the family.").

algorithmic accountability illustrates the tension between privacy and antidiscrimination or fairness.[25] Yet this expansive, criteria-free approach to privacy has come to fold in information-based threats to self-expression, antisubordination, and fairness as core privacy concerns.[26] The result is a proliferation of vexing "privacy–privacy tradeoffs"[27] with little hope of reconciliation.

Situating privacy law within the broader structure of information-based power has become a critical task for scholars and policymakers alike. American privacy law scholarship has yet to even reconcile the basic distinction between privacy and data protection,[28] let alone the new modes of information governance that European and other societies are exploring today.[29] Distinguishing privacy from data protection, content moderation, or antidiscrimination law would shed light on the precise goals societies are trying to meet, the range of approaches that exist to meet them, and the institutions best suited to address these issues. The FTC, for example, may be better positioned to address violations of information privacy, whereas the DOJ Civil Rights Division is better versed in antidiscrimination law. Only recently have the United States and the European Union agreed on a privacy framework to share data, and to this day, the European Union has not recognized any American federal agency as a data-protection authority.[30]

It is imperative that we try to understand what work the concept of privacy is doing in today's complex information environment. As it happens, some of the leading and emerging lights in privacy law scholarship are beginning to disentangle privacy from other information-based values, reminding the field just what we are experts in.[31] The time has come to leverage this literature in service of a new direction for the field.

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25. See, e.g., Roger Allan Ford & W. Nicholson Price II, Privacy and Accountability in Black-Box Medicine, 23 Mich. Telecomms. & Tech. L. Rev. 1, 4 (2016) ("The solution to the accountability problem is to validate black-box models, but that requires access to more information, which can exacerbate the privacy problem. And the solution to the privacy problem is to limit [information] . . . but that can make it harder to validate models and easier to hide . . . problems."); Finale Doshi-Velez & Mason Kortz, Accountability of AI Under the Law: The Role of Explanation 10 (2017), https://dash.harvard.edu/bitstream/handle/1/34372584/2017-11_aiexplainability-1.pdf [https://perma.cc/E7NE-3E9C] (unpublished working paper) ("AI systems do not automatically store information about their decisions. . . . [U]nlike human decision-makers, AI systems can delete information to optimize their data storage and protect privacy. However, an AI system designed this way would not be able to generate *ex post* explanations the way a human can.").

26. See infra section I.C.

27. See Pozen, supra note 20, at 222.

28. See infra notes 285–294 and accompanying text.

29. See infra notes 295–300 and accompanying text.

30. See 2023 O.J. (C 4745).

31. See, e.g., Julie E. Cohen, What Privacy Is For, 126 Harv. L. Rev. 1904, 1905 (2013) [hereinafter Cohen, What Privacy Is For] (arguing that privacy is not a legal protection for the liberal self but instead a fundamental tool for protecting "the situated practices of

The Essay proceeds as follows. Part I traces the efforts of twentieth-century privacy scholars to define our subject matter, culminating in Solove's intervention in the early 2000s, and acknowledges the generative role of privacy's taxonomy paradigm. Part II argues that social recognition has always been a flawed means by which to distinguish privacy and that privacy as taxonomy stands in the way of identifying, reconciling, and distinguishing privacy harms in a diverse and complex information environment. Section II.A discusses information-based harms that privacy law was late to recognize, such as information-based discrimination and algorithmic manipulation. Section II.B discusses unresolved tensions between and among privacy and other values.

Part III outlines a post-taxonomy research agenda for privacy law, one that decouples classification from social recognition, foregrounds the role of reflexivity, and begins to answer the deep question of just what work privacy is doing in the context of information-based harms. Misinformation, hate speech, bias, data sovereignty, labor extraction, and many other contemporary concerns *implicate* or *involve* privacy but sound in different values altogether. By uncritically broadening the concept of privacy, most Americans are missing out on a global conversation around data protection, information governance, and harm mitigation. Only by distinguishing privacy can privacy law reach its full potential as a discipline and a body of law.

I. PRIVACY AS SOCIAL TAXONOMY

Scholars understand themselves as participating in a conversation. The precise contours of this conversation—collectively, the field—are important. Thus, it should come as no surprise that the development of a robust privacy literature was attended by commentators' many attempts to conceptualize their object of study. Early privacy scholars asked, time and again, just what *is* privacy? How does privacy differ from other social facts, concepts, and values?

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boundary management through which the capacity for self-determination develops"); Cynthia Dwork & Deirdre K. Mulligan, It's Not Privacy, and It's Not Fair, 66 Stan. L. Rev. Online 35, 36 (2013), https://review.law.stanford.edu/wp-content/uploads/sites/3/2016/08/DworkMullliganSLR.pdf [https://perma.cc/Q8JA-463Q] ("Regrettably, privacy controls and increased transparency fail to address concerns with the classifications and segmentation produced by big data analysis."); Paul Schwartz, Data Processing and Government Administration: The Failure of the American Legal Response to the Computer, 43 Hastings L.J. 1321, 1343–52 (1992) [hereinafter Schwartz, Data Processing] (discussing the weaknesses of the "privacy" paradigm and proposing instead to talk about bureaucratic justice and human autonomy); Salomé Viljoen, A Relational Theory of Data Governance, 131 Yale L.J. 573, 578 (2021) (critiquing privacy law's individualism, which fails to address data's population-level relational effects); Tal Z. Zarsky, Privacy and Manipulation in the Digital Age, 20 Theoretical Inquiries L. 157, 161–68 (2019) [hereinafter Zarsky, Privacy and Manipulation] (suggesting that manipulation-based arguments are preferable to privacy theories, which are plagued with substantial theoretical shortcomings and pitfalls).

How we conceptualize a problem also determines how we craft a solution. A good understanding of what is at stake helps ensure that we can effectively protect the interests involved. Conversely, "[m]isdiagnosing a problem makes it hard to fix."[32] With an uncertain concept, we may end up designing a policy that does not provide an adequate solution or that addresses the problem's symptoms but not its real cause. We may even distract from the problem altogether, failing to foreground the range of interconnected issues.

For these reasons and others, privacy scholars struggled for over a century to offer an adequate conceptualization of privacy. Eventually, however, after no definition managed to garner a consensus, when every effort felt over- or underinclusive, defining privacy became less and less holy a grail. Today, the field understands privacy to be an umbrella concept that spans a wide variety of issues, values, and goals. Under this approach, privacy is, at most, amenable to taxonomy.

A. *The Field's Struggle to Define Privacy*

Scholars have not always considered the search for a definition of privacy quixotic. In the wake of a famous and early formulation of the right to privacy furnished by then–law partners Samuel Warren and Louis Brandeis in 1890,[33] several scholars set about the task of proposing an adequate and encompassing definition. Warren and Brandeis's definition is well known: The right to privacy can be understood as "the right 'to be let alone.'"[34] Yet from the start, this formulation was repeatedly criticized as too vague or as merely describing a single attribute of privacy.[35] And it was followed by innumerable efforts to identify the "essence" or "core" features of privacy.

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32. Calo, Boundaries of Privacy Harm, supra note 20, at 1136.

33. See Warren & Brandeis, supra note 10, at 195.

34. Id. (quoting Cooley, supra note 10, at 29).

35. See, e.g., Allen, Uneasy Access, supra note 12, at 7 (stating that "[i]f privacy simply meant 'being let alone,' any form of offensive or harmful conduct directed toward another person could be characterized as a violation of personal privacy," from a "punch in the nose" to "a peep in the bedroom"); Edward J. Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U. L. Rev. 962, 970 (1964) (observing that instead of developing an understanding of privacy, Warren and Brandeis focused mostly on gaps in existing tort law); Gavison, Privacy and the Limits of Law, supra note 12, at 437–38 (arguing that "[t]he great simplicity of this definition gives it rhetorical force and attractiveness, but also denies it the distinctiveness that is necessary for the phrase to be useful in more than a conclusory sense"); Tom Gerety, Redefining Privacy, 12 Harv. C.R.-C.L. L. Rev. 233, 263 (1977) (asserting that the definition of privacy as the right to be left alone is too broad); Solove, Conceptualizing Privacy, supra note 14, at 1101 (explaining that describing privacy as the right to be let alone only describes one aspect of privacy and doesn't explain how privacy should be measured against other values or "inform us about the matters in which we should be let alone").

Attempts to conceptualize privacy during this period, while many and varied, largely follow along two veins. For one group of twentieth-century privacy theorists, control acts as a common denominator.[36] Under this view, privacy can be reduced to the control we have over information relating to or about ourselves. A second group has highlighted access as the essence of privacy.[37] Inspired by Professors Ruth Gavison and Anita Allen,[38] scholars in this tradition understand privacy to involve managing access to the self, especially to prevent unauthorized access by third parties to people's lives, feelings, personal goods and properties, and experiences.

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36. See, e.g., Julie C. Inness, Privacy, Intimacy, and Isolation 91 (1992) (describing privacy as "the state of the agent having control over decisions concerning matters that draw their meaning and value from the agent's love, caring, or liking," including "choices on the agent's part about access to herself, the dissemination of information about herself, and her actions"); Arthur R. Miller, The Assault on Privacy 25 (1971) (characterizing privacy as "the individual's ability to control the circulation of information relating to him"); Westin, supra note 19, at 7 ("Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."); Fried, supra note 11, at 482 ("Privacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves."); A. Michael Froomkin, The Death of Privacy?, 52 Stan. L. Rev. 1461, 1463 (2000) (describing informational privacy as "the ability to control the acquisition or release of information about oneself"); Gerety, supra note 35, at 236 (describing privacy as "autonomy or control over the intimacies of personal identity"); Jerry Kang, Information Privacy in Cyberspace Transactions, 50 Stan. L. Rev. 1193, 1203 (1998) (characterizing information privacy as "an individual's control over the processing—i.e., the acquisition, disclosure, and use—of personal information"); Richard B. Parker, A Definition of Privacy, 27 Rutgers L. Rev. 275, 281 (1974) ("[P]rivacy is control over when and by whom the various parts of us can be sensed by others." (emphasis omitted)).

37. See, e.g., Allen, Uneasy Access, supra note 12, at 10 (noting that "a degree of inaccessibility is an important necessary condition for the apt application of 'privacy'"); Sissela Bok, Secrets 10–11 (1982) (describing privacy as "the condition of being protected from unwanted access by others—either physical access, personal information, or attention"); David M. O'Brien, Privacy, Law, and Public Policy 16 (1979) (describing privacy as "an existential condition of limited access to an individual's life experiences and engagements"); Gavison, Privacy and the Limits of Law, supra note 12, at 428 (describing privacy as "a limitation of others' access to an individual"); Jeffrey H. Reiman, Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future, 11 Santa Clara Comput. & High Tech. L.J. 27, 30 (1995) (characterizing privacy as "the condition in which other people are deprived of access to either some information about you or some experience of you"); Ernest Van Den Haag, On Privacy, *in* Nomos XIII: Privacy 149, 149 (J. Roland Pennock & John W. Chapman eds., 1971) (describing privacy as "the exclusive access of a person (or other legal entity) to a realm of his own").

38. See generally Allen, Uneasy Access, supra note 12, at 13–17 ("My own restricted-access definition of 'privacy' is this: personal privacy is a condition of inaccessibility of the person, his or her mental states, or information about the person to the senses or surveillance devices of others."); Gavison, Privacy and the Limits of Law, supra note 12, at 423 ("Our interest in privacy, I argue, is related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention.").

A subset of this second vein also identifies privacy with secrecy.[39] For theorists in this tradition, privacy protects the right to conceal personal information and is violated through unwanted access or disclosure. Supreme Court jurisprudence about the third-party doctrine adheres to this notion of privacy. This doctrine holds, roughly, that there is no reasonable expectation of privacy over information that is no longer completely secret.[40] Consequently, this type of information is less likely to be protected by the Fourth Amendment.[41]

Together, control and access cover considerable ground. Yet focusing exclusively on these two approaches neglects other important conceptions of privacy. Although pivotal, conceptions of control and access largely address flows of personal information.[42] They concern the conditions

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39. See, e.g., Adam Carlyle Breckenridge, The Right to Privacy 1 (1970) (describing privacy as "the rightful claim of the individual to determine the extent to which he wishes to share of himself with others"); Amitai Etzioni, The Limits of Privacy 196 (1999) (characterizing privacy as "the realm in which an actor (either a person or a group, such as a couple) can *legitimately* act without disclosure and accountability to others"); Richard A. Posner, Economic Analysis of Law 46 (5th ed. 1998) (describing privacy as a person's "right to conceal discreditable facts about himself"); Sidney M. Jourard, Some Psychological Aspects of Privacy, 31 Law & Contemp. Probs. 307, 307 (1966) (describing privacy as "an outcome of a person's wish to withhold from others certain knowledge as to his past and present experience and action and his intentions for the future"); Solove, Conceptualizing Privacy, supra note 14, at 1106 ("The privacy-as-secrecy conception can be understood as a subset of limited access to the self."); E.L. Godkin, Libel and Its Legal Remedy, 46 Atl. Monthly 729, 736 (1880) (characterizing privacy as "the right of every man to keep his affairs to himself, and to decide for himself to what extent they shall be the subject of public observation and discussion").

40. See, e.g., Smith v. Maryland, 442 U.S. 735, 743–44 (1979) ("[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."); United States v. Miller, 425 U.S. 435, 443 (1976) (explaining that the Fourth Amendment doesn't protect information "revealed to a third party and conveyed by him to Government authorities," even when "revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed").

41. This rough conception is undergoing change in the digital age. See, e.g., Carpenter v. United States, 138 S. Ct. 2206, 2217, 2220 (2018) (refusing to apply the third-party doctrine to the collection of cell-site location information and noting that "when *Smith* was decided . . . few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier . . . a detailed and comprehensive record of the person's movements"); Matthew Tokson, Automation and the Fourth Amendment, 96 Iowa L. Rev. 581, 585 (2011) ("The Third Party Doctrine precedents, and *Smith* in particular, are problematic in an age where an ever-growing proportion of personal communications and transactions are carried out over the Internet.").

42. It is important to acknowledge, though, that Professors Sissela Bok's, Tom Gerety's, and Richard Parker's definitions of privacy go beyond informational privacy to include other senses of the term. See Bok, supra note 37, at 10–11 (noting that access by others may come in the form of "physical access, personal information, or attention"); Gerety, supra note 35, at 272–73 (describing "intimacies" as highly personal decisions "over which no one wishes to grant the state the right of regulation"); Parker, supra note 36, at 281 (describing being "sensed" by others as encompassing being "seen, heard, touched, smelled, or tasted" and noting that this may apply to "the parts of our bodies, our voices, and the products of our bodies," as well as "objects very closely associated with us").

under which firms, governments, and others collect, transfer, and analyze information about people and groups. Left on the table are other dimensions of privacy less focused on how or where information travels, such as decisional, physical, and proprietary privacy. As Allen rightly points out, these conceptions of privacy capture other patterns of actual usage of the term in the United States.[43]

Decisional privacy "establishes a space for manoeuvre in social action that is necessary for individual autonomy."[44] Within this ontological space, people can make decisions about life projects, modes of behavior, and ways of life without uninvited intervention. This is generally how the Supreme Court has conceptualized privacy in case law involving decisions such as intimate sexual relations, marriage, contraception, and, up until *Dobbs v. Jackson Women's Health Organization*, abortion.[45] Adopting a decisional privacy perspective in *Union Pacific Railway Co. v. Botsford*,[46] *Griswold v. Connecticut*,[47] *Eisenstadt v. Baird*,[48] *Roe v. Wade*,[49] *Planned Parenthood v. Casey*,[50] and other cases, the Court protected the freedom to make the most intimate and personal choices under the label of constitutional privacy. Professor Solove has referred to this as the "[i]ndividuality, [d]ignity, and [a]utonomy" dimension of personhood.[51]

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43. See Anita L. Allen, Privacy-as-Data Control: Conceptual, Practical, and Moral Limits of the Paradigm, 32 Conn. L. Rev. 861, 866 (2000) ("The actual contemporary usage of 'privacy' in the United States is particularly broad. 'Privacy' can mean informational privacy, but also physical, informational, and proprietary privacy.").

44. Beate Rössler, The Value of Privacy 80 (R.D.V. Glasgow trans., Polity Press 2005) (2001).

45. In *Dobbs*, the Supreme Court overturned Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), concluding that the right to abortion could not be constitutionally grounded in the right to privacy. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–43 (2022) (holding that the Constitution does not protect the right to abortion and noting that abortion is "fundamentally different" from other substantive due process rights involving sex, contraception, and marriage).

46. 141 U.S. 250, 251 (1891) (holding that ordering a plaintiff to undergo a surgical examination regarding the extent of the injury sued for violates "the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law").

47. 381 U.S. 479, 486 (1965) (holding that a Connecticut statute forbidding use of contraceptives violates "the notions of privacy surrounding the marriage relationship").

48. 405 U.S. 438, 453 (1972) (holding a ban on distribution of contraceptives to unmarried persons impermissible because "[i]f the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamental[] . . . as the decision whether to bear or beget a child").

49. 410 U.S. at 153 (holding that the right to privacy encompasses a person's choice to have an abortion until the fetus becomes viable).

50. 505 U.S. at 846 (holding that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed").

51. See Solove, Conceptualizing Privacy, supra note 14, at 1116.

Physical privacy entails "allowing people who want to reduce their social interactions to choose a 'retiring' mode of life."[52] This approach, also reflected in case precedent, focuses on physical access to people and personal spaces. The tort of intrusion upon seclusion, for example, seems to adopt this conception, applying to "physical intrusion into a place"; "the use of [one's] senses, with or without mechanical aids, to oversee or overhear . . . private affairs"; and "other form[s] of investigation or examination into . . . private concerns."[53] This restrictive conception of privacy also guided the Supreme Court's reasoning in *Olmstead v. United States*,[54] though the decision was later supplanted by *Katz v. United States*.[55] In *Olmstead*, the Court held that wiretapping was not a search or seizure under the Fourth Amendment, which is addressed to searches of "material things—the person, the house, his papers or his effects."[56]

Finally, proprietary conceptions of privacy underpin the right to publicity. Initially, this dimension of privacy encompassed "issues relating to the appropriation of individuals' possessory and economic interests in their genes and other putative bodily repositories of personality."[57] Therefore, proprietary privacy concerns arose in relation to people's ownership of parts and products of their bodies, such as their genes, genomes, biobanked tissue specimens, gametes, zygotes, and frozen embryos. This conception has come to involve "control over names, likenesses, and repositories of personal identity" as well[58] and may be vindicated through the tort of appropriation of name or likeness.[59]

Scholars have introduced important variants and subcategories to these traditional dimensions of privacy. Professor Neil Richards, for example, refers to intellectual privacy, defining it as "the ability, whether protected by law or social circumstances, to develop ideas and beliefs away

52. Richard A. Posner, Privacy, Secrecy, and Reputation, 28 Buff. L. Rev. 1, 5 (1979) [hereinafter Posner, Privacy, Secrecy, and Reputation].

53. See Restatement (Second) of Torts § 652B cmt. b (Am. L. Inst. 1977).

54. 277 U.S. 438, 466 (1928).

55. In *Katz*, the Supreme Court overturned *Olmstead*, holding that, since the Fourth Amendment protects people rather than places, its reach "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." Katz v. United States, 389 U.S. 347, 353 (1967). Consequently, the *Katz* Court determined that attaching an eavesdropping device to the outside of a public phone booth used by the petitioner breached the privacy on which the petitioner justifiably relied while using the telephone booth and thus violated the Fourth Amendment. Id.

56. 277 U.S. at 464.

57. Anita L. Allen, Genetic Privacy: Emerging Concepts and Values, *in* Genetic Secrets: Protecting Privacy and Confidentiality in the Genetic Era 31, 34 (Mark A. Rothstein ed., 1997) [hereinafter Allen, Genetic Privacy].

58. Anita L. Allen, Coercing Privacy, 40 Wm. & Mary L. Rev. 723, 723–24 (1999).

59. See Restatement (Second) of Torts § 652C (Am. L. Inst. 1977).

from the unwanted gaze or interference of others."[60] Professor Danielle Keats Citron calls for the protection of sexual privacy, involving the "social norms (behaviors, expectations, and decisions) that govern access to, and information about, individuals' intimate lives."[61] Interestingly, these novel variants bring together two or more elements of the previously described conceptions of privacy. Neither Richards nor Citron purports to define privacy generally—only to acknowledge and develop an undertheorized dimension.

B. *A Pragmatic Approach to Conceptualizing Privacy*

Ultimately, a shared and satisfying definition of the concept of privacy has proven elusive. The various—and sometimes competing and contradictory[62]—dimensions of privacy (informational, decisional, physical, and proprietary) are hard to cover with a singular characterization.[63]

Solove (and not just he[64]) sees a futility in the search for the "essence" of privacy. In Solove's view, any selected common denominator of privacy (e.g., control, access, or secrecy) will wind up being either too narrow to include other aspects of privacy; too broad to exclude matters that are not considered private; or too vague to specify what types of information, behaviors, expectations, and decisions are protected.[65] Thus, in 2002, Solove came up with a pragmatic solution: Privacy is better understood by drawing

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60. Neil M. Richards, Intellectual Privacy, 87 Tex. L. Rev. 387, 389 (2008) [hereinafter Richards, Intellectual Privacy]; see also Neil M. Richards, Intellectual Privacy: Rethinking Civil Liberties in the Digital Age 5 (2015) [hereinafter Richards, Rethinking Civil Liberties] ("Intellectual privacy is protection from surveillance or interference when we are engaged in the processes of generating ideas—thinking, reading, and speaking with confidants before our ideas are ready for public consumption.").

61. Danielle Keats Citron, Sexual Privacy, 128 Yale L.J. 1870, 1874 (2019).

62. Robert C. Post, Three Concepts of Privacy, 89 Geo. L.J. 2087, 2087 (2001) (reviewing Jeffrey Rosen, The Unwanted Gaze (2000)) (explaining how privacy is "entangled in competing and contradictory dimensions").

63. As Solove points out, though, there have been some efforts to group these different dimensions. Solove, Conceptualizing Privacy, supra note 14, at 1125 ("Other scholars also recognize that privacy cannot be consolidated into a single conception, and instead they cluster together certain of the conceptions."); see also Judith Wagner DeCew, In Pursuit of Privacy 73–80 (1997) (identifying the categories of informational privacy, accessibility privacy, and expressive privacy); Allen, Genetic Privacy, supra note 57, at 33 (identifying decisional privacy, physical privacy, informational privacy, and proprietary privacy); Anita L. Allen, Taking Liberties: Privacy, Private Choice, and Social Contract Theory, 56 U. Cin. L. Rev. 461, 461, 464–66 (1987) (noting two usages of privacy that have emerged in the law: "conditions of restricted access" and liberty from "interference with decisionmaking and conduct, especially respecting appropriately private affairs"); Kang, supra note 36, at 1202–05 (identifying the categories of physical space, choice, and "flow of personal information").

64. See, e.g., Hartzog, supra note 21, at 1679 (arguing that "a broad and singular conceptualization of privacy is unhelpful for legal purposes").

65. Solove, Conceptualizing Privacy, supra note 14, at 1099–124.

from philosopher Ludwig Wittgenstein's notion of "family resemblances."[66] According to Wittgenstein's account, certain concepts might not have a single common characteristic but might instead draw from a common pool of similar elements.[67] Therefore, members of a family share "overlapping and criss-crossing" characteristics instead of an essential element.[68]

Building on this theory and other aspects of pragmatism[69] familiar to lawyers since the turn of the twentieth century,[70] Solove proposed a "method of philosophical inquiry" to understand privacy from the bottom up in specific contextual situations.[71] On this view, we should conceptualize privacy by (1) examining specific problematic situations that involve "disruptions to certain practices";[72] (2) focusing on the specific types of disruption (privacy invasions) and the specific practices (private matters[73]) disrupted; and (3) evaluating the latter "empirically, historically, and normatively."[74] "If privacy is conceptualized as a web of interconnected types of disruption of specific practices," argued Solove, "then the act of conceptualizing privacy should consist of mapping the typography of the web."[75]

In 2006, as an alternative to defining privacy, Solove published *A Taxonomy of Privacy*, an article proposing a taxonomy of activities that pose privacy problems.[76] According to Solove, the many troubling activities recognized under the rubric of privacy differ from one another but share enough commonalities to bear a "family resemblance."[77] In this sense, privacy problems become "a cluster of related activities that impinge upon

66. Ludwig Wittgenstein, Philosophical Investigations §§ 66–67 (G.E.M. Anscombe trans., 3d ed. 1967).

67. See id.

68. See id.

69. Solove, Conceptualizing Privacy, supra note 14, at 1127 ("My approach to conceptualizing privacy draws from a few recurring ideas of pragmatism: a recognition of context and contingency, a rejection of a priori knowledge, and a focus on concrete practices." (footnote omitted)).

70. See Menand, supra note 15, at 337–75, 435–42 (explaining that this familiarity was fostered through Justice Holmes, Jr., who was a student, friend, or contemporary of public intellectuals John Dewey, Charles Peirce, Jane Addams, and others).

71. Solove, Conceptualizing Privacy, supra note 14, at 1154–55.

72. Id. at 1129 (explaining that the "practices" encompass "various activities, customs, norms, and traditions," such as "writing letters, talking to one's psychotherapist, engaging in sexual intercourse, making certain decisions, and so on").

73. Solove has acknowledged that this cannot be a fixed term, since the matters we consider private change over time as well as across cultures and historical periods. In that sense, "there is no consistent set of practices that should be considered private." Id. at 1142.

74. Id.

75. Id. at 1130.

76. Solove, Taxonomy of Privacy, supra note 14, at 482.

77. Id. at 486.

people in related ways,"[78] and privacy "an umbrella term, referring to a wide and disparate group of related things."[79]

What are those activities, and how are they related? Using *social recognition* as the determining criterion, Solove identified in 2006 a total of sixteen harmful activities,[80] classifying them in four basic groups.[81] Solove explained that

> [a]lthough the primary focus will be on the law, this taxonomy is not simply an attempt to catalog existing laws, as was Prosser's purpose. Rather, it is an attempt to understand various privacy harms and problems *that have achieved a significant degree of social recognition.* I will frequently use the law as a source for determining what privacy violations society recognizes. However, my aim is not simply to take stock of where the law currently stands today, but to provide a useful framework for its future development.[82]

Based on what jurists and scholars had discussed under the rubric of privacy as of the time of his article, Solove furnished courts, lawmakers, and scholars with a taxonomy intended to serve as a framework to address privacy violations.[83] The taxonomy not only catalogues the activities of individuals, corporations, and the government that can cause privacy problems but also identifies possible privacy harms (both dignitary and architectural) that can be derived from each type of activity. Solove's ultimate purpose was to enable us all to "see privacy in a more multidimensional way."[84]

Taxonomies were not an entirely new phenomenon in privacy. After reviewing more than three hundred cases, Prosser concluded in 1960 that the law of privacy consisted of four types of invasions of four distinct inter-

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78. Id. at 484.

79. Id. at 486; see also Danielle Keats Citron & Daniel J. Solove, Privacy Harms, 102 B.U. L. Rev. 793, 830 (2022) [hereinafter Citron & Solove, Privacy Harms] ("Privacy is an umbrella concept that encompasses different yet related things.").

80. These activities are: surveillance, interrogation, aggregation, identification, insecurity, secondary use, exclusion, breach of confidentiality, disclosure, exposure, increased accessibility, blackmail, appropriation, distortion, intrusion, and decisional interference. Solove, Taxonomy of Privacy, supra note 14, at 490–91.

81. The four basic groups are: information collection, information processing, information dissemination, and invasion. Id. at 489.

82. Id. at 484 (emphasis added).

83. According to Solove,

> The full equation for a privacy violation or problem is the existence of a certain activity that causes harms or problems affecting a private matter or activity. This taxonomy focuses on the first part of the equation (harmful or problematic activities) rather than on what constitutes a private matter or activity.

Id. at 484 n.27.

84. Id. at 562.

ests: intrusion upon seclusion, public disclosure, false light, and appropriation.[85] Prosser's criterion for recognition was court precedent.[86] And as part of his renowned 1967 book *Privacy and Freedom*, Westin proposed a taxonomy of privacy attitudes, identifying four psychological conditions or states of individual privacy that a person might strive for at different times or in different circumstances: solitude, intimacy, reserve, and anonymity.[87]

Yet Solove's ambitions were greater still: He sought to reorient privacy from an individual concept based on formal definitional criteria to an umbrella concept based in social recognition. And more so than Prosser or Westin, Solove's taxonomic approach appears to have exerted an extraordinary influence on the shape and scope of contemporary privacy law scholarship—the subject of the next section.

C. *The New Boundaries of Privacy Law Scholarship*

Solove's approach of foregrounding troublesome activities and harms and eschewing boundaries appears to have helped the field of privacy law grow and evolve. "By getting us past the threshold question of what privacy is," wrote Hartzog in a recent essay recognizing Solove's profound influence, "Solove's work provides room for scholars and lawmakers to tackle bigger phenomena."[88]

Making peace with the uncertainty about privacy's core elements has relieved scholars and policymakers of a stressful intellectual burden. In particular, it has freed scholars to explore and engage in broader discussions around concepts such as informational capitalism[89] and the role of information in racial, gender, and other forms of discrimination.[90] Novel data-exploitation practices—from data mining to the application of machine learning and artificial intelligence to consumer and government decisionmaking—have become fundamental to privacy discourse, resulting in a Cambrian explosion of topics. Over the last twenty years, American privacy scholars have started to study the use of automated hiring processes, watchlists, air passenger screening, price discrimination in

85. See Prosser, supra note 18, at 389.

86. See id. at 388–89 ("Today, with something over three hundred cases in the books, the holes in the jigsaw puzzle have been largely filled in, and some rather definite conclusions are possible. What has emerged from the decisions is no simple matter. It is not one tort, but a complex of four.").

87. See Westin, supra note 19, at 31.

88. Hartzog, supra note 21, at 1687.

89. See generally Julie E. Cohen, Between Truth and Power: The Legal Constructions of Informational Capitalism 1 (2019) (arguing that "[t]o understand what technology signifies for the future of law, we must understand how the design of networked information technologies within business models reflects and reproduces economic and political power").

90. See Hartzog, supra note 21, at 1687 (explaining that Solove's work has facilitated scholars' interrogation of the way in which "capitalistic incentives cause companies to leverage information in harmful ways . . . and how marginalized populations are affected first and hardest by privacy-invasive actors").

e-commerce, digital redlining (also known as "weblining"[91]), genetic discrimination by insurers and employers, social scoring, online harassment, the attention economy, content personalization, targeted advertising, recidivism predictions, the influence of algorithms on political and dating decisions, mis- and disinformation, dark patterns, and more.[92]

As part of this process, novel harms from emerging technology, especially algorithms, have been adopted into the privacy family. For some time now, the field has been undergoing an "algorithmic turn."[93] Partly enabled

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91. Paul M. Schwartz, Beyond Lessig's *Code* for Internet Privacy: Cyberspace Filters, Privacy Control, and Fair Information Practices, 2000 Wis. L. Rev. 743, 757 (defining "weblining" as the "Information Age version of that nasty old practice of redlining, where lenders and other businesses mark whole neighborhoods off-limits" (internal quotation marks omitted) (quoting Marcia Stepanek, Weblining, Bus. Wk. (Apr. 3, 2000), https://www.bloomberg.com/news/articles/2000-04-02/weblining (on file with the *Columbia Law Review*))).

92. See, e.g., Danielle Keats Citron, The Fight for Privacy, at xii (2022) (delineating "intimate privacy," or the "social norms (attitudes, expectations, and behaviors) that set and fortify the boundaries around our intimate lives," encompassing "the extent to which others have access to, and information about, our bodies; minds (thoughts, desires, and fantasies); health; sex, sexual orientation, and gender; and close relationships"); Neil Richards, Why Privacy Matters 141 (2021) [hereinafter Richards, Why Privacy Matters] (describing "liquid surveillance," or "the spread of surveillance beyond government spying to a sometimes private surveillance in which surveillance subjects increasingly consent and participate"); Ifeoma Ajunwa, An Auditing Imperative for Automated Hiring Systems, 34 Harv. J.L. & Tech. 621, 625, 628 (2021) (arguing for mandated auditing of automated hiring systems and updates to antidiscrimination law that acknowledge this duty while also taking workers' data privacy interests seriously); Ifeoma Ajunwa, Kate Crawford & Jason Schultz, Limitless Worker Surveillance, 105 Calif. L. Rev. 735, 738–39 (2017) (noting that "rapid technological advancements and diminishing costs now mean employee surveillance occurs both inside and outside the workplace—bleeding into the private lives of employees"); Anita L. Allen, Dismantling the "Black Opticon": Privacy, Race Equity, and Online Data-Protection Reform, 131 Yale L.J. Forum 907, 911 (2022), https://www.yalelawjournal.org/pdf/F7.AllenFinalDraftWEB_6f26iyu6.pdf [https://perma.cc/LQ7Z-VVL5] (describing the "Black Opticon," which the author uses "to denote the complex predicament of African Americans' vulnerabilities to varied forms of discriminatory oversurveillance, exclusion, and fraud — aspects of which are shared by other historically enslaved and subordinated groups in the United States and worldwide"); Danielle Keats Citron & Frank Pasquale, The Scored Society: Due Process for Automated Predictions, 89 Wash. L. Rev. 1, 3 (2014) (describing the growing use of predictive algorithms and "scoring" that mine a person's personal on- and offline activities); Margaret Hu, Big Data Blacklisting, 67 Fla. L. Rev. 1735, 1738 (2015) (describing the privacy and liberty implications of the government's big data blacklisting programs, such as air passenger screenings); Matthew Tokson, Inescapable Surveillance, 106 Cornell L. Rev. 409, 412 (2021) (arguing against the adoption of an "inescapable" standard for evaluating personal data disclosures under the Fourth Amendment); Tal Z. Zarsky, "Mine Your Own Business!": Making the Case for the Implications of the Data Mining of Personal Information in the Forum of Public Opinion, 5 Yale J.L. & Tech. 1, 5 (2003) [hereinafter Zarsky, Mine Your Own Business] (arguing that "[i]n the interaction between [data mining] and traditional privacy claims, we should pay special attention to public opinion").

93. See María P. Angel, Privacy's Algorithmic Turn, 30 B.U. J. Sci. & Tech. L. (forthcoming 2024) (manuscript at 2), https://ssrn.com/abstract=4602315 [https://perma.cc/73QT-G953] (describing a transformation in American privacy law scholars' conception of

by privacy's multidimensionality and lack of clear boundaries—what Professor David Pozen refers to as the "pluralistic turn"[94]—scholars have begun to identify different types of information-based harms as privacy harms without reference to any specific criteria. Though examples of this sociotechnical phenomenon abound, this Essay focuses on two recently labeled privacy harms: *information-based discrimination* and *algorithmic manipulation*.[95] The Essay frequently returns to these two harms in the following pages to illustrate how the boundaries of privacy law scholarship have broadened over time.

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information privacy); Hartzog, supra note 21, at 1681 (noting the "algorithmic turn in privacy scholarship, which opened the door for discussions of how privacy issues impact marginalized and vulnerable populations"). Although she does not do so in relation to privacy, Professor Ifeoma Ajunwa also uses the term "algorithmic turn" to refer to "the profusion of algorithmic decision-making in our daily lives, even in the absence of established regulatory or ethical frameworks to guide the deployment of those algorithms." See Ifeoma Ajunwa, The Paradox of Automation as Anti-Bias Intervention, 41 Cardozo L. Rev. 1671, 1683–84 (2020).

94. See Pozen, supra note 20, at 225 (defining the "pluralistic turn" as many privacy theorists' tendency to "reject[] approaches to privacy that strive to identify its essence or its core characteristics and settling, instead, 'on an understanding of privacy as an umbrella term that encompasses a variety of related meanings'" (quoting Richards, Rethinking Civil Liberties, supra note 60, at 9)).

95. Procedural unfairness is yet another area of study pursued by privacy scholars. See, e.g., Kate Crawford & Jason Schultz, Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms, 55 B.C. L. Rev. 93, 109 (2014) (arguing for "procedural data due process," which would "regulate the fairness of Big Data's analytical processes with regard to how they use personal data . . . in any adjudicative process, including processes whereby Big Data is being used to determine attributes or categories for an individual"). Coined by Citron in 2008, "technological due process" refers to restoring constitutional or statutory process guarantees in light of technological change. See Danielle Keats Citron, Technological Due Process, 85 Wash. U. L. Rev. 1249, 1258, 1305–13 (2008) [hereinafter Citron, Technological Due Process] (highlighting the threat automation poses to procedural due process and suggesting new procedural models). Scholars in this area write about the ways law and code interact within algorithmic or software-based decisionmaking to deny people the ability to understand or challenge adverse decisions. See, e.g., Ryan Calo & Danielle Keats Citron, The Automated Administrative State: A Crisis of Legitimacy, 70 Emory L.J. 797, 800 (2021) (describing problems caused by automation of public benefits determinations, including the difficulty of challenging decisions); Daniel J. Steinbock, Data Matching, Data Mining, and Due Process, 40 Ga. L. Rev. 1, 3 (2005) ("We have entered the age of decision by algorithm—the computer application of statistical formulas to large bodies of data to identify relationships or patterns.").

The technological due process conversation has spilled over into many other disciplines and contexts. See, e.g., Aparna Balagopalan, Haoran Zhang, Kimia Hamidieh, Thomas Hartvigsen, Frank Rudzicz & Marzyeh Ghassemi, The Road to Explainability Is Paved With Bias: Measuring the Fairness of Explanations, 2022 Ass'n for Computing Mach. Conf. on Fairness Accountability & Transparency 1194, 1202(demonstrating how "[u]nfair explanation models can have negative effects on real-world decision making"); Gayane Grigoryan, Explainable Artificial Intelligence: Requirements for Explainability, 2022 Ass'n for Computing Mach. SIGSIM Conf. on Principles of Advanced Discrete Simulation 27, 27–28 (identifying four requirements that have to be met for the information provided by a machine-learning model to be considered explainable).

Information-based discrimination harms encompass the unequal treatment of members of marginalized communities (such as women, sexual and gender minorities, and people of color) that results from profiling, the misuse of their personal information, or both.[96] They can also refer to privacy violations' disproportionate effects on marginalized populations. This disparate treatment (or the disparate effects of apparently neutral processing of information) can lead to loss of opportunities—such as education, jobs, promotions, housing, and affordable insurance—and can increase exposure to certain types of targeting (such as policing, surveillance, airport scrutiny, price discrimination, vicious online harassment, and cybermobbing).[97] Likewise, information-based discrimination harms can exacerbate disadvantages and patterns of inequality that members of these groups already experience and even cause psychological harms through the "searing wound of stigma, shame, and loss of esteem that can turn into permanent scars."[98]

Algorithmic manipulation refers to the use of personal information, data mining tools, and cognitive and behavioral science tactics to unacceptably influence people's decisions or behaviors, impairing their autonomy and free will.[99] Either by taking advantage of a person's cognitive limitations or contextual vulnerabilities[100] or by influencing the way in which they would normally behave or make choices, these techniques leverage information to channel behavior and bypass the person's

96. See Zarsky, Mine Your Own Business, supra note 92, at 22 (explaining how vendors use data to profile and discriminate between present and prospective customers, such as by promoting certain products or creating pricing schemes).

97. For example, Professor Andrew Guthrie Ferguson describes how big data policing disproportionally affects poor people and people of color. See Andrew Guthrie Ferguson, The Rise of Big Data Policing: Surveillance, Race, and the Future of Law Enforcement 93 (2017) ("By and large, it is people of color who are populating the growing police databases. If these racially skewed databases of past police contacts become the justification for future police contacts, then biased data collection will distort police suspicion."). Similarly, Citron explains how cyberharassment and cyberstalking disproportionately target women. Danielle Keats Citron, Hate Crimes in Cyberspace 13–14 (2014) (discussing various studies showing that women are more at risk for cyberstalking and noting that "for lesbian, transgender, or bisexual women and women of color, the risk may be higher").

98. Citron & Solove, Privacy Harms, supra note 79, at 855–56.

99. See Neil Richards & Woodrow Hartzog, A Duty of Loyalty for Privacy Law, 99 Wash. U. L. Rev. 961, 967 (2021) [hereinafter Richards & Hartzog, A Duty of Loyalty] ("Insufficiently constrained by the law, companies can deploy a potent cocktail of techniques derived from cognitive and behavioral science to 'nudge' or otherwise influence the choices we make.").

100. See Ryan Calo, Digital Market Manipulation, 82 Geo. Wash. L. Rev. 995, 1001 (2014) [hereinafter Calo, Digital Market Manipulation] (explaining that "companies and other firms will use what they know about human psychology to set prices, draft contracts, minimize perceptions of danger or risk, and otherwise attempt to extract as much rent as possible from their consumers"); Shaun B. Spencer, The Problem of Online Manipulation, U. Ill. L. Rev. 959, 980 ("[M]arketers can already identify some individual biases and vulnerabilities in real time, and the emerging research suggests that they will rapidly expand their ability to do so.").

capacity for reflection and deliberation.[101] Such techniques "circumvent[] the subject's rational decision-making process,"[102] leading the subject to depart from the self-interested course they would usually follow[103] and turning them into a puppet.[104] As a result, scholars argue, the person's behaviors or decisions end up playing to their disadvantage, in favor of the manipulator's ends and preferences.[105]

1. *Information-Based Discrimination's Path Into the Privacy Literature.* — Information-based discrimination did not appear in Solove's original taxonomy but quickly came to be represented in the literature.[106] In particular, the idea that information-based discrimination constitutes a core privacy concern has intensified in the last decade. In 2014, for example, Professors Kate Crawford and Jason Schultz proposed the term "predictive privacy harms" to describe harms that, although not necessarily within the conventional conception of privacy boundaries, "are still derived from collecting and using information that centers on an individual's data behaviors."[107] While describing this new type of harm—which results from "[t]he generative data-making practices of Big Data"[108]—they made clear that predictive privacy harms can manifest as discriminatory practices.[109] Similarly, Professor Frederik Zuiderveen Borgesius included discrimination as one of the three "privacy problems" addressed in his 2015 book about privacy in behavioral targeting (along with chilling

101. See Cass R. Sunstein, Fifty Shades of Manipulation, 1 J. Mktg. Behav. 213, 216 (2015) (suggesting that "an effort to influence people's choices counts as manipulative to the extent that it does not sufficiently engage or appeal to their capacity for reflection and deliberation" (emphasis omitted)).

102. See Spencer, supra note 100, at 989.

103. See Calo, Digital Market Manipulation, supra note 100, at 1033 (describing digital market manipulation's goal of catching a consumer in a moment of irrationality and seizing upon that vulnerability to turn a profit).

104. See Citron & Solove, Privacy Harms, supra note 79, at 846 ("A coerced person understands that they are coerced; on the other hand, a manipulated person might not realize that they are being turned into a puppet . . . .").

105. See Calo, Digital Market Manipulation, supra note 100, at 1030 ("All that is necessary to trigger either category of privacy harm is the belief or actuality that the person is being disadvantaged—that her experience is changing in subtle and material ways to her disadvantage.").

106. As Part II explores, there were already examples in the literature (by Professors Batya Friedman, Helen Nissenbaum, and Tal Zarsky)—but they did not amount to enough social recognition to be considered significant enough for inclusion in the taxonomy. See infra Part II.

107. Crawford & Schultz, supra note 95, at 95; see also Alicia Solow-Niederman, Information Privacy and the Inference Economy, 117 Nw. U. L. Rev. 357, 361 (2022) (discussing the rise of the "inference economy in which organizations use available data collected from individuals to generate further information about both those individuals and about other people" (emphasis omitted)).

108. Crawford & Schultz, supra note 95, at 105.

109. Id. at 99.

effects and a lack of control over data).[110] And in his 2019 article *Antidiscriminatory Privacy*, Professor Ignacio Cofone claimed that "discrimination can also be viewed as an information problem" and can therefore be addressed through antidiscriminatory privacy rules.[111]

Information-based discrimination has also been linked to privacy during this period in other ways. Scholars may not explicitly frame discrimination as a privacy harm, but they do present discrimination as a consequence of one of the activities at the heart of many privacy problems: surveillance. In his 2020 book *Privacy at the Margins*, Professor Scott Skinner-Thompson argued that "privacy can serve as a liminal or transitional right [against surveillance] until [marginalized] communities gain both formal antidiscrimination protections and lived equality."[112] The same can be seen outside of legal academia. For instance, in Professor Simone Browne's book *Dark Matters: On the Surveillance of Blackness*, Browne proposed the concept of "racializing surveillance" to describe "those moments when enactments of surveillance reify boundaries, borders, and bodies along racial lines, and where the outcome is often *discriminatory treatment* of those who are negatively racialized by such surveillance."[113]

Yet another line of scholarship relates discrimination with privacy harms through the disproportionate effects that privacy violations have on certain minority groups.[114] Mothers experiencing poverty, for example, have been dispossessed of privacy rights, argues Professor Khiara M. Bridges's magisterial book *The Poverty of Privacy Rights*, in part because their economic position is considered indicative of "flawed character."[115] These mothers are trapped in a catch-22 that makes it impossible for them to escape invasive state intrusion, whether or not they receive public assistance.[116] Professor Christen A. Smith has described Black women's right to be let alone as an "impossible privacy": Police violence against Black women tends to happen in "homes

110. Frederik J. Zuiderveen Borgesius, Improving Privacy Protection in the Area of Behavioural Targeting 2 (2015).

111. See Ignacio N. Cofone, Antidiscriminatory Privacy, 72 SMU L. Rev. 139, 142 (2019).

112. Scott Skinner-Thompson, Privacy at the Margins 181 (2020).

113. Simone Browne, Dark Matters: On the Surveillance of Blackness 16 (2015) (emphasis added).

114. Professors Michele Gilman and Rebecca Green refer to this line of scholarship with the term "differentiated privacy harms," or "the idea that different groups experience privacy harms in different ways." See Michele Gilman & Rebecca Green, The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization, 42 N.Y.U. Rev. L. & Soc. Change 253, 281 (2018).

115. Khiara M. Bridges, The Poverty of Privacy Rights 9 (2017).

116. Id. at 9–10 (explaining that mothers experiencing poverty "lose their privacy if they accept government assistance (because safety net programs demand access to private areas of beneficiaries' lives)" but also if they reject it, as "they will be unable to provide their children with basic necessities, thus making them vulnerable to . . . CPS").

and in what should be private places."[117] Professors Michele Gilman and Rebecca Green, in turn, shine a light on a countervailing reality—namely, the "discrimination that arises from the lack of data inputs from marginalized groups."[118] For Gilman and Green, this type of information inequality or "surveillance gap"—faced by many undocumented people, day laborers, people experiencing homelessness, people with conviction histories, and others—should also be considered a privacy concern.[119]

2. *The Emergence of Algorithmic Manipulation as a Privacy Issue.* — As with information-based discrimination, many scholars today understand algorithmic manipulation as a privacy problem. For example, Professor Ido Kilovaty has called attention to the challenges online manipulation poses to privacy, autonomy, and democracy.[120] Similarly, Professors Sandra Wachter and Brent Mittelstadt have argued that "due to companies' widespread implementation of inferential analytics for profiling, nudging, *manipulation*, or automated decision-making, these 'private' decisions can, to a large extent, impact the privacy of individuals."[121] The prospect of extractive manipulation also sits at the heart of Professor Shoshana Zuboff's popular summative work *The Age of Surveillance Capitalism*.[122]

Additionally, another line of scholarship has started to see algorithmic manipulation as a danger against which privacy can protect. In his recent book *Why Privacy Matters*, Richards framed blackmailing, discrimination, and manipulation as the "dangers of surveillance" against which privacy serves as a bulwark.[123] Similarly, Professor Shaun B. Spencer

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117. Christen A. Smith, Impossible Privacy: Black Women and Police Terror, 51 Black Scholar no. 1, 2021, at 20, 21 ("We are not safe in our homes because there is no such thing as privacy for Black women, at least in the eyes of the state. Ours is an impossible privacy.").

118. See Gilman & Green, supra note 114, at 286.

119. See id. at 295 ("The surveillance gap is not a failure to adhere to privacy norms, but rather a failure—be it purposeful or accidental, benign or malignant—of data and information to follow the same flows for residents of the surveillance gap as nonresidents.").

120. See Ido Kilovaty, Legally Cognizable Manipulation, 34 Berkeley Tech. L.J. 449, 468–73 (2019) (arguing that online manipulation "impairs the ability of individuals to make independent and informed opinions and decisions," which, collectively, may distort the democratic process).

121. Sandra Wachter & Brent Mittelstadt, A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI, 2019 Colum. Bus. L. Rev. 494, 541 (emphasis added).

122. See Shoshana Zuboff, The Age of Surveillance Capitalism 8 (2019) ("[T]he most-predictive behavioral data come from intervening in the state of play in order to nudge, coax, tune, and herd behavior toward profitable outcomes. Competitive pressures produced this shift, in which automated machine processes not only *know* our behavior but also *shape* our behavior at scale.").

123. Richards, Why Privacy Matters, supra note 92, at 146–62 (asserting that privacy protections can help prevent the types of discrimination, sorting, and inequality threatened by new technologies).

has recommended "using the threat of online manipulation as another argument for comprehensive regulation of the data sharing ecosystem."[124]

Finally, scholars have also related manipulation to privacy when it comes to the use of manipulative techniques to induce consumers to consent to the collection and processing of their personal data. For example, privacy scholars Alessandro Acquisti, Curtis Taylor, and Liad Wagman have underscored how "the same policy can nudge individuals to disclose varying amounts of personal data simply by manipulating the format in which the policy itself is presented to users."[125] In a similar vein, Professor Julie Cohen has highlighted how the design of digital interactive environments can be used to manipulate consumers and encourage "broad forward-looking consent to processing and use."[126]

Hartzog credits Solove for opening the door to new types of privacy harms.[127] Indeed, it does appear as though information-based discrimination and algorithmic manipulation have come to be recognized over time by the right people and institutions as privacy problems. In fact, a recent paper by Solove and Citron outlines a "typology" of privacy harms that explicitly includes algorithmic manipulation and discrimination alongside legacy concerns.[128] Despite the lack of specific criteria, these problems, as well as many others, have made it into the taxonomy—adopted into the family, so to speak. But hasn't the taxonomic approach to privacy begun to wear thin? This is the subject to which this Essay turns next.

II. THE TROUBLE WITH SOCIAL TAXONOMY

Though it facilitated the growth and proliferation of privacy scholarship, the big-tent taxonomic approach has come at a cost to the field. A deeper look into the recent evolution of privacy law—including the adoption of discrimination and algorithmic manipulation into the privacy family—casts doubts on the wisdom of using social recognition as the sole gatekeeper for the field. Social recognition alone cannot furnish a principled approach for determining whose voices are heard and valued when it comes to identifying new privacy harms. Nor does the taxonomic approach provide a framework for recognizing or addressing the internal tensions between conflicting values included in the growing privacy family.

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124. Spencer, supra note 100, at 1001–02.

125. Alessandro Acquisti, Curtis Taylor & Liad Wagman, The Economics of Privacy, 54 J. Econ. Literature 442, 480 (2016) (citing Idris Adjerid, Alessandro Acquisti, Laura Brandimarte & George Loewenstein, Sleights of Privacy, Symposium on Usable Privacy and Security (SOUPS), July 2013, at 1, 2).

126. Julie E. Cohen, Turning Privacy Inside Out, 20 Theoretical Inquiries L. 1, 7 (2019).

127. See Hartzog, supra note 21, at 1681 (explaining that conceiving of privacy as "a pluralistic, fluid concept . . . furthers diverse values and is capable of having both intrinsic and utilitarian worth and coexisting with many different policy goals," which allows us to "solve complex information problems without constantly relitigating privacy's meaning").

128. Citron & Solove, Privacy Harms, supra note 79, at 831 fig.1, 846, 855.

For the reasons that follow, privacy's big-tent approach has begun to show rips in its fabric.

A. *The Limits of Social Recognition*

To welcome a new harm into the privacy family, the taxonomic approach asks whether the right people or institutions talk about it as involving privacy. But what does it take for an information-based phenomenon to achieve a significant degree of social recognition as a privacy harm? Whose attention counts as valuable? How much talk is enough to be considered significant?

The big privacy tent Solove envisioned in 2006 sheltered one set of privacy problems.[129] Today's tent has welcomed several more, not because the problems did not exist in 2006 but because the core privacy community did not talk about them enough or in the right way. Meanwhile, other kinds of information-based harms still do not count as privacy problems because they haven't been socially recognized as such.[130]

A taxonomic approach to privacy grounded in social recognition may relieve the burden of defining privacy but necessarily raises a range of critical and unanswered questions about legitimacy and authority in the field. Who decides how much recognition is enough for a harm to be considered a privacy harm? Whose recognition counts? Whose approaches are sidelined? Current answers to these interrogations might reflect "imbedded hierarchical racist [sexist, homophobic, etc.] paradigms that currently exist in our society."[131]

Critically assessing these answers would allow the field to engage with criticism and insights coming from critical race and feminist theorists in the context of diversity and inclusivity in academia.[132] Interrogating the

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129. See supra notes 14–17 and accompanying text.

130. See infra section II.A.3.

131. See Payne Hiraldo, The Role of Critical Race Theory in Higher Education, 31 Vt. Connection 53, 55 (2010).

132. See Angela P. Harris & Carmen G. González, Introduction to Presumed Incompetent: The Intersections of Race and Class for Women in Academia 1, 8 (Gabriella Gutiérrez y Muhs, Yolanda Flores Niemann, Carmen G. González & Angela P. Harris eds., 2012) ("[W]hat is required is transforming academic culture so that it welcomes and embraces those who are currently regarded as 'other' and increases the opportunity for alternative points of view to challenge dominant ideologies and deep-rooted social hierarchies."); Dolores Delgado Bernal & Octavio Villalpando, An Apartheid of Knowledge in Academia: The Struggle Over the "Legitimate" Knowledge of Faculty of Color, 35 Equity & Excellence Educ. 169, 176–77 (2002) ("[B]y marginalizing the knowledges of faculty of color, higher education has created an apartheid of knowledge where the dominant Eurocentric epistemology is believed to produce 'legitimate' knowledge, in contrast to the 'illegitimate' knowledge that is created by all other epistemological perspectives."); Hiraldo, supra note 131, at 54–58 (using the tenets of critical race theory to evaluate the racist perspectives embedded in higher education programs and highlight how to overcome these inequitable policies); Caroline Sotello Viernes Turner, Samuel L. Myers, Jr. & John W. Creswell, Exploring Underrepresentation: The Case of Faculty of Color in the Midwest, 70 J. Higher

"social recognition" approach at the heart of the social taxonomy may contribute to "revealing the social inequities that exist within the structure of higher education"[133] and, in particular, within "the traditionally white male establishment of legal academia."[134] The time has come to be wary of social recognition as the "sacred canon[] of objective truth"[135] and the sole gatekeeper for the privacy field.

As explained in section I.C, information-based discrimination and algorithmic manipulation have come to be recognized as privacy harms in the last few years. Sections II.A.1 and II.A.2, however, seek to show how both harms had been addressed in other fields' literature—and even in the privacy law field—for a long time before. Why, then, didn't they find their way into Solove's taxonomy of privacy in 2006? Similarly, section II.A.3 provides examples of other information-based harms that, despite being present in the privacy field for a while, were not included in Solove and Citron's 2022 typology of privacy harms.[136] What amount of social

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Educ. 27, 28 (1999) ("Challenges to the successful recruitment, retention, and development of faculty of color include . . . a pervasive racial and ethnic bias that contributes to unwelcoming and unsupportive work environments for faculty of color.").

133. See Hiraldo, supra note 131, at 57.

134. See Meera E. Deo, The Ugly Truth About Legal Academia, 80 Brook. L. Rev. 943, 951 (2015) (presenting evidence of the many ways in which racial and gender discrimination persist in legal academia). See generally Marina Angel, Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women, 61 Temp. L. Rev. 799 (1988) (analyzing data at five law schools to identify barriers to women in law schools, both as faculty members and students); Katherine Barnes & Elizabeth Mertz, Is It Fair? Law Professors' Perceptions of Tenure, 61 J. Legal Educ. 511 (2012) ("[F]emale professors and professors of color perceive the tenure process more negatively than their white male counterparts across cohorts, with some changes in the strength of these differences over time. But the nuance of when an individual was reviewed for tenure is quite important in describing that individual's perceptions."); Richard Delgado, Minority Law Professors' Lives: The Bell–Delgado Survey, 24 Harv. C.R.-C.L. L. Rev. 349 (1989) ("Large numbers of minority law professors are overworked, excluded from informal information networks and describe their work environment as hostile, unsupportive, or openly or subtly racist. Many face increasing challenges to their legitimacy in the classroom."); Paul M. George & Susan McGlamery, Women and Legal Scholarship: A Bibliography, 77 Iowa L. Rev. 87 (1991) (providing a lengthy bibliography of sources about women in the legal profession and legal academia as well as feminist theory more broadly); Deborah Jones Merritt, Are Women Stuck on the Academic Ladder? An Empirical Perspective, 10 UCLA Women's L.J. 249 (2000) (comparing data of male and female law professors over time to showcase how female candidates fare at each step of the law school tenure track); Judith Resnik, A Continuous Body: Ongoing Conversations About Women and Legal Education, 53 J. Legal Educ. 564 (2003) ("The legal academy has to address how assumptions about gender, race, and ethnicity shape the law and, in turn, about what role law plays, has played, and should play in making those concepts meaningful.").

135. See Delgado & Villalpando, supra note 132, at 169 (quoting Teresa Córdova, Power and Knowledge: Colonialism in the Academy, *in* Living Chicana Theory 16, 18 (Carla Trujillo ed., 1998)) (discussing the biases that have traditionally influenced the perceived legitimacy of faculty of color).

136. See Citron & Solove, Privacy Harms, supra note 79, at 830–61 ("Our typology groups privacy harms into seven basic types: (1) physical harms; (2) economic harms; (3)

recognition is enough for a given information-based harm to be considered a privacy harm? As these examples demonstrate, the criteria are still unclear.

1. *Social Recognition of Bias and Unfairness.* — Privacy scholarship is not the only place where bias and unfairness have been socially recognized. In 1996, for instance, computer scientist Batya Friedman and philosopher Helen Nissenbaum—today a prominent privacy scholar—published the article *Bias in Computer Systems*.[137] Friedman and Nissenbaum's groundbreaking paper examines what bias in computer systems could look like.[138] According to the authors, bias in computer systems can arise from "social institutions, practices, and attitudes" ("preexisting bias"); "technical constraints or considerations" ("technical bias"); or the same "context of use" ("emergent bias").[139] In all these cases, "biased computer systems are instruments of injustice."[140]

Decades later, information and social scientists also began to raise awareness of automated decisionmaking systems' disparate impact on vulnerable populations, proposing critiques of algorithms as political artifacts.[141] In 2017, political scientist Virginia Eubanks was among the first scholars to pick up the bias discussion.[142] Using three case studies of public-assistance sorting and monitoring systems in Indiana, Los Angeles, and Pittsburgh, Eubanks exposed how these "[t]echnologies of poverty management are not neutral."[143] In particular, these case studies revealed the disparate impact of predictive algorithms, risk models, and automated

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reputational harms; (4) psychological harms; (5) autonomy harms; (6) discrimination harms; and (7) relationship harms.").

137. Batya Friedman & Helen Nissenbaum, Bias in Computer Systems, 14 Ass'n for Computing Mach. Transactions on Info. Sys. 330 (1996).

138. See id. at 330–32 (providing an example of computer systems' bias and introducing the authors' framework for understanding it). For other, more superficial, approaches to bias, see generally Deborah G. Johnson & John M. Mulvey, Computer Decisions: Ethical Issues of Responsibility and Bias (Stat. & Operations Rsch. Ser. Technical Report SOR-93-11, 1993) (highlighting implicit biases as one of three ethical issues in computer systems that may lead to their abuse); James H. Moor, What Is Computer Ethics?, 16 Metaphil. 266 (1985) (noting the problem of the "invisibility factor" in computer systems, which facilitates intentional invisible abuse, the importation of programming values and biases that may not be apparent to users, and invisible miscalculations that may be too complex to verify completely).

139. Friedman & Nissenbaum, supra note 137, at 332.

140. Id. at 345.

141. See Langdon Winner, Do Artifacts Have Politics?, Dædalus 121, Winter 1980, at 121, 121 (noting the "provocative" argument that technology "can embody specific forms of power and authority").

142. See Virginia Eubanks, Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor 11 (2017) (describing how automated eligibility systems target poor and working-class people, collecting personal information and labeling them as "risky investments" while simultaneously discouraging them from accessing resources to survive in the changing socioeconomic reality).

143. Id. at 9.

eligibility systems on poor and working-class people.[144] That same year, law professor Andrew G. Ferguson published an account analyzing the use of big data technologies and predictive analytics for policing, similarly uncovering their discriminatory effects against people of color, immigrants, religious minorities, people experiencing poverty, protesters, and government critics.[145]

Internet studies scholar Professor Safiya Umoja Noble's important work sheds light on the data discrimination generated by internet search engines.[146] Besides showing how algorithms privilege whiteness and discriminate against people of color, particularly women of color, Noble also showed how search engines reproduce a vicious cycle of "technological redlining."[147] Society's racist perceptions of Black women and girls are embedded in computer code and artificial intelligence technologies, which then influence societal perceptions.[148]

Researcher Mounika Neerukonda and information, technology, and society scholar Professor Bidisha Chaudhuri, among others, highlighted the dangers of considering technologies (gender) neutral.[149] Algorithms governing artificial intelligence systems often reproduce or reiterate human biases, including gender biases.[150] These biases, Neerukonda and Chaudhuri argued, can result either from the data used to feed and train the algorithms or from the highly male-dominated technology industry responsible for developing them.[151]

Could this acknowledgement of bias in the computer and social sciences be considered *significant* in terms of social recognition of discrimination? Interestingly, in the social sciences literature reviewed here,

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144. Id. at 11.

145. See Ferguson, supra note 97, at 3–5 (2017) (explaining that "black data," a term the author uses to denote hidden, racially coded data collected by police on communities of color, affects all marginalized communities by collecting, selling, and surveilling detailed personal data, which can contain inaccurate information for police to act upon).

146. Safiya Umoja Noble, Algorithms of Oppression: How Search Engines Reinforce Racism 5 (2018) (explaining how algorithmically designed searches readily suggest racist and sexist results and reflect "a corporate logic of either willful neglect or a profit imperative that makes money from racism and sexism").

147. See id. at 1.

148. Id. at 9–10 (arguing that algorithmic oppression, often in the form of racism and sexism, is part of the web's fundamental design and that the missing social and human context in these algorithmic decisions results in "erroneous, stereotypical, or even pornographic" portrayals of marginalized people that "reinforce oppressive social and economic relations").

149. See Mounika Neerukonda & Bidisha Chaudhuri, Are Technologies (Gender)-Neutral?: Politics and Policies of Digital Technologies, 47 Admin. Staff Coll. India J. Mgmt. 32, 39–41 (2018) (arguing that technology is designed with gender biases and thus reflects these biases in the production of knowledge and practices of power associated with technology).

150. Id. at 32.

151. See id.

worries about information-based discrimination are generally framed in terms of justice and fairness rather than privacy.[152] Why did privacy scholars decide to start talking about this harm as involving privacy? What "social recognition" counts for these matters? When is it sufficiently consolidated to be considered social? These are the types of questions Solove's pragmatic approach does not help us resolve. Confronting them would open the door to facing and questioning hidden power imbalances reinforced and perpetuated through academic research.

2. *Social Recognition of Data-Driven Manipulation.* — Today, many scholars understand digital manipulation as a privacy problem or as a danger against which privacy can protect—so much so that it made its way into Solove and Citron's 2022 typology of privacy harms.[153] But, as with discrimination, discussions about this harm already existed in the privacy literature long before it was formally included in the typology. In the early 1970s, Professor Arthur Miller predicted that computers, data banks, and dossiers could eventually blur the distinction between deploying cybernetics to understand a person and using it to control them.[154] "[I]t does not require a vivid imagination," Miller noted, "to conjure up a number of simulation activities involving the prediction of an individual's or a group's behavior that may lead to attempts at human manipulation."[155] Similarly, in 1980, Gavison suggested that unequal distribution of privacy could lead to manipulation.[156] In 2003, then–J.S.D candidate Tal Zarsky "describe[d] the current privacy debate, highlighting the issues most relevant to the new reality data mining creates,"[157] including manipulation[158] (and discrimination) among them. A year later, he would label those issues as "privacy-based concerns," which he defined as "those stemming from fears of the actual detrimental uses of personal data collected by commercial entities."[159]

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152. See, e.g., Noble, supra note 146, at 31 ("I am building on the work of previous scholars of commercial search engines such as Google but am asking new questions that are informed by a Black feminist lens concerned with *social justice* for people who are systemically oppressed." (emphasis added)); Cathy O'Neil, Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy 13 (2016) ("This book will focus sharply in the other direction, on the damage inflicted by [opaque mathematical models] and the *injustice* they perpetuate." (emphasis added)).

153. Citron & Solove, Privacy Harms, supra note 79, at 831 fig.1.

154. See Miller, supra note 36, at 42–43 (explaining that widespread computer use not only enables corporations to map patterns of consumer behavior but also allows firms to determine people's desires and decisions by "making palatable what industry or government already has decided to offer the public").

155. Id.

156. Gavison, Privacy and the Limits of Law, supra note 12, at 444.

157. Zarsky, Mine Your Own Business, supra note 92, at 2.

158. Zarsky referred to such manipulations as "the autonomy trap," as they hinder individual and societal autonomy. Id. at 35–36.

159. See Tal Z. Zarsky, Thinking Outside the Box: Considering Transparency, Anonymity, and Pseudonymity as Overall Solutions to the Problems of Information Privacy in the Internet

In 2014, Calo explored manipulation in the context of behavioral economics.[160] Looking to update the concept of market manipulation[161] for a technology-mediated marketplace, Calo unpacked why and when leveraging data against the consumer becomes a problem worthy of consumer protection law intervention.[162] Digital market manipulation "has the potential to generate economic and privacy harms and to damage consumer autonomy in a very specific way."[163] In light of these harms, Professor Ryan Calo argued that law should look for ways to realign the incentives of consumers and firms.[164] In 2019, privacy scholars Daniel Susser, Beate Roessler, and Helen Nissenbaum dove deep into what exactly it means to manipulate someone as well as the harms that manipulation inflicts on people and social institutions.[165] Like Calo, the authors considered whether the new forms of manipulative practice made possible by information technology should be cause for serious worry, since "[s]ubverting another person's decision-making power undermines his or her autonomy."[166] Manipulation has also been a topic of exploration for constitutional and administrative law scholar Cass Sunstein since at least 2014.[167]

At what point did algorithmic manipulation become a privacy harm? Apparently, Miller and Zarsky's early acknowledgments of the harm were not enough to merit recognition in Solove's 2006 taxonomy of privacy

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Society, 58 U. Miami L. Rev. 991, 1005 (2004). Interestingly, Zarsky has more recently come to question whether manipulation-based concerns justify the risks of expanding information privacy law. See Zarsky, Privacy and Manipulation, supra note 31, at 168 ("[W]hat will stop information privacy laws, doctrines and concepts from mushrooming uncontrollably?").

160. See Calo, Digital Market Manipulation, supra note 100, at 999 ("The interplay between rational choice and consumer bias that is at the heart of behavioral economics helps illustrate how information and design advantages might translate into systematic consumer vulnerability.").

161. This term was initially coined in 1999 by Professors Jon Hanson and Douglas Kysar. See Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: Some Evidence of Market Manipulation, 112 Harv. L. Rev. 1420, 1424–25 (1999) ("[B]ecause individuals exhibit systematic and persistent cognitive processes that depart from axioms of rationality, they are susceptible to manipulation by . . . actors in a position to influence the decisionmaking context. Moreover, the actors in the dominant position *must* capitalize on this manipulation or eventually be displaced from the market.").

162. Calo, Digital Market Manipulation, supra note 100, at 999.

163. Id. at 1025.

164. Id. at 1044.

165. Daniel Susser, Beate Roessler & Helen Nissenbaum, Online Manipulation: Hidden Influences in a Digital World, 4 Geo. L. Tech. Rev. 1, 2 (2019).

166. Id. at 4.

167. See, e.g., Sunstein, supra note 101, at 216–17 ("The principal goal of this article is to make progress in understanding what manipulation is and what is wrong with it. If we can make progress on those tasks, we should be better equipped to assess a wide range of problems in ethics, policy, and law.").

harms.[168] Did later discussion about manipulation amount to enough social recognition, even when scholars' main emphasis was not on privacy but rather on autonomy concerns? Was it enough for authors to be invited to FTC workshops on the topic,[169] to present at the right conferences,[170] or to speak to the popular press?[171] A taxonomic approach grounded exclusively in social recognition furnishes no criteria by which to answer these important questions.

3. *Information-Based Harms Still Outside the Periphery of Privacy Law.* — Like information-based discrimination and algorithmic manipulation, many other data-driven practices, such as procedural injustices or fragmentation of the public sphere, also rely on personal information about individuals. But they have not yet achieved enough social recognition to register as privacy harms.

Take the case of procedural injustice. As early as 1993, Professor Paul Schwartz set off alarm bells on the government's use of data processing to distribute welfare and its possible implications for bureaucratic justice.[172] Years later, Professor Daniel Steinbock followed suit, looking to identify "the due process effects of using data matching and mining to identify persons against whom official action is taken."[173] In 2008, Citron published her germinal article *Technological Due Process*, in which she raised awareness of the threats that automated decisionmaking poses to the last century's procedural protections, particularly for the fairness, accountability, transparency, and participation values that these protections are meant to ensure.[174] And building on Citron's article, Crawford and Schultz, along

168. See Solove, Taxonomy of Privacy, supra note 14, at 489–91 (describing privacy harms encompassed by Solove's taxonomy and omitting algorithmic manipulation).

169. See, e.g., Exploring Privacy: A Roundtable Series, FTC, https://www.ftc.gov/news-events/events/2010/03/exploring-privacy-roundtable-series [https://perma.cc/3GD4-YHXY] (last visited Oct. 22, 2023) (featuring Allen and others); The Internet of Things—Privacy and Security in a Connected World, FTC, https://www.ftc.gov/news-events/events/2013/11/internet-things-privacy-security-connected-world [https://perma.cc/GJ34-XEPQ] (last visited Oct. 22, 2023) (featuring Calo and others).

170. See, e.g., Privacy Law Scholars Conference, https://privacyscholars.org/ [https://perma.cc/Q2VC-GB5Y] (last visited Feb. 6, 2024).

171. See, e.g., Joanna Kavenna, Shoshana Zuboff: 'Surveillance Capitalism Is an Assault on Human Autonomy', The Guardian (Oct. 4, 2019), https://www.theguardian.com/books/2019/oct/04/shoshana-zuboff-surveillance-capitalism-assault-human-automomy-digital-privacy [https://perma.cc/3YDX-86FN] (interviewing Zuboff about the dangers of widespread data collection by large technology companies).

172. See Schwartz, Data Processing, supra note 31, at 1348–49. Schwartz defines bureaucratic justice as "administrative decisionmaking that pays appropriate attention to accuracy, cost-effectiveness, and the dignity of the participants." Id. at 1349.

173. Steinbock, supra note 95, at 7.

174. Citron, Technological Due Process, supra note 95, at 1258. Citron further developed this idea in subsequent coauthored articles. See, e.g., Calo & Citron, supra note 95, at 820 ("[A]utomation has led to the adoption of inexpert tools that waste government resources and deny individuals any meaningful form of due process."); Citron & Pasquale, supra

with many others, proposed a right to procedural data due process to mitigate predictive privacy harms.[175]

Some of these authors—like Crawford and Schultz—have addressed the threats to due process as a privacy problem.[176] Others have completely omitted privacy in their discussion of technological due process, talking instead about fairness and justice.[177] Indeed, Schwartz's early work explicitly states that privacy is not an ideal normative concept to frame these threats, since "[p]rivacy does not help once the issue becomes not *whether*, but *how* personal data should be collected and processed."[178]

Another example is nondiscriminatory social inequality. In her recent article *A Relational Theory of Data Governance*, Professor Salomé Viljoen maintains that data production facilitates social inequality.[179] In particular, the relational nature of data collection and use—and the population-based relations and data flows they give rise to—can have harmful and subordinating consequences for less-socially-advantaged groups.[180] Many other scholars have supported this view and have highlighted the oppressive effects that data processing can have at both the individual and societal levels.[181]

Certain scholars discuss this harm within the periphery of privacy law, calling for "the third way"[182] or "a 'third wave' for Privacy Law"[183] to

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note 92, at 19 ("If law and due process are absent from this field, we are essentially paving the way to a new feudal order of unaccountable reputational intermediaries.").

175. See Crawford & Schultz, supra note 95, at 109 ("[P]rocedural data due process would regulate the fairness of Big Data's analytical processes with regard to how they use personal data (or metadata derived from or associated with personal data) in any adjudicative process . . . .").

176. See id. at 96 ("Alongside its great promise, Big Data presents serious privacy problems.").

177. See, e.g., Citron, Technological Due Process, supra note 95, at 1253–54 (discussing automation's erosion of individual due process rights, including notice and the opportunity to be heard).

178. Schwartz, Data Processing, supra note 31, at 1347.

179. See Viljoen, supra note 31, at 581.

180. See id. at 616.

181. See, e.g., Woodrow Hartzog & Neil Richards, Privacy's Constitutional Moment and the Limits of Data Protection, 61 B.C. L. Rev. 1687, 1695 (2020) (criticizing data protection regimes that assume that fair data processing is "eternally virtuous" and ignore the damage being done by large-scale data processing); Daniel J. Solove, The Limitations of Privacy Rights, 98 Notre Dame L. Rev. 975, 989 (2023) [hereinafter Solove, Limitations of Privacy Rights] ("[P]rivacy issues extend beyond threats to individual privacy. There are larger societal problems caused or worsened by certain uses of personal data, such as discrimination as well as subordination of minority groups and the poor."); Ari Ezra Waldman, The New Privacy Law, 55 U.C. Davis L. Rev. Online 19, 39 (2021), https://lawreview.law.ucdavis.edu/sites/g/files/dgvnsk15026/files/media/documents/55-online-Waldman.pdf [https://perma.cc/2GXE-PTGM] (observing that "[t]echnology companies conscript us in the commodification and subordination of others").

182. Hartzog & Richards, supra note 181, at 1694 (internal quotation marks omitted).

183. Waldman, supra note 181, at 40–41.

address it. Viljoen, on the other hand, invites us to look outside the predominant legal regimes that govern data collection and use—contract and privacy law—for "collective institutional forms of [democratic] ordering."[184] In fact, instead of referring to privacy harms, she strategically frames these issues as individual and social informational harms.[185]

A final example of an information-based harm that still falls outside the scope of privacy is the fragmentation of the public sphere. Scholars have long called attention to how content personalization decreases our exposure to differing perspectives.[186] Often referred to as the "filter bubble," this information-based harm threatens to control how society consumes and shares information, narrowing people's worldviews and ultimately interfering with the realization of our democracy.[187] While some theorists have addressed social fragmentation within the context of privacy discourse,[188] others, like Professors Cynthia Dwork and Deirdre Mulligan,

184. See Viljoen, supra note 31, at 584, 586.

185. See id. at 586.

186. See, e.g., Eli Pariser, The Filter Bubble: What the Internet Is Hiding From You 6–10 (2011) (revealing how the computer monitor is becoming a one-way mirror); Christoph Bezemek, Filter Bubble and Fundamental Rights, *in* Fundamental Rights Protection Online: The Future Regulation of Intermediaries 16, 24–26 (Bilyana Petkova & Tuomas Ojanen eds., 2020) (exploring the filter bubble phenomenon through a fundamental rights perspective); Engin Bozdag & Jeroen van den Hoven, Breaking the Filter Bubble: Democracy and Design, 17 Ethics & Info. Tech. 249, 254–63 (2015) (analyzing the design of different software tools that try to break filter bubbles against the backdrop of different theories of democracy); Dwork & Mulligan, supra note 31, at 37 (exploring legal concerns around "the social fragmentation of 'filter bubbles' that create feedback loops reaffirming and narrowing individuals' worldviews" (footnote omitted)); Lucas D. Introna & Helen Nissenbaum, Shaping the Web: Why the Politics of Search Engines Matters, 16 Info. Soc'y 169, 182 (2000) (noting that segmentation of search engines may "fragment the very inclusiveness and universality of the Web that we value" and lead to the internet "merely mirror[ing] the institutions of society with its baggage of asymmetrical power structures, privilege, and so forth"); Janice Richardson, Normann Witzleb & Moira Paterson, Political Micro-Targeting in an Era of Big Data Analytics, in Big Data, Political Campaigning and the Law: Democracy and Privacy in the Age of Micro-Targeting 1, 4 (Normann Witzleb, Moira Paterson & Janice Richardson eds., 2020) (investigating whether the use of internet data and political microtargeting "exacerbate[s] the issue of 'filter bubbles'" and thus "undermine[s] some of the inherently collective processes underpinning democratic governance"); Markus Zanker, Laurens Rook & Dietmar Jannach, Measuring the Impact of Online Personalisation: Past, Present and Future, 131 Int'l J. Hum.-Comput. Stud. 160, 161–66 (2019) (summarizing multidisciplinary research on the impact of personalization and recommendation systems); Frederik J. Zuiderveen Borgesius, Damian Trilling, Judith Möller, Balázs Bodó, Claes H. de Vreese & Natali Helberger, Should We Worry About Filter Bubbles?, Internet Pol'y Rev., Mar. 31, 2016, at 1, 3–6 (summarizing empirical research on the effects of personalization).

187. See Bozdag & van den Hoven, supra note 186, at 249 ("As a consequence [of filter bubbles], the epistemic quality of information and diversity of perspectives will suffer and the civic discourse will be eroded.").

188. See, e.g., Bezemek, supra note 186, at 24 ("It may seem self-explanatory that from a fundamental rights perspective—as a practical matter—[filter bubbles] not only affect[] freedom of speech, but also tend[] to pose a problem for the individual's pursuit of self-fulfillment inherent to the right to privacy.").

explicitly deny that the issue is a privacy problem.[189] "While targeting, narrowcasting, and segmentation of media and advertising, including political advertising, are fueled by personal data, they don't depend on it," Dwork and Mulligan claim in an essay titled *It's Not Privacy, and It's Not Fair*.[190]

Procedural injustice, social inequality, and the fragmentation of the public sphere still have not found their way under the umbrella.[191] What keeps these information-based harms and others from being adopted into the privacy family? Should we not—as Schwartz attempted to do decades ago[192]—talk through what makes privacy an unsuitable paradigm to address these harms? Or examine what makes them different from information-based discrimination or algorithmic manipulation harms, which also stem from the use of personal data for decisionmaking?

4. *Privacy Over-Inclusion and Value Dilution.* — How a problem is conceptualized has profound implications on the legal approaches we choose to prevent and address it. A certain conceptualization can determine whether we should recur to information privacy law to regulate and address it.

Likewise, harm conceptualization has significant effects on the conditions under which the claimants of a given harm are heard in court and receive relief.[193] Unlike other harms, when it comes to privacy harms, "courts and some scholars require a showing of harm . . . out of proportion with other areas of law."[194] As Solove and Citron have aptly explained,

> Through harm requirements, courts have made the enforcement of privacy laws difficult and, at times, impossible. They have added requirements for harm via standing. They have required

189. See Dwork & Mulligan, supra note 31, at 36–37 (arguing that privacy measures "fail to address concerns with the classifications and segmentation produced by big data analysis" and that the effects of those classifications—"decreased exposure to differing perspectives, reduced individual autonomy, and loss of serendipity"—are in any case "not privacy problems").

190. Id. at 37.

191. This is especially remarkable in the case of procedural injustice, considering Citron's forerunner position among what others would later call the "technological due process scholars." See supra note 174 and accompanying text; Jay Thornton, Note, Cost, Accuracy, and Subjective Fairness in Legal Information Technology: A Response to Technological Due Process Critics, 91 N.Y.U. L. Rev. 1821, 1833–34 (2016) (noting that scholars of technological due process phrase their two main critiques of automated decision systems in terms of accuracy and justice, not privacy).

192. See supra note 178 and accompanying text.

193. As Professors Ignacio Cofone and Adriana Robertson point out, "a clear conception of [privacy] harms is essential for determining both standing and remedies." Ignacio N. Cofone & Adriana Z. Robertson, Privacy Harms, 69 Hastings L.J. 1039, 1041 (2018).

194. Ryan Calo, Privacy Harm Exceptionalism, 12 Colo. Tech. L.J. 361, 361 (2014) ("[H]arm presents an especially acute challenge in the context of privacy. Courts generally demand that privacy plaintiffs show not just harm, but concrete, fundamental, or 'special' harm before they can recover." (quoting Doe I v. Individuals, 561 F. Supp. 2d 249, 257 (D. Conn. 2008))).

> harm for statutes that do not require such a showing. They have mandated proof of harm even for statutes that include statutory damages, undercutting the purpose of these provisions. They have adopted narrow conceptions of cognizable harm to exclude many types of harm, including emotional injury and dashed expectations.[195]

An overinclusive theory of privacy also opens the door to a skeptical court devaluing a harm by painting it with the privacy brush and obscuring the true value at stake.[196] In prior work, one of us critiqued the taxonomic approach on this basis.[197] Thus, for example, cases concerning the right to contraception or abortion may be on firmer legal footing when premised on liberty and equality than on privacy.[198] And indeed, the *Dobbs* majority referred to privacy's absence from the Constitution in deconstitutionalizing a pregnant person's right to choose.[199]

At a broader level, the ability to distinguish privacy is important for privacy law as a field. Clearly identifying what—besides social recognition—makes a harm relevant to privacy would allow us to better determine what type of privacy law we need and should aim for.[200] It would give scholars the opportunity to confront fears concerning the abuse of the concept

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195. Citron & Solove, Privacy Harms, supra note 79, at 800 (footnotes omitted). Other scholars have also observed courts' reluctance to address and remedy privacy harms. See, e.g., Lauren Henry Scholz, Privacy Remedies, 94 Ind. L.J. 653, 654 (2019) ("Courts struggle to determine when privacy infringements that occur in cyberspace are sufficiently 'concrete' to allow standing in federal courts."); Daniel J. Solove & Danielle Keats Citron, Risk and Anxiety: A Theory of Data-Breach Harms, 96 Tex. L. Rev. 737, 739 (2018) (noting that suits seeking redress for data breaches have often turned on issues of harm instead of whether defendants are at fault for failing to protect plaintiffs' data).

196. See Calo, Boundaries of Privacy Harm, supra note 20, at 1137–38 ("If too many problems come to be included under the rubric of privacy harm—everything from contraception to nuisance—we risk losing sight of what is important and uniquely worrisome about the loss of privacy.").

197. See id. at 1141–42 ("But without a limiting principle or rule of recognition, we lack the ability to deny that certain harms have anything to do with privacy or to argue that wholly novel privacy harms should be included, which in turn can be useful in protecting privacy and other values.").

198. See id. at 1134 (noting that "ruling out privacy harm may force courts and theorists to confront other basic values such as autonomy or equality" because privacy may "obviate[] the perceived need to grapple with other crucial, yet perhaps more politically contestable, values" in cases involving contraception, abortion, and antisodomy laws).

199. See Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245 (2022) ("*Roe*, however, was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, *which is also not mentioned*." (emphasis added)).

200. According to Charles Fried, "legal [privacy] norms are more or less incomprehensible without some understanding of what kind of a situation is sought to be established with their aid. Without this understanding we cannot sense the changing law they demand in changing circumstances." Fried, supra note 11, at 493; see also María P. Angel, Are Individual Privacy Rights the Appropriate Approach?, Wash. J.L. Tech. & Arts Blog (Apr. 20, 2022), https://wjlta.com/2022/04/20/are-individual-privacy-rights-the-appropriate-approach/

of privacy. As one of us has argued, overuse of the term "risks its diffusion into a meaningless catchall."[201] Similarly, Zarsky has questioned whether the "expansive dynamic [of privacy] might lead information privacy law to eventually merge with other fields of law such as consumer protection or broader notions of protecting individual autonomy—or perhaps collapse into these broader and more established fields of law."[202] Privacy's current unarticulated expansion deserves a thorough discussion within the field. Otherwise—as Professor Morgan Weiland warned regarding the expansion of First Amendment speech doctrine—"we risk diluting it not only through its broad application but also by undermining its internal coherence."[203]

B. *Unresolved Tensions*

Agnosticism toward the nature of privacy has allowed privacy scholars and others to include many values under the large and expanding um brella of privacy. Personal autonomy, self-expression, equality, antisubordination, and fairness have come to be recognized, to greater or lesser extents, as furthered or protected by privacy in the information context. Unfortunately, this approach seems to disregard—and even obscure—longstanding and emerging tensions *within* this capacious conception of privacy and *among* privacy problems, or what Pozen has coined as "privacy–privacy tradeoffs."[204] Further, it gives courts, lawmakers, and scholars no framework for interrogating or resolving those tensions.

"The more sorts of privacy claims that there are," writes Pozen, "the greater the risk that there will be conflicts among them."[205] This Essay expands on Pozen's work to make the case that holding a giant umbrella over myriad, sometimes-conflicting values exacerbates the dilemma of privacy–privacy tradeoffs while giving no clues about how to unpack or reconcile internal tensions between family members.

The following sections address three tensions that are obscured and remain unresolved under the large umbrella of privacy problems: (1) privacy versus equality, (2) privacy versus algorithmic accountability, and (3) privacy versus freedom of expression.

[https://perma.cc/37XS-Z96H] (noting that current proposed data privacy laws overlook the "social/relational dimensions" of privacy).

201. Calo, Boundaries of Privacy Harm, supra note 20, at 1137.

202. Zarsky, Privacy and Manipulation, supra note 31, at 168.

203. Morgan N. Weiland, Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition, 69 Stan. L. Rev. 1389, 1400 (2017).

204. According to Pozen, privacy–privacy tradeoffs arise when "enhancing or preserving privacy along a certain axis . . . entail[s] compromising privacy along another axis." Pozen, supra note 20, at 222.

205. Id. at 227.

1. *Historical Tensions Between Privacy and Equality.* — Privacy has never been thought of as an unambiguously positive societal force. Economic theorists bemoan privacy's capacity to withdraw information from the marketplace and cause inefficiency.[206] Other scholars offer critiques of privacy grounded in equity and inclusion. Feminist and queer legal studies have long called attention to the capacity of privacy (or claims of privacy) to harm and impair equality.[207] For years, these scholars have understood privacy as a convenient cover for violence and subjugation—for example, shielding domestic abusers from the state and justifying regressive bathroom segregation.[208]

Since the Supreme Court recognized a privacy-based right of reproductive freedom,[209] feminist theorists such as Justice Ruth Bader Ginsburg and Professors Sylvia Law and Catharine MacKinnon have contended that constitutional privacy can operate to obscure what they have argued is the core interest at the heart of contraception and abortion debates[210]—namely, a woman's "ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen."[211] These scholars argue that considering these issues under privacy doctrine "blunts our ability to focus on the fact that it is *women* who are oppressed when abortion is denied."[212] By focusing on a presumably universal value such

206. See, e.g., Richard A. Posner, The Economics of Privacy, 71 Am. Econ. Rev. 405, 406 (1981) ("[C]oncealment of personal information is a form of fraud."); Posner, Privacy, Secrecy, and Reputation, supra note 52, at 8 ("As a detail, it may be noted that if there is a taste for solitude as an end in itself it is a *selfish* emotion in a precise economic sense that can be assigned to the concept of selfishness. Solitary activity (or cessation of activity) benefits only the actor."); Richard A. Posner, The Right of Privacy, 12 Ga. L. Rev. 393, 403 (1978) ("[T]here is a prima facie case for assigning the property right away from the individual where secrecy would reduce the social product by misleading the people with whom he deals."). But see Acquisti et al., supra note 125, at 478–85 (arguing that advancements in information technology raise increasingly nuanced and complex issues to the economic analysis of privacy); Ryan Calo, Privacy and Markets: A Love Story, 91 Notre Dame L. Rev. 649, 665–90 (2016) (arguing that privacy and markets should be considered as sympathetic and interdependent).

207. See infra notes 209–229 and accompanying text.

208. See infra notes 209–229 and accompanying text.

209. See Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (holding that a Connecticut statute forbidding use of contraceptives violated "the notions of privacy surrounding the marriage relationship").

210. In 2022, in *Dobbs v. Jackson Women's Health Organization*, the Court overruled Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), holding instead that the Constitution does not confer the right to obtain an abortion. 142 S. Ct. 2228, 2242–43 (2022); see Isabelle G. Horn, Student Case Note, *Dobbs v. Jackson Women's Health Organization* 142 S. Ct. 2228 (2022), 49 Ohio N.U. L. Rev. 231, 245 (2022) ("[T]he majority holding in *Dobbs* . . . poses a significant threat to other rights rooted in the Fourteenth Amendment's Due Process Clause.").

211. Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, 63 N.C. L. Rev. 375, 383 (1985) (citing Kenneth Karst, The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 57–59 (1977)).

212. Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1020 (1984).

as privacy, reproductive rights doctrine overlooks the specific role of gender—including all the nuanced ways that this oppression intersects with people who can become pregnant who do not identify as women.

Situating the choices to pursue an abortion or use contraception under privacy law "reinforces a public/private [dichotomy] that is at the heart of the structures that perpetuate the powerlessness" of individuals who can become pregnant.[213] Thus, by conceiving privacy as a right against public intervention in the private sphere, these decisions situate pregnant individuals within a realm that is inaccessible to the state, hermetic, and unaccountable. Yet reproductive "equality will require intervention, not abdication, to be meaningful."[214] Otherwise, MacKinnon forcefully claims, "[T]he legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labor."[215] For this reason, and despite some later pro-privacy views based on a more affirmative concept of privacy linked to autonomy enhancement,[216] feminist theorists have continuously tried to shed light on "the dark and violent side of privacy."[217]

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213. See id.

214. See MacKinnon, Privacy v. Equality, supra note 24, at 100; see also Catharine A. MacKinnon, Toward a Feminist Theory of the State 191 (1989) ("The right to privacy looks like . . . a sword in men's hands presented as a shield in women's. Freedom from public intervention coexists uneasily with any right that requires social preconditions to be meaningfully delivered."); Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281, 1311 (1991) ("[W]hile the private has been a refuge for some, it has been a hellhole for others . . . . In gendered light, the law's privacy is a sphere of sanctified isolation, impunity, and unaccountability. . . . It belongs to the individual with power. Women have been accorded neither individuality nor power."); Catharine A. MacKinnon, The Road Not Taken: Sex Equality in *Lawrence v. Texas*, 65 Ohio St. L.J. 1081, 1090 (2004) ("Privacy works to protect systematic inequality, whether structurally in reinforcing the public/private line or in express doctrine in substantive due process liberty." (footnote omitted)).

215. MacKinnon, Privacy v. Equality, supra note 24, at 101.

216. See, e.g., Allen, Uneasy Access, supra note 12, at 36 ("[O]pportunities for privacy and the exercise of liberties that promote privacy have special importance for women. Privacy can strengthen traits associated with moral personhood, individuality, and self-determination. It can render a woman more fit for contributions both in her own family and in outside endeavors."); Ruth Gavison, Feminism and the Public/Private Distinction, 45 Stan. L. Rev. 1, 43 (1992) ("[F]ighting the verbal distinction between public and private, rather than fighting invalid arguments which invoke them, or the power structures which manipulate them in unjustifiable ways, is as futile as seeking individual therapy for problems of social structure."); Elizabeth M. Schneider, The Synergy of Equality and Privacy in Women's Rights, 2002 U. Chi. Legal F. 137, 138 ("[C]oncepts of equality are necessary for a robust understanding of privacy, and concepts of privacy are necessary for the full realization of equality."); Laura W. Stein, Living With the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality, 77 Minn. L. Rev. 1153, 1155 (1993) ("[T]o avoid even greater dangers, feminists must try to transform these doctrines. There is no reason why feminists must choose between privacy and equality or between equality and some other way of claiming entitlements. Instead, feminists can and should use the whole range of legal arguments available.").

217. Schneider, Violence of Privacy, supra note 24, at 974.

Feminist theorists have also surfaced privacy's prejudicial effects on equality outside reproductive matters. For instance, in the labor market sphere, Professor Lucinda Finley has argued that the apparent dichotomy between the "public" world of work and the "private" world of family and home "has fostered the economic and social subordination of women," ultimately contributing to their discriminatory treatment in the workplace.[218] Similarly, in the case of mothers who are poor, single, or both, Professor Martha Albertson Fineman has maintained that a "continued emphasis on privacy as the concept to constitutionally protect certain sorts of intimate behavior will serve to deter the development of other legal principles that might help to limit state regulation of poor and single mother families."[219]

Various scholars have also highlighted the gendered character of privacy to showcase how it can be used as a tool of female oppression, objectification, and subordination.[220] Theorists have repeatedly stressed how both the tort of privacy's reliance on outdated expectations about women's modesty and seclusion, as well as "[t]he Fourth Amendment's overarching standard of reasonableness and its epistemological stance of objectivity,"[221] make evident the "unmistakable mark of an era of male hegemony."[222] Professor Jeannie Suk Gersen has suggested that the judicial and public policy debate over privacy is really about determining the type of woman we envision and "which feminist idea of the woman will shape constitutional doctrine."[223]

Queer critical legal studies have also addressed the multiple ways in which privacy can impair gender equality. Scholars such as Professors

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218. Finley, supra note 24, at 1119.

219. Martha Albertson Fineman, Intimacy Outside of the Natural Family: The Limits of Privacy, 23 Conn. L. Rev. 955, 956 (1991).

220. See, e.g., Anita L. Allen & Erin Mack, How Privacy Got Its Gender, 10 N. Ill. U. L. Rev. 441, 441 (1991) ("The privacy tort was the brainchild of nineteenth-century men of privilege, and it shows."); I. Bennett Capers, Unsexing the Fourth Amendment, 48 U.C. Davis L. Rev. 855, 858 (2015) ("[T]raditional notions of sex and gender inform much of Fourth Amendment practice and jurisprudence."); Dana Raigrodski, Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment, 17 Tex. J. Women & L. 153, 156 (2008) ("[T]his article seeks to flesh out the invisible biases that underlie the facially objective and neutral legal standards of search and seizure law."); Victoria Schwartz, Leveling Up to a Reasonable Woman's Expectation of Privacy, 93 U. Colo. L. Rev. 115, 117 (2022) ("In the real world, however, the role that gendered privacy norms should play in privacy law remains a valid question in need of an answer."); Jeannie Suk, Is Privacy a Woman?, 97 Geo. L.J. 485, 488 (2009) ("Privacy is figured as a woman, an object of the male gaze."); Kristen M.J. Thomasen, Beyond Airspace Safety: A Feminist Perspective on Drone Privacy Regulation, 16 Can. J.L. & Tech. 307, 308 (2016) ("[T]he ways in which the drone might enhance or undermine women's privacy in particular have not yet been the subject of significant academic analysis.").

221. Raigrodski, supra note 220, at 156.

222. See Allen & Mack, supra note 220, at 442.

223. Suk, supra note 220, at 506.

Shannon Gilreath, Kendall Thomas, Susan Hazeldean, and Kenji Yoshino have contended that the secrecy and invisibility privacy provides to LGBTQI+ people and communities is not always empowering.[224] Rather, the rhetoric of privacy obscures the real debates that should be held about, for example, LGBTQI+ individuals' right "to be free from state-legitimated violence at the hands of private and public actors" (also referred to as the right to "corporal integrity").[225]

Notably, the secrecy of "the closet" has actually allowed heterosexual people to make decisions that negatively affect the LGBTQI+ community under the cover of a state of ignorance about LGBTQI+ people's intimate lives.[226] In that sense, what was supposed to be a safeguard has turned out to be "an ideological anchor for the oppression of gays and lesbians."[227]

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224. See Shannon Gilreath, The End of Straight Supremacy 76 (2011) ("Privacy is, of course, the perfect vehicle for dominance."); Susan Hazeldean, Privacy as Pretext, 104 Cornell L. Rev. 1719, 1741 (2019) ("When transgender people seek permission to use facilities that accord with their gender identity at their school or work, privacy concerns are often used to justify denying access."); Kendall Thomas, Beyond the Privacy Principle, 92 Colum. L. Rev. 1431, 1435 (1992) ("[T]he lack of close attention to the actual human beings whose bodies are touched by laws like that challenged in *Hardwick* deprives privacy analysis of an important and indispensable conceptual resource."); Kenji Yoshino, Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell", 108 Yale L.J. 485, 492 (1998) ("Whether a group's visibility (or invisibility) empowers or disempowers it in the political process is a deeply contextual inquiry. It is therefore impossible to generalize about the effects of visibility (or invisibility) across those contexts."); Cathy A. Harris, Note, Outing Privacy Litigation: Toward a Contextual Strategy for Lesbian and Gay Rights, 65 Geo. Wash. L. Rev. 248, 251 (1997) ("By focusing on the right of privacy, litigators . . . dilute the power of those assertions that strike at the heart of the legal obstacles facing gays and lesbians. Specifically, equal protection and freedom of expression claims more directly address the discrimination against lesbians and gays.").

Notably, some scholars, despite these arguments, maintain that privacy may provide temporary protection for LGBTQI+ people against discrimination and surveillance. See, e.g., Toby Beauchamp, Going Stealth: Transgender Politics and U.S. Surveillance Practices 22 (2018) (observing that increased visibility of transgender people may end up optimizing public agencies' ability to monitor them); Anita L. Allen, Privacy Torts: Unreliable Remedies for LGBT Plaintiffs, 98 Calif. L. Rev. 1711, 1762–64 (2010) (acknowledging that though privacy tort suits have had limited utility for LGBTQI+ plaintiffs, they still may have had a deterrent effect on attacks against the LGBTQI+ community and noting that privacy rights for the LGBT community will be necessary as long as homophobia is alive).

225. Thomas, supra note 224, at 1435 (internal quotation marks omitted) (discussing the limitations of privacy rhetoric as a conceptual resource for analyzing homophobic antisodomy laws, which are better understood "as a kind of 'body politics'").

226. See, e.g., Bowers v. Hardwick, 478 U.S. 186, 192 (1986), overruled by Lawrence v. Texas, 539 U.S. 558 (2003) (holding that a Georgia antisodomy law could not be invalidated by the Court, since the Constitution does not grant "a fundamental right to homosexuals to engage in acts of consensual sodomy"). In *Lawrence v. Texas*, the Court overturned its decision in *Bowers*, explaining that it had misapprehended the fundamental liberty interest at stake, which "touch[es] upon the most private human conduct, sexual behavior, and in the most private of places, the home." 539 U.S. at 567.

227. Thomas, supra note 224, at 1456.

As Yoshino has noted, this can be seen in the case of the military's "Don't Ask, Don't Tell" policy:

> [W]hile the invisibility of gays may free them from certain kinds of superficial judgment, it entraps them in others. . . . [T]he superficial judgments about gays that justify the [Don't Ask, Don't Tell] policy—that they destroy unit cohesion, that they trench on the privacy of heterosexual servicemembers, and that they create debilitating sexual tension—survive precisely because the coerced invisibility of gays prevents them from being challenged.[228]

Relatedly, cisgender men and women have sometimes weaponized their own right to privacy in order to curtail LGBTQI+ equality. Hazeldean, for example, has shown how the privacy of women and girls has been wrongly used as a pretext to attack antidiscrimination protections for LGBTQI+ people, such as allowing transgender individuals to enter facilities that correspond to their gender identity.[229]

In sum, there are myriad situations in which privacy does not always further equality or protect people against discrimination.[230] On the contrary, privacy can operate against marginalized populations by not only obscuring the real rights and values at stake but also reinforcing and even legitimizing oppressive and discriminatory practices. A taxonomic approach that simply embraces equality as part of the privacy family renders these types of tensions harder to recognize and resolve.

Though the privacy umbrella has helped move the field forward, it has also obfuscated from public awareness the internal tensions among the values privacy implicates without offering solutions.[231]

2. *Conflicts Between Privacy and Algorithmic Accountability.* — As with equality, privacy can also conflict with the values that algorithmic account-

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228. Yoshino, supra note 224, at 545.

229. See Hazeldean, supra note 224, at 1722 ("A desire for privacy in the bathroom is legitimate, but policies that allow transgender people to use bathrooms that accord with their gender identity do not undermine privacy.").

230. See also Lior Jacob Strahilevitz, Privacy Versus Antidiscrimination, 75 U. Chi. L. Rev. 363, 378–80 (2008) (arguing that the protection of private information regarding criminal history status will rarely, if ever, be the most appropriate tool for reintegrating people with felony convictions into the workplace).

231. Analogously, in *Seeking Refuge Under the Umbrella: Inclusion, Exclusion, and Organizing Within the Category Transgender*, anthropologist Megan Davidson argued that, although the umbrella term "transgender" has been a useful tool for mobilizing activism, its use often elides "ideological differences, internal contestations, and deep ambiguities about inclusion, exclusion, and the processes of creating social change" among activists in public consciousness, without contributing to solving them. Megan Davidson, Seeking Refuge Under the Umbrella: Inclusion, Exclusion, and Organizing Within the Category *Transgender*, 4 Sexuality Rsch. & Soc. Pol'y: J. Nat'l Sexuality Res. Ctr. 60, 78 (2007). In a similar fashion, although the taxonomic approach to privacy has provided refuge to a myriad of values, its use also elides critical conflicts among them.

ability and technological due process pursue, such as explainability, transparency, and accuracy. The eventual integration of procedural justice into the privacy family could obscure and downplay those conflicts.

One need look no further than technology firms' strategic, recurrent invocations of privacy to forestall accountability. In 2021, for example, Meta[232] shut down the accounts of NYU researchers who were running the free, open-source browser extension Ad Observer to look into misinformation on the company's platform.[233] Meta invoked its consumers' privacy in preventing researchers' access to data—though it was voluntarily provided by users and being used only to evidence the extent of misinformation on Facebook. Such "privacywashing"[234] practices demonstrate that privacy does not always further the other values it is expected to.

A decade or more of scholarship on algorithmic accountability also provides plenty of examples of cases in which an effort to protect desirable values such as accountability, explainability, or transparency in the context of algorithms may work against privacy. For instance, Professors Roger Allan Ford and W. Nicholson Price II have examined the conflict that can exist between the twin goals of privacy and accountability when it comes to the use of big-data techniques for healthcare applications: "[I]ndependent researchers need access to this [health] information to verify black-box algorithms, ensuring they are accurate and unbiased, but risking further privacy losses."[235]

Professors Finale Doshi-Velez and Mason Kortz have highlighted a comparable tension between privacy and explainability. According to the authors, "[U]nlike human decision-makers, AI systems can delete information to optimize their data storage and protect privacy."[236] Yet if we want these systems to generate ex post human-like explanations, the authors explain, we will necessarily need them to automatically store information regarding their decisions.[237]

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232. Previously known as Facebook.

233. Laura Edelson & Damon McCoy, Opinion, We Research Misinformation on Facebook. It Just Disabled Our Accounts., N.Y. Times (Aug. 10, 2021), https://www.nytimes.com/2021/08/10/opinion/facebook-misinformation.html (on file with the *Columbia Law Review*).

234. Rory Mir & Cory Doctorow, Facebook's Attack on Research Is Everyone's Problem, Elec. Frontier Found. (Aug. 12, 2021), https://www.eff.org/deeplinks/2021/08/facebooks-attack-research-everyones-problem [https://perma.cc/7AA3-UHSX] (arguing that Facebook's strategy of presenting its actions against NYU disinformation researchers as a defense of user privacy is "a dangerous practice that muddies the waters about where real privacy threats come from").

235. Ford & Price, supra note 25, at 42.

236. Doshi-Velez & Kortz, supra note 25, at 10.

237. See id. ("AI systems do not automatically store information about their decisions. . . . However, an AI system designed this way would not be able to generate *ex post* explanations the way a human can.").

A similar situation occurs in the case of transparency. Claims to open the "black box" of algorithms require, among other things, extensive information disclosure. Despite these disclosures' multiple advantages, several authors have repeatedly stressed that "an excessive disclosure of information about the internal logic of a system could infringe on the rights of others, either by revealing protected trade secrets or by violating the privacy of individuals whose data is contained in the training dataset."[238]

Finally, scholars have also argued that privacy runs in tension with the accuracy of automated decisionmaking systems, though some have contested this claim.[239] In Professors Jane Bambauer and Tal Zarsky's view, implementing individual privacy rights, such as the right to opt out or the right to be forgotten, might enable gaming of AI systems and "hamper the firm's ability to use countergaming measures like complexity or constantly changing predictive models."[240] Thus, although they enhance subjects' autonomy and control over their data, these privacy-based measures can be detrimental for the accuracy of the data collected and the data-driven decisions made.

These examples are not uncommon. They demonstrate how privacy does not always align itself with the values algorithmic accountability encompasses. Yet the taxonomic approach fails to acknowledge, let alone resolve, this reality, instead offering an ambiguous criterion of inclusion—social recognition—that may eventually allow algorithmic accountability to find its way into the privacy family.

3. *The Disregarded Tensions Between Privacy and Freedom of Expression.* — Privacy advances freedom of expression by protecting society against another privacy harm: the "chilling effect."[241] Likewise, scholars have described protecting intellectual privacy as essential

238. Sandra Wachter, Brent Mittelstadt & Chris Russell, Counterfactual Explanations Without Opening the Black Box: Automated Decisions and the GDPR, 31 Harv. J.L. & Tech. 841, 882–83 (2018) (noting that an excessive disclosure of information about operating systems could violate trade secrets or privacy rights); see also Margot E. Kaminski, Binary Governance: Lessons From the GDPR's Approach to Algorithmic Accountability, 92 S. Cal. L. Rev. 1529, 1580 (2019) ("[E]stablishing accountability in a collaborative governance regime can raise individual privacy concerns.").

239. Notably, the existence of this tension has been disputed by Professors Ignacio Cofone and Katherine Strandburg. See Ignacio N. Cofone & Katherine J. Strandburg, Strategic Games and Algorithmic Secrecy, 64 McGill L.J. 623, 650 (2019) ("Disclosure of information about secret automated decision-making algorithms will increase the threat of gaming by obfuscation or altered input only in a narrow range of circumstances.").

240. Jane Bambauer & Tal Zarsky, The Algorithm Game, 94 Notre Dame L. Rev. 1, 35 (2018).

241. See Citron & Solove, Privacy Harms, supra note 79, at 854 (defining "chilling effect" as a "harm caused by inhibiting people from engaging in certain civil liberties, such as free speech, political participation, religious activity, free association, freedom of belief, and freedom to explore ideas").

to the First Amendment values of free thought and expression.[242] In that sense, self-expression is usually recognized as a value furthered by privacy.

Yet privacy can also be in tension with First Amendment freedom of expression. Despite some precarity,[243] the historical dominance that free expression interests have had over privacy interests (sometimes referred to as "the Supreme Court's maximalist approach to First Amendment law"[244]) is now well-known.[245] "When information is true and obtained lawfully," Professor Fred Cate has noted, "the Supreme Court has repeatedly held that the State may not restrict its publication without showing a very closely tailored, compelling governmental interest."[246]

It is no secret either that many of the most relevant privacy reforms face strong First Amendment obstacles. Despite heavy contestation,[247] multiple scholars have argued that the First Amendment restricts the government's ability to rely on means such as the privacy tort of "disclosure,"

242. See Richards, Rethinking Civil Liberties, supra note 60, at 3–5 (showing how free speech and privacy complement each other in the digital age); Richards, Intellectual Privacy, supra note 60, at 394 ("Because the core of the First Amendment is the freedom of thought, if we care about speech, we must care about intellectual privacy."); Paul M. Schwartz, Free Speech vs. Information Privacy: Eugene Volokh's First Amendment Jurisprudence, 52 Stan. L. Rev. 1559, 1572 (2000) [hereinafter Schwartz, Free Speech vs. Information Privacy] (arguing that "information privacy law is an integral part of the mission of free speech and not its enemy").

243. See Amy Gajda, The First Amendment Bubble: How Privacy and Paparazzi Threaten a Free Press 3 (2015) (describing the "First Amendment bubble, in which constitutional protection for press and news media continually expands to the breaking point, jeopardizing future protection not only at the margins but also for the core").

244. Jane Bambauer, Is Data Speech?, 66 Stan. L. Rev. 57, 117 (2014) (arguing that data must receive First Amendment protection).

245. See, e.g., N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) ("The constitutional guarantees [of the First and Fourteenth Amendments] require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' . . . ."); see also Peter B. Edelman, Free Press v. Privacy: Haunted by the Ghost of Justice Black, 68 Tex. L. Rev. 1195, 1198 (1990) ("If the right to publish private information collides with an individual's right not to have that information published, the Court consistently subordinates the privacy interest to the free speech concerns. Its rationale for doing so is quite mysterious.").

246. Fred H. Cate, Principles of Internet Privacy, 32 Conn. L. Rev. 877, 887 (2000) [hereinafter Cate, Principles of Internet Privacy].

247. See Neil M. Richards, Reconciling Data Privacy and the First Amendment, 52 UCLA L. Rev. 1149, 1166 (2005) [hereinafter Richards, Reconciling] (criticizing scholars who have "improperly conflated information flows—such as the sale of a database—with the 'freedom of speech' protected by the First Amendment"); Schwartz, Free Speech vs. Information Privacy, supra note 242, at 1559 (disputing Volokh's idea that "the government's safeguarding of information privacy endangers a wide range of speech unrelated to personal data").

criminal laws prohibiting the publication of the names of rape victims, or privacy laws limiting the sale of personal data.[248]

Some scholars have gone so far as to claim that the First Amendment's protections apply not only to disseminating data but to collecting it as well.[249] For Professor Jane Bambauer, the right to freedom of speech carries an implicit right to knowledge creation through data acquisition.[250] In practice, this could result in data protection laws having to withstand judicial scrutiny under the First Amendment.[251] As Bambauer has written, "[C]ourts will need to scrutinize whether a privacy law is actually tailored to specific, weighty interests in seclusion or confidentiality. A well-tailored regulation will create limitations on particular disclosures and misuses of information, rather than creating global bans on data collection and distribution."[252] Bambauer's arguments are contested within the privacy literature.[253] But the view that free speech may protect data collection also appears in the context of civil accountability. As Professor Margot Kaminski has explored, the prevailing view among federal appellate courts holds that the First Amendment also includes a right to record.[254] Therefore, filming the police, at least in public, constitutes a constitutionally protected activity.[255]

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248. See, e.g., Cate, Principles of Internet Privacy, supra note 246, at 887 (requiring that restrictions on publication of truthful and lawfully obtained information must demonstrate "a very closely tailored, compelling governmental interest"); Singleton, supra note 23, at 97 ("The courts should think twice before sacrificing the mature law of free speech to the less coherent concerns about privacy."); Rodney A. Smolla, Privacy and the First Amendment Right to Gather News, 67 Geo. Wash. L. Rev. 1097, 1138 (1999) ("As matters stand today, strong First Amendment doctrines stand in the way of many of the most meaningful privacy reforms."); Volokh, supra note 23, at 1051 ("While privacy protection secured by contract is constitutionally sound, broader information privacy rules are not easily defensible under existing free speech law.").

249. See, e.g., Bambauer, supra note 244, at 63 ("[F]or all practical purposes, and in every context relevant to the current debates in information law, data is speech. Privacy regulations are rarely incidental burdens to knowledge. Instead, they are deliberately designed to disrupt knowledge creation."); Froomkin, supra note 36, at 1508 ("The First Amendment protects the freedom of speech and of the press, but does not explicitly mention the right to gather information. However, both the Supreme Court and appellate courts have interpreted the First Amendment to encompass a right to gather information.").

250. See Bambauer, supra note 244, at 60 ("This Article contends that the freedom of speech carries an implicit right to create knowledge. When the government deliberately interferes with an individual's effort to learn something new, that suppression of disfavored knowledge is presumptively illegitimate and must withstand judicial scrutiny.").

251. See id.

252. Id. at 114.

253. See, e.g., Richards, Rethinking Civil Liberties, supra note 60, at 89–90 (warning that the adoption of the "data is speech" position will turn into "digital *Lochner*").

254. See Margot E. Kaminski, Privacy and the Right to Record, 97 B.U. L. Rev. 167, 168 (2017) ("Recent cases, however, have recognized a First Amendment 'right to record.'").

255. See id. at 181 ("[R]ecording police activity should be squarely protected by the First Amendment, both because the recording serves a government oversight function and because it can inform future policy choices.").

This conflict is well-known and highly discussed, but the taxonomic approach to privacy provides little insight into the longstanding tensions between privacy and freedom of expression. By allowing self-expression to be adopted into the capacious privacy family, it not only fails to address those conflicts but also obscures them.[256]

4. *Emerging Conflicts Within Privacy and Among Privacy Problems.* — So far, all-embracing or umbrella approaches to privacy appear to beget conflicts *within* privacy—that is, among privacy-associated values. When the value of equality, which underpins the feminist and queer-studies criticisms of privacy, itself becomes part of the privacy family, discrimination is an issue that privacy both expands and exacerbates as well as a value it protects.[257] For example, privacy disempowers marginalized populations by rendering their oppression less visible. Yet at the same time, privacy also empowers them to resist unequal treatments that result from the misuse of their information. Because these are now all dimensions of the same concept of privacy, privacy ends up both promoting and undermining itself.[258] How can privacy be balanced against privacy?

The expansive nature of the privacy umbrella allows for more direct conflicts as well—namely, conflicts that appear to be *among* privacy problems. As privacy problems multiply, so does the range of conflicts between them. Labeling everything as "privacy" diminishes scholars' capacity, not to mention the capacity of lawmakers and courts, to balance information harms, one against the next. It seems defensible, for example, for a commentator or polity to decide that antidiscrimination represents a higher value than information privacy in many contexts. But if every information harm involves privacy, then it is clear neither analytically nor pragmatically how privacy may yield to discrimination.

As new privacy problems are welcomed into the umbrella, it becomes evident how mitigating these problems implicates other, well-known privacy problems. This is what Pozen has referred to as "*dimensional tradeoffs*," whereby "[t]argeting one privacy risk creates a new, countervailing risk."[259] For example, the police must invade a stalking

256. There are some exceptions. See Richards, Reconciling, supra note 247, at 1150–52 (arguing for greater reconciliation between data privacy and the First Amendment and claiming that many data privacy rules "are fully justifiable under well-established First Amendment theory, either because they do not regulate 'speech' protected by the First Amendment, or because they are legitimate speech regulations under existing doctrine").

257. Analogously, many social or political movements embody a tension between inclusivity and focus. See, e.g., Davidson, supra note 231, at 63–65 (exploring this tension in the context of activists' discourse about inclusion under the "transgender umbrella" circa 2007). Thank you to Kendra Albert for this analogy.

258. Something similar happens with freedom of expression. Privacy has long been thought to further free speech. Yet different types of privacy invasions (e.g., personal data collection, data recording of the police or farming operations) are considered part of free speech. Free speech has thus turned out to be both a value that privacy furthers and a privacy problem.

259. Pozen, supra note 20, at 230.

suspect's privacy to investigate the suspect's surveillance of a victim. Developers of artificial intelligence must give third parties access to training databases with personal information to try to resolve or mitigate algorithmic bias or unfairness in their systems. Stalking is a privacy problem, but so is surveillance. Bias is a privacy problem, but so is access.

The taxonomic approach is silent—even agnostic—as to these emerging conflicts. As Pozen has accurately warned since 2016, "[t]he danger of this approach is that *it increases the likelihood of intraprivacy conflicts* (by recognizing more claims as privacy claims) *while simultaneously depriving us of resources to resolve them* (by refusing to supply a hierarchy of privacy principles)."[260] Like a strong wind, this danger will eventually cause the worn-out privacy umbrella to flip inside out.

III. BEYOND SOCIAL TAXONOMY: A PRIVACY RESEARCH AGENDA

Here is the argument thus far. For over a century, privacy scholars sought to define privacy by reference to a unitary concept—often involving control over or access to the self. Dissatisfaction with this quixotic project led to the embrace of an attractive alternative: the social-taxonomic approach. This approach, however, eschews analytic efforts at definition, instead emphasizing privacy problems and pitching a big tent encompassing *any* problem that the right people or institutions have come to recognize as implicating privacy. This pluralist, pragmatic approach opened the door to a shift in emphasis from defining to doing, as well as the broadening of privacy to encompass information-based harms such as discrimination and algorithmic manipulation. Yet the approach is beginning to wear thin, particularly when it comes to determining what constitutes a privacy problem. Social recognition provides no answers for critical questions about the legitimacy and authority of voices in the field. And addressing conflicts between values under the umbrella or among privacy problems without a framework that distinguishes among them turns out to be a problem of its own.

The final Part of this Essay briefly sketches the contours of a post-taxonomic approach to privacy. The time has come to take a deeper look at the reasons why a given problem merits study under a privacy framework. If everything that touches information is a privacy problem just because people say so, what are privacy scholars experts in? This Essay does not advocate a return to the search for a specific and unitary definition of privacy.[261] Nor does it deny the importance of furnishing policymakers and jurists, who are often reticent to intervene on behalf of

260. Id. at 243.

261. For one of the latest essentialist efforts of this type, see Bellin, supra note 20, at 471 (pushing back on privacy pluralists and proposing a baseline definition of privacy to anchor legal discourse).

privacy victims, with a concrete set of privacy harms.[262] But it does reject the viability of relying solely on social recognition to define privacy problems.

A post-taxonomic approach to privacy grapples with an admittedly difficult question: Exactly what work is the concept of privacy doing? This question permits anyone—irrespective of their role in society or how many voices agree with them at the moment—to press the case that a given problem is worthy of study from a privacy standpoint. The criteria for what makes the problem a privacy problem, however, should be something other than social recognition or a vague resemblance. Building on other privacy scholars' work, this Essay takes the view that privacy problems sit somewhere at the intersection of observation and power. In that sense, to qualify as a privacy problem, we think, a given phenomenon must involve: (1) an observation that (2) exposes individuals to unbalanced information relationships and (3) that renders them vulnerable[263] and/or powerless.[264]

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262. See Citron & Solove, Privacy Harms, supra note 79, at 799 (providing a typology to "clear away the fog so that privacy harms can be better understood and appropriately addressed").

263. Various scholars, including one of us, have theorized extensively about the relationship between vulnerability and privacy/data protection. See, e.g., Ryan Calo, Privacy, Vulnerability, and Affordance, 66 DePaul L. Rev. 591, 602 (2017) (arguing that privacy plays a complex role as both a shield and a sword for vulnerability and proposing to conceptualize it as an affordance); Gianclaudio Malgieri & Jędrzej Niklas, Vulnerable Data Subjects, Comput. L. & Sec. Rev., July 2020, at 1, 6 (foregrounding the role and potentiality of the notion of "vulnerable data subjects" in the data protection field and proposing the adoption of a layered approach to vulnerability in European law); Nora McDonald & Andrea Forte, The Politics of Privacy Theories: Moving From Norms to Vulnerabilities, CHI '20: Proc. of the 2020 CHI Conf. on Hum. Factors in Computing Sys., Ass'n for Computing Mach., Apr, 30, 2020, at 1, 8 (proposing to augment existing privacy frameworks by integrating intersectional and queer-Marxist theories that allow researchers to look at what creates the privacy shortfalls of vulnerable populations).

264. Several privacy law scholars have for years foregrounded the role of power in information relationships. See, e.g., Julie E. Cohen, Examined Lives: Informational Privacy and the Subject as Object, 52 Stan. L. Rev. 1373, 1408 (2000) ("The data processing paradigm conceals a power relationship, and that relationship, in turn, is a crucial determinant of the truth that data processing constructs."); Neil M. Richards, The Information Privacy Law Project, 94 Geo. L.J. 1087, 1094 (2006) [hereinafter Richards, Information Privacy Law Project] ("I am in basic agreement with these scholars that a greater attention to both the architectures of information flow and the power asymmetries involved in information relationships is warranted."); Neil Richards & Woodrow Hartzog, A Relational Turn for Data Protection?, 6 Eur. Data Prot. L. Rev. 492, 492–93 (2020) [hereinafter Richards & Hartzog, A Relational Turn] ("Data is dangerous in the hands of these companies not just because it is personal to us, but because in their hands it becomes power that can be wielded to control people and institutions. It exposes us in ways that risk more than just identification or denial of control." (footnote omitted)); Solove, Conceptualizing Privacy, supra note 14, at 1142 ("Privacy is an issue of power; it is not simply the general expectations of society, but the product of a vision of the larger social structure."); Solove, Limitations of Privacy Rights, supra note 181, at 979 ("Privacy is about power. Rights can't empower individuals enough to equalize the power imbalance between individuals and the organizations that collect and use their data." (footnote omitted)); Daniel J. Solove, Privacy and Power: Computer

An essentialist definition is not the only path forward. Recent scholarship has embraced a *functional* account of privacy that defines the field in terms of the specific set of problems privacy exists to address.[265] Rather than define privacy per se, socially or otherwise, this approach interrogates what privacy is "for." As early as 1968, Professor Charles Fried argued that privacy is the necessary atmosphere for "respect, love, friendship and trust."[266] As explained by Fried, "Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable. They require a context of privacy or the possibility of privacy for their existence."[267] In 1980, Gavison proposed "the promotion of liberty, autonomy, selfhood, and human relations, and furthering the existence of a free society" as the set of functions that privacy has in our lives.[268]

Cohen has also delved into the purpose of privacy. In her canonical 2013 article *What Privacy Is For*, Cohen contended that privacy is distinct because it preserves "breathing room" for the critical, emergent, and relational subjectivity needed for liberal democracy and innovation to thrive and "engage in socially situated processes of boundary management."[269] Similarly, in his recent book *Why Privacy Matters*, Richards claimed that privacy furthers identity, freedom, and protection, which he described as "human values that make our lives better, both as individuals and as members of society."[270] The functional approach highlights what is unique and valuable about privacy without trying to define the term in the abstract.

An explicit set of criteria for privacy or privacy problems permits immediate discussion of a phenomenon, whether or not the right people or institutions talk a certain way, so long as the proponent can convincingly

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Databases and Metaphors for Information Privacy, 53 Stan. L. Rev. 1393, 1399 (2001) ("Databases alter the way the bureaucratic process makes decisions and judgments affecting our lives; and they exacerbate and transform existing imbalances in power within our relationships with bureaucratic institutions."); Ari Ezra Waldman, Privacy, Practice, and Performance, 110 Calif. L. Rev. 1221, 1227 (2022) ("[T]he goal is to perform privacy law in emancipatory ways—namely, to address the ways in which data-extractive capitalism creates vulnerabilities, power asymmetries, and subordination.").

265. See infra notes 266–270.

266. See Fried, supra note 11, at 477.

267. Id.

268. See Gavison, Privacy and the Limits of Law, supra note 12, at 423.

269. See Cohen, What Privacy Is For, supra note 31, at 1909–12 (internal quotation marks omitted) (quoting Julie E. Cohen, Configuring the Networked Self: Law, Code and the Play of Everyday Practice 149 (2020)).

270. See Richards, Why Privacy Matters, supra note 92, at 5–6. Notably, Solove himself has taken a functional approach to privacy, stating that privacy should be "valued as a means for achieving certain other ends that are valuable." Solove, Conceptualizing Privacy, supra note 14, at 1145. Unlike Fried, Gavison, Cohen, and Richards, however, who are clear about the values that privacy serves, Solove avoids committing to a specific value. Instead, he contends that the values that privacy promotes vary in different contexts. See id. at 1145–46.

ground the problem in privacy. The word "explicit" is key in this endeavor. Qualitative researchers have furnished the term "reflexivity" to describe the tool or method by which "the researcher engages in an explicit, self-aware meta-analysis of the research process."[271] As a practice, reflexivity not only cultivates self-awareness about the normative presuppositions underlying the researcher's knowledge claims and their "inescapable linkage to researcher positionality"[272] but also invites the researcher to make those assumptions visible.[273] According to Professor Roni Berger, "Reflexivity is demonstrated by use of first-person language and provision of a detailed and transparent report of decisions and their rationale."[274] As in the social sciences, we believe that privacy scholarship would highly benefit from scholars' reflexive accounts of their assumptions and rationale for bringing privacy into a given conversation about information-based problems.

For an information-based problem to be of interest to privacy law and scholarship, it need not involve *only* privacy. Few do. The problem of unaccountable algorithms or information capitalism is hardly limited to government or corporate love of data. But privacy discourse should arguably focus on the aspects of the problem our methods and literature illuminate. Tackling the enormous issue of online misinformation, for example, represents privacy scholarship to the extent the inquiry centers around core privacy concerns such as intrusion or (now) data-driven manipulation. We may simply have wiser things to say about the way

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271. Linda Finlay, "Outing" the Researcher: The Provenance, Process, and Practice of Reflexivity, 12 Qual. Health Rsch. 531, 531 (2002). Reflexivity is just one of the possible methods used by qualitative researchers to acknowledge, self-evaluate, and respond to their "positionality," or "the multiple, unique experiences that situate each of us." David Takacs, How Does Your Positionality Bias Your Epistemology?, 19 Thought & Action 27, 33 (2003). In that sense, reflexivity can be considered as a strategy for "situating knowledges." See Gillian Rose, Situating Knowledges: Positionality, Reflexivities and Other Tactics, 21 Progress Hum. Geography 305, 306 (1997) ("Reflexivity in general is being advocated by these writers as a strategy for situating knowledges: that is, as a means of avoiding the false neutrality and universality of so much academic knowledge.").

272. See Louise Folkes, Moving Beyond 'Shopping List' Positionality: Using Kitchen Table Reflexivity and In/Visible Tools to Develop Reflexive Qualitative Research, 23 Qual. Rsch. 1301, 1302 (2023) (citing Jennifer Mason, Qualitative Researching (2d ed. 2002); Anne E Pezalla, Jonathan Pettigrew & Michelle Miller-Day, Researching the Researcher-as-Instrument: An Exercise in Interviewer Self-Reflexivity, 12 Qual. Rsch. 165 (2012); Jeff Rose, Dynamic Embodied Positionalities: The Politics of Class and Nature Through a Critical Ethnography of Homelessness, 23 Ethnography 451 (2020)).

273. See Dongxiao Qin, Positionality, *in* The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies 2 (Nancy A. Naples ed. 2016) ("The reflexivity of researcher's positionality seeks to clarify the personal experiences that have shaped this research inquiry and to make transparent the reflexivity that informs the analyses and theorizing process.").

274. Roni Berger, Now I See It, Now I Don't: Researcher's Position and Reflexivity in Qualitative Research, 15 Qual. Rsch. 219, 222 (2015).

Cambridge Analytica enables the targeting of political messages[275] than we do about the prevalence or impact of Russian disinformation bots.

The question of what work privacy is doing helps disentangle privacy harms from other information-based harms, each of which may merit its own treatment. We take this to be Mulligan and Dwork's insight about algorithmic fairness when they say that "it's not privacy and it's not fair."[276] Mulligan and Dwork understand that lumping questions of fairness into discussions of surveillance can potentially dilute both.[277]

And we take it to be Schwartz's point when he discusses the limited utility of the concept of privacy in the context of government use and abuse of databases.[278] Today, there are entire conferences about algorithmic fairness and accountability.[279] There are special volumes in law reviews dedicated to the role of data-driven decisionmaking in administrative law.[280] Privacy scholars participate in this discourse as privacy scholars only when they say something about privacy itself—for example, the role of observation and power. Otherwise, they are participating as scholars of due process or other aspects of constitutional or administrative law.

Focusing on the precise work privacy is doing within contemporary information problems could also help explain why some invocations of privacy should be given credence, while others—for example, corporations hoping to avoid transparency or lawmakers trying to enforce rigid gender norms—should be entirely discounted. At most, the social-taxonomic approach can sort such claims into this or that category of privacy problem. But they are not truly privacy problems, no matter how many people or institutions say so. They are not even problems so much as cynical rhetorical strategies aimed at another objective.[281]

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275. See Jeremy B. Merrill & Olivia Goldhill, These Are the Political Ads Cambridge Analytica Designed for You, Quartz (Jan. 10, 2020), https://qz.com/1782348/cambridge-analytica-used-these-5-political-ads-to-target-voters [https://perma.cc/BL2B-734W] (describing Cambridge Analytica's advertising tactics, which used data (including stolen Facebook data) to target voters based on their personality traits).

276. Dwork & Mulligan, supra note 31, at 35 (cleaned up).

277. See id. at 37 ("Exposing the datasets and algorithms of big data analysis to scrutiny—transparency solutions—may improve individual comprehension, but given the independent (sometimes intended) complexity of algorithms, it is unreasonable to expect transparency alone to root out bias.").

278. Schwartz, Data Processing, supra note 31, at 1347.

279. See, e.g., ACM Conference on Fairness, Accountability, and Transparency (ACM FAccT), https://facctconference.org [https://perma.cc/2C6F-U9HZ] (last updated Oct. 17, 2023).

280. See, e.g., Volume 71, Number 6 (March 2022): Fifty-Second Annual Administrative Law Issue: Automating the Administrative State, Duke L.J., https://scholarship.law.duke.edu/dlj/vol71/iss6/ [https://perma.cc/8HX6-9F6A] (last visited Feb. 6, 2024).

281. As Pozen has perceptively pointed out, "it is important to remain on guard against false tradeoffs, exaggerated countervailing risks, and overly reductive logic in debates over privacy reform." Pozen, supra note 20, at 245.

Understanding why that is involves understanding what privacy is about.

This foregrounding of the role of the concept of privacy—foreshadowed by leading and emerging privacy theorists[282]—could begin to furnish a roadmap for analyzing tensions among and between privacy problems and the values that underpin them. In fact, it could contribute to the development of normative frameworks—long called for by Pozen in privacy theory—for when policymakers must make hard choices and weigh various privacy interests.[283]

It can be true that algorithmic hiring constitutes a privacy problem because it reduces people to data and pulls information from surprising or nonconsenting sources. It can also be true that algorithmic hiring poses a discrimination problem because the data the systems draw from to form their models are biased against historically marginalized people. And it can be true that addressing bias involves sifting through personal data in ways that implicate privacy.[284] But unless we articulate what sort of value privacy is, it is not clear how that value can be weighed against another, perhaps better-articulated value, such as antidiscrimination.

Finally, clearly identifying privacy's role within contemporary information problems may give American privacy scholarship the opportunity to engage in contemporary global discussions about how to best govern data in the digital age. One of those discussions addresses the distinction between the concepts of privacy and data protection. European scholars have mostly dominated this conversation after the Right to Data Protection was listed as a fundamental right in Article 8 of the Charter of Fundamental Rights of the European Union.[285] Authors have debated whether data protection is a simple facet of

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282. See Cohen, What Privacy Is For, supra note 31, at 1911 (arguing that privacy is not a legal protection for the liberal self but, rather, a fundamental tool for protecting the boundary management practices needed for self-determination); Richards, Why Privacy Matters, supra note 92, at 5–6 (arguing that privacy can promote and safeguard identity, freedom, and protection); Viljoen, supra note 31, at 578 (highlighting the limits of privacy law's focus on individual selfhood).

283. See Pozen, supra note 20, at 243 ("The development of normative frameworks for evaluating privacy-privacy tradeoffs is an increasingly urgent task for the privacy field.").

284. We understand that bias is systemic, that algorithmically sorting people may be inherently oppressive, and that the evidence is that completely de-biasing models does not seem to be possible as a factual matter. See Zeerak Waseem, Smarika Lulz, Joachim Bingel & Isabelle Augenstein, Disembodied Machine Learning: On the Illusion of Objectivity in NLP 2 (Jan. 28, 2021) (unpublished manuscript), https://openreview.net/pdf?id=fkAxTMzy3fs [https://perma.cc/6WTZ-K4YT] (explaining that "[b]y contextualising bias in these terms, we seek to shift the discourse away from bias and its elimination towards subjective positionality"). We use this context only as an example.

285. See infra notes 298–300.

privacy,[286] a different but interdependent right,[287] or an autonomous one with its own added value.[288] In the United States, Professors Margot Kaminski and Meg Leta Jones recently examined the distinctions between privacy law and data protection law[289] as well as the differences between the U.S. and E.U. approaches to data privacy.[290] Similar analyses have also been done in the past by Cate;[291] Professors Paul Schwartz and Karl-

286. See, e.g., Antoinette Rouvroy & Yves Poullet, The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy, *in* Reinventing Data Protection? 45, 61–62 (Serge Gutwirth, Yves Poullet, Paul De Hert, Cécile de Terwangne & Sjaak Nouwt eds., 2009) (exploring how the data protection facet followed the "seclusion" and "noninterference" facets of privacy).

287. See, e.g., Hielke Hijmans, The European Union as Guardian of Internet Privacy: The Story of Art 16 TFEU, at 66 (2016) ("[P]rivacy and data protection are different concepts. The right to privacy represents a normative value, whereas the right to data protection represents a legal structure aimed at allowing individuals to claim that their data should be fairly and lawfully processed."); Paul De Hert & Serge Gutwirth, Privacy, Data Protection and Law Enforcement. Opacity of the Individual and Transparency of Power, *in* Privacy and the Criminal Law 61, 62–63 (Erik Claes, Antony Duff & Serge Gutwirth eds., 2006) (describing privacy as a "tool of opacity" and data protection and criminal procedure as "tools of transparency" while emphasizing the importance of "ascertaining the differences in scope, rationale and logic" between these tools and the rights they protect (internal quotation marks omitted)); Norberto Nuno Gomes de Andrade, Data Protection, Privacy, and Identity: Distinguishing Concepts and Articulating Rights *in* Privacy and Identity Management for Life 90, 96 (Simone Fischer-Hübner, Penny Duquenoy, Marit Hansen, Ronald Leenes & Ge Zhang eds., 2011) ("[A] crucial distinction can be made between data protection, on the one hand, and privacy and identity on the other. Data protection is procedural, while privacy and identity are substantive rights.").

288. See, e.g., Orla Lynskey, The Foundations of EU Data Protection Law 90 (2015) (explaining that data protection may be viewed as "an independent right which serves a multitude of functions including, but not limited to, the protection of privacy" and arguing that "data protection offers individuals enhanced control over their personal data"); Lorenzo Dalla Corte, A Right to a Rule: On the Substance and Essence of the Fundamental Right to Personal Data Protection, *in* Data Protection and Privacy: Data Protection and Democracy 27, 29 (Dara Hallinan, Ronald Leenes, Serge Gutwirth & Paul De Hert eds., 2020) ("[D]ata protection is evolving away from privacy into something entirely distinct, albeit still connected to it."); Orla Lynskey, Deconstructing Data Protection: The 'Added Value' of a Right to Data Protection in the EU Legal Order, 63 Int'l & Comp. L. Q. 569, 573 (2014) ("[D]ata protection offers individuals more rights over more types of information than the right to privacy."); Maria Tzanou, Data Protection as a Fundamental Right Next to Privacy? 'Reconstructing' a Not So New Right, 3 Int'l Data Priv. L. 88, 88 (2013) ("The two rights seem to share a parent–child relationship. Data protection appeared as an offspring of privacy and the two rights still seem inextricably tied up together with a birth cord. However—as does any child—data protection is trying to mark its own way in life.").

289. Meg Leta Jones & Margot E. Kaminski, An American's Guide to the GDPR, 98 Denv. L. Rev. 93, 97–101 (2020) (noting that "[d]ata protection arguably has a different scope than privacy").

290. Id. at 106–11 (discussing several ways in which the U.S. approaches to information or data privacy differ from European-style data protection).

291. See Fred H. Cate, The Changing Face of Privacy Protections in the European Union and the United States, 33 Ind. L. Rev. 173, 179 (1999) (acknowledging the differences between the American and the European contexts that would impede the extension of the E.U. data protection directive to the United States).

Nikolaus Peifer;[292] and Professors Chris Jay Hoofnagle, Bart van der Sloot, and Frederik Zuiderveen Borgesius.[293] There has yet to be, however, a substantial discussion of the advantages, drawbacks, and feasibility of adopting a data protection approach in the American context nowadays. Richards once argued that given that privacy "is itself a troublesome concept, whose vagueness eludes definition and whose historical and conceptual baggage complicates and limits efforts to distill it to a particular essence," it would be more convenient to "provide a better conceptual home for the problems of personal data than the troublesome metaphors of 'privacy': data protection [law] and confidentiality [law]."[294] This discussion is worth continuing today.

Meanwhile, global discussions are moving beyond data protection entirely in favor of broader discussions of information governance and harm mitigation. In 2019, for example, Canada started a larger-scale overhaul of its data privacy landscape with the announcement of its digital charter.[295] Consequently, on June 16, 2022, it introduced the Digital Charter Implementation Act (Bill C-27), which amends the country's data

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292. See Paul M. Schwartz & Karl-Nikolaus Peifer, Transatlantic Data Privacy Law, 106 Geo. L.J. 115, 121–38 (2017) (analyzing the respective legal identities constructed around data privacy in the European Union and the United States).

293. See generally Chris Jay Hoofnagle, Bart van der Sloot & Frederik Zuiderveen Borgesius, The European Union General Data Protection Regulation: What It Is and What It Means, 28 Info. & Commc'ns Tech. L. 65 (2019) (highlighting how the EU's GDPR differs from U.S. privacy law).

294. Richards, Information Privacy Law Project, supra note 264, at 1088, 1134–35. With both Solove and Hartzog, Richards has taken the law of confidentiality seriously. See Woodrow Hartzog & Neil Richards, Legislating Data Loyalty, 97 Notre Dame L. Rev. Reflection 356, 358 (2022), https://ndlawreview.org/wp-content/uploads/2022/07/Hartzog-and-Richards_97-Notre-Dame-L.-Rev.-Reflection-356-C.pdf [https://perma.cc/F9UZ-Z8FL] (proposing a legislative model for applying the duty of loyalty to privacy law); Woodrow Hartzog & Neil Richards, The Surprising Virtues of Data Loyalty, 71 Emory L.J. 985, 992 (2022) (arguing that "clarifying the duty of loyalty is, in fact, the single most important factor enabling its potential as a key cog in a meaningful data privacy framework"); Neil Richards & Woodrow Hartzog, A Duty of Loyalty, supra note 99, at 967 (proposing that a duty of loyalty be applied to American privacy law); Richards & Hartzog, A Relational Turn, supra note 264, at 494 (noting that scholars are increasingly turning to confidentiality and relationships-based models of trust to ground privacy law); Neil Richards & Woodrow Hartzog, Taking Trust Seriously in Privacy Law, 19 Stan. Tech. L. Rev. 431, 459–62 (2016) (conceptualizing confidentiality as a form of discretion that should shape privacy law); Neil M. Richards & Daniel J. Solove, Privacy's Other Path: Recovering the Law of Confidentiality, 96 Geo. L.J. 123, 133–45 (2007) (tracing the history of confidentiality as a protected aspect of law before the birth of the right to privacy); Neil Richards & Woodrow Hartzog, Privacy's Trust Gap: A Review, 126 Yale L.J. 1180, 1188 (2017) (book review) (arguing that privacy rights can be revitalized using a foundation of trust through concepts like confidentiality). Nevertheless, with regards to data protection law, it appears like there's been a lot of water over the dam since.

295. See Canada's Digital Charter in Action: A Plan by Canadians, for Canadians, Minister's Message, Gov't of Can. (May 21, 2019), https://ised-isde.canada.ca/site/innovation-better-canada/en/canadas-digital-charter/canadas-digital-and-data-strategy [https://perma.cc/USW2-UTR3] (last updated Oct. 23, 2019).

privacy statute at the federal level, establishes a tribunal specializing in privacy and data protection and, more importantly, purports to enact the Artificial Intelligence and Data Act.[296] The latter act "aims to protect individuals against a range of serious risks associated with the use of artificial intelligence systems, including risks of physical or psychological harm or biased output with adverse impacts on individuals."[297]

Similarly, since 2020, the European Union has adopted a comprehensive approach to data, which seeks to increase the use and demand of data as well as promote the adoption of artificial intelligence.[298] The European Union has been in the process of approving various legislative acts that, complementing its data protection regime, look to (1) establish an appropriate regulatory framework regarding data governance, access, and reuse;[299] and (2) address the multiple types of risks associated with the use of artificial intelligence.[300] With a better understanding of privacy's role, and therefore its limits, American privacy scholars will be in a better position to evaluate, and even consider, these broader approaches to data governance.

Ultimately, privacy is not the only value at play in a complex digital ecosystem. For privacy scholarship to remain relevant, the field needs to move beyond the comfortable habit of labeling whatever information-based harm the right people are talking about as a "privacy problem." This worked for a time and got the field out of an analytic tailspin. That time

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296. See Bill C-27: An Act to Enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to Make Consequential and Related Amendments to Other Acts, Charter Statement, Gov't of Can. (Nov. 4, 2022), https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c27_1.html [https://perma.cc/PT3A-EX2Z] [hereinafter Bill C-27 Charter Statement] (last updated Nov. 10, 2022); Lisa R Lifshitz, Roland Hung & Cameron McMaster, Proposed Canadian Privacy Bill Introduces Fines and New Requirements for Private Organizations, ABA (July 6, 2022), https://www.americanbar.org/groups/business_law/resources/-business-law-today/2022-july/proposed-canadian-privacy-bill/ (on file with the *Columbia Law Review*) (describing the introduction and effects of Bill C-27).

297. Bill C-27 Charter Statement, supra note 296.

298. See Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Data, at 1, COM (2020) 66 final (Feb. 19, 2020); European Commission, White Paper on Artificial Intelligence—A European Approach to Excellence and Trust, at 25–26, COM (2020) 65 final (Feb. 19, 2020); European Commission Press Release IP/20/273, Shaping Europe's Digital Future: Commission Presents Strategies for Data and Artificial Intelligence (Feb. 19, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_273 [https://perma.cc/UMN4-448U] (last updated Feb. 26, 2020).

299. See, e.g., Proposal for a Regulation of the European Parliament and of the Council on European Data Governance (Data Governance Act), at 1, COM (2020) 767 final (Nov. 25, 2020); Proposal for a Regulation of the European Parliament and of the Council on Harmonised Rules on Fair Access to and Use of Data (Data Act), at 3, COM (2022) 68 final (Feb. 23, 2022).

300. See Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, at 3, COM (2021) 206 final (Apr. 21, 2021).

has passed. Privacy scholars cannot avoid the questions of just what it is we are studying and what it is that privacy law should look to address. This does not necessitate a unitary definition. But it does require a deeper discussion of the set of questions—and problems—that are unique to privacy scholarship and the law it influences.

CONCLUSION

Social taxonomy offered an attractive way out of the elusive search for the definition of privacy. In its place, the social-taxonomic approach welcomed under a common tent the many problems that people and institutions have associated with privacy since the turn of the twentieth century. The tent now shelters more problems—such as information-based discrimination and manipulation—than those widely recognized at the dawn of the social-taxonomic approach. And scholars have branched out from defining privacy to understanding and even addressing the consequences of its absence. Today, the conversation is less about what privacy is than what privacy is for.

This Essay has nevertheless argued that social taxonomy fails to provide a useful framework for determining what constitutes a privacy problem and, as a consequence, has begun to disserve the community. Not everyone or everything is staying safe and dry under the tent. The criterion of social recognition raises difficult questions about *whose* attention matters. Until recently, these questions have been elided in mainstream privacy law discourse. Social recognition also obscures tensions between privacy and other values and exacerbates the issue of privacy–privacy tradeoffs, offering no coherent framework by which to reconcile new and old conflicts between family members.

The way forward involves confronting the defects in social taxonomy without revisiting the quixotic search for a single, perfect definition of privacy. Under a functional approach, for instance, the field can say—and has said—what work privacy is doing without having to agree on its essential nature. Privacy scholarship and law take place against a complex backdrop of societal values and information-based harms. Though it is not an easy task, the field should return its focus to the precise work privacy is doing. Some of privacy scholarship's leading lights are already heading in this direction. We join these voices in calling for a deeper and more explicit understanding of the specific value of privacy in this complicated digital world.

What is the *role* of privacy in a complex information environment? What is it that privacy scholarship and law should look to address in this context? What is the set of *questions* that are unique to our field? What types of *problems* are our *methods* and *literature* best suited to tackle? Privacy scholars will hopefully begin to address these types of questions before studying

an issue under a privacy framework, aiming to participate in ongoing, global discussions about information governance and harm mitigation.

The field of privacy, especially information privacy, has benefited from the freedom to expand and shift emphasis. The social taxonomy did indeed expand the tent and provide shelter from the storm. Having achieved a level of stability and strength, however, the field should consider owning up to the flaws of social recognition and the many, growing conflicts between the loose family members huddled under the same tent. It is still raining out there, but the wear and tear of the tent is beginning to show.

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