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2022-2023

WHEN TAINT TEAMS GO AWRY: LAUNDERING UNCONSTITUTIONAL VIOLATIONS OF THE FOURTH AMENDMENT

Edward S. Adams*
William C. Price Jr.**

INTRODUCTION

During a sunrise raid in April 2021, FBI agents executed a search warrant against attorney Rudy Giuliani's residence and office, seizing multiple phones and other electronic devices.[1] Knowing that these devices contained information protected by attorney-client privilege, prosecutors immediately sought a court-appointed special master to review the material and remove privileged documents before investigators began their work (though the prosecutors still wanted to conduct the initial search for responsive records).[2] This was a notable departure from the standard practice of using a taint team (also known as a filter team), in which a group of Department of Justice ("DOJ") investigators do an initial review of the seized materials to make privilege determinations before turning non-privileged documents over to DOJ prosecutors.[3] It was so remarkable that, in her letter requesting the special master for Giuliani's records, U.S. Attorney Audrey Strauss noted that use of a special master to make privilege determinations instead of a DOJ taint team was only appropriate in "certain exceptional circumstances" (while

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1. William K. Rashbaum et al., *F.B.I. Searches Giuliani's Home and Office, Seizing Phones and Computers*, N.Y. TIMES (May 4, 2021), [https://perma.cc/8J48-966U].

2. Josh Gerstein & Daniel Lippman, *Feds Seek Outsider to Sift Seized Giuliani Records*, POLITICO (May 4, 2021, 8:00 PM), [https://perma.cc/K7Y2-F8BQ].

3. Jim Brochin & Pat Linehan, *DOJ 'Taint Teams' Pose Privilege Risks for Defendants*, LAW360 (July 29, 2020), [https://perma.cc/R3W6-JVZ9].

also arguing that a taint team—even in this case—would adequately protect the attorney-client privilege).[4] While any case involving Mr. Giuliani would likely mean high-profile scrutiny of the prosecutors' actions, Ms. Strauss would have been correct to be concerned about a DOJ taint team conducting a privilege review *in any investigation* involving seized materials from an attorney.

Similarly, when the FBI raided attorney Michael Cohen's office, it seized documents protected under attorney-client privilege.[5] The DOJ wanted to allow Cohen and Trump's legal counsel to identify potentially privileged material and then use a taint team of DOJ prosecutors to determine which documents were actually privileged.[6] Unlike the Giuliani case, federal prosecutors forcefully argued against the use of a court-appointed third party to do the privilege review.[7] After Cohen and Trump objected, the court appointed a special master to conduct the privilege evaluation after Cohen and Trump's legal teams reviewed the documents first.[8] When the judge was dissatisfied with Cohen and Trump's leisurely progress on reviewing documents, she threatened to allow a DOJ taint team to comb through any files remaining after her deadline.[9] The fact that both the judge and Cohen and Trump saw the possibility of taint team involvement as such an effective carrot and stick, respectively, should alarm legal observers. If taint teams are truly effective at protecting attorney-client privilege, why would a federal judge threaten their use against the target[10] of an investigation in order to encourage compliance with a deadline?

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4. Letter from Audrey Strauss, U.S. Att'y, S. Dist. New York, to J. Paul Oetken, J., S. Dist. New York (Apr. 29, 2021), [https://perma.cc/Z2A8-9VZU].

5. Clare Foran, *Michael Cohen Raid and Attorney-Client Privilege: What Is a 'Taint Team'?*, CNN: POL. (Apr. 10, 2018, 5:29 PM), [https://perma.cc/6WX7-BS55].

6. *See* Alan Feuer, *Judge Orders Document Review in Cohen Case to End Next Week*, N.Y. TIMES (June 26, 2018), [https://perma.cc/HJ23-GLKQ].

7. *See* Gerstein & Lippman, s*upra* note 2.

8. *See* Feuer, *supra* note 6.

9. *See* Gerstein & Lippman, *supra* note 2.

10. In this Article, we will occasionally use the terms "target" and "defendant" more or less interchangeably. We acknowledge that they are distinct concepts—a target of an investigation may never become a defendant if she is not indicted. However, we will use both terms in this Article to refer to someone whom the federal government is investigating or has investigated.

Taint teams have received newfound publicity and skepticism in the wake of media coverage of the Giuliani and Cohen cases.[11] The government has turned to taint teams with increasing frequency in recent years, claiming that it is attempting to preserve attorney-client privilege during the execution of search warrants.[12] Taint teams are most often used when the government uses a search warrant to seize large amounts of electronically stored documents, sometimes with a secret warrant (so the target has no notice of either the investigation or the search).[13] Secret warrants and wiretaps have become popular tools for investigators of white-collar crimes,[14] though the warrants and their underlying affidavits are often constitutionally deficient.[15] In their most common iteration, taint teams and their underlying search warrants violate a myriad of constitutional rights by allowing prosecutors prejudicial access to privileged materials, often through knowingly unreasonable searches. While the primary use of a taint team is to protect underlying attorney-client privilege, the structure of these teams casts doubt on the effectiveness of this goal. Taint teams thus *launder* unconstitutional searches, giving the resulting evidence a clean bill of health. Yet, courts and commentators alike are critical of these practices, noting that their use is insufficient to protect attorney-client privilege and its attendant constitutional rights.[16]

Imagine a situation, for example, where a corporate executive sends and receives hundreds of emails from dozens of people a day, including people with whom she has an attorney-client relationship. Further assume this particular executive is

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11. Eileen H. Rumfelt, *"Taint Team" or Special Master: One Recent Analysis*, AM. BAR ASS'N (Sept. 27, 2018), [https://perma.cc/CSC6-GFHZ].

12. *See id.*

13. Robert J. Anello & Richard F. Albert, *Government Searches: The Trouble with Taint Teams*, N.Y.L.J. (Dec. 5, 2016), [https://perma.cc/V9RQ-2336].

14. *See, e.g.*, David Horan, *Breaking the Seal on White-Collar Criminal Search Warrant Materials*, 28 PEPP. L. REV. 317, 318-19 (2001).

15. *Id.* at 318.

16. Brochin & Linehan, *supra* note 3; *see also* Rashbaum et al., *supra* note 1; United States v. SDI Future Health, Inc., 464 F. Supp. 2d 1027, 1037 (D. Nev. 2006) (stating that federal courts have often "taken a skeptical view of the Government's use of 'taint teams.'"); *In re* Grand Jury Subpoenas, 454 F.3d 511, 522 (6th Cir. 2006) (holding that taint-team procedures used "would present a great risk to the appellants' continued enjoyment of privilege protections.").

under investigation by the government, and investigators use shaky affidavits to get a secret warrant for the entirety of her corporate and personal emails. The DOJ agrees to implement a taint team to review seized materials before forwarding to prosecutors documents it considers non-privileged. Because of the secret warrant, the DOJ does not have to tell the executive about the warrant or its investigation, leaving her in the dark.[17] When prosecutors seize her email accounts, members of the DOJ gain access to privileged conversations between her and her attorneys, including communications about legal advice, legal strategy, and trial preparation. This unfettered, ongoing access to thousands of emails is clearly beyond what was contemplated when the Fourth Amendment was drafted.[18] Aside from Fourth Amendment concerns, the executive in this example has no ability to review the procedures in place to ostensibly protect her privilege, to help identify potentially privileged documents (by providing names of attorneys or keywords to search), or to challenge any of the privilege determinations of the taint team (which, since it consists of DOJ prosecutors, likely takes a narrower view of privilege than the executive and her attorney would). In the end, prosecutors would receive troves of emails (including ones wholly unrelated to the investigation), which underwent cursory privilege review conducted without any involvement from the person who owned the privilege and had incentive to protect it. In settings like this, it is not hard to understand how privileged documents wind up in the hands of the prosecution.

These concerns grow exponentially if the target of the investigation is a lawyer as opposed to a non-lawyer business executive. The DOJ could then potentially have access to the suspect's privileged communications with her legal counsel and the privileged communications between the lawyer and all of her clients. For example, her clients (who are not involved in or targets of the investigation) send emails to her asking for legal

17. *See, e.g.*, Horan, *supra* note 14, at 323 (describing the increase in sealed probable cause affidavits in white collar criminal investigations).

18. *See, e.g.*, Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV 547, 550-52 (1999) (providing a brief summary of the historical understanding of the role of the Fourth Amendment).

advice, secure in the knowledge that the communications will be privileged. However, these communications may no longer be confidential since the DOJ could see them as part of the seized material. In this way, taint teams risk violating the rights of the targets of investigations *and* uninvolved third parties. Such unfettered access is an unacceptable intrusion into the attorney-client relationship and could undergird violations of constitutional rights.

In theory, taint teams are supposed to weed out privileged communications so that the prosecution team can only see non-privileged materials.[19] In practice, conflicts of interest and vague taint team procedures frequently fail to protect attorney-client privilege.[20] Emails and documents can fall through the cracks and end up in the hands of the prosecution, even if the taint team knows that the person sending or receiving the communication is a lawyer.[21] The taint team structure also lends itself to more intentional misconduct because both the taint team and prosecution team are in the same organization, report to the same leaders, and often share the same goals.[22] When the taint team passes privileged information to the prosecution, there is no clear remedy. Courts have been reluctant to suppress such evidence using the exclusionary rule, often applying the good faith exception because the prosecution used a taint team in the first place.[23] Further, courts have rarely found the requisite prejudice from disclosure of privileged communications to warrant remedies under the Fifth or Sixth Amendments, such as a new trial or dismissal of the indictment.[24] Because of this judicial reluctance, the government has little incentive to fix the myriad of problems that taint teams offer. This lack of remedies creates

19. Brochin & Linehan, *supra* note 3.

20. *Id.*

21. *Id.*

22. *See id.*

23. *See, e.g.*, United States v. Jarman, 847 F.3d 259, 265-66 (5th Cir. 2017) (applying the good faith exception to the exclusionary rule, saying that "evidence must be 'viewed in the light most favorable to the' Government.").

24. *See* United States v. SDI Future Health, Inc., 464 F. Supp. 2d 1027, 1036-37, 1047-53 (D. Nev. 2006); *see also* United States v. Elbaz, 396 F. Supp. 3d 583, 595-96 (D. Md. 2019) (holding that despite the prosecution having access to privileged materials, there was not a substantial violation of the defendant's Fifth or Sixth Amendment rights).

an unconstitutionally untenable situation in which prosecutors are free to intentionally and unintentionally disregard the rights of targets and non-targets alike, with little to no recourse. This must change.

In this Article, we examine the legal landscape in which taint teams operate, why taint teams are constitutionally problematic, and propose a solution to protect the attorney-client privilege. In Part I, we will first describe what taint teams are supposed to protect—attorney-client privilege. Next, we review how a taint team gets its documents to review, namely the doctrine surrounding (secret) search warrants. Part I ends with a non-exhaustive summary of remedies available when attorney-client privilege is violated during searches. In Part II, we explain the current policies and practices surrounding taint teams, including sources of procedure for taint teams and the use of warrants for electronic information. Part II concludes with a summary of the lopsided pre-2019 split in authority on the use of taint teams in federal criminal prosecutions. Part III is devoted to examining the constitutional and practical shortcomings of the current formulation of taint teams. Using a 2019 case that forcefully criticized the use of taint teams, we explore constitutional issues under the Bill of Rights and separation-of-powers doctrine. Part III concludes with a discussion of the federal government's proposed solution to these judicially identified deficiencies and an explanation of why that solution is wholly inadequate. In Part IV, we review a series of possible solutions already in practice in various jurisdictions and then propose a new solution to resolve the constitutional issues of taint teams and protect attorney-client privilege. Specifically, we propose a new structure that locates privilege-review teams as a function within the federal public defender's office, where judicial officers make recommended privilege determinations subject to judicial review. We explain that this solves the Fourth Circuit's constitutional criticisms while simultaneously recognizing the need to review potentially privileged materials by someone other than the target of an investigation.

I. ON A COLLISION COURSE: ATTORNEY-CLIENT PRIVILEGE AND (SECRET) SEARCH WARRANTS

The legal landscape surrounding taint teams is admittedly in flux. Before 2019, the weight of authority and legal momentum favored the use of taint teams. That began to change in 2019 when the Fourth Circuit joined the Sixth Circuit in its disapproval of taint teams. This Part will explain the aforementioned legal landscape. First, we will briefly describe the attorney-client privilege and its importance to the American legal system. We will then review the document underlying taint teams—the search warrant. After a short discussion of Fourth Amendment search doctrine, we will summarize how the use of secret warrants has increased, thereby removing the target of the investigation from any discussions around privilege. After reviewing attorney-client privilege and Fourth Amendment doctrine, this Part concludes with a brief summary of remedies available in federal criminal trials for violations of privilege or unconstitutional searches.

A. Attorney-Client Privilege Is an Integral Part of the American Legal System

Attorney-client privilege is one of the oldest recognized "privileges for confidential communications."[25] Indeed, the earliest forms of attorney-client privilege in English common law can be traced back to at least 1577.[26] Generally, this privilege protects communications between the lawyer and the client if those communications are confidential and concern legal advice.[27] The privilege itself belongs to the client, though the attorney can assert the privilege on the client's behalf and has

25. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Hunt v. Blackburn, 128 U.S. 464, 470 (1888). Attorney-work-product doctrine is a related but narrow concept covering documents and other things that reveal an attorney's thinking on a matter but do not fall under attorney-client privilege. *See, e.g.*, *Upjohn Co.*, 449 U.S. at 400-01. For the purposes of this Article, we will focus only on attorney-client privilege.

26. *See* Jason Batts, *Rethinking Attorney-Client Privilege*, 33 GEO. J. LEGAL ETHICS 1, 13-14 (2020).

27. *In re* Lindsey, 148 F.3d 1100, 1103 (D.C. Cir. 1998). Attorney-client privilege does not protect all communications with lawyers, just those concerning legal advice. *See, e.g.*, *In re* Grand Jury Subpoena (Mr. S.), 662 F.3d 65, 71 (1st Cir. 2011).

duties to maintain the confidentiality of client information.[28] Attorney-client privilege is not absolute; it may be waived, either intentionally or through inadvertent disclosure.[29] Further, the privilege does not attach to when a client gives information to the attorney for the purpose of perpetrating a fraud or committing a crime.[30] In the United States, attorney-client privilege is considered an integral part of the Sixth Amendment's promise of effective counsel[31] because it "encourage[s] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice."[32] By encouraging full and frank communication, attorney-client privilege also helps to ensure competent representation of clients by attorneys.[33] Without this privilege and its incentive for full disclosure, attorneys would not be able to represent their clients competently because they would not have full information.[34] Moreover, attorney-client privilege is grounded in common law and not statute, so it has evolved to continue to protect communications between lawyers and clients and promote its underlying policies.[35]

B. Just the Bare Necessity: Search Warrants, Wire Taps, and Fourth Amendment Doctrine in White Collar Cases

Because of its central role in establishing access to the potentially privileged materials, our discussion of taint teams must consider Fourth Amendment doctrine. For a taint team to lawfully gain access to material to search, the investigators must

28. *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 173 (4th Cir. 2019); *see also* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2018).

29. FED. R. EVID. 502.

30. *In re* Grand Jury Proceedings, 401 F.3d 247, 251 (4th Cir. 2005). Prosecutors and defendants may disagree over whether this crime-fraud exception to attorney-client privilege applies, and this dispute *should be* resolved by the court.

31. *See* U.S. CONST. amend. VI.

32. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

33. *See id.* (citing Hunt v. Blackburn, 128 U.S. 464, 470 (1888)).

34. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2021) (requiring that lawyers provide competent representation of their clients).

35. *Upjohn Co.*, 449 U.S. at 389.

either get a warrant to search and seize the documents or rely on voluntary surrender of the documents.[36]

The Fourth Amendment to the United States Constitution establishes the right of the people to be free from unreasonable searches and seizures.[37] The Fourth Amendment also requires that a warrant for a search must be based on probable cause, must be supported by a sworn statement, and must describe with particularity the place of the search and the things or persons to be seized.[38] The purpose of the warrant requirement is to ensure that any searches are both necessary and as limited as possible.[39] To establish probable cause, the warrant must rely on current (i.e., not stale) information that points to a nexus between the place to be searched, the items to be seized, and the likelihood of a criminal violation of law.[40] The particularity requirement in the Fourth Amendment is to prevent searches that are so broad that the agents executing the search have "unbridled discretion to rummage at will among a person's private effects."[41] In short, the search warrant must be "carefully tailored" to only those things that there is probable cause to search because there is a nexus between the search and potential criminality—wide-ranging "exploratory searches" are prohibited.[42] If a search is deemed unconstitutional, the court may exclude the evidence at trial.[43]

Congress imposed additional requirements and allowances for when prosecutors seek access to electronically stored information ("ESI"). Specifically, the government may require providers of electronic communication services to disclose communications stored for 180 days or less only if a court of

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36. *See generally* H. MARSHALL JARRETT ET AL., SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS (3d ed. 2009); *see also infra* text accompanying notes 37-70.

37. U.S. CONST. amend. IV.

38. *Id.*

39. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971).

40. *See* United States v. Miller, 24 F.3d 1357, 1361 (11th Cir. 1994); United States v. Harris, 20 F.3d 445, 450 (11th Cir. 1994); United States v. Buck, 813 F.2d 588, 590-92 (2d Cir. 1987).

41. United States v. Galpin, 720 F.3d 436, 445 (2d Cir. 2013) (quoting Arizona v. Gant, 556 U.S. 332, 345 (2009)).

42. Maryland v. Garrison, 480 U.S. 79, 84 (1987).

43. *See infra* Section I.C.

competent jurisdiction issues a warrant.[44] Disclosure of communications stored longer than 180 days may be required via warrant, court order, or grand jury subpoena.[45] In either case, if a warrant is used, it may be issued *without notice* to the subscriber (i.e., the owner of the ESI).[46] If a court order or subpoena is used, notice is required.[47] However, prosecutors may delay providing notice for up to ninety days, creating a window during which the accountholder would have no idea that their service provider had turned over their ESI.[48] In totality, this scheme allows investigators to build a case while the subscriber unknowingly continues communication through the provider, which they otherwise might not do if the privacy breach were known.

Warrants for materials that will be passed through a taint team are not exempt from these requirements.[49] Valid warrants cannot overcome attorney-client privilege—in fact, privileged documents and communications receive special consideration under Fourth Amendment doctrine because such privileged communications possess an inherent, intrinsic expectation of privacy.[50] Because of this, when a court approves a search warrant that targets potentially privileged information, especially ESI, it often includes an addendum directing the government to establish a method for ensuring that "no attorney-client privileged communications will be inadvertently reviewed by the prosecution" and only requiring a DOJ taint team if an inadvertent disclosure occurs.[51]

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44. 18 U.S.C. § 2703(a). A "court of competent jurisdiction" can include both the federal district court with jurisdiction over the offense being investigated and the federal district court in the district in which the ESI is being housed. 18 U.S.C. § 2711.

45. 18 U.S.C. § 2703(b).

46. 18 U.S.C. § 2703(b)(1)(A).

47. 18 U.S.C. § 2703(b)(1)(B)(i)-(ii).

48. 18 U.S.C. §§ 2703(b)(1)(B), 2705.

49. Claudia G. Catalano, Annotation, *Criminal Defendant's Rights Under Stored Communications Act, 18 U.S.C.A. §§ 2701 et seq.*, 11 A.L.R. Fed. 3d § 1 (2016).

50. United States v. Skeddle, 989 F. Supp. 890, 894 (N.D. Ohio 1997); *see also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 806 (1994) (arguing that searches of attorneys' offices should be deemed constitutionally unreasonable unless extraordinary on-site measures are taken to ensure privileged material is not seized).

51. Memorandum in Support of Defendant's Motion to Suppress at 5, United States v. Adams, No. 17-CR-00064, 2017 WL 7796418 (D. Minn. Sept. 28, 2017). In this case, failure by the prosecution to establish and follow adequate procedures as outlined in the search warrant addendum led to exposure of privileged materials to the prosecution team, leading

The protections afforded to targets of investigations when a search warrant targeting potentially privileged information is directed at a third party (like an internet provider or email server host) has varied over time and jurisdiction. At its inception, a special doctrine granted the target of the investigation the ability to attempt to intervene before the search occurs. This doctrine—the *Perlman* doctrine—is "the legal principle that a discovery order aimed at a third party may be immediately appealed on the theory that the third party will not risk contempt by refusing to comply."[52] A legal privilege must be implicated for the *Perlman* doctrine to apply.[53] In essence, it provides an instant vehicle for the target of the investigation to attempt to guard his interests.[54] If the FBI sought a warrant to seize from Google a Gmail account that an attorney used, the attorney would be able to challenge the warrant under the *Perlman* doctrine by appealing the warrant before the search has occurred.

Over time, courts in various jurisdictions have cabined the *Perlman* doctrine's defendant-friendly breadth. Most notably, the trend in federal appellate courts has been to limit *Perlman* appeals only to non-parties, meaning that targets of investigations and defendants are foreclosed from *Perlman*'s protection.[55] Still, other courts decline to apply *Perlman* to criminal cases altogether outside of the grand jury context.[56] Because of this dual narrowing of *Perlman*, the doctrine is not a reliable avenue for targets of investigations to challenge demands on third parties for potentially privileged information. As such, thorough safeguards are required whenever search warrants target potentially privileged information. When warrants are secretly issued and cannot be challenged on privilege grounds through an adversarial

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to subsequent litigation. *Id.* This calls into question the actual efficacy of such addenda. *See generally* United States v. Adams, No. 17-CR-00064, 2018 WL 5311410 (D. Minn. Oct. 27, 2018).

52. *In re* Search of Elec. Commc'ns in the Acct. of chakafattah@gmail.com at Internet Serv. Provider Google, Inc., 802 F.3d 516, 526 (3d Cir. 2015).

53. *Id.*

54. *Id.*

55. *See generally* Bryan Lammon, Perlman *Appeals After* Mohawk, 84 U. CIN. L. REV. 1 (2016) (discussing how *Perlman* has been limited by federal appeals courts).

56. *See, e.g.*, United States v. Copar Pumice Co., 714 F.3d 1197, 1207 (10th Cir. 2013) (noting the circuit's narrow application of *Perlman* to only include grand jury proceedings).

process, the need for additional protections to preserve privilege becomes even more acute.

Wiretaps (i.e., electronic surveillance) constitute a special kind of Fourth Amendment search that poses unique dangers to liberty, especially privileged communications between an attorney and her client, because of the ongoing nature of the search and the lack of notice to the targets.[57] Recognizing this danger, Congress passed specific provisions limiting the use of wiretaps as part of Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968 ("Title III").[58] Title III specifically authorizes ex parte issuance of a wiretap for certain enumerated offenses.[59] Title III also purports to limit the duration of wiretaps, only authorizing renewable periods of thirty days and only allowing the wiretap as long as "is necessary to achieve the objective of the authorization."[60] In order to obtain a wiretap, a district court judge must be convinced that there is probable cause a crime is being committed using the device to be monitored;[61] must be convinced that other investigative procedures are either unlikely to succeed, are too dangerous, or have already been tried and failed;[62] and must believe that the government has steps in place to avoid intercepting conversations that have nothing to do with the alleged criminal activity at issue.[63] Failure to establish these elements can result in the fruits of the wiretap being suppressed.[64] Nevertheless, challenges to federal wiretaps are usually not successful despite the legal requirements being clear.[65]

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57. *See* Berger v. New York, 388 U.S. 41, 63 (1967) ("Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices.").

58. 18 U.S.C. § 2516; *see also* United States v. Gigante, 538 F.2d 502, 503 (2d Cir. 1976) (recognizing that Title III was included by Congress to "ensure careful judicial scrutiny of the conduct of electronic surveillance and the integrity of its fruits").

59. *See* 18 U.S.C. § 2516(1)(a)-(s).

60. 18 U.S.C. § 2518(5).

61. 18 U.S.C. § 2518(1)(b).

62. 18 U.S.C. § 2518(1)(c).

63. 18 U.S.C. § 2518(5); *see also* Scott v. United States, 436 U.S. 128, 136-40 (1978) (noting that minimization is a fact-intensive inquiry that depends on the circumstances of each case).

64. 18 U.S.C. § 2518(10)(a)(i)-(iii).

65. *See, e.g.*, United States v. Young, 822 F.2d 1234, 1237 (2d Cir. 1987) (denying a challenge to a wiretap on the grounds that the necessity requirement was not met); United States v. Goffer, 756 F. Supp. 2d 588, 597 (S.D.N.Y. 2011) (denying a challenge to a wiretap

In practice, repeated renewals can lead to wiretaps that last for many months, even though they are theoretically limited. In 2020, wiretaps authorized by federal courts ran for over forty-six days on average, with about one-third of wiretaps running longer than the initial thirty-day period.[66] The longest wiretaps ran for 270 days.[67] Further, the government does not seem to take minimization seriously. The average federal court-authorized wiretap in 2020 intercepted thousands of communications, with some wiretaps generating thousands of intercepts *per day*.[68] These long-running, expansive searches—which are initiated and approved in ex parte procedures[69]—are a particular concern to attorney-client privilege. Because of the nature of the proceedings; the target (and her attorney) have no notice of the search, cannot challenge the underlying warrant, cannot contest taint-team procedures, and cannot assert privilege claims before prosecutors receive potentially privileged information.[70] Because there is no possibility of an adversarial process during the search and document review processes, and because challenges to federal wiretaps are rarely successful, additional safeguards are necessary to protect the attorney-client privilege.

C. Violations of Attorney-Client Privilege During Investigations, the Constitution, and Available Remedies

Ideally, the target of an investigation would know about a warranted search and be able to prevent privileged documents from ever being in the government's possession, either by voluntarily turning over non-privileged responsive documents or by litigating the matter. Once the government has seized potentially privileged materials from an individual, the remedies

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on minimization grounds even though the court acknowledged that the government was deficient in minimizing the wiretap to avoid capturing privileged conversations).

66. *See* U.S. CTS., UNITED STATES DISTRICT COURTS REPORT OF COURT-AUTHORIZED INTERCEPTS OF WIRE, ORAL, OR ELECTRONIC COMMUNICATIONS PURSUANT TO 18 U.S.C. 2519 FOR THE REPORTING YEAR 2020 (2020), [https://perma.cc/Y6BN-CCAP].

67. *Id.*

68. *Id.*

69. *See* 18 U.S.C. § 2516(1).

70. *See* discussion *infra* Section I.C.2.

for that individual become significantly more limited, and the potential for harm to the defendant becomes significantly greater. This Section will summarize how attorney-client privilege violations can violate constitutionally afforded rights through the lens of several remedies available when privilege is violated (with or without a taint team) in the course of a search or trial. As we will explain, these remedies are insufficient because they are rarely applied in practice.

1. Exclusion of Evidence: The Fourth Amendment Remedy Without Teeth

Under the Fourth Amendment, a defendant can seek to exclude evidence gained from an unconstitutional search using the exclusionary rule.[71] Application of the rule typically involves applying a balancing test between the cost of excluding the evidence and the deterrent effect on misconduct in future searches.[72] The fruit of the poisonous tree doctrine allows courts to extend the exclusionary rule to exclude evidence found in the chain of events resulting from an unconstitutional search.[73] For example, in *Wong Sun v. United States*, the Court held that narcotics found during defendant James Wah Toy's arrest could not be used against him because there was no legal or factual basis for a warrant, making the search unconstitutional.[74] Therefore, the Court reasoned that "the narcotics were 'come at by the exploitation of that illegality' and hence that they may not be used against Toy."[75] Because the lower court did not properly apply the exclusionary rule to exclude the evidence, the Court ordered a new trial for the *Wong Sun* defendants.[76] In practice though, courts have recognized myriad doctrinal exceptions to the

71. *See, e.g.*, United States v. Jarman, 847 F.3d 259, 264-65 (5th Cir. 2017).

72. Hudson v. Michigan, 547 U.S. 586, 591 (2006).

73. Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). However, the fruit of the poisonous tree doctrine does not automatically apply. To determine whether it applies, courts must ask "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488 (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

74. *Id.* at 488.

75. *Id.*

76. *Id.* at 493.

exclusionary rule to avoid excluding evidence (which, for some reason, is viewed as an extreme remedy).[77]

One prominent exception to the exclusionary rule is *good faith*.[78] The good faith exception applies if an objectively reasonable officer could rely on the warrant used *even if* it is later found to be invalid.[79] The good faith exception gives deference to the magistrate's probable cause determination and judgment.[80] This good faith exception does not apply, however, in a situation where "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth."[81] The exception also does not apply if the magistrate "wholly abandoned his judicial role."[82] Finally, if the warrant is so deficient that officers cannot reasonably believe that it is valid, the good faith exception does not apply.[83] If, for example, the warrant gives the DOJ access to a defendant's email (inclusive of privileged conversations) for months at a time, it is not "stating with particularity" the subject of the search and is therefore facially deficient.[84]

The *independent source doctrine* is another exception to the exclusionary rule. If the police can show that the same evidence was discovered later in the course of the investigation and without a constitutional violation, then the evidence need not be excluded.[85] The Court held that the ultimate question for whether the independent source doctrine should apply "is whether the search pursuant to [the] warrant was in fact a genuinely independent source of the information and tangible evidence at

77. *See, e.g.*, United States v. Leon, 468 U.S. 897, 905, 909 (1984).

78. *Id.* at 913.

79. *Id.* at 918-22.

80. *Id.* at 921.

81. *Id.* at 923 (citing Franks v. Delaware, 438 U.S. 154 (1978)).

82. *Leon*, 468 U.S. at 923 (citing Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979)).

83. *Id.*

84. *See* United States v. Pearson, No. 1:04-CR-340, 2006 WL 8442594, at *7 (N.D.N.Y. May 24, 2006).

85. *See* Murray v. United States, 487 U.S. 533, 540-41 (1988).

issue here."[86] The independent-source doctrine can apply even when the police already possess the evidence in question.[87]

The *inevitable discovery exception* to the exclusionary rule is similar to the independent source doctrine. In *Nix v. Williams*, the Court used the inevitable discovery exception to ensure it did not put the government in a worse position than if the police did not violate the law.[88] To avoid exclusion of the evidence, the prosecution had to prove an independent chain of events would have occurred in the absence of a constitutional violation and that independent chain of events could have led to discovery of the evidence.[89] If this independent chain of events would have led to the inevitable discovery of the evidence, it need not be excluded.[90]

Another exception to the exclusionary rule is *attenuation*.[91] Attenuation looks at whether the discovery of the evidence is "sufficiently distinguishable" in time, location, or means to avoid the taint of an earlier illegal search.[92] This has been used in cases such as *Wong Sun v. United States*, where the Court held that Wong Sun's confession was admissible.[93] The Court found that "[o]n the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement, we hold that the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.'"[94]

As should be apparent from this discussion, the exclusion of evidence is not a sufficient remedy for taint-team violations. First, the exclusionary rule is limited to criminal trials, so it would not provide any remedy during grand jury proceedings to prevent indictment in the first place.[95] Second, the number of recognized exceptions (and often the creative application of such exceptions)

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86. *Id.* at 542.

87. *Id.* ("So long as a later, lawful seizure is genuinely independent of an earlier, tainted one (which may well be difficult to establish where the seized goods are kept in the police's possession) there is no reason why the independent source doctrine should not apply.").

88. 467 U.S. 431, 432 (1984).

89. *Id.* at 447-50.

90. *Id.* at 447.

91. Wong Sun v. United States, 371 U.S. 471, 487 (1963).

92. *See id.* at 488 (quoting MAGUIRE, *supra* note 73, at 221).

93. *Id.* at 491.

94. *Id.* (citing Nardone v. United States, 308 U.S. 338, 341 (1939)).

95. *See* United States v. Leon, 468 U.S. 897, 909 (1984).

can render the exclusionary rule essentially toothless. Moreover, excluding certain evidence from the record would not be enough to remedy the immense strategic harm of taint teams. Improper taint-team practices can give the prosecution access to trial preparation notes, confidential attorney-client communications discussing trial strategy and the incident itself, and much more. Those insights could severely hinder or even derail a defendant's case without ever being introduced into evidence. Excluding trial preparation notes from trial evidence would do little to remedy the fact that prosecutors had already adjusted their strategies and tactics after seeing the defense's playbook.

2. A New Trial: A Sixth Amendment Issue to Remedy Prejudice

The Sixth Amendment establishes several rights to ensure fair trials for defendants in federal criminal prosecutions, including the right to effective assistance of counsel.[96] If attorney-client privilege is compromised and interferes with the defendant's right to effective assistance of counsel, the remedy for that prejudice against the defendant might be a new trial.[97] Because access to attorney-client communications can heavily influence the prosecution's trial strategy, this may be the most just remedy in that situation. For instance, the Eighth Circuit held that "effective assistance [of counsel] is denied if an accused is prevented from consulting privately with his attorney."[98] Other courts, including the Fourth Circuit, have equated effective assistance of counsel with "privacy of communication with counsel."[99] If this privacy between client and counsel is violated, or if privilege violations interfere with the defendant's trial strategy, a Sixth Amendment infringement might occur.[100]

96. *See* U.S. CONST. amend VI.

97. United States v. Coffman, 574 F. App'x 541, 565 (6th Cir. 2014).

98. Clark v. Wood, 823 F.2d 1241, 1249 (8th Cir. 1987) (holding that the accused must show that prosecutors at trial used information they gathered against him after monitoring the accused's conversations with his attorney).

99. *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 174 (4th Cir. 2019) (quoting United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981)).

100. United States v. Pearson, No. 1:04-CR-340, 2006 WL 8442594, at *7 (N.D.N.Y. May 24, 2006).

Receiving a new trial after such a violation is an extremely high bar that is rarely met. Even if the government wrongfully obtained privileged materials after taint-team review, intentionally or through error, an individual is only able to obtain a new trial if they can meet the high bar of a showing of prejudice.[101] To show prejudice, a defendant must demonstrate that the government made "direct use of the privileged communications, either at trial or before the grand jury."[102] The requirement that a defendant demonstrate prejudice by "direct use of the privileged communications" is almost always impossible for defendants to meet, even after the government may have already conceded obtaining materials in violation of attorney-client privilege after taint-team review.[103] Imposing this requirement on individuals allows the government to use taint teams in ways exceeding their authority, so long as no "direct use" takes place at trial.

Courts have begun to open the door to other ways of meeting the high bar of showing prejudice other than direct use of privileged communications at trial or in grand jury testimony. Some courts have held that a defendant can also show prejudice by demonstrating that the government intentionally violated attorney-client privilege.[104] For example, if the prosecutor has access to the defendant's email server and knowingly views his emails to his attorney, that is an intentional violation of attorney-client privilege.[105] Similarly, if the defendant is an attorney and

101. *See Coffman*, 574 F. App'x at 565; *see also* United States v. White, 970 F.2d 328, 336 (7th Cir. 1992) (noting attorney-client privilege is testimonial; thus, no prejudice results unless evidence of a breach of attorney-client privilege is introduced at trial).

102. *Coffman*, 574 F. App'x at 565 (quoting United States v. Warshak, 631 F.3d 266, 294-95 (6th Cir. 2011)); *see also White*, 970 F.2d at 336.

103. *Coffman*, 574 F. App'x at 565.

104. *See Pearson*, 2006 WL 8442594, at *7 ("In determining whether there has been an intrusion into the attorney-client relationship in violation of a defendant's Sixth Amendment rights, Courts have examined the following factors: (1) whether there was an intentional intrusion into the attorney-client relationship to gather confidential privileged information, or whether the intrusion was inadvertent; (2) whether evidence to be used at trial was obtained directly or indirectly by the government intrusion; (3) whether the prosecution obtained details of the defendant's trial preparation or defense strategy; and (4) whether the government, directly or indirectly, used or will use evidence obtained as a result of the intrusion to the substantial detriment of the defendant.") (citing Weatherford v. Bursey, 429 U.S. 545 (1976)).

105. *See id.* at *8-9.

the government viewed her emails to her clients, that also intentionally violates attorney-client privilege.[106] One D.C. district court even held that "[w]hile the parties dispute whether courts have sanctioned the Department of Justice's 'taint team' procedures, it is clear that the government's affirmative decision to invoke these procedures constitutes a *per se* intentional intrusion [into attorney-client privilege]."[107] Other courts have focused on government and prosecutorial misconduct as grounds for showing prejudice and thus allowing for a new trial.[108] This includes a member of the taint team posting comments online about the case.[109] Further, pretrial publicity can sometimes be prejudicial enough to warrant a new trial.[110] The proper remedy would be a new trial if any of these scenarios happened since there would be immense prejudice stemming from the government's Sixth Amendment violation.[111]

Some cases, like *United States v. Bowen*, are so extreme that the defendant does not need to show prejudice to get a new trial.[112] In *Bowen*, the Fifth Circuit upheld the district court's grant of a new trial to the defendants, finding that the defendants had demonstrated prejudice via the government's prosecutorial misconduct.[113] *Bowen* involved a federal indictment against former New Orleans Police Department officers charging them with civil rights, firearms, conspiracy, and obstruction of justice offenses in the aftermath of a shooting incident.[114] In the course of the investigation, the district court discovered that several DOJ employees and members of the U.S. Attorney's Office had been posting comments online about the case, including the head of the DOJ's internal taint team.[115] This behavior and the DOJ's accompanying attempt to cover it up before the district court, the

106. *Id.* at 9, 12.

107. United States v. Neill, 952 F. Supp. 834, 840-41 (D.D.C. 1997).

108. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 637 n.9 (1993).

109. *See* United States v. Bowen, 799 F.3d 336, 336 (5th Cir. 2015).

110. Clark v. Wood, 823 F.2d 1241, 1244 (8th Cir. 1987) (first citing Sheppard v. Maxwell, 384 U.S. 333 (1966); and then citing Irvin v. Dowd, 366 U.S. 717 (1961)).

111. *See* United States v. Pearson, No. 1:04-CR-340, 2006 WL 8442594, at *7 (N.D.N.Y. May 24, 2006).

112. *Bowen*, 799 F.3d at 355.

113. *Id.* at 355-56.

114. *Id.* at 340.

115. *Id.* at 345-47.

Fifth Circuit noted, constituted "prejudice . . . shown both from [a] pattern of misconduct and evasion and from other abusive prosecutorial actions."[116] While rare and unusual, the Fifth Circuit held that the *Bowen* case rendered "imposition of the *Brecht* remedy [as] necessary."[117] While these cases have focused on especially egregious governmental misconduct, they demonstrate a willingness to recognize prejudice beyond showing "direct use" of privileged materials at trial.

3. Dismiss the Indictment or Reverse the Conviction: A Fifth Amendment Due Process Remedy

Another potential remedy to a violation of attorney-client privilege is for the court to dismiss the indictment or reverse an already-obtained conviction by arguing that the practice amounted to a denial of due process under the Fifth Amendment.[118] However, "[i]n order to obtain the drastic remedy of dismissing an indictment or reversing a conviction . . . 'a defendant must establish that the government engaged in outrageous behavior in connection with the alleged criminal events and that due process considerations bar the government from prosecuting.'"[119] The government's conduct must shock the conscience.[120] Intentional violations of attorney-client privilege, and especially intentional violations cloaked in the allegedly noble intent of taint teams, should shock the conscience of any judge. Aside from shocking the conscience, there is certainly a valid due process question if a secret warrant is used and the privilege holder has no notice or opportunity to review the

116. *Id.* at 351.

117. *Bowen*, 799 F.3d at 355; *see also* Brecht v. Abrahamson, 507 U.S. 619, 637 n.9 (1993) ("[A] deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.").

118. U.S. CONST. amend. V.

119. United States v. Pearson, No. 1:04-CR-340, 2006 WL 8442594, at *10 (N.D.N.Y. May 24, 2006) (quoting United States v. Cuervelo, 949 F.2d 559, 565 (2d Cir. 1991)); *see also* United States v. Russell, 411 U.S. 423, 431-32 (1973).

120. *Russell*, 411 U.S. at 432; *see also* United States v. Rahman, 189 F.3d 88, 131 (2d Cir. 1999).

documents the taint team deems "not privileged."[121] The Second Circuit, however, noted that such claims rarely succeed,[122] thus this is not a realistic remedy in practice.

4. Removing the Fox from the Hen House: Requesting an Outside Taint Team or Special Master or Seeking Disqualification of Government Counsel

If other remedies (like a new trial, dismissal of the indictment, etc.) have been tried and denied, a defendant might seek disqualification of the government's taint team or prosecutor to exclude those who have knowledge of the privileged communications from the investigation.[123] As explained further below, these seemingly commonsense remedies are better than nothing but do not adequately resolve the concerns surrounding attorney-client privilege violations.

If the target seeks to remove the privilege review from the government's taint team, she would likely request an independent taint team or a judicially supervised special master to take its place. Illustrated in *United States v. Johnson*, the defendant asked for, and the court appointed, an outside taint team consisting of members from a separate U.S. Attorney's Office than the one prosecuting her.[124] On its face, this might seem to remedy the conflicting issues endemic to taint teams (and is admittedly a step in the right direction). However, this remedy assumes that the defendant is aware there is a taint team. If the defendant is unaware that there is a warrant and thus a taint team, this remedy cannot be used, and it may be too late to remedy any constitutional violations if they arise. Further, while situating the taint team in a different U.S. Attorney's office than the one prosecuting a target is certainly an improvement, it is still troubling that federal prosecutors would be making privilege determinations. Federal prosecutors on the taint team are on the "same team" as the other

121. 2 PAUL R. RICE ET AL., ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 11:19 (2021) (emphasis omitted).

122. United States v. LaPorta, 46 F.3d 152, 160 (2d Cir. 1994).

123. *See* Brochin & Linehan, *supra* note 3.

124. United States v. Johnson, 362 F. Supp. 2d 1043, 1082 (N.D. Iowa 2005).

U.S. Attorneys and report up the same chain of command, including the relevant prosecutor.[125]

If a privilege violation does occur and the prosecutor becomes privy to protected communications, some defendants have moved to disqualify the prosecutors appointed to their cases.[126] Switching prosecutors could theoretically help remedy the violation. However, this would not be enough because the breached documents could still be in the office or on the office computers, making them accessible to the next prosecutor. Further, subordinate members of the prosecution team may also know the contents of the privileged communications and be able to share them with the next prosecutor. This remedy also presupposes that the defendant discovers the privilege violation before his or her trial, which may be near impossible. If the defendant uncovers the violation after the trial, this remedy would be no use, leaving the defendant without any recourse.

II. NO RULES, JUST RIGHT: A CLOSER LOOK AT TAINT TEAMS AND THE PRE-2019 LOPSIDED CIRCUIT SPLIT

A. No Rules: Taint Teams and the Sources of Their Rules and Procedures

Taint teams are made up of allegedly neutral individuals who review seized materials to keep privileged communications away from investigators to leave attorney-client privilege intact.[127] Indeed, "the Department of Justice prefers to segregate data using taint teams composed of attorneys or agents who are not members of the prosecution team" in order to protect privileged information.[128] Oftentimes, these "neutral" individuals are

125. *Organizational Chart: Criminal Division*, U.S. DEPT. OF JUST., [https://perma.cc/MWF8-75X5] (last visited Nov. 4, 2022).

126. *See, e.g.*, United States v. Koerber, No. 2:17-CR-37, 2017 WL 3172809, at *6 (D. Utah July 25, 2017).

127. *See* United States v. Pedersen, No. 3:12-CR-00431, 2014 WL 3871197, at *29 (D. Or. Aug. 6, 2014).

128. Lily R. Robinton, *Courting Chaos: Conflicting Guidance from Courts Highlights the Need for Clearer Rules to Govern the Search and Seizure of Digital Evidence*, 12 YALE J.L. & TECH. 311, 336 (2010).

attorneys from the same government office as the prosecutors in a given case.[129] They are not required to follow any specific procedures to prevent the sharing of information.[130] Taint team members also eventually report to the same supervisor as prosecutors.[131] This potential for commingling of prosecutors and supposed neutral third parties has led some commentators and courts to view taint teams as essentially the "fox guarding the chicken coop."[132] Further, the DOJ does not even require taint team members making privilege determinations to be attorneys or have expertise in attorney-client privilege.[133] This combination of lack of expertise, close organizational and physical proximity and control, and potential for conflicts of interest creates a risk that attorney-client privilege will be wantonly disregarded.

It is often unclear what rules govern taint teams, but two sources of guidance are the DOJ Manual and parameters set by the individual judges who approve the use of taint teams.[134] Title 9 of the DOJ Manual reads:

> **Prior Consultation.** In addition to obtaining approval from the United States Attorney or the pertinent Assistant Attorney General, and before seeking judicial authorization for the search warrant, the federal prosecutor must consult with the Criminal Division through the Office of Enforcement Operations, Policy and Statutory Enforcement Unit (PSEU) . . . . NOTE: Attorneys are encouraged to consult with PSEU as early as possible regarding a possible search of an attorney's premises.
>
> To facilitate the consultation, the prosecutor should submit a form available to Department attorneys through PSEU. The prosecutor must provide relevant information about the proposed search along with a draft copy of the proposed search warrant, affidavit in support thereof, and any special instructions to the searching agents regarding search procedures and **procedures to be followed to ensure that**

129. Aaron M. Danzig, *A Tainted Practice? Department of Justice Filter Teams Under Review*, ARNALL GOLDEN GREGORY LLP (Dec. 1, 2021), [https://perma.cc/QCA3-VGXU].

130. *See* U.S. DEPT. OF JUST., JUSTICE MANUAL § 9-13.420 (2021), [https://perma.cc/WPY3-AF7V].

131. *See Organizational Chart: Criminal Division*, *supra* note 125.

132. Anello & Albert, *supra* note 13.

133. *See* Brochin & Linehan, *supra* note 3.

134. Danzig, *supra* note 129.

> **the prosecution team is not "tainted" by any privileged material inadvertently seized during the search**. This procedure does not preclude any United States Attorney or Assistant Attorney General from discussing the matter personally with the Assistant Attorney General of the Criminal Division.
>
> If exigent circumstances prevent such consultation before the warrant is presented to a court, the Criminal Division should be notified of the search as promptly as possible. In all cases, the Criminal Division should be provided as promptly as possible with a copy of the judicially authorized search warrant, search warrant affidavit, and any special instructions to the searching agents.
>
> The Criminal Division is committed to ensuring that consultation regarding attorney search warrant requests will not delay investigations. Timely processing will be assisted if the Criminal Division is provided as much information about the search as early as possible. The Criminal Division should also be informed of any deadlines.[135]

Prior to 2021, the Manual gave very little guidance on anything other than the formation of a taint team.[136] With the 2021 update, the Manual adds:

> F. **Review Procedures**. The following review procedures should be discussed prior to approval of any warrant, consistent with the practice in your district, the circumstances of the investigation and the volume of materials seized.
>
> Who will conduct the review, i.e., **a privilege team**, a judicial officer, or a special master.
>
> Whether all documents will be submitted to a judicial officer or special master or **only those which a privilege team has determined to be arguably privileged or arguably subject to an exception to the privilege**.
>
> Whether copies of all seized materials will be provided to the subject attorney (or a legal representative) in order that: a) disruption of the law firm's operation is minimized; and b) the subject is afforded an opportunity to participate in the process of submitting disputed documents to the court by

135. U.S. DEPT. OF JUST., *supra* note 130, § 9-13.420 (emphasis added).
136. *Id.*

> raising specific claims of privilege. To the extent possible, providing copies of seized records is encouraged, where such disclosure will not impede or obstruct the investigation.
>
> Whether appropriate arrangements have been made for storage and handling of electronic evidence and procedures developed for searching computer data (i.e., procedures which recognize the universal nature of computer seizure and are designed to avoid review of materials implicating the privilege of innocent clients).
>
> These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.[137]

The Manual continues:

> Procedures should be designed to ensure that **privileged materials are not improperly viewed, seized or retained during the course of the search**. While the procedures to be followed should be tailored to the facts of each case and the requirements and judicial preferences and precedents of each district, in all cases a prosecutor must employ adequate precautions to ensure that the materials are reviewed for privilege claims and that any privileged documents are returned to the attorney from whom they were seized.[138]

This vague guidance might be good in spirit but not in application. For example, the Manual explicitly contemplates a team of investigators conducting a privilege review[139] but does not indicate those individuals' qualifications. Further, there is no concrete guidance on how attorney-client privilege should be protected or what precautions must be in place. Without adequate direction, prosecutors are left to their own discretion to determine what constitutes sufficient protections for attorney-client privilege and, thus, the defendant's constitutional rights.

The separation between prosecutors and taint teams is less delineated than it may appear. The taint team is part of the same

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137. *Id.* (emphasis added).
138. *Id.* (emphasis added).
139. *Id.*

government organization (the DOJ) as the prosecutors, and they sometimes even share the same physical office.[140] The taint team may even be made up of prosecutors who stumbled upon privileged evidence while working on the case and had to remove themselves from the prosecutorial role.[141] When this happens, the taint team consists of people who were already investigating the defendant, calling into question their commitment to the vigorous protection of the defendant's attorney-client privilege. Because the prosecutors and the taint teams are in such close proximity, organizationally and sometimes physically, it is difficult to assume that there is no contamination, even if best efforts are made. For example, if the prosecutors and the taint teams use the same printers in the office, the prosecutors could accidentally see a document they should not have, or the prosecutors may accidentally overhear a conversation where the taint team is discussing privileged information relating to the case. Or one taint team member might be a prosecutor in the following case—encouraging unseemly horse trading.

Even if the prosecutor does not use any privileged information they acquired from the taint team in the trial, this information could inform their theory of the case and overall trial strategy. If they saw a witness list the defendant's attorney prepared detailing the weaknesses of the State's witnesses, the prosecutor could decide not to call some of them and put more emphasis on other witnesses. These "small" adjustments to the prosecution's trial strategy based on seemingly innocuous information leaked from the taint team could make or break a defendant's case.

140. U.S. DEPT. OF JUST., *supra* note 130, § 9-13.420.

141. *See., e.g.*, United States v. Rayburn House Off. Bldg., Room 2113, Washington, D.C. 20515, 497 F.3d 654, 665-66 (D.C. Cir. 2007) (holding that FBI agents that saw privileged documents could not discuss them and could not be a part of the defendant's prosecution).

B. Just Right: The Lopsided Pre-2019 Split of Authority on Taint Teams

As explored more deeply in Part II, taint teams present unique risks for violations of constitutional rights.[142] Despite this, most courts examining them have upheld the use of taint teams, even if taint-team processes resulted in government intrusion on the attorney-client privilege. Before 2019, only one circuit looked disfavorably on taint teams. This Section will take a look at the split in authority before 2019. First, we will review cases where taint teams were upheld. We will then discuss the Sixth Circuit's approach, which struck down taint teams over fifteen years ago.

1. Outside the Sixth Circuit, Federal Courts Upheld the Use of Taint Teams and Denied Remedies to Defendants

Before 2019, most courts approved of the use of taint teams.[143] Cases from circuits across the country illustrate the varied approaches courts used to find taint teams acceptable.

The Fifth Circuit approved the use of taint teams and applied the good faith exception to avoid excluding evidence. In *United States v. Jarman*, the lawyer-defendant in a child pornography case appealed the district court's decision to not exclude evidence seized from his home.[144] Because Jarman was an attorney, the FBI began using a taint team prior to Jarman's indictment to review the data it seized from his laptop.[145] Jarman argued that the district court erred in denying his motion to suppress evidence found in his home, which he claimed was required because the affidavit underlying the warrant did not establish probable cause, the good faith exception should not apply, and because the twenty-three month delay between seizure of his computer and completion of the privilege review violated the Fourth Amendment.[146] The Fifth Circuit held that the district court

142. *See infra* Part II.
143. *See* Danzig, *supra* note 129.
144. United States v. Jarman, 847 F.3d 259, 261-64 (5th Cir. 2017).
145. *Id.* at 263.
146. *Id.* at 261.

correctly found that the defendant was not entitled to suppression because the good faith exception applied and the government's delay after the seizure was not unconstitutional.[147] The taint team, which was made up of an attorney from the DOJ and a computer expert from the FBI, screened privileged material out of the data before they passed it on to the prosecution.[148] The court found that the time it took the taint team to review the data and the prosecution to review the hard drives was "within the typical periods of delay in executing warrants that courts have permitted due to the complexity involved in searching computers."[149] The court noted that the government was actively working during this time and not simply sitting idle[150]—in essence, the use of a taint team led the court to give the government greater leeway on timing than it otherwise would have had.

United States v. Jarman is a prime example of how technology leads the court into uncharted territory when it comes to searches and privileged information. Because the court needs to evolve to deal with the "complexity involved in searching computers," prosecutors were afforded extra leeway in their searches.[151] Because search and privilege doctrine have evolved much more slowly than technology, courts occasionally deal with inevitable ambiguity by affording the government extra deference at the expense of defendants, as the Fifth Circuit did in *Jarman*.[152]

The Third Circuit also considered taint teams in the context of an investigation of a sitting congressman. That case, *In re Search of Electronic Communications in the Account of chakafattah@gmail.com at Internet Service Provider Google,*

147. *Id.*

148. *Id.* at 263.

149. *See Jarman*, 847 F.3d at 266-67.

150. *See id.* at 266.

151. *See id.* at 267.

152. *But see* United States v. Metter, 860 F. Supp. 2d 205, 212 (E.D.N.Y. 2012) ("[T]he government's more than fifteen-month delay in reviewing the seized electronic evidence, under the facts and circumstances of this case, constitutes an unreasonable seizure under the Fourth Amendment."). It is also worth noting that the court may have been more amenable to give the government special deference because this was a child pornography case. *Jarman*, 847 F.3d at 267 (quoting *Metter*, 860 F. Supp. 2d at 215 ("'[N]umerous cases hold that a delay of several months' or even years 'between the seizure of electronic evidence and the completion of the government's review of [it] . . . is reasonable' and does not render the warrant stale, especially in child-pornography cases.").

Inc., examined whether a search warrant of a congressman's Google email account would violate, inter alia, attorney-client privilege or the Fourth Amendment.[153] Congressman Fattah was under investigation for fraud, extortion, and bribery, and investigators received a warrant to seize the contents of his Gmail account from Google.[154] The government instituted a taint team to review the contents of the email account.[155] The taint team in this case had a preliminary review by a federal agent who was not an attorney and then a subsequent review by "independent attorney federal agents."[156] Congressman Fattah moved to quash the search warrant and suppress the evidence from the search.[157] After the district court declined to suppress the evidence and held that the use of a taint team properly protected his attorney-client privilege, Fattah appealed.[158]

Because the warrant was directed at a third party (Google), the court considered whether the *Perlman* doctrine applied in this case.[159] The court found that the *Perlman* doctrine did apply in the instances where attorney-client privilege claims were implicated (but not, as Fattah had argued, where Speech or Debate Clause claims were implicated).[160] This is because the attorney-client privilege is based on non-disclosure, and allowing disclosure while the privilege claims were being litigated would defeat the purpose of the privilege.[161] In contrast, the Speech or Debate Clause privilege was not so expansive as to prevent the disclosure of documents to government officials in the course of an investigation.[162] Fattah argued further that the taint team the government used violated these privileges.[163] The court, however, generally approved of the use of a taint team to protect

153. *In re* Search of Elec. Commc'ns in the Acct. of chakafattah@gmail.com at Internet Serv. Provider Google, Inc., 802 F.3d 516, 522 (3d Cir. 2015).
154. *Id.* at 517, 522.
155. *Id.* at 522.
156. *Id.* at 530.
157. *Id.* at 522.
158. *In re Search of Elec. Commc'ns*, 802 F.3d at 522.
159. *Id.* at 526.
160. *Id.* at 529.
161. *See id.*
162. *Id.* at 528.
163. *In re Search of Elec. Commc'ns*, 802 F.3d at 530.

privilege.[164] In a small victory for Fattah, the court disapproved of the use of a non-attorney to conduct the first privilege review, holding that the initial privilege determination should be conducted by an attorney since it is a legal determination.[165] The court remanded Fattah's request for further reforms of the taint team's procedures, but clearly approved of the taint team's presence in the investigation.[166]

In addition to highlighting the general acceptance of taint teams by courts, this case highlights another troubling aspect of the current use of taint teams: the lack of any uniform practices or standards to follow to ensure the protection of constitutional interests.[167] Relying on case-by-case procedure creation results in a dizzying array of procedures with varying efficacy and propriety across the country. This creates a constitutional morass and makes it difficult to trust that taint teams across the country are acting in constitutionally permissible ways. For example, when the court orders a third party to produce an attorney's email communications, the risk is high that some confidential attorney-client communications will be uncovered. Allowing DOJ investigators—even those on a taint team—to violate attorney-client privilege as they comb through these documents will unconstitutionally harm the attorney and/or her clients. More courts should make clear that in situations where a warrant to a third party covers attorney-client communication, the *Perlman* doctrine applies and enables the targeted attorney to challenge the warrant before any potentially privileged materials are turned over.[168] This clear legal recognition would establish a right for the holders of attorney-client privilege to challenge these warrants to third parties in order to assert their privilege claims and demand that any privilege review not be conducted by a DOJ taint team.

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164. *Id.*

165. *Id.*

166. *See id.*

167. *See id.*

168. *In re Search of Elec. Commc'ns*, 802 F.3d at 526 (holding that *Perlman* "established an exception when the traditional contempt route is unavailable because the privileged information is controlled by a disinterested third party who is likely to comply with the request rather than be held in contempt for the sake of an immediate appeal. In these circumstances, a litigant asserting a legally cognizable privilege may timely appeal an adverse disclosure order.") (citing Perlman v. United States, 247 U.S. 7, 13 (1918)).

In the Second Circuit, a district court confoundingly found that no Sixth Amendment violation occurred when an investigator read the defendant's trial preparation notes.[169] *United States v. Pearson* concerned communications between the defendant and another witness, and the defendant and his father.[170] The defendant's father was an attorney, but at the time of the search, there was no evidence his father represented him (and his father attested that he was not representing his son in this matter).[171]

During the review of seized evidence (without a taint team), an investigator viewed the defense's trial preparation notes and then alerted their supervisor, who subsequently requested a taint team and sealed the trial notes in order to prevent further access by investigators.[172] The subsequent taint team included two officials who were removed from the prosecution team because of their exposure to the privileged materials (i.e., the special agent who viewed the privileged materials and the Assistant U.S. Attorney overseeing the case).[173] In a letter to the judge explaining the creation of the taint team and change in the prosecution team, that same Assistant U.S. Attorney asserted that the reassignment was "not required under the law inasmuch as there was no intentional review of privileged material and no inappropriate use of any such material."[174]

The court found that even if the government did violate the defendant's rights under the Sixth Amendment, "there is no per se rule requiring dismissal of the indictment."[175] The court held that merely showing that the government was exposed to the privileged materials was not enough to warrant relief.[176] The defendant instead must show that the government used the privileged material in a way to his detriment, such as having a witness testify about it or using it to find evidence (i.e., a showing

169. United States v. Pearson, No. 1:04-CR-340, 2006 WL 8442594, at *9 (N.D.N.Y. May 24, 2006) (citing United States v. Weissman, No. S2-94-CR-760, 1996 WL 751386, at *12 (S.D.N.Y. Dec. 26, 1996)).

170. *Id.* at *4-6.

171. *Id.* at *8.

172. *Id.* at *5.

173. *Id.* at *6.

174. *Pearson*, 2006 WL 8442594, at *7.

175. *Id.* at *9.

176. *Id.*

of direct prejudice).[177] The court found that this was not the case here because a taint team was formed and the notes were sealed, showing that the government worked to protect the defendant from any resulting prejudice.[178]

The *Pearson* court also ordered an in-camera review of allegedly lost exculpatory material that the prosecution seized and allowed the taint team to be present for that review (even though their presence would expose potentially privileged materials to taint team members, who were also former members of the same prosecution team).[179] If the review showed the evidence to be exculpatory, the government's taint team would have a chance to argue it was not exculpatory before the judge made a final decision.[180] The taint team would not be allowed to tell the trial team about any exculpatory material.[181] The court further rejected the defendant's claim that turning over an encrypted password violated attorney-client privilege, finding that because the pre-trial hearing would only be between the defendant and the taint team, the court would have an opportunity to find a remedy if the hearing uncovered privileged information.[182]

Through this combination of personnel shifts (albeit to just another role on the government's team), explaining away any prejudice, and in-camera review of potentially exculpatory materials, the trial court dismissed the very real constitutional concerns stemming from the invasion of a defendant's attorney-client privilege.[183] This case shows both the general presumption that taint teams are unproblematic panaceas to privilege concerns and how difficult it is for defendants to win even modest relief when privilege has been violated. The court's reasoning in *Pearson* is flawed because requiring the defendant to show that the government used the privileged material to the detriment of the defendant is nearly impossible to do.[184] It is incredibly hard to prove how much the privileged information influenced the

177. *Id.*
178. *Id.* at *9.
179. *Pearson*, 2006 WL 8442594, at *10.
180. *Id.*
181. *Id.*
182. *Id.* at *18.
183. *See id.* at *6, *10, *18.
184. *See Pearson*, 2006 WL 844259, at *9.

defense's trial strategy. Influence is not always overt or explicit—it may be subtle or even unconscious. It is not difficult to imagine how knowledge of a defendant's trial strategy or confidential legal consultations could shape the prosecution's strategy in large and small ways, leading to a trial that is less than fair to the defendant. Courts should not reward the government for slashing through attorney-client privilege (intentionally or through reckless disregard) and then trying to reassemble it with rubber bands and chewing gum.

Pearson's framing of the privilege determination in relation to the attorney-client relationship is also problematic. The *Pearson* court found that because there was no evidence of the attorney-client relationship at the time of the search, the evidence did not implicate the privilege.[185] That is, however, the incorrect standard. As detailed in Part I, attorney-client privilege protects communications between a lawyer and her client that are confidential and concern legal advice.[186] The relevant inquiry is *not* whether an attorney-client relationship existed at the time of the search but rather, whether an attorney-client relationship existed at the time of the communication.[187] Just because Pearson's father was not representing him in *this* case did not eliminate the privilege of communications that took place between Pearson and his father on prior legal matters.[188] Pearson was still owed this attorney-client privilege, but the court cavalierly disregarded it.[189] Further, if a question of law exists, like whether there was an attorney-client relationship, the proper decisionmaker is the court, not DOJ investigators. Investigators should not be able to use taint teams as a shortcut to avoid dealing with thorny privilege questions. Even assuming taint teams were an effective way to siphon out privileged information (which we would challenge), automatically granting the DOJ access to potentially privileged information just because they are not sure an attorney-client relationship exists reeks of unconstitutional overreach.

185. *Id.* at *8.
186. *See supra* Section I.A.
187. *Id.*
188. *Id.*
189. *See id.*

2. The Sixth Circuit Has Viewed Taint Teams Suspiciously for over Fifteen Years

In a 2006 case, the Sixth Circuit Court of Appeals considered taint-team discretion in the context of the government's proposed taint-team procedure.[190] Specifically, the court of appeals addressed the question of which party "ha[d] the right to conduct a review for privilege of documents" that were subject to a grand jury subpoena but in the possession of a third party.[191] The lower court ruled in favor of the government and allowed a taint team over the objections of the subjects of the grand jury investigation who had potential privilege rights implicated in the documents.[192]

The government's taint-team procedure allowed government attorneys not involved in the grand jury investigation to access the seized materials for the purpose of separating privileged documents from non-privileged documents.[193] Any privileged documents would be returned to their owner and the team would provide any documents or materials it determined to be potentially privileged to the owner and the district court for a final determination.[194] In discussing the lower court's ruling, the Sixth Circuit noted that by approving this taint-team procedure, the district court "held that the public policy underlying grand jury secrecy and the effective investigation of criminal activity outweighed the appellants' privilege claims."[195]

Reversing the district court, the Sixth Circuit found that this taint-team procedure, when the documents were not already in the possession of the government, presented "a great risk to the appellants' continued enjoyment of privilege protections."[196] The Sixth Circuit noted that taint teams are typically used in "limited, exigent circumstances in which government officials have already obtained the physical control of potentially-privileged documents through . . . a search warrant."[197] Under these

190. *In re* Grand Jury Subpoenas, 454 F.3d 511, 512 (6th Cir. 2006).
191. *Id.*
192. *Id.* at 513.
193. *Id.* at 515.
194. *Id.*
195. *In re Grand Jury Subpoenas*, 454 F.3d at 518.
196. *Id.* at 522.
197. *Id.*

circumstances, where the government is already in possession of the potentially privileged documents, the court recognized the use of a taint team to "sift the wheat from the chaff" as an "action respectful of, rather than injurious to, the protection of privilege."[198]

When used beyond the confines of documents already in the government's possession, the Sixth Circuit stated that taint teams "present inevitable, and reasonably foreseeable, risks to privilege."[199] The Sixth Circuit explained taint teams present conflicting interests to their members who may be interested in preserving privilege but also in furthering the investigation.[200] Seemingly most troubling to the court was the problem presented by differing interpretations and views of what constitutes privilege.[201] In the context of the procedure approved in *In re Grand Jury Subpoenas*, however, the private individual's attorney would only have an "opportunity to assert privilege . . . over those documents which *the taint team has identified* as being clearly or possibly privileged."[202] This left no "check" against the government taint team making "false negative conclusions, finding validly privileged documents to be otherwise."[203] Ultimately, the Sixth Circuit held that the use of a taint team was inappropriate under the government's procedure and that "appellants themselves must be given an opportunity to conduct their own privilege review."[204]

In re Grand Jury Subpoenas highlights the problems that taint teams can create when privilege determinations are left to the discretion of government attorneys. In the context of a grand jury investigation, even supposed "neutral" government attorneys who are members of the taint team possess conflicting interests between preserving privilege and furthering the investigation. Courts have continued to express concern over this issue in the

198. *Id.* 522-23 (citing United States v. Abbell, 914 F. Supp. 519 (S.D. Fla. 1995)).

199. *Id.* at 523.

200. *In re Grand Jury Subpoenas*, 454 F.3d at 523.

201. *Id.* ("It is reasonable to presume that the government's taint team might have a more restrictive view of privilege than appellants' attorneys.").

202. *Id.*

203. *Id.*

204. *Id.*

wake of the Sixth Circuit's decision in *In re Grand Jury Subpoenas*.[205]

Allowing government attorneys to make privilege determinations at their discretion risks false-negative conclusions relating to what constitutes privileged material, as well as simple human error.[206] Current taint-team procedures allow documents that taint teams do not highlight as possibly privileged to slip through the cracks with the defendant having no recourse. Thus, taint-team procedures present valid and concerning threats to existing attorney-client privilege, especially when left unchecked. This risk exists even with the presence of a valid warrant, as a warrant does not negate the protection of attorney-client privilege.[207]

III. THE COLLISION: EXPLORING THE PROBLEMS OF TAINT TEAMS

This Part will explore the constitutional and ethical issues endemic to taint teams. As discussed in Part I, courts have largely approved the use of taint teams, but in 2019 the tides began to turn when the Fourth Circuit (joining the Sixth Circuit) broadly invalidated their use. This Part will first discuss that case, *In re Search Warrant*. This discussion will include a detailed account of the procedures used by the taint team in that case, followed by an explanation of the court's wide-ranging analysis supporting its holding. Next, we will turn to a summary of the many constitutional and practical problems of taint teams as they are

205. *See* United States v. Gallego, No. CR-18-01537-001, 2018 WL 4257967, at *2 (D. Ariz. Sept. 6, 2018) (quoting United States v. SDI Future Health, Inc., 464 F. Supp. 2d 1027, 1037 (D. Nev. 2006)) ("[F]ederal courts have generally 'taken a skeptical view of the Government's use of "taint teams" as an appropriate method for determining whether seized or subpoenaed records are protected by the attorney-client privilege.'"); United States v. Castro, No. 19-20498, 2020 WL 241112, at *2 (E.D. Mich. Jan. 16, 2020) (refusing the government's request to use a taint team to screen prisoner's calls with his attorney, citing and incorporating the holding of *In re* Grand Jury Subpoenas, 454 F.3d 511, 523 (6th Cir. 2006)).

206. *In re Grand Jury Subpoenas*, 454 F.3d at 523 (citing United States v. Noriega, 764 F. Supp. 1480 (S.D. Fla. 1991)) ("[T]he government's taint team missed a document obviously protected by attorney-client privilege, by turning over tapes of attorney-client conversations to members of the investigating team.").

207. *See id.* at 522-23.

currently formulated, including but not limited to those relied on by the Fourth Circuit. Finally, we will review the government's recent response to the concerns around taint teams and explain why this response is wholly inadequate.

A. Seven Strikes, You're Out!: The Fourth Circuit Strikes Down Taint Teams

As mentioned above, the Fourth Circuit struck down the use of a taint team in 2019.[208] In its wide-ranging opinion, the court relied on at least seven independent rationales for its decision.[209] This Section will explain the context of the case, including the process used to get the warrant and the composition of the taint team. This case represents a common formulation of the taint-team procedure and represents taint teams as a whole. Then, we will explain the court's analysis, enumerating each of the seven identified problems.

This case arose out of a challenge to a search warrant and its related taint-team procedure.[210] The warrant allowed for a wide-ranging search of a law firm and its files, including privileged attorney-client documents, in an investigation targeting a single client of a single attorney at the firm.[211] The investigation concerned the client's alleged involvement in assisting drug dealers with money laundering and obstruction of justice.[212] When a magistrate judge approved the search warrant in ex parte proceedings, the judge also contemporaneously adopted the investigator's proposed "Filter Team Practices and Procedures."[213]

The taint-team procedures called for the team to consist of lawyers from the U.S. Attorney's office, agents from the Drug Enforcement Agency and IRS, and paralegals.[214] The taint team operated out of the Greenbelt, Maryland U.S. Attorney's Office, while the prosecution team was to remain in the Baltimore office

208. *See In re* Search Warrant Issued June 13, 2019, 942 F.3d 159 (4th Cir. 2019).
209. *Id.* at 175-81.
210. *Id.* at 160.
211. *Id.* at 165.
212. *Id.*
213. *In re Search Warrant*, 942 F.3d at 165.
214. *Id.*

(minimizing the chance of physical overlap).[215] Members of the prosecution team were excluded from being members of the taint team, and they were not involved in any other investigations of the lawyer and his client.[216]

In conducting its privilege review, the taint team was to sort the documents into three categories: non-privileged, potentially privileged, and privileged.[217] Documents deemed to be non-privileged were to be forwarded to the prosecution team without further review from investigators, the target of the investigation, or the court.[218] The taint team then reviewed the privileged and potentially privileged documents to determine if the materials were "responsive to the search warrant."[219] If the materials were responsive to the warrant, they were categorized into three further designations:[220]

Privileged and Could Not Be Redacted: These documents were returned to the target of the search.

Privileged but Could Be Redacted: The taint team provided copies of these documents to counsel, seeking an agreement on whether the documents could be forwarded to prosecutors. If no agreement could be reached, the materials would be submitted to the court for a determination of privilege and appropriate redaction.

Potentially Privileged: This category involved documents in which privilege was questionable (i.e., the crime-fraud exception might apply). The taint team followed the same procedures as those for documents that were privileged but could be redacted, namely seeking an agreement with counsel and resorting to the court if no agreement could be reached.[221]

The protocol also allowed taint team members to contact the law firm's clients directly to attempt to obtain a waiver of privilege from the owner of the privilege (the client).[222] If the

215. *Id.*
216. *Id.*
217. *Id.* at 165-66.
218. *In re Search Warrant*, 942 F.3d at 166.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*

client waived the privilege, the taint team would pass the documents on to the prosecutors with no further review.[223]

Five days after the search warrant and taint-team procedures were approved ex parte, fifteen agents, who were members of the taint team, executed the warrant in a six-hour search of the law firm's office.[224] The agents made copies of the entirety of the targeted lawyer's phone and computer and seized all of his correspondence.[225] This included 37,000 received emails and 15,000 sent emails covering multiple clients (not just the client the government was investigating).[226] Only 116 emails were from or concerned the client under investigation.[227] While the search was taking place, other lawyers at the firm raised objections to the sheer breadth of the search and seizures on attorney-client privilege grounds, claiming the agents were violating the attorney-client privilege of other clients who were not the target of the search warrant.[228] Some of those clients who were not targets of the search warrant at issue were actually being investigated or prosecuted by the same U.S Attorney's Office in unrelated matters.[229] When lawyers at the firm requested that the agents only seize materials relevant to the client who was the target of the search warrant, the agents refused.[230]

After the search, a client of the firm and the law firm itself challenged the taint-team procedures and sought a temporary restraining order and preliminary injunction.[231] The firm argued that it had no chance to conduct a privilege review, as it would have been able to do if the government had sought the information using a subpoena instead of a search warrant.[232] It also pointed to the breadth of the seizure compared to the relevance of the documents to the investigation (noting only 116 emails out of the

223. *In re Search Warrant*, 942 F.3d at 166.
224. *Id.* at 165-66.
225. *Id.* at 166-67.
226. *Id.*
227. *Id.* at 168.
228. *In re Search Warrant*, 942 F.3d at 167.
229. *Id.*
230. *Id.*
231. *Id.* at 168.
232. *Id.*

52,000 seized were relevant to the search warrant).[233] Finally, the firm characterized the taint-team procedures as "fatally flawed," pointing out that investigators on the taint team would have access to privileged documents of clients unrelated to this investigation, and that those taint team members may already be investigating (or then decide to investigate) those clients.[234] The district court denied the law firm's motion, deciding that the firm "had not established that it would suffer irreparable harm absent injunctive relief."[235]

On appeal, the Fourth Circuit reversed the district court's denial of the law firm's motion.[236] It relied on at least seven independent grounds, showing the breadth of the issues with the taint-team search and procedures in this case.

Attorney-Client Privilege: The Fourth Circuit noted that an adverse party's review of privileged materials seriously injures the privilege holder in ways that are not easily remedied, taking attorney-client privilege and violations thereof more seriously than the lower court.[237] In this case, the court said that the taint team's review of the seized materials was injurious to the law firm and its clients and could not be undone.[238] The court refused to approve of procedures that cavalierly disregarded the harm of privilege violations.[239]

Breadth of Warrant: The court characterized the search and taint-team procedures as an impermissible greenlight for agents to "rummage" through attorney-client communications.[240] To make its point, the court noted that less than one percent of the seized communications were related to the investigation at issue.[241] This kind of wide-ranging, capacious search was not reasonable.[242]

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233. *In re Search Warrant*, 942 F.3d at 168.
234. *Id.* at 168-69.
235. *Id.* at 169.
236. *Id.* at 170.
237. *Id.* at 175.
238. *In re Search Warrant*, 942 F.3d at 175.
239. *Id.*
240. *Id.* at 179.
241. *Id.* at 172.
242. *Id.* at 179-80.

Nondelegation: The Fourth Circuit held that allowing a U.S. Attorney taint team to make privilege determinations violated the nondelegation doctrine because it assigned a judicial function to the executive branch.[243] Such a delegation violates separation of powers, especially when the executive branch is one of the parties interested in the pending dispute.[244] The district court itself must be the one to evaluate and decide claims of privilege.[245]

Participation of Non-Lawyers: The court criticized the approved taint-team procedures because—in addition to delegating judicial functions to the executive branch—the procedures allowed non-lawyers to make privilege determinations.[246] Participation of non-lawyers increased the likelihood of mistake or neglect, leading to privilege violations.[247] While natural differences of opinion regarding the scope and applicability of attorney-client privilege were to be expected between a team of prosecutors and the target of an investigation, those differences should not be allowed to be worsened by the participation of non-lawyers.[248]

Timing of Taint-Team Procedure Approval: The Fourth Circuit also took issue with the contemporaneous approval of the search warrant and taint-team procedures.[249] It noted that at the time, there was no way for the magistrate judge to know what was actually seized, including the full breadth of unrelated emails.[250] Approving taint-team procedures without knowing what was seized was inappropriate.[251] The Fourth Circuit said that the magistrate should have waited until after the search, and then conducted adversarial procedures on whether to authorize a taint team and what those procedures should be.[252] Doing so would

243. *In re Search Warrant*, 942 F.3d at 176.

244. *Id.*

245. *Id.* at 176-77; *see also In re* City of New York, 607 F.3d 923, 947 (2d Cir. 2010) (noting that privilege determinations are always a judicial function); NLRB v. Interbake Foods, LLC, 637 F.3d 492, 498, 500 (4th Cir. 2011) (holding that a court cannot delegate in-camera review of documents to an agency for a determination of privilege).

246. *In re Search Warrant*, 942 F.3d at 177.

247. *See id.*

248. *Id.*

249. *Id.* at 178.

250. *Id.*

251. *See In re Search Warrant*, 942 F.3d at 178-79.

252. *Id.* at 179.

have allowed the judge to be fully informed of the materials that were seized in order to ensure that the procedures adequately protected attorney-client privilege.[253]

Contact with Represented Parties: In allowing the taint team members to contact the law firm's clients directly to seek a waiver, the taint team's procedures violate Model Rule of Professional Conduct 4.2, which bars attorneys from communicating with a represented party about the subject of the representation without the prior consent of the represented party's attorney.[254] The court noted that exceptions to this rule may be made, but that any exception should be evaluated on an individualized basis after evaluating the attorney-client relationship at issue.[255] Such broad approval of contact with represented parties showed that the investigators and the lower court did not afford adequate respect for the attorney-client privilege and the law firm's duty of confidentiality to its clients.[256]

Public Interest: The court noted that taint teams create an appearance of unfairness in the administration of justice, creating an untenable risk to public confidence in the courts.[257] Specifically, the Fourth Circuit took issue with the inclusion on the taint team of prosecutors employed in the same judicial district where the law firm's clients were being investigated and prosecuted.[258] Allowing prosecutors in the same district to rummage through clients' privileged communications, especially under the guise of an unrelated search warrant, created valid concerns about public perceptions of the fairness of investigations and prosecutions.[259]

After detailing its seven issues with the search and taint-team procedures in this case, the Fourth Circuit turned to the appropriate remedy.[260] To ensure that attorney-client privilege

253. *Id.*

254. *Id.* at 180; MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS'N 2020).

255. *In re Search Warrant*, 942 F.3d at 180; *see also* United States v. Lopez, 4 F.3d 1455, 1461 (9th Cir. 1993).

256. *In re Search Warrant*, 942 F.3d at 180.

257. *Id.* at 182.

258. *Id.*

259. *Id.* at 182-83.

260. *See id.* at 181.

was adequately respected and protected, the court ordered that either the magistrate judge or a judicially appointed special master must perform the privilege review.[261] The court ended its opinion by noting that prosecutors must both see that justice is done and ensure that justice *appears* to be done.[262] The taint-team procedures at issue failed on both counts, and the court struck them down.[263]

In a short concurrence, Judge Rushing opined that a modification to the taint team procedures would solve the nondelegation issue.[264] She said that a provision that "no documents—including those the Filter Team considers nonprivileged—can be sent to the Prosecution Team without either the consent of the Law Firm or a court order" would not violate nondelegation doctrine.[265] We note that this provision would not solve other concerns, like prosecutors roaming through privileged documents.

B. The Dog that Shouldn't Hunt: Summarizing Why Taint Teams Are Constitutionally, Ethically, and Practically Problematic

This Section will provide a brief summary of the issues with taint teams, including those relied on in the Fourth Circuit's *In re Search Warrant* decision. In sum, the combination of conflicts of interest, lack of consistent procedures, and involvement of non-lawyers creates an untenable system that regularly disregards constitutional rights. By showing how drastically out of step current taint teams are with a constitutionally valid structure, this Section will establish that taint teams must be immediately reformed to protect the rights of defendants and non-target third parties.

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261. *In re Search Warrant*, 942 F.3d at 181.

262. *Id.* at 183; *see also In re* Search Warrant for L. Offs. Executed on March 19, 1992, 153 F.R.D. 55, 59 (S.D.N.Y. 1994).

263. *In re Search Warrant*, 942 F.3d at 183.

264. *Id.* at 183-84 (Rushing, J., concurring).

265. *Id.*

1. Fourth Amendment and Search Violations

From the beginning of the process, taint teams are implicated in unconstitutionally unreasonable searches and seizures. As detailed in Part I, warrants must be based on probable cause and be narrowly tailored to only those items for which there is probable cause to search.[266] The government has consistently attempted to use taint teams to avoid the particularity requirement of warrants.[267] Further, the underlying affidavits are often shaky and vague, but magistrate judges overlook these deficiencies and find probable cause anyway.[268] Thus, taint teams cannot remedy unconstitutional searches.

Similarly, courts are impermissibly lenient with wiretap applications. The necessity requirement discussed in Part I is rarely scrutinized by approving courts, and challenges are rarely successful.[269] In fact, courts almost invariably grant wiretap requests. From 2010 to 2020, state and federal courts denied a total of nine requests for wiretaps.[270] With 36,128 wiretaps requested, courts approved wiretap requests 99.975% of the time.[271] This kind of blanket approval indicates that the requirements intended to protect people from unreasonable searches and wiretaps are not being taken seriously.

Additionally, searches and seizures of knowingly privileged information can never be reasonable under the Fourth Amendment.[272] A search warrant or wiretap, even if completely valid, does not overcome attorney-client privilege.[273] If the government believes that certain materials should not be

266. *See supra* Section I.B.

267. *See, e.g.*, *In re Search Warrant*, 942 F.3d at 165-66, 178.

268. *See, e.g.*, Franks v. Delaware, 438 U.S. 154, 165-67 (1978) (discussing remedies when underlying affidavits omit or misstate material information).

269. *See* Robert H. Hotz, Jr. & Harry Sandick, *Unconventional Investigative Techniques in White Collar Cases: Wiretaps, Search Warrants, and Sting Operations*, AKIN GUMP, [https://perma.cc/9KQR-W5VF] (last visited Nov. 4, 2022).

270. *See* U.S. CTS., *supra* note 66.

271. *Id.*

272. *Cf.* United States v. Skeddle, 989 F. Supp. 890, 894 (N.D. Ohio 1997) (noting that privileged materials are entitled to special protection under Fourth Amendment jurisprudence);50 Amar, *supra* note 50, at 806 (arguing that searches of attorneys' offices should be deemed constitutionally unreasonable unless extraordinary on-site measures are taken to ensure that privileged material is not seized).

273. *See* Amar, *supra* note 50, at 806; *see also supra* note 50 and accompanying text.

protected by privilege, the solution is not to seize them and search them anyway, even with a taint team in place. Instead, the government must convince a court that an applicable exception to attorney-client privilege exists.[274] When the government knowingly searches privileged materials without seeking any such determination, that is per se unreasonable.

2. Sixth Amendment Violations

Taint teams implicate the Sixth Amendment by regularly (intentionally or erroneously) giving prosecutors access to confidential communications, violating attorney-client privilege and risking the effective assistance of counsel. Sixth Amendment protections generally attach whenever a defendant learns of charges against him and has his liberty subject to restriction.[275] However, the Sixth Amendment can also attach before a formal charge, when the defendant "finds himself faced with the prosecutorial forces of organized society" and "the intricacies of substantive and procedural criminal law."[276] The timing of the indictment and the privilege violation may be of little consequence if the ultimate effect of the constitutional violation occurs during trial or trial preparation.[277]

As noted above, taint teams are a vehicle through which investigative actors (the members of the government taint team) regularly access privileged information.[278] In many cases, this privileged information is inappropriately disclosed to prosecutors, either intentionally or inadvertently.[279] The lack of taint-team oversight and consistent processes amplifies the inherent potential for prejudice against defendants by members of investigative and prosecutorial bodies. This is further

274. 2930*See supra* notes 29-30 and accompanying text.

275. *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 194 (2008).

276. United States v. Gouveia, 467 U.S. 180, 189 (1984).

277. *See* United States v. Stein, 435 F. Supp. 2d 330, 366 (S.D.N.Y. 2006) ("The fact that events were set in motion prior to indictment with the object of having, or with knowledge that they were likely to have, an unconstitutional effect upon indictment cannot save the government. This conduct, unless justified, violated the Sixth Amendment.").

278. See generally *supra* Section III.B.2 for a discussion on how taint teams access privileged information.

279. *See* Brochin & Linehan, *supra* note 3.

exacerbated when taint teams allow non-lawyers to make privilege determinations. By using ad-hoc processes and involving those without expertise in privilege matters, taint teams create unacceptable risks that privileged materials will be improperly forwarded to the prosecution.

The widespread use of taint teams poses serious threats to defendants' Sixth Amendment rights, whether through intentionally violating attorney-client privilege or serious governmental misconduct resulting from a lack of oversight. When prosecutors have access to privileged documents, it can chill the free and full disclosure between client and attorney, calling into question the attorney's ability to adequately and zealously defend his client. Further, when prosecutors gain access to trial preparation communications and litigation strategy, the prosecutors gain an unfair advantage to the detriment of the defendant, even if those documents are never entered into evidence. All of this creates the inevitable conclusion that a system that tolerates or even tacitly encourages such disclosures violates the Sixth Amendment's promise of a fair trial and effective assistance of counsel.

3. Nondelegation and Separation of Powers

As discussed in the coverage of *In re Search Warrant* above, the use of DOJ or FBI taint teams constitutes an unconstitutional delegation of judicial functions to the executive branch.[280] This strikes at the heart of current taint-team structure and recognizes that separation of powers must be respected. By allowing investigators to conduct the search, make privilege determinations, and prosecute alleged offenders, courts have abdicated their responsibilities to ensure justice is done impartially. In fact, it shows a level of partiality towards prosecutors that is suspect. The upshot of this issue is that any taint team in the executive branch making any privilege determinations from seized materials is a per se unconstitutional violation of the separation of powers.

280. *See supra* text accompanying notes 243-45.

This issue is especially egregious when taint team procedures are approved ex parte or as part of secret searches. In those scenarios, not only is the target of the investigation excluded from any notice or opportunity to challenge procedures or warrants, but the court also delegates its own judicial functions to the same agency conducting the prosecution.[281] This concentrates far too much power in the hands of investigators and prosecutors, who are definitionally adversaries of targets of investigations and defendants. The courts must jealously guard their role in fair, impartial justice.

4. Violations of the Rules of Professional Conduct for Lawyers

The use of taint teams also violates the spirit (and, in some cases, the letter) of ethical rules lawyers are expected to follow. For example, the court in *In re Search Warrant* made a point to note that the taint-team procedures failed to respect lawyers' ethical duties to maintain client confidentiality.[282] When a taint-team protocol grants widespread approval for investigators to contact represented parties without the consent of their attorneys, the protocol encourages violations of the rules meant to prevent such communications.[283]

The special ethical rules applicable to prosecutors are also violated by the use of taint teams in their current iteration. These actions may technically comply with a narrow reading of the rule but certainly violate the spirit of these ethics standards.

First, Model Rule 3.8(a) directs that a prosecutor shall not prosecute when he knows the action is not supported by probable cause.[284] As noted above, warrants and wiretaps underlying the use of taint teams are often based on extremely shaky affidavits that cannot reasonably be said to give rise to probable cause.[285] Prosecutors should not seek searches in such circumstances.

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281. *See supra* text accompanying note 244.

282. *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 180-81 (4th Cir. 2019); MODEL RULES PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2020).

283. *See In re Search Warrant*, 942 F.3d at 180; *see also* MODEL RULES PRO. CONDUCT r. 4.2 (AM. BAR ASS'N 2020).

284. MODEL RULES PRO. CONDUCT r. 3.8(a) (AM. BAR ASS'N 2020).

285. *See supra* notes 266-271 and accompanying text.

Second, Model Rule 3.8(b) directs prosecutors to ensure defendants are informed of their right to obtain counsel and are given that right.[286] The spirit of this rule is that the adversaries of the prosecutor should have the effective assistance of counsel, in line with the Sixth Amendment.[287] As detailed above, the use of taint teams can interfere with this relationship.[288] Thus, the use of taint teams can violate the spirit of Rule 3.8(b) because while the defendant may have access to her attorney, the relationship between them may be compromised by the actions of the taint team and prosecutors.

Third, Rule 3.8(d) requires prosecutors to disclose to the defendant evidence *and information* that could negate her guilt or mitigate the offense.[289] If information was obtained through an unconstitutional search or if prosecutors improperly viewed privileged information that then informed the prosecution, the prosecutors must disclose this to the defendant to keep within the spirit of this rule.[290] These kinds of disclosures are rare, and prosecutors often decline to even describe the searches used when defendants request them.[291] By refusing to volunteer this information, prosecutors are straying out of the bounds of the spirit of Rule 3.8(d).

Finally, Rule 3.8(e) prohibits prosecutors from subpoenaing a lawyer to give evidence in a criminal proceeding if the prosecutor believes that any applicable privilege applies.[292] We readily acknowledge that this rule is written to only include subpoenas (and not search warrants or wiretaps) and would argue that this is perhaps too narrow in light of modern practice. However, this rule is meant to prevent prosecutors from compelling lawyers to disclose privileged information.[293] Taint

286. MODEL RULES PRO. CONDUCT r. 3.8(b) (AM. BAR ASS'N 2020).

287. *See* MODEL RULES PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2020).

288. *See supra* Section III.B.2.

289. MODEL RULES PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2020).

290. *See supra* text accompanying note 138.

291. *See, e.g.*, Memorandum in Support of Defendant's Motion to Suppress Exhibit #11 at 2-3, 7-8, United States v. Adams, No. 17-CR-00064, 2017 WL 7796418 (D. Minn. Sept. 28, 2017).

292. MODEL RULES PRO. CONDUCT, r. 3.8(e) (AM. BAR ASS'N 2020).

293. *See* Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427, 446-47 (2009).

teams should not be a ready work-around to these ethics restrictions.

5. Practical Issues and Public Policy

Throughout this Article, we have alluded to the issue of using other prosecutors to conduct privilege review, especially when those reviews are conducted without set procedures and with the involvement of non-lawyers. All of these issues lead to concerns both of the practicality of an effective privilege review and the perception of fairness of the investigations and prosecutions. As such, these practical issues and public-perception issues will be discussed together.

As an initial matter, it makes little sense for the appearance of justice to have prosecutors in the same office and chain of command conduct privilege determinations as members of a taint team, even if they are not involved in the instant investigation. Organizationally, these people are all members of the same team and chain of command, with common goals and a shared organizational culture.[294] They may even share offices.[295] This kind of organizational proximity can create incentives and pressures that may not fully respect the rights of the targets of the investigation. Further, senior officials in the DOJ, who have oversight over both investigations and taint teams, can exert their influence to encourage taint teams to be less protective of privilege (especially since courts have regularly approved of taint teams and rarely granted remedial actions to defendants).[296] Because they report to these senior officials, DOJ employees who wind up on taint teams may intentionally violate attorney-client privilege to attempt to please their bosses.

On a personal level, the common interests of prosecutors and their shared jobs may mean that they are acquaintances or even friends. These personal connections can also create incentives to

294. *See* Brochin & Linehan, *supra* note 279; *see also supra* text accompanying note 125.

295. Daniel Suleiman & Molly Doggett, *Despite Inherent Risks to the Attorney-Client Relationship, Taint Teams Are Here to Stay (For Now)*, AM. BAR ASS'N WHITE COLLAR CRIME COMM. NEWSL., Winter/Spring 2022, at 1, 4.

296. *See supra* note 124 and accompanying text; *see also supra* text accompanying note 24.

try to help each other be successful. These conflicts of interest create real risks to defendants and amplify the natural difference in opinion on privilege matters between defendants and prosecutors.

The lack of common processes or strict requirements for taint team members also creates issues. When poor process development meets unspecialized taint team members, the situation is ripe for attorney-client privilege violations. For example, many taint teams consist of lawyers and others without a law degree or specialized training in attorney-client privilege.[297] Taint-team procedures often rely on an initial search of seized materials to identify potentially privileged materials.[298] If a piece of evidence is not flagged as privileged in this initial search, then a taint team often does not evaluate whether it is privileged and might send it directly to the prosecution team.[299] The risk of these erroneous designations rises when ad hoc, untested procedures are used, and non-attorneys are involved. Because the taint team failed to properly identify privileged information, the prosecution gains access to it. Oftentimes, the defendant has little to no recourse once the document is in the hands of the prosecution.[300] This leads to prosecutions that seem unfair, creating doubt and distrust of our legal system, investigative agencies, and judicial institutions.

Additionally, the public's interest regarding efficiency is also implicated. Taint teams often take a lot of time, lead to more debate over privilege, and make investigations and trials generally less efficient.[301] For example, if a taint team is implemented in ex parte proceedings with the judge, the defendant might seek to challenge taint-team protocols after executing the search warrant. After those motions, the taint team conducts its work, which might take months. Then, the defendant might challenge the actual determinations of the taint team's

297. Suleiman & Doggett, *supra* note 295, at 1-2, 4.

298. *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 165 (4th Cir. 2019).

299. *See id.* at 166.

300. *See id.* at 166-68 ("[T]he [l]aw [f]irm asked the government to immediately submit the seized materials to the magistrate judge or the district court for *in camera* inspection. The government never responded . . . .").

301. *See* RICE ET AL., *supra* note 121, § 11:19 (stating that some courts are concerned with the delays that taint teams cause).

process. These motions could consume additional months of briefing and argument. Add in appeals and the possibility for a defendant to challenge a verdict on similar grounds, and it is easy to understand how taint teams might add many months or years of litigation to an investigation and prosecution. This kind of avoidable inefficiency must be corrected.

C. Feeling Inadequate: Why the Government's Solution Solves Nothing

Recognizing that the current state of taint teams is untenable, especially in light of *In re Search Warrant*, the government proposed to reform taint teams. In response to increased litigation of privilege issues and the Fourth Circuit's *In re Search Warrant* decision, the DOJ created a "Special Matters Unit" (SMU) within its Fraud Section.[302] This unit is tasked with establishing uniform privilege-review services and working *with* investigatory teams.[303] Notably, this unit is still within the organization that investigates and prosecutes fraud.[304] In fact, a job posting for the Chief of the Special Matters Unit disclosed that this person would also be the Deputy Chief of the Fraud Section.[305] The posting requested that applicants for the Chief job have at least four years of experience as a federal prosecutor.[306] Experience litigating privacy claims or white-collar cases was preferred but not required.[307]

It should be obvious that this will not solve the constitutional issues of taint teams. While there may be some additional safeguards for defendants if a single team developed uniform, specialized procedures and expertise in privilege reviews, it still does not solve the nondelegation and inherent conflict-of-interest

302. Ines Kagubare, *Fraud Section to Create New Privilege Unit*, GLOB. INVESTIGATIONS REV. (May 13, 2020), [https://perma.cc/HG3A-DTMC]; Adam Dobrik, *DOJ Fraud Section Sets Up Dedicated Privilege Team*, GLOB. INVESTIGATIONS REV. (June 24, 2019), [https://perma.cc/5JS6-6JPF].

303. *See* Brochin & Linehan, *supra* note 279.

304. *See id.*

305. *Supervisory Trial Attorney (Chief, Special Matters Unit)*, U.S. DEP'T OF JUST., [https://perma.cc/37SM-PRCM] (last visited Nov. 4, 2022).

306. *Id.*

307. *Id.*

issues. First, this is still an executive branch team making privilege determinations.[308] Second, the Chief of this matter is one of the leaders of the investigatory and prosecution organization for fraud crimes.[309] Instead of creating organizational space to attempt to mitigate conflicts of interest, this "solution" places the leader of the privilege-review process as second-in-command of prosecutions. Third, by tasking the team to work "with" investigatory teams, this plan disposes of any appearances that the taint team is making neutral decisions. All of these possibilities for conflicts give rise to an unacceptable risk of numerous opportunities for attorney-client privilege (and its attendant constitutional rights) to be undermined, even with the best of intentions. A real solution is needed.

IV. SOLUTIONS

A. Return to Rigorous Evaluation of Search Warrants and Wiretap Requests

As we discussed in Parts I and III, requests for search warrants and wiretaps require certain elements to be approved.[310] However, courts often approve the requests without rigorous scrutiny.[311] Warrants may be supported only by unreliable or vague affidavits and seek overly broad searches.[312] Wiretaps may not be necessary because other investigative techniques can be effective. Nevertheless, courts regularly approve these, leading to searches and wiretaps that sweep up far too much privileged information, including that of uninvolved third parties.[313] Our first reform focuses on ensuring that the realm of potentially privileged information that the government seizes is as limited as it is reasonable.

To do this, we call on district courts and magistrate judges to begin to apply the requirements for search warrants and wiretap

308. *In re* Seach Warrant Issued June 13, 2019, 942 F.3d 159, 176 (4th Cir. 2019).
309. *See Supervisory Trial Attoney (Chief, Special Matters Unit)*, *supra* note 305.
310. *See supra* Parts I & III.
311. *See* discussion *supra* Section III.B.1.
312. *See supra* text accompanying note 268.
313. *See* discussion *supra* Section III.B.1.

authorizations more rigorously. Courts should create an expectation that probable cause will be supported and approach executive-branch investigators with a healthy amount of skepticism. These judges should also reign in the scope of the requested warrants. The particularity requirement means nothing if it is not enforced. Allowing the government to search and seize tomes of privileged information unrelated to the case at hand is unconstitutional and creates perceptions of unfairness. Courts should also take a stronger view of the necessity requirement in wiretaps and force the government to create better techniques that only capture those communications relevant to the crimes for which there is probable cause.

Further, courts should intentionally narrow the breadth of the allowed exceptions to the exclusionary rule to keep the exclusionary rule intact. As it stands today, there are so many loopholes in the exclusionary rule that it is often rendered obsolete.[314] In order to provide adequate recognition for the strictures of the Fourth Amendment, the existing exceptions must be narrowly defined to avoid allowing egregious misconduct to prejudice defendants.

These "reforms" are just asking the judiciary to use the tools that are already available. Should courts fail to take this up on their own, Congress should get involved and pass legislation to tighten the requirements for search warrants and wiretaps. The best way to prevent investigators from improperly violating attorney-client privilege is to limit their access to privileged documents in the first place.

B. A New Order Protocol of Privilege-Review Methods: Interlocking Reforms for Attorney-Client Privilege Evaluation and Determination

1. Defendant's Counsel Creates a Privilege Log and Hands over Only the Nonprivileged Documents

One remedy that some scholars have suggested is to allow the defendant's counsel to create privilege logs and hand over

314. *See* discussion *supra* Section I.C.1.

only the non-privileged documents.[315] This amounts to the gold standard of privilege protection because it allows the defendant to retain all privileged documents without granting access to prosecutors and should be the default mode of privilege review wherever possible.[316] This method is common in the civil litigation context,[317] so it is a little shocking that it is so rare in criminal contests (where defendants have higher stakes, including their own liberty). This defendant-first process would conserve time and resources in litigation because defendant's counsel would be able to quickly search and identify privileged documents, and there would be no litigation concerning taint-team procedures or determinations.

In order to protect the propriety of the privilege review, the defendant's counsel would submit a privilege log to the prosecution and court, and the prosecution could raise objections, including asserting any exceptions to attorney-client privilege. The judge would then rule on these objections. That would preserve the attorney-client privilege while ensuring the prosecution has access to the documents it needs. Although the defendant's counsel probably has a broader view of privilege than the prosecution, the privilege log and subsequent hearings would be able to adequately address the gap and lead to a balanced approach. In short, the court would reach better, fairer decisions because it would be assessing arguments from both sides in adversarial proceedings (which often does not happen in the current taint-team protocols, since taint teams often turn over documents based on their unilateral, narrow view of the defendant's privilege.)[318]

Again, this is only a viable alternative if the defendant knows that the government has access to their documents. This is a variation of the general default rule we favor above. One way around this problem is to notify the defendant when the taint team is about to begin its search and give her immediate access to the

315. *See* Stephen Dettelbak & S. Jeanine Conley, *Knock, Knock!: The Rep. William Jefferson Search Case and Its Implications in the Attorney-Client Context*, ANDREWS LITIG. REP., June 2008, at 1, 5.

316. *Id.*

317. *Id.*

318. *Id.*

documents.[319] The defendant could then identify the privileged documents and submit a privilege log to the taint team, mitigating delays and adversarial proceedings.[320] The taint team would only need to review those documents that are potentially privileged. However, this would not solve the issue of delegation of judicial functions to a taint team, nor would it provide the target of the search warrant with an opportunity to challenge the underlying warrant or wiretap or the use of and procedures for the taint team.

2. Situate Privilege Review as a Function of the Federal Public Defender's Office

We propose that—in any situation where the defendant cannot do the privilege review—the privilege review be conducted by a specialized team situated in the federal public defender's office.[321] We will refer to this as the Privilege Review Team, or "PRT." This solution is especially important where the defendant has no notice of the search, like when a secret warrant or wiretap is used. This solution can solve all of the issues identified with the current iteration of taint teams, as we explain further below.

As a function of the federal courts, the public defender's office is part of the judiciary.[322] While these are not "judicial actors," they are certainly not members of the executive branch and especially not members of the prosecution team. Delegating privilege review to these actors, especially with the supervision of the court, solves the nondelegation issue created by allowing an executive-branch taint team to make privilege determinations. Removing the privilege-review function to an actor directly

319. RICE ET AL., *supra* note 121, §11:19.

320. *Id.*

321. Federal public defenders date back to the Criminal Justice Act of 1964, which established compensation for public defense attorneys. *See* 18 U.S.C. § 3006A. Now, public defense in federal cases is handled by a combination of federal defender organizations, whose chief is appointed by the Court of Appeals of each circuit, and community defender organizations, which are incorporated under state law. *Defender Services*, U.S. CTS., [https://perma.cc/9JUT-TMEG] (last visited Nov. 4, 2022). There are also 12,000 private panel attorneys who accept these "CJA assignments" and are paid $148 per hour. *Id.* This robust network of public defenders creates ample opportunity to solve the problem of taint teams.

322. *See Defender Services*, *supra* note 321.

supervised by the judiciary ensures that judicial power stays within its branch of government. Further, by removing the privilege reviewer from the same organization and chain of command as the investigators, the PRT mitigates the conflicts of interest issues identified above.

The PRT would also consist of only attorneys and would be charged with developing uniform procedures for privilege review. By creating a dedicated team of specialized expertise, we hope to eliminate erroneous privilege determinations. We envision that these procedures would require, wherever possible, that the defendant is involved in crafting the search terms used to identify privileged documents and that the defendant have ample notice and opportunity to raise challenges to privilege determinations prior to materials being turned over to prosecutors. The procedures would also include provisions for judicial review at each step, as necessary to protect privilege while ensuring efficiency of the courts.

This solution is also flexible. In normal investigations, where the defendant has notice of the search, the PRT can act as an extension of the court's function as a neutral between two adversarial parties. But, in investigations involving secret warrants, when the defendant has no notice of the search and thus cannot be involved, the PRT could be tasked to act as a stand-in for the defendant in privilege evaluations. In this role, we envision the PRT going through the documents and creating a privilege log that is then submitted to the investigators and the court. At this point, the prosecution could object to the privilege determinations, and the court would make the ultimate decision after in-camera review of the materials. While this may not provide exactly the same level of advocacy as a defendant herself might, a PRT consisting of public defenders would be an infinite improvement over the current state of taint teams. It would also ensure a firewall between investigators and those making the privilege determinations.

From a resource perspective, we envision that this solution would require no incremental government funding. Since the executive branch is already paying for inefficient taint teams, those funds could be repurposed to the judiciary to support the PRT and related privilege-review activities. Through uniform

processes and the development of specialized experience, the PRT would likely become much more efficient than the current ad hoc teams. Further, by mitigating the legal concerns of taint teams, the PRT would likely make courts and criminal prosecution as a whole speedier, less costly, and more efficient.

3. Review by a Judicial Actor

In its 2006 opinion striking down taint teams, the Sixth Circuit held that "a government taint team's review of documents is far riskier to . . . privilege than is a judge's *in camera* review. . . . [T]aint teams present inevitable, and reasonably foreseeable, risks to privilege . . . . [H]uman nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations."[323] Similarly, the Fourth Circuit has held that disputes that arise relating to whether materials are protected by attorney-client privilege cannot be delegated to other branches or agencies.[324] Instead, the Fourth Circuit has suggested that these disputes must be resolved by judicial officers themselves and judicial officers are unable to delegate in-camera review.[325] Further, the District of Oregon also took a similar position in *United States v. Pedersen*, going so far as to recommend that if a taint team is to be used, it should "forbid the intentional review of any presumptively privileged materials . . . [which includes] any private communication between a defendant and members of his or her current or former legal teams."[326] We agree.

If a defendant is not going to be afforded a first pass at the privilege review or the benefit of the Privilege Review Team we propose, then the court must assume responsibility for the review itself, most likely through a special master or the magistrate

323. *In re* Grand Jury Subpoenas, 454 F.3d 511, 520, 523 (6th Cir. 2006).

324. *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 176 (4th Cir. 2019) (citing NLRB v. Interbake Foods, LLC, 637 F.3d 492, 498, 500 (4th Cir. 2011)) ("concluding that . . . a court 'cannot delegate' an *in camera* review of documents to an agency, but must itself decide a claim of privilege"); *id.* (citing *In re* Grand Jury Proceedings, 401 F.3d 247, 256 (4th Cir. 2005)) ("remanding to district court for *in camera* review concerning privileged communications and applicability of crime-fraud exception").

325. *In re Search Warrant*, 942 F.3d at 176.

326. No. 3:12-CR-00431, 2014 WL 3871197, at *31 (D. Or. Aug. 6, 2014).

judge. In our formulation, the special master or magistrate would receive the fruits of the search. At that point, both the prosecution and defendant could offer search terms that could be used to identify potentially privileged documents. The judicial officer would conduct the search and review the documents to make privilege determinations. At each step, both sides would be involved, but prosecutors would not have access to anything that was potentially privileged until a conclusive judicial determination that the material was not privileged. Nevertheless, this may not be a viable solution except in extreme circumstances due to the cost and inefficiencies of using a special master and the current caseload for both district court and magistrate judges.

CONCLUSION

Difficult questions of privilege (and its exceptions) arise in almost every white-collar investigation. Taint teams, however, are not the answer to these questions. The "fox guarding the chicken coop" model is not working.[327] Taint teams have seen unprecedented growth in their use over the last two decades, punctuating dramatic images of pre-dawn raids and stacks of servers being carried out of offices.[328] As the use of taint teams has increased, so has the criticism of taint teams as unconstitutional violations of attorney-client privilege.[329] Courts increasingly trend toward the inevitable conclusion that taint teams as currently formulated—with their risks of prejudice, unreasonable searches, conflicts of interest, and delegations of judicial power—cannot be a part of any constitutional criminal prosecution.[330] In light of this impending shift in judicial attitude toward taint teams, we offer a set of solutions for preserving appropriate privilege review of validly seized materials while mitigating the risks endemic to the current state of taint teams.

To start, courts must become much more rigorous in their protection of Fourth Amendment rights. By enforcing the

327. *See* Anello & Albert, *supra* note 13.

328. *See* Rashbaum et al., *supra* note 1.

329. *See* Elliot S. Rosenwald et al., *United States: Fifth Circuit Latest to Cry Taint on DOJ Taint Team*, MONDAQ (Oct. 4, 2021), [https://perma.cc/CD5C-K5KQ].

330. *See* discussion *supra* Part III.

probable cause and particularity requirements for search warrants and the necessary requirements of wiretaps, courts can limit the scope of privileged information that the government inappropriately seizes, thereby limiting the scope of potential damage from inadvertent privilege violation.[331]

Next, courts and Congress must embrace a new protocol for privilege determinations for lawfully seized materials. First, courts should default to allowing the targets of investigations to do the first privilege review by withholding privileged documents and submitting a privilege log, as is done in civil contexts. Litigation arising from the privilege log would test the veracity of those privilege claims, but the privileged documents would not be given to investigators until a judicial determination of privilege has been made. If that is not feasible given the circumstances, the alternative is a new specialized unit within the federal public defender's office. As a specialized unit within the judiciary and outside the chain of command of investigators, this Privilege Review Team would ensure respect for the defendant's attorney-client privilege while expediting privilege determinations. This PRT is a great solution when secret warrants or wiretaps are employed because the PRT can flexibly stand in for the defendant until the defendant is notified of the search. Finally, if the defendant is unable to either conduct her own privilege review or enjoy the benefits of a Privilege Review Team, then the potentially privileged materials must be reviewed by a judicial actor, like a judge, magistrate, or special master.

Across its three branches, our government should advocate for the protection of attorney-client privilege and its attendant constitutional rights. This benefits not only the targets of investigations and criminal defendants, but also society as a whole: showing principled constraints on government power, driven by constitutional ideals of fairness and separation of powers, will inspire the confidence of the American people in our system of justice. Taint teams, in their current iteration, risk the integrity of some of our most important institutions (including our federal courts and the Department of Justice) at a time when that

331. *See* Riley v. California, 573 U.S. 373 (2014).

trust is already low.[332] By adopting these reforms, we can help preserve and rebuild these institutions as bastions of justice and ensure fair and constitutional outcomes for all.

332. *See Confidence in Institutions*, GALLUP, [https://perma.cc/FXB8-5PV5] (last visited Nov. 4, 2022) (showing a general downward trend in confidence in American institutions since the 1970s).

THE LEGAL CONTRIBUTION TO DEMOCRATIC DISAFFECTION

Brian Christopher Jones*

I. INTRODUCTION

At its best, law and legal processes contain the ability to not just complement the acrimony of politics but lift it onto a higher plane, where independent thought can lead to valuable and extremely useful revelations. Such insights may help provide solutions for intractable or highly sophisticated societal problems, ensure equality under the law, or help uphold the structures of democratic government. Alas, law is not always at its best. At times law may damage and undermine politics by condemning the political realm or its agents, squandering opportunities to dignify politics, and belittling the people that make difficult, albeit sometimes poor, decisions. These condemnations can contribute to an unhealthy view of the political realm, which often highlights and accentuates its failures. No doubt much work has been put into law at its best, but its downsides must also be acknowledged. The idea that law—pure and pristine and supposedly detached from politics, as many want to make it seem—could be at least partially blamed for the state of democratic governance may be difficult for many to accept. But in reality the legal and political realms are so intimately connected that it is virtually impossible to disconnect one from the other. After all, the most significant outputs of politics remain its creation of law in the form of statutes, constitutions, treaties, and other varieties of legislation. It is the legal realm that interprets and adjudicates these outputs and helps uphold constitutional principles. Ultimately, the

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relationship between law and politics is not distinct or unconnected but inseparable.

The contribution of law and courts to the operation of democracy has long been downplayed. Simplistic—and what we may now consider naïve—views on the judiciary often highlighted its fragility, lack of power, and lack of influence on state functionality. Federalist No. 78 famously refers to it as the "least dangerous" branch and goes onto say:

> The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[1]

Montesquieu also states in *The Spirit of the Laws*, "Of the three powers above mentioned, the judiciary is in some measure next to nothing . . . ."[2] These canonical statements provide a distorted picture of the judiciary, portraying the branch as an extremely fragile or delicate part of state operation or as one that cannot really produce significant effects on state operation even if it tried to do so. And yet as constitutional government has evolved, it seems increasingly clear that law, legal processes, and especially *judgment* are certainly not "next to nothing."[3] In fact, judgment has been a remarkably resilient institutional quality to possess, and its influence on the other branches—and on the operation of constitutionalism more generally—has been considerable. Far from having no influence or direction over the elected branches, judiciaries have been and continue to be major constitutional players whose judgment can deeply influence—even threaten—the political realm.[4]

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1. THE FEDERALIST NO. 78 (Alexander Hamilton).

2. BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 156 (Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748).

3. *Id.*

4. FRANK VIBERT, THE RISE OF THE UNELECTED: DEMOCRACY AND THE NEW SEPARATION OF POWERS 181-82 (2007) ("In practice, the authority of the judiciary is more powerful than Hamilton allowed and the judiciary can act as a threat to other and lesser jurisdictions. It can also act in collusion with the other branches."); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 35-36 (Yale Univ. Press 2d ed. 1986) (1962).

Given the influence of these antiquated views of the judiciary in relation to constitutional government, one may be forgiven for thinking the problems facing contemporary democracy rest entirely on the failings of politics or the disengagement of citizens, but that story is an incomplete one. Although most of the literature on democratic disaffection focuses on one or both of these subgroups,[5] understanding the puzzle brought about by disaffection should not stop there. A more complete picture of what democracies are going through is required. And if this is going to be provided, then we must acknowledge and accept that there have been dramatic changes to the legal realm over the past century in many democracies and that these changes have likely influenced democratic disaffection, perhaps even significantly. Indeed, many such changes have been central to the function and operation of democracy and call into question not only the fundamental nature of where power lies but also the proper roles of various constitutional actors. As many democracies struggle to overcome populist or authoritarian tendencies,[6] these questions regarding the evolution of the legal realm have only become more pronounced.

This Article, primarily focused on common law jurisdictions, discusses the relationship between law and democratic disaffection. Its main contention is that the judiciary's contribution to democratic disaffection has been downplayed and even ignored throughout the years, and that recent legal developments may have had very real effects on democratic

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5. Some prominent foundational works I draw upon throughout this Article are: JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS 1-5 (1995); DISAFFECTED DEMOCRACIES: WHAT'S TROUBLING THE TRILATERAL COUNTRIES? 1-27 (Susan J. Pharr & Robert D. Putnam eds., 2000); RUSSELL J. DALTON, DEMOCRATIC CHALLENGES, DEMOCRATIC CHOICES: THE EROSION OF POLITICAL SUPPORT IN ADVANCED INDUSTRIAL DEMOCRACIES 1-5 (2004); COLIN HAY, WHY WE HATE POLITICS 3-5 (2007); MATTHEW FLINDERS, DEFENDING POLITICS: WHY DEMOCRACY MATTERS IN THE TWENTY-FIRST CENTURY 33-34 (2012); PIPPA NORRIS, DEMOCRATIC DEFICIT: CRITICAL CITIZENS REVISITED 3-8 (2011); PETER MAIR, RULING THE VOID: THE HOLLOWING OF WESTERN DEMOCRACY 1-2 (2013); Roberto Stefan Foa & Yascha Mounk, *The Danger of Deconsolidation: The Democratic Disconnect*, J. DEMOCRACY, July 2016, at 5, 6-10.

6. *See* ANNIKA SILVA-LEANDER, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, THE GLOBAL STATE OF DEMOCRACY 2021, at 7-9 (Alistair Scrutton & Seema Shah eds., 2021).

disaffection. Law is, after all, in the unique position of being able to "check" various actions of the political realm.[7] In performing these functions, law usually functions quite admirably. But sometimes law drifts beyond its checking function, undermining and potentially damaging the political realm.

This Article proceeds in three main parts. Part II describes the origins and definitions of democratic disaffection and questions why the law may have been marginalized when studying the phenomenon. Part III explores the different possible relationships between law, politics, and democratic disaffection by looking at both how courts may contribute to but also counter disaffection. Part IV articulates some of the democratic distancing measures the law has engaged in over the past few decades and questions whether such distancing may be stopped. The Article concludes by suggesting that law should acknowledge and accept its impact on democratic disaffection, and that it should do more to ennoble the political realm.[8]

A couple quick caveats: I am certainly not excluding the elected branches from sharing the brunt of democratic disaffection. As the most accountable people in government, they provide the closest link to citizens and, therefore, the most direct link to the operation of democracy.[9] Thus, it is virtually impossible to let them off the hook. It follows that I am also not asserting that the law is the primary or sole reason for contemporary disaffection. The law, after all, largely responds to politics, culture, and society,[10] and thus to say that it is the driving force would be irresponsible. But the law, just like the other elements and mechanisms of government, must own up to its pathologies. Finally, democratic disaffection is a multifaceted and highly complex phenomenon. Below I have articulated a theoretical, not empirical, claim that law and courts contribute to disaffection.

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7. Miro Cerar, *The Relationship Between Law and Politics*, 15 ANN. SURV. INT'L & COMPAR. L. 19, 20 (2009).

8. *See infra* Part V.

9. Elmer B. Staats, U.S. Comptroller Gen., Keynote Address at The Annual Conference of NCAC/ASPA: Who Is Accountable? To Whom? For What? How? 2, 5 (Dec. 6, 1979).

10. *See* Tamar Frankel & Tomasz Braun, *Law and Culture*, 101 B.U. L. REV. ONLINE 157, 157-58, 160 (2021).

II. WHAT IS DEMOCRATIC DISAFFECTION?

Democratic disaffection goes by a number of different labels and incorporates a variety of elements. It is also known as democratic disillusionment,[11] democratic disengagement,[12] political disengagement,[13] political alienation,[14] anti-politics,[15] and democratic drift,[16] among other labels.[17] Generally, two main elements comprise the phenomenon. First, democratic disaffection refers to the fact that confidence in government and democratic institutions—and democracy more generally—has been slowly decreasing from a comparative perspective.[18] This research often focuses on the contemporary lack of faith or trust that citizens currently possess in politicians, politics, and the political process.[19] The second major element is the disengagement with formal democratic structures that citizens have shown throughout the world (e.g., lower levels of voter turnout, decreasing enrollment in political parties, etc.).[20] Early studies of disaffection mostly used attitudinal surveys identifying

11. Roberto Foa & Yascha Mounk, *Across the Globe, a Growing Disillusionment with Democracy*, N.Y. TIMES (Sept. 15, 2015), [https://perma.cc/D6B5-AMA9] (also invoking the term "democratic dysfunction").

12. PAUL HOWE, CITIZENS ADRIFT: THE DEMOCRATIC DISENGAGEMENT OF YOUNG CANADIANS, at xiv-xviii (2010).

13. ELISE UBEROI & NEIL JOHNSTON, HOUSE OF COMMONS LIBR., POLITICAL DISENGAGEMENT IN THE UK: WHO IS DISENGAGED? 6 (2021), [https://perma.cc/9LNG-KCRD].

14. Ada W. Finifter, *Dimensions of Political Alienation*, 64 AM. POL. SCI. REV. 389, 389 (1970).

15. ANTI-POLITICS, DEPOLITICIZATION, AND GOVERNANCE 5-8 (Paul Fawcett et al. eds., 2017).

16. MATTHEW FLINDERS, DEMOCRATIC DRIFT: MAJORITARIAN MODIFICATION AND DEMOCRATIC ANOMIE IN THE UNITED KINGDOM 14, 86, 287-88 (2010).

17. Some other labels may be: democratic indifference, political disenchantment, and political apathy. MAIR, *supra* note 5, at 2-3; Gerry Stoker, *Explaining Political Disenchantment: Finding Pathways to Democratic Renewal*, 77 POL. Q. 184, 184 (2006); Erica Weintraub Austin & Bruce Pinkleton, *Positive and Negative Effects of Political Disaffection on the Less Experienced Voter*, 39 J. BROAD. & ELEC. MEDIA 215, 215-16 (1995).

18. *See, e.g.*, DALTON, *supra* note 5, at 1-5, 10, 21; Robert D. Putnam et al., *What's Troubling the Trilateral Democracies?*, *in* DISAFFECTED DEMOCRACIES, *supra* note 5, at 1, 6-13; HAY, *supra* note 5, at 5-6, 11.

19. *See, e.g.*, DALTON, *supra* note 5, at 1-4; Putnam et al., *supra* note 18, at 13-21; HAY, *supra* note 5, at 27-31.

20. *See, e.g.*, MAIR, *supra* note 5, at 20-29, 35-40.

citizens' views towards various aspects of democracy and their levels of trust in government.[21] The citizen engagement element, and the steady decrease of political participation throughout the years, came further down the line and has been tracked as these post-World War II trends developed.[22]

Democratic disaffection can be distinguished from other forms of recent scholarship such as democratic decay, democratic backsliding, or constitutional rot.[23] These fascinating emerging areas of study are mostly focused on contemporary threats to democratic states, such as increasing authoritarian and populist governments and the wider challenges to liberal democracy more generally.[24] However, studies regarding democratic disaffection go back over half a century, focusing primarily on the attitudes that citizens have towards government and their corresponding democratic engagement.[25] Democratic decay takes disaffection into consideration but is often more focused on the erosion of the mechanisms or principles of constitutional democracy (e.g., threats to the rule of law or judicial independence) than it is on how and why citizens have become disenchanted with democracy.[26] Thus, while these domains are certainly not unrelated, democratic disaffection research stretches back further and also has a slightly different focus in terms of the interaction between law and democracy.

But contemporary democratic disaffection encapsulates more than decreasing political participation and confidence in elected institutions. A third, perhaps more ominous and wide-ranging, component to democratic disaffection resides in a general anti-political sentiment towards politics, democracy, and

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21. *See, e.g.*, Arthur H. Miller, *Political Issues and Trust in Government: 1964-1970*, 68 AM. POL. SCI. REV. 951, 951-52 (1974).

22. *See* DALTON, *supra* note 5, at 21.

23. This goes by a variety of other names. *See, e.g.*, Tom Gerald Daly, *Democratic Decay: Conceptualising an Emerging Research Field*, 11 HAGUE J. ON RULE L. 9, 9-11 (2019) (considering "democratic decay" and noting that it may be referred to as "democratic backsliding," among other terms); Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 147 (2017) (introducing the idea of "constitutional rot").

24. *See, e.g.*, Daly, *supra* note 23, at 9-11.

25. *See* MICHEL CROZIER ET AL., THE CRISIS OF DEMOCRACY 59-61 (1975).

26. Tom Gerald Daly, *Democratic Decay: The Threat with a Thousand Names*, LONDON SCH. OF ECON. & POL. SCI. (Mar. 9, 2019), [https://perma.cc/C9KA-PCEC] (summarizing Daly, *supra* note 23).

the political realm.[27] It stems from the idea that politics is not beneficial, but harmful. Many contemporary citizens do not just have negative views of politics and the political realm but openly loathe or "hate" them.[28] And the sentiment appears to be unrelenting. Indeed, the very idea of "'politics', has . . . become a dirty word" for many, synonymous "with notions of duplicity, corruption, dogmatism, inefficiency, undue interference in essentially private matters, and a lack of transparency in decision making."[29] Although cynical views of politics and politicians have been present throughout history, of late the Madisonian fears of unenlightened statesmen and the dangers of passion and self-interest have gone into overdrive. Attacking politics and vilifying elected leaders has become "a national blood sport" in many jurisdictions.[30] And if much anti-political sentiment boils down to whether people are optimistic or pessimistic about the human condition, then it seems contemporary democracies "have been overcome with pessimism."[31] This is no small problem. Considerations about human nature readily connect to the structure and operation of states, including how power is distributed and what types of checks and balances should be implemented in the political process.[32] These considerations also connect to how much power citizens may hold, how involved they are in decision-making, and ultimately, how responsive governments are to citizen views.

Profound shifts in the trust and confidence citizens possess in elected officials have occurred since the mid-twentieth century. For example, in 1958 around 70% of American citizens thought that government officials were honest, cared about people, and tried to do what was right.[33] These numbers held steady until the mid-1960s—close to two decades after the end of World War II—when they began to decline.[34] The contemporary picture

27. ANTI-POLITICS, DEPOLITICIZATION, AND GOVERNANCE, *supra* note 15, at 6.

28. *See* E. J. DIONNE, JR., WHY AMERICANS HATE POLITICS 10 (1991).

29. HAY, *supra* note 5, at 1, 4-5.

30. FLINDERS, *supra* note 5, at 27.

31. HAY, *supra* note 5, at 9-10.

32. Bruce Thornton, *The Laws of Human Nature*, HOOVER INST. (Apr. 20, 2016), [https://perma.cc/WRW3-HS5M].

33. DALTON, *supra* note 5, at 26; *see also* Putnam et al., *supra* note 18, at 8-10.

34. DALTON, *supra* note 5, at 25-26.

regarding trust and confidence in public officials is drastically different, almost disturbingly so. Today, around 60% of Americans possess little or no trust in the federal government to handle international or domestic problems.[35] As recently as 1997 this figure only stood at 30%, meaning it has doubled in just over two decades.[36] Trust in the individual branches (executive, legislative, and judicial) has also declined, with the legislative figures being the most staggering.[37] In 1972 only 3% of survey respondents had no trust or confidence *at all* in Congress; this figure now sits at 25%.[38] Additionally, the decreases seen in trust and faith in government are not limited to any specific social groups and tend to cut across all demographic and geographic characteristics.[39] Thus, the problem of democratic disaffection cannot be limited to merely one jurisdiction or one particular social group.

Although scholars have produced a wealth of empirical data on democratic disaffection,[40] explanations for the phenomenon vary significantly. Some theories point to political events such as scandals, wars, and other contentious incidents affecting citizens' perceptions of elected officials.[41] After all, in the late 1960s issues such as Watergate, the Vietnam War, and struggles over

35. *Trust in Government*, GALLUP, [https://perma.cc/82AY-ZZWR] (last visited Nov. 1, 2022).

36. *Id.*

37. *Id.*

38. *Id.* (as of September 2021).

39. DALTON, *supra* note 5, at 80-81; see also Putnam et al., *supra* note 18, at 22, where the authors note that country-specific explanations are somewhat limited, as it seems unlikely "that so many independent democracies just happened to encounter rough water or careless captains simultaneously." However, researchers have examined such demographic and geographical differences at various times and have seen subtle differences. *See* Finifter, *supra* note 14, at 397, 405-06. For a more recent account, see Michael Kenny & Davide Luca, *The Urban-Rural Polarisation of Political Disenchantment: An Investigation of Social and Political Attitudes in 30 European Countries*, 14 CAMBRIDGE J. REGIONS ECON. & SOC'Y 565, 566, 570-77 (2021).

40. *See, e.g.*, RICHARD WIKE ET AL., PEW RSCH. CTR., MANY ACROSS THE GLOBE ARE DISSATISFIED WITH HOW DEMOCRACY IS WORKING 5-7 (2019), [https://perma.cc/MZ7D-A66X]; Ali Abdelzadeh et al., *Dissatisfied Citizens: An Asset to or a Liability on the Democratic Functioning of Society?*, 38 SCANDINAVIAN POL. STUD. 410, 416-29 (2015); *Trust in Government*, *supra* note 35.

41. *See, e.g.*, CROZIER ET AL., *supra* note 25, at 4-6.

civil rights led to "shocks" within the system.[42] Thus, attitudes towards government were widely perceived as responses to particular events or societal tumult, and the potential failure of the political realm to remedy these. However, as noted above, findings in relation to citizen trust in government and disengagement have not just come from America but have also been found in many long-established democracies.[43] And they have not been tied merely to the spectacular events of the 1960s and 1970s. Citizen disengagement around the world has been a noticeable and sustained long-term trend.[44]

Most explanations for increasing levels of disaffection place blame on the failures of politics. For example, an influential 1970s article on the phenomenon in the American context concluded "that the widespread discontent prevalent in the U.S. today arises, in part, out of dissatisfaction with the policy alternatives that have been offered as solutions to contemporary problems."[45] This conclusion places significant emphasis on the failures of politics and the political realm to resolve contemporary challenges. It seems that some things never change. A recent international report on worldwide democratic disaffection lays the underlying problem on failures of the political realm, stating:

> [T]he most likely explanation is that democratically elected governments have not been seen to succeed in addressing some of the major challenges of our era, including economic coordination in the eurozone, the management of refugee flows, and providing a credible response to the threat of global climate change. The best means of restoring democratic legitimacy would be for this to change.[46]

A host of complementary theories seek to explain why democratic disaffection has taken hold around the world. Some point to an increasing expectations gap between what is promised by politicians, and then heightened in the media, from what can

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42. GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES AND KILLS POLITICS 177 (2009).

43. *See* CROZIER ET AL., *supra* note 25, at 18; *see also supra* note 39 and accompanying text.

44. *See* Uberoi & Johnston, *supra* note 13, at 5.

45. Miller, *supra* note 21, at 970.

46. R.S. FOA ET AL., CTR. FOR THE FUTURE OF DEMOCRACY, GLOBAL SATISFACTION WITH DEMOCRACY 2020, at 42 (2020), [https://perma.cc/53Y4-YVSF].

actually be achieved in practice.[47] Others point to less deferential and increasingly critical citizens who may have more education and increasingly sophisticated understandings of democracy.[48] Another theory regarding disengagement argues that lowering the voting age has produced long-term negative effects on political engagement.[49] Beyond this, authors have recognized increasing levels of indifference to politics and democracy[50] and the effects of depoliticization at the national or global level.[51]

Researchers have also found that feelings of powerlessness among the general public have intensified, and that some believe they have been shut out of the political process.[52] Many citizens "feel as if no one is listening to them anymore,"[53] and they are "less hopeful that anything they do might influence public policy."[54] According to a recent U.K. study, close to half of respondents believe they have no influence on national policymaking.[55] This finding chimes with those who point to depoliticization as one of the main factors influencing disaffection. Peter Mair notes that ordinary citizens have gone from being "semi-sovereign" to essentially "*non*-sovereign," as democracy has been "steadily stripped of its popular component."[56] For democracies, which rest on the power of citizens to influence government, these findings are highly problematic.

47. Miller, *supra* note 21, at 969-70, 972; FLINDERS, *supra* note 5, at 36.

48. Pippa Norris, *The Growth of Critical Citizens?*, *in* CRITICAL CITIZENS: GLOBAL SUPPORT FOR DEMOCRATIC GOVERNANCE 1, 9 (Pippa Norris ed., 1999).

49. MARK N. FRANKLIN ET AL., VOTER TURNOUT AND THE DYNAMICS OF ELECTORAL COMPETITION IN ESTABLISHED DEMOCRACIES SINCE 1945, at 61 (2004).

50. MAIR, *supra* note 5, at 2-3.

51. HAY, *supra* note 5, at 82-87.

52. For one of the original studies on this, see Finifter, *supra* note 14, at 391-402.

53. Regarding the latter, see HIBBING & THEISS-MORSE, *supra* note 5, at 10.

54. Foa & Mounk, *supra* note 5, at 7.

55. JOEL BLACKWELL ET AL., HANSARD SOC'Y, AUDIT OF POLITICAL ENGAGEMENT 16, at 6 (2019), [https://perma.cc/NBJ6-Y6FH].

56. MAIR, *supra* note 5, at 2.

A. Why Has the Law Been Marginalized in the Study of Disaffection?

When it comes to diagnosing democratic disaffection, commentators rarely focus on the contribution of the legal realm. Indeed, when law has been mentioned as a factor in disaffection, this attention has only been fleeting.[57] But even if one does not believe that "[l]aw is politics carried on by other means,"[58] the lack of attention in relation to law's contribution to disaffection seems especially odd. This may come down to the fact that frequently this "intimate relationship is treated as no more than the chance meeting of two disparate disciplines."[59] And yet, this view is increasingly difficult to reconcile today. The study of law and democracy remains a booming if not illustrious field for contemporary scholars and is awash with texts on law and politics,[60] law and democracy,[61] democratic and constitutional theory,[62] theories of jurisprudence,[63] and law and society,[64] to name a few relevant subjects. But even with this abundance of literature, a significant part of democratic disaffection's story appears to be left out. Admittedly, part of this may be down to methodological considerations.

When examining democratic disaffection much of the analysis has gone into demand-side factors, or as Colin Hay characterizes them: "changes in the responsiveness to, and desire

57. *See, e.g.*, Anthony King, *Distrust of Government: Explaining American Exceptionalism*, *in* DISAFFECTED DEMOCRACIES, *supra* note 5, at 74, 83-85.

58. J.A.G. Griffith, *The Study of Law and Politics*, 1 J. LEGIS. STUD. 3, 3 (1995).

59. *Id.*

60. *See, e.g.*, Keith E. Whittington et al., *The Study of Law and Politics*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 3, 3 (Keith E. Whittington et al. eds., 2008).

61. *See, e.g.*, TOM CAMPBELL & ADRIENNE STONE, LAW AND DEMOCRACY, at xi (2003).

62. *See, e.g.*, Gary Jacobsohn & Miguel Schor, *The Comparative Turn in Constitutional Theory*, *in* COMPARATIVE CONSTITUTIONAL THEORY 1, 1-2 (Gary Jacobsohn & Miguel Schor eds., 2018).

63. *See, e.g.*, H. L. A. HART, *Introduction*, *in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 1, 1 (1983).

64. *See, e.g.*, Patricia Ewick & Austin Sarat, *On the Emerging Maturity of Law and Society: An Introduction*, *in* THE HANDBOOK OF LAW AND SOCIETY, at xiii-xiv (Austin Sarat & Patricia Ewick eds., 2015).

for, such goods by their potential consumers."[65] Demand-side analyses mostly focus on citizen engagement (or lack thereof) and put significant weight on the idea that citizens themselves may be to blame for a lack of engagement (e.g., political party membership, voting turnout levels, etc.).[66]

Law and legal processes do not fit neatly into this demand-side story of disaffection. Unlike members of the executive and legislative branches, judges are unelected.[67] Thus, there are no readily identifiable "engagement" figures to examine, and it would seem especially odd to group figures related to judicial review or litigation more generally as "democratic" engagement, especially when some of these legal actions may be seeking to challenge governmental or majority decision-making. The legal realm also does not contain anything akin to "political parties," where participation and engagement could be easily measured year to year and trends detected. Thus, the lack of readily identifiable democratic engagement figures could be one significant reason why the legal realm has not been prominently featured in the disaffection literature.

Another reason may come down to law's relatively positive results on attitudinal surveys. As noted above, one of the elements relevant to disaffection is the decreasing faith or trust in the elected branches.[68] But judiciaries—or in some cases apex courts—have at times bucked this trend. In some jurisdictions trust in judges or apex courts outweighs trust in elected officials or the elected branches. For example, in Ipsos MORI's latest Veracity Index, 80% of U.K. citizens trusted judges, while only 16% trusted government ministers, and 12% trusted politicians generally.[69] These findings come during an era of supposed "hostility towards the judiciary" and not long after the media

65. HAY, *supra* note 5, at 39; *see also* John Boswell et al., *State of the Field: What Can Political Ethnography Tell Us About Anti-Politics and Democratic Disaffection?*, 58 EUR. J. POL. RSCH. 56, 57-58 (2019).

66. *See* Boswell, *supra* note 65, at 57-58.

67. *About Federal Judges*, U.S. CTS., [https://perma.cc/4ZAD-UYMV] (last visited Nov. 3, 2022).

68. *See supra* notes 37-38 and accompanying text; *see also Trust in Government*, *supra* note 35.

69. Michael Clemence, *Ipsos Veracity Index 2022*, IPSOS (Nov. 23, 2022), [https://perma.cc/4MMZ-N396].

branded a trio of U.K. judges as "Enemies of the People" following a major Brexit-related decision.[70] In America, there is a less drastic but similar picture: trust in the judiciary has exceeded trust in the elected branches since the early 1970s.[71] In fact, when assessing the function and operation of democracy and state operation, law and legal institutions may often be at the periphery of citizens' concerns. Focus group research has found that compared to Congress and the presidency, U.S. citizens do not frequently think about the Supreme Court and its Justices.[72] This was even true when the researchers prompted participants to discuss the Court in relation to other governmental branches.[73] This led John R. Hibbing & Elizabeth Theiss-Morse to note:

> The Supreme Court may hold a hallowed place in the institutional structure, but most people do not perceive it as playing a major role in the day-to-day decisions of the political system. . . . This is all to the good as far as public support for the Court is concerned.[74]

Thus, even though the courts may possess substantial powers from an institutional or constitutional perspective, citizens may not view them as having a significant impact on the day-to-day operation of democracy.

But the picture is not all rosy when looking at legal institutions on survey data, and this is especially true when the focus moves away from judges or particular apex courts. Recent data from the Organisation for Economic Co-operation and Development on trust in governmental institutions shows that judicial systems are only trusted by an average of 57% of citizens—slightly better than trust in national governments (41%) but lower than trust in education systems (58%), health care

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70. Caroline Davies, *Thousands Spent on Judges' Security Amid Growing Hostility*, GUARDIAN (Feb. 26, 2017, 7:01 PM), [https://perma.cc/KN34-TY28].

71. *See* Jeffrey M. Jones, *Trust in Judicial Branch Up, Executive Branch Down*, GALLUP (Sept. 20, 2017), [https://perma.cc/XG7F-2D9Y]. Although, this survey differed from the Ipsos MORI one above—this Gallup survey was based on institutional trust, whereas the Ipsos MORI one was based on trust in certain professions, not institutions. *See id.*; Clemence, *supra* note 69.

72. HIBBINS & THEISS-MORSE, *supra* note 5, at 88-89.

73. *Id.*

74. *Id.* at 92.

systems (62%), and local police (67%).[75] A large scale study focused on the trilateral democracies found that confidence in legal systems decreased from the 1980s to the 1990s and that these decreases aligned with other public institutions.[76] Cracks can also be seen on the domestic front in various jurisdictions. Close to one in five people in a 2012-2013 survey said that courts did not treat people equally within the United Kingdom.[77] Additionally, Hibbing and Theiss-Morse have found that a majority of people believe the U.S. Supreme Court is involved in too many issues and that many citizens admit to having been upset about Court decisions.[78] Researchers focused on the sub-national level have also found that confidence in state courts is often lower compared to that in state executives.[79] This less-flattering picture of the judiciary and legal systems more generally calls into question why law and legal processes have commonly been left out of studies on democratic disaffection.

Finally, given the judiciary's role as an independent interpreter of law, mediator of conflicts, and potential "check" on the political branches, there may be an implicit assumption that anything the law does is at least *attempting* to ennoble the political realm. Judges do, after all, endeavor to provide an independent perspective to the resolution of disputes, and often this perspective can be helpful for democracies.[80] This "checking," rather than "leading" or "governing," function that the judiciary traditionally engages in may be another reason why the legal realm has not been subject to scrutiny as regards democratic disaffection. As one study puts it, "confidence in courts partly stems from an expectation that courts are an

75. BUILDING TRUST TO REINFORCE DEMOCRACY: MAIN FINDINGS FROM THE 2021 OECD SURVEY ON DRIVERS OF TRUST IN PUBLIC INSTITUTIONS 18, 35-36 (2022), [https://perma.cc/YG7B-V8UV].

76. Kenneth Newton & Pippa Norris, *Confidence in Public Institutions: Faith, Culture, or Performance?*, in DISAFFECTED DEMOCRACIES, *supra* note 5, at 52, 54-55.

77. Sarah Butt & Rory Fitzgerald, *Critical Consensus? Britain's Expectations and Evaluations of Democracy*, *in* BRITISH SOCIAL ATTITUDES 1, 14 (Alison Park et al. eds., 2014).

78. HIBBING & THEISS-MORSE, *supra* note 5, at 47.

79. Christine A. Kelleher & Jennifer Wolak, *Explaining Public Confidence in the Branches of State Government*, 60 POL. RSCH. Q. 707, 718 (2007).

80. *See Rule of Law and the Courts*, AM. BAR. ASS'N. (Aug. 22, 2019), [https://perma.cc/EE8F-T4KW].

important part of a democratic system and that they mostly function properly."[81] This may also be the reason why, when the legal realm is mentioned in the same breath as democratic disaffection, it is almost always mentioned as a way to "protect" or "defend" democratic institutions, rather than as a possible contributing source of democratic disaffection itself.[82] There are exceptions to this, but these voices are few and far between.[83] However, the attractive idea that anything the law does is attempting to ennoble politics should not be taken at face value. In fact, for reasons articulated below, this notion should be discarded.[84] The law certainly does possess the potential to ennoble the political realm and help resolve intractable or sophisticated societal problems. However, because it is so highly trusted by citizens, and because it operates on principles such as judicial independence and the rule of law, it also possesses the potential to influence—as well as harm—the political realm.

Although the demand-side does not appear to suit the legal realm in relation to democratic disaffection, that may not be true for the supply-side. As Hay identifies, "Virtually no consideration" has been given to supply-side factors of disaffection, such as "changes in the substantive content of the 'goods' that politics offers to political 'consumers', and changes in the capacity of national-level governments to deliver genuine political choice to voters."[85] Law's contribution to political disaffection could certainly be one such supply-side factor: something that possesses the ability to change the substantive content of goods on offer and also to impact the capacity of national-level governments. This is true not just for constitutional issues, which are increasingly policed by judiciaries and apex courts, but also for other areas of domestic policy, in which

81. Aylin Aydın Çakır & Eser Şekercioğlu, *Public Confidence in the Judiciary: The Interaction Between Political Awareness and Level of Democracy*, 23 DEMOCRATIZATION 634, 635 (2016).

82. *See* SILVERSTEIN, *supra* note 42, at 177.

83. *See, e.g.*, MAIR, *supra* note 5, at 19-20; SILVERSTEIN, *supra* note 42, at 269-70; *see also* JAMES ALLAN, DEMOCRACY IN DECLINE: STEPS IN THE WRONG DIRECTION 42-83 (2014) (discussing judges as one of four causes for democratic decline, particularly as seen in five select Anglo-American countries).

84. *See infra* Section III.A.

85. HAY, *supra* note 5, at 55.

popular influence and control has noticeably decreased. Indeed, many contemporary democracies explicitly place constitutions and constitutional law above popular control, and popular elements within states have become increasingly downgraded with respect to constitutional elements.[86] These constitutional trends complement what is happening in other areas of public policy, where there is a clear and obvious trend "to 'depoliticize' public policy by displacing responsibility for policy making and/or implementation to independent public bodies."[87]

Of course, some may argue that as a supply-side factor, law's impact on the substantive content of political "goods" may be positive, rather than negative. After all, as noted above, law may improve public decision-making, help solve intractable societal problems, and also provide an independent perspective on difficult legal and constitutional issues.[88] These potential benefits that law may bring to democracy are explored in the next Part, which discusses the various relationships between law and democratic disaffection.

III. THE RELATIONSHIP(S) BETWEEN LAW, POLITICS, AND DEMOCRATIC DISAFFECTION

As views from Montesquieu and the American founders demonstrate, law and courts were thought of differently over two centuries ago. The judiciary was not conceived of as a powerful state entity that could wield extensive influence over the political branches and thus significantly impact the operation of democracy. Indeed, Montesquieu described court power in relation to the other branches as "next to nothing,"[89] a view that feels odd and out of place today. And although contemporary powers of the judiciary are still at times downplayed or characterized as fragile, it would be very difficult to say that these early views of judicial power have withstood the test of time.

86. *See* MAIR, *supra* note 5, at 10-11.

87. HAY, *supra* note 5, at 57-58; MARK TUSHNET, THE NEW FOURTH BRANCH: INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY, *in* COMPARATIVE CONSTITUTIONAL LAW AND POLICY 1-5 (Tom Ginsburg et al. eds., 2021).

88. *See* discussion *supra* Introduction.

89. MONTESQUIEU, *supra* note 2, at 156.

Courts are now major constitutional players—in some jurisdictions—actively involved in the direction and governance of the state, and in other jurisdictions the leading adjudicator of rights, liberties, and constitutions.[90]

The middle of the twentieth century is key to understanding the connection between law and democratic disaffection, as this period is around when researchers began finding noticeable declines in trust and confidence in government.[91] The era seems to have brought about a different type of relationship between law and politics: one that was more antagonistic and predicated on the taming or subordination of the other. This new relationship also coincides with a significant period of growth in law and legal mechanisms more generally, such as the number of written constitutions, the constitutionalization of rights, and the expansion of judicial review throughout the world.[92] While quite a lot of work has been done on the growth of these legal mechanisms, less is known about how the increasingly antagonistic relationship between law and politics evolved during this period, including the similarities between the economic and legal views of constitutionalism. Some have termed this development "constitutional economics" and attributed it to those who "look at political institutions through the lens of economics."[93] Below I discuss these similarities in more detail, and then focus on possible ways that law and courts have contributed to disaffection, may counter disaffection, and could perhaps do both at the same time.[94]

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90. *See* ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 56-58 (2000); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 100-01 (2004).

91. DALTON, *supra* note 5, at 1, 21.

92. On the rise of constitutionalism more generally, see Bruce Ackerman, Essay, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 774 (1997). On the worldwide growth of judicial power, see, for example, C. Neal Tate, *Why the Expansion of Judicial Power?*, *in* THE GLOBAL EXPANSION OF JUDICIAL POWER 27, 27 (C. Neal Tate & Torbjörn Vallinder eds., 1995). On the rise of written constitutions, see BRIAN CHRISTOPHER JONES, CONSTITUTIONAL IDOLATRY AND DEMOCRACY: CHALLENGING THE INFATUATION WITH WRITTENNESS 5 (2020); for a visual timeline, see also *Data Visualizations*, COMPAR. CONSTS. PROJECT, [https://perma.cc/96X9-QN8H] (last visited Nov. 22, 2022) (specifically, the chart titled "New Constitutions").

93. VIBERT, *supra* note 4, at 78-79. From a U.K. perspective, see generally TONY PROSSER, THE ECONOMIC CONSTITUTION (2014).

94. *See* discussion *infra* Section III.A; *see also infra* note 126 and accompanying text.

In the middle of the twentieth century—as citizen views on trust and confidence in government were changing—a bold new theory called Public Choice was gaining steam.[95] It went on to have a profound impact on the development of liberal democracies.[96] In short, it painted an extremely unflattering picture of politics and the political realm. The theory is based around the idea that politicians are rational self-interested actors, and even though they are elected public officials, they will act not in the public's interest but in their own best interests.[97] Ultimately, they will "behave in ways that are costly to citizens" and cannot be trusted to carry out the general will—either of their constituents or of the people more generally.[98] The theory also contains an exceptionally negative view of the public, which it views as self-interested, largely ignorant when it comes to politics and the political realm, and unable to effectively monitor government.[99] But that hardly covers everything. A gloomy view of civil-servant bureaucrats manifests as well, viewing them as captured by special interests and mostly focused on maximizing departmental budgets.[100] And to top it all off, because politicians, the public, and civil servants cannot be trusted, the theory advocates using a small set of technocrat guardians to oversee certain areas, such as fiscal policy, to ensure that decisions are

95. *See* Jane S. Shaw, *Public Choice Theory*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson ed., 1993).

96. Public choice theory was not the only major economic theory to influence the trajectory of the political realm. Following this was the "political overload thesis," the "bureaucratic overload thesis," "new public management theory," and "rational expectations." *See* HAY, *supra* note 5, at 101-03; Jenny Harrow, *New Public Management and Social Justice: Just Efficiency or Equity As Well?*, *in* NEW PUBLIC MANAGEMENT: CURRENT TRENDS AND FUTURE PROSPECTS 141, 142 (Kate McLaughlin et al. eds., 2002) (discussing new public management theory); Steven Pressman, *What Is Wrong with Public Choice*, 27 J. POST KEYNESIAN ECON. 3, 14 (2004) (discussing rational expectations). All these offshoots share a common view of politics and the political realm: without adequate supervision, politicians and other actors in the political realm will make self-interested decisions and ultimately threaten the viability of the state. *See* HAY, *supra* note 5, at 102-03; Harrow, *supra*, at 142; Pressman, *supra*, at 14.

97. Shaw, *supra* note 95.

98. *Id.*

99. *Id.*; *see also* William F. Shughart II, *Public Choice*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS, *supra* note 95.

100. Shughart II, *supra* note 99.

made in the public's interest.[101] Its central authors and advocates went on to win Nobel Prizes[102] and write celebrated books,[103] and its influence continues well into the twenty-first century.

At the heart of public choice theory is a deeply cynical view of the political realm: politicians and legislatures are not to be trusted, especially when it comes to important decisions in an election year.[104] These views align with some prominent legal philosophies of the mid-twentieth century. For example, in 1964, Judith N. Shklar recognized, "Politics is regarded not only as something apart from law, but as *inferior* to law. Law aims at justice, while politics looks only to expediency."[105] Her book goes on to equate the political realm with an uncontrolled child.[106] Shklar's focus on expediency demonstrates clear similarities with public choice: politics and politicians are opportunistic, self-interested actors that cannot be trusted.[107] Some viewed this newfound skepticism of politics as healthy, suggesting that at the time there was too much deference to authority and trust placed in political leaders.[108] And because politicians could not be trusted to make major decisions without thinking about their own best interests, the remedy for public choice theorists was to "depoliticize" policy choices in a whole range of areas.[109] Only through depoliticization could certain essential elements be protected.

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101. *See* ALASDAIR ROBERTS, THE LOGIC OF DISCIPLINE: GLOBAL CAPITALISM AND THE ARCHITECTURE OF GOVERNMENT 47-49 (2010).

102. See, for example, Press Release, Royal Swedish Acad. of Scis., This Year's Economics Prize Awarded for a Synthesis of the Theories of Political and Economic Decision-Making (Public Choice) (Oct. 16, 1986), [https://perma.cc/9QZB-HPAR], announcing James Buchanan as the winner of the Nobel Prize in Economic Sciences in 1986 and listing JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962), as James Buchanan's best-known work.

103. See generally, for example, ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957), which was discussed as a key work in THE OXFORD HANDBOOK OF CLASSICS IN CONTEMPORARY POLITICAL THEORY (Jacob T. Levy ed., 2015).

104. *See generally* DOWNS, *supra* note 103, at 11-12, 27-28.

105. JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRAITS 111 (2d ed. 1986) (emphasis added).

106. *Id.* ("The former [law] is neutral and objective, the latter [politics] the uncontrolled child of competing interests and ideologies.").

107. *See id.* at 9, 17, 111.

108. MAIR, *supra* note 5, at 133.

109. HAY, *supra* note 5, at 90-91, 93.

The idea of depoliticization has been common in many areas of government, as elements are often taken out of the governmental context and given to other public or quasi-public bodies.[110] As Alasdair Roberts describes, the approach to depoliticization is usually two-pronged. Firstly, those advocating reform "usually begin[] with an expression of deep skepticism about the merits of conventional methods of democratic governance."[111] This skepticism often focuses around politics and politicians being unstable, short-sighted, and selfish, which leads them to make ill-advised decisions.[112] Secondly, depoliticization must impose some type of formal constraint on elected officials.[113] Indeed, "it involves removing certain subjects from the realm of everyday politics," and the method by which this is done is primarily, if not exclusively, through legal instruments.[114] Implementation of these depoliticization measures in recent decades has allowed for the creation or furthering of a plethora of arms-length bodies that are disconnected from the political realm but which touch on people's daily lives, including those that provide essential services (e.g., Bank of England), are responsible for assessing risk (e.g., Food Standards Agency), straddle the boundaries between public and private (e.g., Financial Services Authority), and determine if powers are being used appropriately (e.g., Pensions Ombudsman).[115]

The operation of constitutionalism over the past few decades shares much in common with public choice theory. In particular, it views ordinary citizens and the political realm extremely skeptically, and the idea of depoliticization has been thoroughly taken on board. For example, in defending the idea of liberal constitutionalism, one celebrated account paints a damaging and tremendously dark picture of the political realm and of the general public:

110. VIBERT, *supra* note 4, at 18; HAY, *supra* note 5, at 82-87.
111. ROBERTS, *supra* note 101, at 4.
112. *Id.*
113. *Id.* at 5.
114. *Id.*
115. VIBERT, *supra* note 4, at 20-30.

> [L]iberal constitutions are crafted to help solve a whole range of political problems: tyranny, corruption, anarchy, immobilism, unaccountability, instability, *and the ignorance and stupidity of politicians*. . . . Present-day citizens are myopic; they have little self-control, are sadly undisciplined, and are always prone to sacrifice enduring principles to short-term pleasures and benefits.[116]

Although the author of this work was not writing from a public choice perspective, he undoubtedly employs similar justifications. Holmes criticizes the public for its "inability to subject public officials to ongoing scrutiny."[117] He goes on to talk about "irrational desire," "unconstrained passions," and "the unrestrained capacity to satisfy immediate or given desires."[118] But that is not all. The author notes that constitutionalism has been developed "to free people from the effects of a debilitating passion," and that "[d]eliberative democracy . . . compensates for the disabling inflexibilities and obsessions of spontaneous thinking."[119] Holmes' writing presents quite the image: citizens running mad with debilitating passion, disabling obsessions, and unrestrained desire.[120]

This extreme depiction of the political realm is nothing new. Politics is often viewed as "dangerous and potentially destructive," needing to "be tamed and placed within" certain legal bounds.[121] Legal academics encourage the perception that politics is "ruled by the passions, which can run wild," while law speaks "the cool language of reason and logic."[122] And because the political realm cannot be trusted, depoliticizing measures have been implemented in many jurisdictions. On one level, written constitutions and bills of rights were used to decrease the stakes of politics.[123] The implementation of constitutional supremacy, which has replaced parliamentary sovereignty in many

116. STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 6, 135 (1995) (emphasis added).

117. *Id.* at 271.

118. *Id.* at 267-68 (emphasis omitted).

119. *Id.* at 273 (emphasis omitted).

120. *See id.* at 267-68.

121. MARTIN LOUGHLIN, SWORD & SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW & POLITICS 223 (2000).

122. ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION 12-13 (2005).

123. *See id.* at 9-10, 12.

jurisdictions throughout the world, was one such method. The depoliticization strategy was best articulated by Jutta Limbach, who stated that "the supremacy of the constitution means the *lower ranking* of statute; and that at the same time implies the *lower ranking* of the legislator."[124] This, like implementation of other distancing, was entirely purposeful and is articulated in more detail below.[125]

Ultimately, these highly influential theories on the operation of constitutionalism—both from the economic and legal realm—have emphasized the negative downsides of politics and the political process.[126] This unabashedly pessimistic attitude towards the political realm has impacted the relationship between law, democracy, and disaffection.

A. Law and Courts Contributing to Disaffection

Below I identify three instances in which law and courts may contribute to disaffection: (1) the courts as a viable or "better" alternative; (2) the overly critical court; and (3) the court as domineering constitutional authority. It is important to recognize that these relationships or representations are not mutually exclusive and that they can, and do, overlap in various ways.

1. The Courts as a Viable or "Better" Alternative

In some ways the courts have been presented as a viable or better alternative to politics and the political realm, and they have been in three primary ways: in their potential to hold the government accountable,[127] in acting as a venue for furthering policy goals,[128] and in presenting themselves as a form of "anti-

124. Jutta Limbach, *The Concept of the Supremacy of the Constitution*, 64 MOD. L. REV. 1, 1 (2001).

125. *See infra* notes 228-29 and accompanying text.

126. *See, e.g.*, HOLMES, *supra* note 116, at 6; TOMKINS, *supra* note 122, at 12-13.

127. *See* BETH COLE ET AL., U.S. INST. OF PEACE, GUIDING PRINCIPLES FOR STABILIZATION AND RECONSTRUCTION, at 7-81 to -82, -84 (2009).

128. *See* CHRISTOPHER A. SIMON ET AL., STATE AND LOCAL GOVERNMENT AND POLITICS: PROSPECTS FOR SUSTAINABILITY 325, 362, 364 (2d ed. 2018).

politics."[129] These views may contribute to democratic disaffection because if the courts are perceived as a better alternative to making policy and also to constraining political actors, then the political realm may be increasingly viewed as insufficient or even obsolete at some of its primary functions. Thus, less time and effort may be placed on fostering a healthy, sustainable, and vibrant political domain, and more time and effort will be placed on strategic litigation and other judicial concerns.

Theories of democracy focus on elections as the primary component of democratic accountability: if representatives want to be re-elected, they need to pass laws and govern in ways that secure citizen trust and confidence. But in between elections, there is vigorous debate over how best to hold governments accountable.[130] Almost every governmental system provides some role for the courts to check the power of the executive, which often connects to upholding the rule of law.[131] But questions remain as to how effective court-centered accountability mechanisms are compared to other mechanisms, and also to what degree the courts should undertake this role. An over-reliance on legal measures for accountability can water down or even strip away political accountability measures. This is especially true when there are viable political-accountability mechanisms available that could produce similar or just as effective results, and yet the courts still intervene. Ultimately, if courts alone are perceived as effective in holding governments to account, then there may be less incentive for citizens to contact their representatives, become a member of a political party, participate in a public protest, or even visit the ballot box at the next election.

Another way that courts can contribute to democratic disaffection is through presenting themselves as viable alternatives to the normal political process. Here, courts may

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129. *See* Lisa Hilbink, *Agents of Anti-Politics: Courts in Pinochet's Chile*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 102, 104 (Tom Ginsburg & Tamir Moustafa eds., 2008).

130. ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 115-17 (2010).

131. *See id.*; *Rule of Law and the Courts*, *supra* note 80.

allow citizens to further policy-related goals through litigation, rather than through the more typical political process. Indeed, it is no secret that "[p]olitical losers and political minorities turn to the independent, that is, unelected and unaccountable, judiciary in the hopes of persuading judges of claims that fail to command a majority in the legislature."[132] Even the courts have acknowledged this at times,[133] and this may also be why we have seen the law not quell but perpetuate the culture wars.[134] In his excellent study of how law can shape, constrain, save, and kill politics, Gordon Silverstein acknowledges this has taken place in a variety of areas in the U.S. context, but perhaps mostly notably in relation to poverty and abortion.[135] In fact, going down the litigation route may also be a more efficient or effective means of changing or developing policy,[136] as the slower-moving political realm relies on mobilization and political support. If citizens can advance policy goals by effectively bypassing the political process for a legal one, then the incentives to participate in democracy are certainly weakened, perhaps considerably so.

Finally, courts can even present themselves as a form of "anti-politics," which may be considered more respectable to those disenchanted with the political realm. The idea that courts are "non-majoritarian" or apolitical may be highly attractive to citizens, especially those that view politics with disdain or associate it with corruption, misdeeds, self-interest, or other negative features, as is often highlighted in constitutional economics. For these citizens, the legal realm may be a more respectable and desirable path. Rather than a focus on

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132. Amanda Hollis-Brusky, *An Activist's Court: Political Polarization and the Roberts Court*, *in* PARCHMENT BARRIERS: POLITICAL POLARIZATION AND THE LIMITS OF CONSTITUTIONAL ORDER 80, 82 (Zachary Courser et al. eds., 2018). Of course, some advocate this element as inherent to constitutional government. Ginsburg notes, "By serving as an alternative forum in which to challenge government action, judicial review provides a form of insurance to prospective electoral losers during the constitutional bargain." TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 25 (2003).

133. *See* NAACP v. Button, 371 U.S. 415, 429 (1963) ("Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts.").

134. *See* Christopher McCrudden, *Transnational Culture Wars*, 13 INT'L. J. CONST. L. 434, 435-36 (2015).

135. SILVERSTEIN, *supra* note 42, at 95-127.

136. *Id.* at 21-25.

expediency, there is a focus on the fundamental. Rather than having to use traditional political tools to change minds and influence public opinion on a large scale, there is a focus on quality and strength of argument.

Appealing to something detached from the "politics of the day" will always be attractive to citizens, especially if these appeals can be focused on "higher" fundamental values or principles. But there are major questions regarding whether courts can be viewed as a form of anti-politics. At their heart, courts are undoubtedly majoritarian institutions, just on a much smaller scale than the legislature.[137] And whether they are "apolitical" and more concerned with the fundamental is certainly up for debate.

2. The Overly Critical Court

Given that the new relationship between law and politics forged in the twentieth century was predicated on the taming or subordination of politics through law, it may be unsurprising that in some instances courts have been overly critical of the elected branches. These instances of harsh criticism may lead to increased disaffection among the general public. After all, any heightened skepticism of politics by the judiciary may produce "ripple effects . . . in the public's trust of the democratic process."[138] And if these ripple effects are significant enough, they could influence citizen perception of the elected branches.

One common criticism courts engage in is complaining about the drafting or preparation of legislation, which can make the work of legislators appear messy, incompetent, or downright lazy. A notorious example from the United Kingdom is Justice Harman in *Davy v. Leeds Corporation*, who lamented the "monstrous legislative morass" judges had to examine in this particular case.[139] Similarly, in a 2010 U.K. Supreme Court

137. On the U.S. Supreme Court, this amounts to a "Rule of Five." H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 16-17 (2008) ("A five-justice majority on the Court, the strong Rule of Five asserts, can do anything, at least in deciding constitutional-law cases . . . .").

138. Hollis-Brusky, *supra* note 132, at 86.

139. [1964] 1 WLR 1218 at 1224 (Eng.).

judgment, Lord Judge found it "outrageous" that "elementary principles of justice" were buried in a "legislative morass."[140] But the problem crosses boundaries. Even the late Ruth Bader Ginsburg had complaints about legislation, noting, "Detecting the will of the legislature, however, time and again perplexes even the most restrained judicial mind. Imprecision and ambiguity mar too many federal statutes. Bad law breeds unnecessarily hard cases."[141] These complaints, even if primarily circulated among lawyers, could breed disaffection.

Other criticisms carry more constitutional bite. When attempting to determine the constitutionality of a statute, courts may point to an unsatisfactory legislative record. Ruth Colker and James J. Brudney note the U.S. Supreme Court did this in a number of cases at the turn of the century, "convey[ing] the message that Congress is suspect in the powers it exercises and the manner in which it exercises them."[142] In one notable case, *City of Boerne v. Flores*, the Court struck down a provision of a statute that was passed unanimously in the House and flew through the Senate by a vote of 97-3.[143] Scholars have noted that the Court's approach in *Boerne* and similar cases has attempted "to subordinate the primary political function of legislatures"[144] and essentially turn Congress into a lower court it could ridicule.[145] The Court did this again in 2013 when striking down a reauthorization of the Voting Rights Act of 1965.[146] The justices noted that "Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act" but that it "did not use the record it compiled to shape a coverage formula

140. R *In re* Noone v. Governor of HMP Drake Hall [2010] UKSC 30, [86]-[87].

141. Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1417 (1987).

142. Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 98-100, 104-07, 144 (2001).

143. 521 U.S. 507, 511 (1997); H.R. REP. NO. 103-88, at 2 (1993); 139 CONG. REC. S26416 (1993).

144. Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1710-11 (2002).

145. Colker & Brudney, *supra* note 142, at 83, 144.

146. Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (June 25, 2013), [https://perma.cc/Z3B7-JS3A].

grounded in current conditions."[147] They further noted the congressional re-enactment was based on "40-year-old facts having no logical relation to the present day."[148] These are extraordinary statements to make for a statute that was re-authorized by large congressional majorities in 2006.[149]

Instances of courts intentionally embarrassing the elected branches in their judgments have also occurred. I have recently explored this from a common law perspective, focusing on the United States, United Kingdom, and Canada.[150] Although some form of moderate embarrassment is built into the judicial review process—given the public nature of adjudication—I contend that in some instances courts have transitioned from unintentionally to intentionally embarrassing the elected branches. For instance, recent judgments from the United Kingdom have compared government policy to that seen in totalitarian regimes,[151] have accused governments of acting in a "clandestine" manner,[152] and have accused governments of incompetence in relation to basic constitutional architecture.[153] These unnecessary statements allow the courts to portray the elected branches in an extremely

147. Shelby Cnty. v. Holder, 570 U.S. 529, 553-54 (2013).

148. *Id.* at 554.

149. Carl Hulse, *By a Vote of 98-0, Senate Approves 25-Year Extension of Voting Rights Act*, N.Y. TIMES (July 21, 2006), [https://perma.cc/K32E-DAWR].

150. Brian Christopher Jones, *Judicial Review and Embarrassment*, PUB. L. 179, 179-85 (2022).

151. Christian Institute v. Lord Advocate, [2016] UKSC 51, [73]. Lady Hale said:

> Individual differences are the product of the interplay between the individual person and his upbringing and environment. Different upbringings produce different people. The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers' view of the world. Within limits, families must be left to bring up their children in their own way.

Id.

152. Cherry v. Advocate General [2019] CSIH 49, [50], [54]. The Scottish Inner House of the Court of Session said that, in requesting the prorogation of Parliament, the Prime Minister had acted "in a clandestine manner." *Id.*

153. R *In re* Miller v. Sec'y of State for Exiting the Eur. Union, [2016] EWHC (Admin) 2768, [85]. The United Kingdom's High Court noted that the Government's case was "flawed" at even a "basic level." *Id.*

harsh light and could negatively impact how the public views its elected officials.[154]

This relationship connects to the prominent constitutional theories discussed above, which emphasize the negative aspects of the political realm.[155] Overly critical courts may contribute to democratic disaffection by portraying the outputs of the elected branches as deficient, confused, or suspect. Although casting a critical eye on institutional outputs may at times be beneficial and provide valuable institutional feedback, courts should be cautious to not be overly critical in their assessments.

3. The Court as Domineering Constitutional Authority

Since the new relationship between law and politics was forged in the mid-twentieth century, courts have been much more bullish about their central role in constitutional adjudication. As Robin West notes, oftentimes the point of law—and especially constitutional law—is to "stop the political animal dead in his tracks."[156] Beyond this, law can be used as a "battering ram" that does not merely "take the wind out of the political sails" but effectively kills politics.[157] No doubt this is how some lawyers, judges, and legal academics view their roles: as agents who can provide a substitute for the passionate, rancorous, and often brutal political realm.

In the mid-twentieth century, courts around the globe began asserting their role as ultimate constitutional adjudicators in a more forceful fashion.[158] I have previously documented instances of this in relation to a number of jurisdictions, where courts have asserted themselves as the ultimate authority when determining constitutionality, upholding constitutional principles, or indeed

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154. Jones, *supra* note 150, at 179-80, 188. In my previous article, I developed three different types of portrayals that the courts use to embarrass the elected branches: constitutional newbies, constitutional fools, and constitutional villains. *Id.* at 180.

155. *See supra* notes 116-26 and accompanying text.

156. Robin West, *Ennobling Politics*, *in* LAW AND DEMOCRACY IN THE EMPIRE OF FORCE 58, 59-60 (H. Jefferson Powell & James Boyd White eds., 2009).

157. SILVERSTEIN, *supra* note 42, at 268-69.

158. *See* Tate, *supra* note 92, at 2-5.

protecting the constitution more generally.[159] Under these bold pronouncements any view of constitutionality outside of the court's assessment may be viewed as amateurish, naïve, or unsophisticated. For example, in 2013, the Canadian Supreme Court noted that it "cannot be barred by *mere statutes* from issuing a declaration on a fundamental constitutional matter."[160] The U.S. Supreme Court has repeatedly asserted its dominant role as "supreme in the exposition of the law of the Constitution."[161] And the Australian Supreme Court has at times flaunted its authority, declaring that no other institution possesses "the power and the will to" protect the constitution.[162] In relation to constitutional matters, these views clearly attempt to make politics and the political realm subservient to law.

Whether prominently intervening in the electoral process,[163] second-guessing decisions historically left to the executive,[164] or rejecting validly passed constitutional amendments,[165] it is obvious the courts in many jurisdictions are far from "next to nothing."[166] In fact, they have asserted themselves as domineering constitutional authority in many contexts.

B. Law and Courts Working to Counter Disaffection

Two primary ways in which courts may counter disaffection are: (1) by helping uphold collective societal values and principles such as justice, the rule of law, and democracy, among other things[167] and (2) by acting as an alternative or backstop venue for advancing political agendas or for resolving

159. Jones, *supra* note 92, at 148-53. Examples here came from the United States, Israel, Australia, and Canada. *Id.*

160. Man. Metis Fed'n Inc. v. Att'y Gen., [2013] 1 S.C.R. 623, 685 (Can.) (emphasis added).

161. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

162. *NSW v Commonwealth*, (2006) 231 ALR 1, 148 (Austl.).

163. *See* Bush v. Gore, 531 U.S. 98, 110 (2000).

164. *See* R *In re* Miller v. Prime Minister (*Miller II*) [2019] UKSC 41, [30]-[50].

165. For more on this, see Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT'L L. 1, 6 (2018).

166. MONTESQUIEU, *supra* note 2, at 156.

167. *See infra* Section III.B.1.

controversial societal issues.[168] I explore both of these aspects below.

1. The Courts as Upholders of Collective Societal Values and Principles

Perhaps the most decisive way that the courts work to counter democratic disaffection is by helping uphold collective societal values and principles such as justice, equality, the rule of law, and other ideals, such as democracy.[169] After all, the collective values and principles present in societies should also be seen and furthered within the courts. These values and principles may be inscribed in statutes or written constitutions, found in the customs or traditions of politics and law (such as the procedures of a legislative body or in the common law), or be commonly advocated by citizens. Similar to the other governmental branches, the courts have a role to play in upholding and defending these values. Some may even say that the courts institutionally lead on some of these, such as administering justice and protecting the rule of law.[170] Undoubtedly, some citizens may be drawn to particular values and principles over others and may even believe that courts uphold certain values better than the elected branches.[171] If the courts do an adequate job of protecting these collective values, or even protect certain values better than the political realm, then they may counter democratic disaffection, even if they do not explicitly address this as an outcome.

At times, courts have even signaled positivity towards politics and the political process and upheld democratic innovations that bring citizens closer to self-government. Scholars have noted that the U.S. Supreme Court under Earl Warren was "optimistic about the possibility of politics" and demonstrated trust in Congress by upholding major pieces of

168. *See infra* Section III.B.2.

169. *See, e.g.*, Alexander Wohl, *The Role of Courts in Our Society*, HUM. RTS. MAG., June 2017, at 1, 1.

170. *See, e.g.*, *The Responsibilities of the Judiciary in Strengthening the Rule of Law*, ACT 4 RULE OF L., [https://perma.cc/9JNS-UVEU] (last visited Nov. 6, 2022).

171. *See The Court and Constitutional Interpretation*, U.S. SUP. CT., [https://perma.cc/F96G-LPK7] (last visited Nov. 6, 2022).

legislation such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965.[172] Before this, America's highest Court also allowed controversial democratic innovations to take shape, many of which are now recognized as essential democratic mechanisms. In 1912, the Court declined to rule on the constitutionality of state referendums as a valid form of law-making.[173] Eventually, twenty-four U.S. states passed some form of citizen-referendum process, and such processes are widely used today.[174] Declining jurisdiction was undoubtedly important, as scholars have demonstrated that referendums can lead to increased political knowledge and engagement among citizens,[175] which may thwart democratic disaffection.

There is no doubt that upholding these cherished societal standards comes with significant difficulties. Scholars have found that the operation of the legal system may entrench inequalities[176] or continually favor "repeat players" in the courtroom.[177] But the protection of cherished societal values does not just happen through the elected branches or the democratic process. It also happens in the courts. Indeed, judiciaries may lead when it comes to particular values, such as justice and the rule of law, and they also have a role to play in the public perceptions of politics and the political process.[178] Upholding these precious values may counter democratic disaffection.

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172. Pamela S. Karlan, *Democracy and Disdain*, 126 HARV. L. REV. 1, 18-25 (2012).

173. Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 133-34, 151 (1912).

174. *See* KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS 41-42, 50 (2009).

175. MATT QVORTRUP, THE REFERENDUM & OTHER ESSAYS ON CONSTITUTIONAL POLITICS 91 (2019).

176. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 95, 103-104, 125 (1974).

177. *See* DONALD BLACK, THE BEHAVIOR OF LAW 27 (1976).

178. *See The Responsibilities of the Judiciary in Strengthening the Rule of Law*, *supra* note 170; Natalie Anne Knowlton, *Trusting the Public's Perception of Our Justice System*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Aug. 27, 2020), [https://perma.cc/5QHS-4HD9].

2. The Courts as an Alternative or Backstop Venue for Advancing Political Agendas or Resolving Controversial Societal Issues

Although this item was listed above as potentially furthering disaffection,[179] it is also possible that this element could counter democratic disaffection. Indeed, as democratic disaffection has increased throughout the years, it seems only natural that citizens pursue alternative venues to the political arena. Politics can be frustrating, slow, and messy, and it is inevitable that citizens may occasionally get disenchanted with the political process. Nowadays, citizens often have another place they can turn. Courts in many jurisdictions have undoubtedly become an alternative or backstop venue for advancing political agendas or resolving controversial societal issues. In the American context, it is readily acknowledged that if citizens "cannot win at the ballot box they will try to win in the courtroom."[180] Of course, not all jurisdictions subscribe to this level of court intervention. However, as the judicialization of politics has grown around the world, an increasing number of decisions that were made in the political realm are now made in the legal realm.[181]

The transition to increased judicialization has happened for a variety of reasons, some of which may counter democratic disaffection. As noted above, some citizens may prefer courts to the political arena, in part because judiciaries are beyond the reach of political parties and electoral politics.[182] Additionally, resolution of disputes may be more efficient and straightforward in the legal realm and may not require as much time and effort as a political campaign does. It may also be the case that courts have been increasingly courted or invited by the elected branches to resolve disputes, either through statutory or other means.[183] Indeed, some legal and political science literature notes that the elected branches have been hesitant to make decisions on

179. *See supra* Section III.A.1.

180. Martin Shapiro, *The United States*, *in* THE GLOBAL EXPANSION OF JUDICIAL POWER, *supra* note 92, at 43, 63.

181. *See* John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41, 41-43 (2002).

182. *See supra* Section III.A.1; *supra* notes 179-81 and accompanying text.

183. *See infra* Section IV.A.

controversial issues or have even increasingly pushed controversial issues to the judiciary.[184] This is the flip-side of judicialization: it is not just that courts have been expanding their jurisdictions through judicial review, but also that the political branches have been actively sending more disputes to the judiciary for resolution. Some citizens may be happy to see disputes settled somewhere, even if it does not occur through ordinary politics or the political process. Finally, increased judicial intervention may be associated with attempting to alleviate the significant failings or breakdowns in the political realm.[185] But determining what qualifies as a "failing" or "breakdown" is difficult, and may be highly dependent on one's political perspective.

If courts have become institutions that are ready and willing to make controversial decisions, correct breakdowns within the political realm, and do so more efficiently than the political realm, then perhaps these characteristics have countered democratic disaffection to a certain degree.

C. Law and Courts Both Contributing to and Countering Disaffection

Probably the most realistic perspective of the relationship between law and democratic disaffection is that courts both contribute to disaffection and also counter it in various ways. This connects to the function and status of judges within the state and how judicial review operates, which can be a countermajoritarian exercise or have mixed effects on democratic processes. Below, I discuss three issues relating to how courts may contribute to but also counter disaffection.

184. *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 143 (2007).

185. This seemed to be Ely's focus in developing a theory of judicial review. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 76, 103 (1980).

1. The Unique Constitutional Position of Judicial Review, Both as Countermajoritarian—But Also Essential—To Any Working Democracy

As the opening paragraph to this Article states, law and legal processes possess the potential to complement politics and the political realm, leading to extremely useful and insightful revelations, but they also possess the potential to damage it.[186] There is no getting around the fact that the role of judges and the operation of judicial review contain anti-democratic or countermajoritarian characteristics.[187] But these anti-democratic or countermajoritarian characteristics also provide democracies a unique perspective, which can, and often does, positively affect state operation.

In many states, judges are unelected actors that are provided an independent status and function within the state.[188] This detachment from the executive and legislative branches is purposeful, as judges are intentionally not subject to mechanisms of democratic accountability.[189] The judicial role carries a number of functions, such as interpreting constitutions, statutes, and regulations; determining lawful or unlawful behavior; and providing other checks on the elected branches.[190] Many of these—such as the interpretation of legal texts—are essential to how democracies operate and can help democracies protect vulnerable citizens, safeguard human rights, or indeed make the elected branches think twice about implementing particular policies. In fact, many people believe that judicial review should

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186. *See supra* Introduction.

187. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 711-12 (1995).

188. *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (Oct. 11, 2022), [https://perma.cc/GD5F-KKEY].

189. *See* Brian Christopher Jones, *The Widely Ignored and Underdeveloped Problem with Judicial Power*, UK CONST. L. ASS'N (Feb. 25, 2020), [https://perma.cc/J7CV-GRW4]. Of course, that does not mean that judges possess no accountability measures. Most judicial decisions are subject to appeal, and judges are also subject to various conduct and complaint procedures. However, there is a purposeful lack of democratic accountability measures. *See, e.g.*, *id.* The major exception to this is the large amount of U.S. state judges that are elected. *See Judicial Selection: Significant Figures*, *supra* note 188.

190. *Court Role and Structure*, U.S. CTS., [https://perma.cc/S7GK-YVM9] (last visited Nov. 6, 2022); *About the Supreme Court*, U.S. CTS., [https://perma.cc/MT8H-8C53] (last visited Nov. 6, 2022).

act as a braking mechanism to the developments in the political realm and consider this countermajoritarian function as essential to its operation.[191]

But judicial review also contains elements that may hinder democracy, such as second-guessing difficult decisions made by elected and accountable lawmakers, constraining future actions of governments, or even allowing for increased criticism of national governments. Although to some degree all of these may benefit the operation of democracy in some ways, there is little doubt that too much second-guessing, too much fettering, and too much criticism of government will have detrimental effects. Also, while some consider the braking function of judicial review as essential to state operation, most of the evidence points to judicial review developing alongside public opinion rather than counter to it.[192] The fact that judicial review often mirrors public opinion raises significant questions as to its use and overall influence. Thus, the unique position of judges and judicial review provides for opportunities to both contribute to and also counter democratic disaffection.

2. Mixed Judicial Records on Protecting Democracy and Democratic Principles

Records demonstrate that judges have both furthered democratic principles and at times also hindered the fruits of democracy. Examining the judicial record of the U.S. Supreme Court displays both these realizations. The Warren Court's treatment of democracy is often held up as positively reinforcing

191. For discussion on this, see Bojan Bugaric, *Can Law Protect Democracy? Legal Institutions as "Speed Bumps"*, 11 HAGUE J. ON RULE L. 447, 448-50 (2019).

192. *See*, *e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 14-15 (2009); FRANCES MCCALL ROSENBLUTH & IAN SHAPIRO, RESPONSIBLE PARTIES: SAVING DEMOCRACY FROM ITSELF 46 (2018) ("The historical and comparative evidence shows that courts seldom stray far from the preferences of elected governments, and when they do, it is usually in the direction of public opinion rather than away from it. This makes them unreliable checks on majority hostility to minorities. Democracies do better than nondemocracies at protecting minority rights, and courts do not improve on what democracies do. Working with electoral incentives might not always solve the problem, but it seems clear that nothing else will."); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 861 (2009).

democratic principles.[193] This is especially true with the major "one-person, one-vote" rulings, which have been championed by scholars as some of the best rulings ever by the Supreme Court.[194] *Baker v. Carr* allowed challenges to legislative redistricting, deeming issues such as gerrymandering justiciable before the courts.[195] *Reynolds v. Sims*[196] and *Wesberry v. Sanders*[197] furthered the development of "one person, one vote" jurisprudence at the state and federal levels, respectively. Perhaps these rulings helped foster increased trust in the political realm or a deeper commitment to democracy.[198] But SCOTUS has also delivered judgments that could have done the opposite, significantly harming the political realm. *Bush v. Gore* stopped a state-wide recount for presidential ballots, essentially handing the presidency to a candidate that did not receive the most national votes.[199] Additionally, much of the Court's campaign finance jurisprudence—such as *Buckley*,[200] *Citizens United*,[201] and *McCutcheon*[202]—have major implications for the political realm and also run contrary to public opinion.[203]

More recent SCOTUS decisions on gerrymandering,[204] voter ID laws,[205] the Voting Rights Act,[206] and voter roll purges[207]

193. *See* Karlan, *supra* note 172, at 4 ("The animating impulse behind many of the Warren Court's major decisions was a commitment to civic inclusion and democratic decisionmaking.").

194. Andrea Sachs, *The Best Supreme Court Decisions Since 1960*, TIME (Oct. 6, 2015, 11:47 AM), [https://perma.cc/2XTD-EK5J].

195. 369 U.S. 186, 198-99, 209-10, 237 (1962).

196. 377 U.S. 533, 565-66, 568 (1964).

197. 376 U.S. 1, 18 (1964).

198. Of course, it is acknowledged that subsequent rulings have essentially overruled these cases. *See* Vieth v. Jubelirer, 541 U.S. 267, 267, 306 (2004); Rucho v. Common Cause, 139 S. Ct. 2484, 2506-07 (2019).

199. 531 U.S. 98, 110 (2000); Ron Elving, *The Florida Recount of 2000: A Nightmare that Goes on Haunting*, NPR (Nov. 12, 2018, 5:00 AM), [https://perma.cc/759C-UGAS].

200. *See* Buckley v. Valeo, 424 U.S. 1, 58-59 (1976).

201. *See* Citizens United v. FEC, 558 U.S. 310, 312-16 (2010).

202. *See* McCutcheon v. FEC, 572 U.S. 185, 227 (2014).

203. *See* Bradley Jones, *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, PEW RSCH. CTR. (May 8, 2018), [https://perma.cc/SKA5-MR4M].

204. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 267, 306 (2004); Rucho v. Common Cause, 139 S. Ct. 2484, 2506-07 (2019).

205. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 181-82 (2008).

206. *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529, 530 (2013).

207. *See, e.g.*, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1838 (2018).

appear to have limited, not expanded, the franchise and may further hinder the democratic process. Perhaps the most damning assessments of these decisions have come not from the media or the elected branches but from the justices themselves. For example, in *Bush v. Gore*, Justice Stevens delivered a severe indictment of the decision, noting: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."[208]

This is reminiscent of a fiery dissent from Lord Atkin during World War II, where he declared that the attitudes of some U.K. judges were "more executive minded than the executive."[209] Both *Bush v. Gore* and *Liversidge v. Anderson* have been evaluated by contemporary academics as highly problematic and evidence that the judiciary may at times get things worryingly wrong.[210]

Although there may be periods of potential democratic enhancement from judicial review, there have also been periods of democratic erosion. Ultimately, the judicial record on upholding democracy and democratic principles remains decidedly mixed.

3. The Boundaries of Judicial Involvement with Politics Are Fraught with Disagreement

Finally, the boundaries of judicial involvement with politics are fraught with disagreement. This continues to be one of the most contentious areas of constitutional theory, as any bright lines regarding such involvement are frequently blurred.[211] The recent Brexit litigation in the United Kingdom, *Miller I*[212] and *Miller*

208. 531 U.S. 98, 128-29 (2000) (Stevens, J., dissenting).

209. Liversidge v. Anderson [1941] UKHL 1, [244], 1 AC (HL) 206 (appeal taken from Eng.) (Lord Atkin of Averdovey, dissenting).

210. *See, e.g.*, Andrea Sachs, *The Worst Supreme Court Decisions Since 1960*, TIME (Oct. 6, 2015, 11:36 AM), [https://perma.cc/8EQG-MLXZ]; Lord Bingham of Cornhill, *The Case of* Liversidge v. Anderson*: The Rule of Law Amid the Clash of Arms*, 43 INT'L LAW. 33, 33, 37 (2009).

211. Perhaps the most famous is that put forward in *Baker v. Carr* regarding the "political question doctrine." 369 U.S. 186, 210-11, 215 (1962).

212. R *In re* Miller v. Sec'y of State for Exiting the Eur. Union (*Miller I*) [2017] UKSC 5, [3], [35], [52], [144]-[146], [151].

II/Cherry,[213] both embody the potential benefits and risks that the courts assume if they intervene in politics or the political process.

The prominent *Miller I* Brexit judgment ruled that Article 50 could not be triggered by the government without parliamentary authority (i.e., an Act of Parliament).[214] The decision both upheld parliamentary sovereignty—something highly valued by Brexit supporters—but also expanded the U.K. Supreme Court's jurisdiction in relation to prerogative powers.[215] Even if the court was merely trying to ensure that the proper constitutional procedures were followed in Britain's EU exit, the decision provided the perception that the judiciary was willing to slow down or potentially even halt Brexit.[216] This perception led to the belief in some quarters that individuals were using the courts as an alternative or backstop venue for resolving Brexit rather than handling it through more direct political channels. At the time, Lord Reed, who dissented in the case and who subsequently became Supreme Court President, said, "It is important for courts to understand that the legalization of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary."[217]

The *Miller II/Cherry* case provided even more intense debate about the appropriate role of judicial intervention. In August 2019, newly implemented Prime Minister Boris Johnson prorogued Parliament for five weeks, fueling views that he wanted to leave the EU without a negotiated trade deal.[218] While there were mixed opinions in the lower courts regarding whether

213. *See Miller II* [2019] UKSC 41, [31], [34], [57]-[58].

214. *See Miller I* [2017] UKSC 5, [274].

215. JOHN FINNIS, JUD. POWER PROJECT, BREXIT AND THE BALANCE OF OUR CONSTITUTION 2-3 (2016), [https://perma.cc/UQD8-9BJB].

216. James Slack, *Enemies of the People: Fury Over 'Out of Touch' Judges Who Have 'Declared War on Democracy' by Defying 17.4m Brexit Voters and Who Could Trigger Constitutional Crisis*, DAILY MAIL (Nov. 4, 2016, 11:26 AM), [https://perma.cc/ED4X-GR7C]. After all, Westminster Parliamentarians at the time were firmly against Brexit. *Government Loses 'Meaningful Vote' in the Commons*, UK PARLIAMENT (Jan. 16, 2019), [https://perma.cc/74LJ-ES9A]. Famously, after the Divisional Court ruling in the case, three judges were branded "enemies of the people" by the Daily Mail newspaper. Slack, *supra*.

217. *Miller I* [2017] UKSC 5, [240] (Lord Reed P, dissenting).

218. Michael Holden, *Scottish Court Says UK PM Johnson's Suspension of Parliament Is Unlawful*, REUTERS (Sept. 11, 2019, 4:16 AM), [https://perma.cc/SA3E-236L].

prorogation was a justiciable issue,[219] a unanimous U.K. Supreme Court eventually ruled that prorogation was justiciable and also that it was unlawful, thus recalling Parliament and embarrassing the government.[220] The court justified its decision as upholding the constitutional principles of parliamentary sovereignty and political accountability and maintained that the judgment was within the court's traditional purview of policing the prerogative rather than an incursion into parliamentary matters.[221] This provoked powerful rebuttals from a number of scholars arguing that the courts had effectively attempted to legalize politics.[222] While the U.K. Supreme Court judgment divided many, the eighty-seat majority won by the Conservative Party in the general election just a couple months afterward demonstrated that the courts perhaps should have taken Lord Reed's advice in *Miller I* regarding judicial restraint.[223]

Determining when courts should get involved in disputes is fraught with disagreement. Some may view judicial incursions into the political realm as protecting fundamental values and principles, while others may view these as unnecessary expansions of jurisdiction and a further legalization of politics.

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219. Cherry v. Advoc. Gen. [2019] CSOH 70, [26]-[29]; Cherry v. Advoc. Gen. [2019] CSIH 49, [50], [60]; R *In re* Miller v. Prime Minister [2019] EWHC (QB) 2381, [H4]-[H5], [H8]-[H9], [H11], [H13].

220. *See* Jones, *supra* note 150, at 187-88.

221. Interestingly, "parliamentary accountability" had not previously been recognized by the court as a major constitutional principle. Mark Elliott, *A New Approach to Constitutional Adjudication? Miller II in the Supreme Court*, PUB. L. FOR EVERYONE (Sept. 24, 2019), [https://perma.cc/BV3T-RMNU].

222. *See, e.g.*, JOHN FINNIS, POL'Y EXCH., THE UNCONSTITUTIONALITY OF THE SUPREME COURT'S PROROGATION JUDGMENT 5-6 (2019), [https://perma.cc/JEH3-HWJB]; Timothy Endicott, *Making Constitutional Principles into Law*, 136 LAW Q. REV. 175, 180 (2020); Stephen Tierney, *Turning Political Principles into Legal Rules: The Unconvincing Alchemy of the Miller/Cherry Decision*, POL'Y EXCH.: JUD. POWER PROJECT (Sept. 30, 2019), [https://perma.cc/TQ2F-ZV28].

223. *See* Matt Clinch & Spriha Srivastava, *Boris Johnson Secures Biggest Conservative Party Election Win Since 1987*, CNBC (Dec. 13, 2019, 10:50 AM), [https://perma.cc/KG8Z-FXH9]; *supra* note 217 and accompanying text.

IV. THE LAW'S DEMOCRATIC DISTANCING

Above, I have sketched out what democratic disaffection is[224] and also provided reasons why the law may have been excluded from studies on the topic.[225] Additionally, I have also explored some of the relationships between law, politics, and democratic disaffection, articulating how law and courts may both contribute to, but also counter, democratic disaffection in various ways.[226] This Part connects the theoretical material on how disaffection arises to some of the practical steps law and courts have taken throughout the years, thus potentially contributing to disaffection.

One of the most significant constitutional developments over the past century has been the purposeful and incremental implementation of what I shall term "democratic distancing." Democratic distancing in the legal realm shares similar characteristics to the depoliticization that has taken place more widely.[227] Generally, it is the implementation of inherently legal mechanisms that takes features of democracy either further away—or potentially off the table—from political resolution. States have consciously inserted mechanisms to separate themselves from the potential negative effects, or so-called "downsides," of democracy.[228] On a one-off basis, these instances can seem innocuous, legitimate, and even much needed within societies. Yet when analyzed collectively, they demonstrate a significant amount of change to the political realm and to the operation of democracy more generally. Indeed, it seems undeniable that "the net effect of having so many decisions that affect the fabric of daily life being taken outside traditional democratic channels is that modern democracies now seem very far from providing for popular government."[229]

These distancing measures are important when assessing democratic disaffection for two reasons in particular. First, if

224. *See supra* Part II.

225. *See supra* Section II.A.

226. *See supra* Part III.

227. *See supra* notes 109-25 and accompanying text.

228. *See, e.g.*, Imer B. Flores, *The Problem of Democracy in Contexts of Polarization* 7-8 (Geo. Pub. L. & Legal Theory, Rsch. Paper No. 13-017, 2013).

229. VIBERT, *supra* note 4, at 9.

popular or political control is decreased, then ultimately citizens have less control over these mechanisms, which may lead to further political alienation and feelings of powerlessness.[230] Citizens already feel a sense of displacement within many democracies,[231] and further decreasing popular control mechanisms seems antithetical to remedying this situation. Second, democratic distancing measures provide the impression that politics—or indeed the citizenry—does not deserve these powers or has been irresponsible in using them. No doubt the political realm has made mistakes, but whether or not these mistakes are serious enough to strip representatives or citizens of powers is up for debate.[232] Thus, while the legal realm may argue that increased court powers only rarely prevent the government from doing what it wants, this argument misses the point: it is the *perception* that politics and the political realm are unfit to possess these powers that matters and which ultimately affects democratic disaffection. Some of these incremental distancing steps are explored more below.

A. Judicial Policymaking Capacity: A One-Way Street

Although the courts have not been at the forefront of championing distancing measures, it would be a mistake to say that they have never done so. Accounts of courts lobbying to significantly expand their jurisdictions,[233] and also pushing for

230. As noted in Part II above, citizen powerlessness has been highlighted by some of the democratic disaffection literature. *See, e.g.*, HIBBING & THEISS-MORSE, *supra* note 5, at 10; Foa & Mounk, *supra* note 5, at 7; BLACKWELL ET AL., *supra* note 55.

231. *See* Phil Parvin, *Democracy Without Participation: A New Politics for a Disengaged Era*, 24 RES PUBLICA 31, 37 (2017).

232. As Robert Dahl once said:

> [T]he risk of mistake exists in all regimes in the real world . . . the opportunity to make mistakes is an opportunity to learn. Just as we reject paternalism in individual decisions, because it prevents the development of our moral capacities, so too we should reject guardianship in public affairs, because it will stunt the development of the moral capacities of an entire people.

ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 78-79 (1989).

233. *See, e.g.*, Jeremy Buchman, *Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925*, 24 JUST. SYS. J. 1, 1-3 (2003).

stronger codification on certain issues (e.g., human rights),[234] have been well documented over the past century.

While descriptions of judicial policymaking expansion often emphasize that the courts have been handed newly fashioned powers directly from the legislature, these accounts tend to downplay the role of judiciaries, or senior judges, in helping make these changes come about. Take the Judiciary Act of 1925, which allowed the U.S. Supreme Court to fully take control of its docket by amending certiorari jurisdiction.[235] Before this, the Court's docket was largely made up of mandatory cases that it was required to hear if they came through the correct channels in the lower courts.[236] Amending certiorari allowed it to pick and choose its own cases and take a larger role "as a prominent [national] policymaker."[237] This, as one author put it, represented a "quantum leap" forward regarding how the Court set its agenda.[238] William Howard Taft, former U.S. President and then Chief Justice of the Supreme Court, energetically lobbied for the change to take place.[239] In fact, a panel of Supreme Court Justices helped write the Bill that was presented in the Senate, and Taft's lobbying for the 1925 Bill possessed one central aim: "to increase the policymaking capacity of the federal judiciary, and of the Supreme Court in particular."[240] Buchman adds:

> Taft sought to give the Court full control over its docket not only to reduce the Court's workload, but also to transform the Court's fundamental purpose within the federal judicial hierarchy. Instead of serving primarily as the federal court of last resort, charged with correcting lower court's errors and vindicating the rights of particular litigants, the Court would become a tribunal whose significance would rest in its power to rule on issues of great legal or political significance to the public at-large, to supervise the federal judicial

234. Anthony Lester, *The Magnetism of the Human Rights Act 1998*, 33 VICT. U. WELLINGTON L. REV. 477, 481-82 (2002).

235. Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1, 1-3 (1928).

236. Buchman, *supra* note 233, at 2.

237. *See id.*

238. *Id.* at 1.

239. *Id.* at 2.

240. *Id.* at 10.

> hierarchy, and to ensure uniformity throughout the system.[241]

Examining the role of the Court in American politics today, it is difficult to conclude this change was insignificant. The Court as a national policymaker seems widely accepted, if not uncontested.[242]

As dramatic and potentially inappropriate as the above example would be considered today—with a Chief Justice actively lobbying for reforms—contemporary campaigns to increase the policymaking capacity of courts can be seen in other jurisdictions. For instance, senior judges in the United Kingdom openly lobbied to domesticate the European Convention on Human Rights (ECHR), a change that undoubtedly increased the policymaking capabilities of domestic U.K. courts.[243]

As a sitting Appeal Court judge, Lord Scarman gave the 1974 Hamlyn Lectures,[244] which "presented a full and cogent case" for domesticating the ECHR.[245] Scarman's lectures were a major intervention, and in 1976, the Labour Party published *A Charter of Human Rights*, which advocated incorporating the ECHR into domestic law—the first time the Party had officially done so.[246] In 1985, just before he retired from being a Lord of Appeal in Ordinary in the House of Lords (at the time, the United Kingdom's highest court), Lord Scarman introduced a Bill in the House of Lords to domesticate the ECHR.[247] The measure ended up passing the Lords, but it fell in the Commons.[248] Lord Scarman, however, was not the only judge advocating for incorporation of the Human Rights Act.[249]

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241. Buchman, *supra* note 233, at 10.

242. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 275, 275, 281 (1957).

243. Lester, *supra* note 234, at 481-82.

244. Leslie Scarman, *English Law: The New Dimension*, *in* 26 THE HAMLYN LECTURES 1, 88 (1974).

245. STEPHEN SEDLEY, LAW AND THE WHIRLIGIG OF TIME 208-09 (2018); *see also* FRANCESCA KLUG, VALUES FOR A GODLESS AGE: THE STORY OF THE UK'S NEW BILL OF RIGHTS 153, 156-57 (2000).

246. KLUG, *supra* note 245, at 156.

247. SEDLEY, *supra* note 245, at 208.

248. *Id.*

249. Indeed, Lord Scarman did not just stop at promoting a human rights charter. In 1992, he advocated that Britain should have a written constitution. Leslie Scarman, *Why*

In 2002, Lord Lester revealed that senior judges supported his 1994 Private Members' Bill to incorporate the ECHR and even gave him advice on how a future version should be drafted, noting the Bill should not allow the judiciary to strike down Acts of Parliament.[250] Additionally, in a celebrated maiden speech as Lord Chief Justice in 1996, Lord Bingham—who served on the United Kingdom's highest court from 2000-2008—also stressed the need for domestication of the ECHR, noting "the convention is not part of our domestic law" and that "[t]he courts have no powers to enforce convention rights directly."[251] Further, a number of academic articles by senior judges around this time argued for the incorporation of the ECHR or other fundamental aspects into the U.K. constitution.[252] Thus, although it would be incorrect to say that senior members of the judiciary were "leading" the charge for domestication of the ECHR, it would also be incorrect to say that they sat idly by to see what transpired or that the judiciary was merely "handed" these powers from Parliament. After all, prominent senior judges were advising on the drafting of bills, making prominent public speeches, and writing in law review articles for the incorporation of something that would undoubtedly expand their power and increase their policymaking capacity.

Finally, it is important to emphasize that judicial policymaking capacity only travels one way: towards further expansion. Although some courts or judges may prove more deferential than others, that does not mean that their jurisdiction or ability to rule on controversial issues has been diminished.

Britain Needs a Written Constitution, CHARTER 88 TR. PUBL'NS (1992), *reprinted in* 19 COMMW. L. BULL. 317, 317-18 (1993).

250. Lester, *supra* note 234, at 482. He identifies these judges as the following: "Lord Taylor of Gosforth, Lord Browne-Wilkinson, and [then] present Lord Chief Justice, Lord Woolf of Barnes." *Id.*

251. HL Deb (3 July 1996) (573) cols. 1465-67.

252. DANNY NICOL, EC MEMBERSHIP AND THE JUDICIALIZATION OF BRITISH POLITICS 237-38 (2001).

B. The Implementation and Expansion of Written Constitutions and Bills of Rights

The world currently has more written constitutions than ever, longer and more detailed constitutions than ever, more articulation of rights (civil, social, cultural, and economic) than ever, and wider enforcement by constitutional courts than ever.[253] And yet, as this post-World War II explosion of constitutional writtenness has come about,[254] democratic disaffection throughout the world has increased significantly.[255] In addition to the effects of constitutional expansion, questions about the efficacy of bills of rights continue to arise, with some authors demonstrating that the articulation of rights provisions does not automatically lead to enhanced protection of enumerated rights.[256] These developments beg the question: has the constitutional pendulum swung too far in favor of law and legal processes and away from politics and political resolution?

In some sense written constitutions have always had a contentious relationship with democracy.[257] Even the authors of the American Constitution, the document which allegedly ushered in the idea of "We the People," celebrated the fact that the people had no formal share in government.[258] And it is no secret that constitutional designers past and present attempt to protect the state from the passions of the political realm.[259] This

253. On the increasing length and detail of written constitutions, see Tom Ginsburg, *Constitutional Specificity, Unwritten Understandings and Constitutional Agreement*, *in* CONSTITUTIONAL TOPOGRAPHY: VALUES AND CONSTITUTIONS 69, 72, 88 (András Sajó & Renáta Uitz eds., 2010). On the increasing number of written constitutions, see *Data Visualizations*, *supra* note 92. See *supra* Section IV.A, for a discussion of the expanding jurisdiction of constitutional courts.

254. *See Data Visualizations*, *supra* note 92.

255. *See* WIKE ET AL., *supra* note 40, at 5.

256. *See* ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER 60 (2020).

257. *See* ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 15, 20 (2d ed. 2003); ALLAN C. HUTCHINSON, DEMOCRACY AND CONSTITUTIONS: PUTTING CITIZENS FIRST 37-39, 52 (2021).

258. *See, e.g.*, George Thomas, *The Madisonian Constitution, Political Dysfunction, and Polarized Politics*, *in* PARCHMENT BARRIERS, *supra* note 132, at 15, 18.

259. *See* Martin Loughlin, *The Contemporary Crisis of Constitutional Democracy*, 39 OXFORD. J. LEGAL STUD. 435, 452 (2019) ("The ambition and ambiguity of modern constitutional documents is remarkable. Drafted in the name of the people, they are

is not to say that written constitutions are inherently anti-democratic in nature but to acknowledge that many features of written constitutions, and the idea of constitutionalism more generally, are in tension with democracy and always have been.

Post-World War II developments enhanced these tensions. The further implementation of written constitutions around the world and the widespread adoption of constitutional supremacy was performed not merely "to tie policy to law" but to also "subordinate it to law."[260] The subordination of policy (i.e., politics, legislation, etc.) appears to be one of the main goals of contemporary constitutionalism, with law (i.e., constitutions, rights, fundamental values, etc.) moving into a superior position above politics and the political realm. Whatever effects on democratic government these arrangements may allegedly provide (e.g., enhanced protection of rights, better scrutiny of government policy, more reasoned decision-making processes in government, etc.), it is unavoidable that the power of the democratic vote, and indeed the power of those with the closest connection to the people—representatives—are decreased.[261]

Of course, some may quibble with constitutions and bills of rights being listed as elements of democratic distancing, especially given that many of these documents begin with "We the People." But the idea of citizens being the "supreme authority" has always been problematic.[262] As I have argued elsewhere,[263] contemporary "We the People" constitutions do not provide increased powers to citizens, and they intentionally devalue politics and the political process by lowering the status of legislators and statutes.[264] There is little doubt that implementation of these devices has changed the way that

presented as instruments of settlement, whilst incorporating multiple techniques of evasion.").

260. Limbach, *supra* note 124, at 7.

261. *See* JONES, *supra* note 92, at 58-59, 69-73.

262. Indeed, this may very well be a fiction. *See, e.g.*, EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 56-60, 65 (1989).

263. JONES, *supra* note 92, at 86.

264. Limbach, *supra* note 124, at 1 ("[T]he supremacy of the constitution means the *lower ranking* of statute; and that at the same time implies the *lower ranking* of the legislator.").

decisions on constitutional government operate from a more political structure to a more legal structure, without guaranteeing positive social change will take place or that better decisions will be made.[265] Nowadays, it is not uncommon to find unamendable eternity clauses in constitutions;[266] and if these are not present in the written constitution, judges may feel the need to determine for themselves which parts of the constitution are "unamendable."[267] Further, explicit statements that judicial rulings are final and incontestable by the political realm are common and expected nowadays, and it is also not uncommon for apex courts to reject constitutional amendments that have gone through proper amendment procedures.[268] These developments provide a strange juxtaposition to those advocating contemporary "We the People" constitutions and still championing citizens as the ultimate authority.

The increase in the number, length, and detail of written constitutions around the world, which has happened in conjunction with increasing levels of democratic disaffection, is impossible to ignore. At the very least, such changes raise serious questions as to whether the pendulum may have swung too far in one direction.

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265. For the classic text in relation to the futility of law and courts to bring about social change, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 420-22 (2d ed. 2008). In relation to Canada's experience, for example, see Peter H. Russell, *The Political Purposes of the Canadian Charter of Rights and Freedoms*, 61 CAN. BAR REV. 30, 49-52 (1983).

266. Basic Law for the Federal Republic of Germany has a number of these. Änderung des Grundgesetzes [Amendment of Basic Law], May 8, 1949, BGBI I at 968, art. 79(3) (Ger.), translation at [https://perma.cc/A5QA-LGPX] ("Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.").

267. This is often referred to as the "basic structure" doctrine. As it regards judges feeling the need to do this themselves, this recently happened in Kenya. *See* Ndii v. Att'y Gen. [2021] K.L.R. 9746 (H.C.K.).

268. Regarding courts rejecting constitutional amendments, see Yaniv Roznai, Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers (Feb. 2014) (Ph.D. dissertation, London School of Economics and Political Science) [https://perma.cc/CT9P-L72L]; RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 1-4 (2019).

C. Judicial Regionalism and Supra-National Jurisdictions

The expansion of regional and supra-national courts contained noble origins: they would serve as recognized tribunals that could handle the most serious and difficult cases the world confronted.[269] But the development of some of these courts has drifted far from these virtuous beginnings. The establishment of regional and supra-national courts has provided a structure whereby ordinary decisions taken by national political actors are being questioned or second-guessed by judges far removed from domestic politics.[270] As evidenced by court caseloads, the dockets of regional and supra-national courts are not merely focused on the most significant human rights abuses or the most grievous breaches of law.[271] Additionally, some regional and supra-national structures have strengthened their commitment to legal-only procedures and solutions, while spurning political processes and resolutions.[272] As these courts have come into being and evolved, democratic disaffection has evolved alongside them.

One of the most significant examples of court development traversing into the political arena comes from the European Court of Human Rights (ECtHR).[273] Originally conceived as a venue that would focus on major breaches of human rights from around Europe, the court has developed into what some now consider the "Supreme European Court"[274] and "one of the world's most

269. *See* Hermann Mosler, *Supra-National Judicial Decisions and National Courts*, 4 HASTINGS INT'L & COMPAR. L. REV. 425, 426-28 (1981).

270. *Id.* at 460-61.

271. *See, e.g.*, Richard H. Pildes, *Supranational Courts and the Law of Democracy: The European Court of Human Rights*, 9 J. INT'L DISP. SETTLEMENT 154, 162-75 (2017) (discussing claims the court has faced concerning democratic rights).

272. Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 LAW & CONTEMP. PROBS. 141, 171 (2016).

273. The court explicitly adjudicates on whether certain changes are "necessary in a democratic society," where a political perspective may not just prove valuable but essential. Pildes, *supra* note 271, at 164-65.

274. Mikael Rask Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, 32 LAW & SOC. INQUIRY 137, 137, 139-40 (2007).

influential and effective" institutions.[275] Growth of the court's docket has been nothing short of staggering. From 1960-1975, the court delivered eighteen judgments in total, or just over one judgment per year.[276] This rose to about fourteen per year from 1976-1985.[277] From 1990-1999, the court delivered 809 judgments, or about eighty-one per year.[278] But from 2000-2014, the court delivered 16,740 judgments, or 1,116 per year.[279] The most recent statistics suggest the court delivers close to 2,000 judgments per year.[280] While the ECtHR possesses honorable intentions, its current operation appears quite far from what members originally signed up for, and its continued operation could be displacing, not improving, national politics.

The ECtHR's enforcement mechanisms have also transformed since its establishment. Originally, the Council of Europe contained a Human Rights Commissioner that served as the court's gatekeeper.[281] The main focus during this time was to find "[f]riendly settlements" "on the basis of respect for human rights."[282] The 11th and 14th Protocols significantly changed the enforcement of the Convention into a highly legal exercise. They eliminated the Human Rights Commission and instituted a full-time court that sat in a number of forms.[283] States were also obligated to accept the court's compulsory jurisdiction, which

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275. JANNEKE GERARDS, GENERAL PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1 (2019). However, the effectiveness of the ECtHR is also up for debate, as scholars have noted that non-execution of the court's judgments is a distinct problem. *See, e.g.*, Fiona de Londras & Kanstantsin Dzehtsiarou, *Mission Impossible? Addressing Non-Execution Through Infringement Proceedings in the European Court of Human Rights*, 66 INT'L & COMP. L.Q. 467, 469-70 (2017).

276. Madsen, *supra* note 272, at 154 fig.1.

277. *Id.*

278. *Id.* at 160 fig.3.

279. *Id.*

280. *See* EUR. CT. OF HUM. RTS., STATISTICS 2020 (2021), [https://perma.cc/QYS4-LSLR].

281. Helen Keller & Alec Stone Sweet, *Assessing the Impact of the ECHR on National Legal Systems*, *in* A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 677, 706-07 & n.63 (Helen Keller & Alec Stone Sweet eds., 2008).

282. *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 28, Nov. 4, 1950, E.T.S. No. 005 (currently Article 39).

283. *See* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, E.T.S. No. 155; Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 13, 2004, E.T.S. No. 194.

was previously voluntary.[284] These changes fully legalized Europe's operation of human rights protection, thus eliminating its most significant political elements.

Scholars believe that the court has profoundly, even "radically," affected some of its member states.[285] If this is the case, then some major issues linger, such as how these courts are affecting the perception and operation of democracy around the world. Although the goals of regional or supra-national courts may be honorable—to increase human rights protection among member states—the fact that increased human rights enforcement has not led to increased satisfaction with the operation of democratic government remains highly problematic. Indeed, it seems that increasing rights adjudication may not be bringing citizens together but tearing them apart.[286] For example, the United Kingdom currently has less than 0.2% of the pending cases before the ECtHR and has also had significantly fewer violations than in years past.[287] But many rights advocates still decry the lack of an elusive "human rights culture" within the United Kingdom,[288] and some even assert the United Kingdom is "abandoning human rights."[289] Ultimately, if over seventy years of Council of Europe membership and two-plus decades of domestic human rights enforcement has not yet created the "new and better relationship between the Government and the people" that was desired upon passage of the Human Rights Act 1998,

284. Keller & Sweet, *supra* note 281, at 678-79.

285. *Id.* at 677.

286. This claim has recently been made at the domestic level. *See, e.g.*, JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART, at xiv-xxi, 163 (2021); *see also* LOUIS MICHAEL SEIDMAN, FROM PARCHMENT TO DUST: THE CASE FOR CONSTITUTIONAL SKEPTICISM 4 (2021) ("[T]he Constitution encourages Americans to formulate ordinary political disputes in terms of 'rights' that are absolute and nonnegotiable. The tendency exacerbates political tension and obstructs authentic dialogue that actually has the potential to persuade participants. It is driving the country toward irreparable fissure.").

287. U.K. MINISTRY OF JUST., RESPONDING TO HUMAN RIGHTS JUDGEMENTS 10 (2020), [https://perma.cc/UQ3Q-72XN].

288. In fact, this point was made by the Joint Committee on Human Rights itself. JOINT COMMITTEE ON HUMAN RIGHTS, ENFORCING HUMAN RIGHTS, 2017-19, HC 669, HL 171, ¶¶ 133-64 (UK).

289. Kate Hodal, *UK's 'Headlong Rush into Abandoning Human Rights' Rebuked by Amnesty*, GUARDIAN (Apr. 7, 2021, 1:01 AM), [https://perma.cc/XPK6-CFRQ].

then one wonders whether it will ever do so.[290] For all the ECtHR's successes, a strong argument could be made that, since its implementation, an increasingly tenuous and distrustful relationship between government and the people has been cultivated.

D. Citizens' Lack of a Role in Burgeoning Constitutional Adjudication

On July 11, 1789, Thomas Jefferson wrote to Thomas Paine that he considered trial by jury "the only anchor, ever yet imagined by man, by which a government can be held to the principles of it's [sic] constitution."[291] Almost two centuries later in the U.K. context, Lord Devlin called trial by jury "more than one wheel of the constitution: it is the lamp that shows that freedom lives."[292] And yet presently, any form of trial by jury in relation to constitutional adjudication is non-existent. There is no anchor, nor lamp.

Citizens' role in constitutional adjudication begins and ends with an individual or interest group bringing a case to court. And courts—especially apex courts—operate on majoritarian voting procedures.[293] As constitutional adjudication has grown in strength and volume throughout the world—and even as constitutional cases have become increasingly political in nature and more explicitly focused on democracy—no role for citizen participation has been identified or allowed.[294] Adjudicative processes for constitutional, administrative, and human rights

290. LEGISLATING FOR HUMAN RIGHTS: THE PARLIAMENTARY DEBATES ON THE HUMAN RIGHTS BILL 3 (Jonathan Cooper & Adrian Marshall-Williams eds., 2000).

291. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), [https://perma.cc/7MTD-CCZL].

292. PATRICK DEVLIN, TRIAL BY JURY 164 (1956).

293. Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692, 1692 (2014) (also published in Chapter 10 of JEREMY WALDRON, POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS (2016)).

294. Regarding the rise of judicial review throughout the world, see 1 STEVEN GOW CALABRESI, THE HISTORY AND GROWTH OF JUDICIAL REVIEW: THE G-20 COMMON LAW COUNTRIES AND ISRAEL 3 (2021); 2 STEVEN GOW CALABRESI, THE HISTORY AND GROWTH OF JUDICIAL REVIEW: THE G-20 CIVIL LAW COUNTRIES 1 (2021).

issues remain entirely judge-led.[295] This is true both at the national level and also the supra-national level, as identified in the section above.[296] But, given the slumping levels of civic participation worldwide, should there not at least be attempts to insert the public more into constitutional adjudication?

The situation in relation to constitutional adjudication sits in marked contrast to the development of other areas of law, such as criminal, where citizen participation has been highly valued in legal systems throughout the world. As Sanford Levinson points out, trial by jury "meant that 'We the People' would have yet another check on potentially unscrupulous or overreaching prosecutors."[297] Why should the same principle not apply to apex court judges, especially those that openly invite political issues to be resolved in the courtroom? Given the way constitutional adjudication is currently set up in many countries, the people have little say on what issues should remain in the political realm and what issues should be pushed to the legal realm.[298] Some may argue that constitutional amendments provide this role, but this idea is seriously flawed. Having to employ constitutional amendment procedures to reverse a decision by an apex court seems an overly dramatic hurdle that may discourage citizens from participating in constitutional politics, not least because of the excessively high barriers to amendment, but also because the apex court may just eventually reject it (even if the amendment passes).

As constitutional adjudication has grown by leaps and bounds over the past few decades, providing judiciaries immense powers within many constitutional democracies, no enhanced role for the people has developed within it. But if constitutional adjudication is going to remain an essential feature of

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295. *See The Court and Constitutional Interpretation*, *supra* note 171; BEN HARRINGTON & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R46930, INFORMAL ADMINISTRATIVE ADJUDICATION: AN OVERVIEW (2021); U.N. Human Rights Office of the High Commissioner, Basic Principles on the Independence of the Judiciary (Sept. 6, 1985), [https://perma.cc/RWU7-7SPJ].

296. *See supra* Section IV.C.

297. SANFORD LEVINSON, AN ARGUMENT OPEN TO ALL 316 (2015).

298. *See* ANDREW HARDING, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, *The Fundamentals of Constitutional Courts* 1-2 (2017), [https://perma.cc/YW9U-WMAV].

constitutional government going forward, then finding a suitable role for the people—be that through jury trials or some other mechanism—is essential.[299]

E. Can Democratic Distancing Be Stopped?

The allure of distancing is powerful, and for many its aims are completely legitimate: democracies must be protected from the debilitating whims of the electorate or from the passion of politics more generally. But how much distancing can take place before democracy becomes ineffective or potentially even obsolete, and has the balance swung too far in one direction? Continually shifting governmental decision-making outside of popular control to depoliticized non-majoritarian institutions may have opened up "a space that lends itself readily to exploitation by populist parties of both the right and the left."[300] This begs the question as to whether there is a point where democratic distancing becomes no longer useful, but even harmful.

One of the interesting things that Roberts points out in his logic of discipline study is that all the entities that were removed from the democratic sphere (e.g., central banking, fiscal rules, port authority, etc.) eventually had to adopt political strategies in order to survive.[301] Thus, although they were supposedly removed or detached from politics, they all ended up either working closely with politics and politicians or adopting overtly political strategies into their operations. This should come as no surprise to legal scholars. As courts have grown in power and stature since WWII, and as many political issues have been turned into legal or constitutional issues, judiciaries around the world have adopted overtly political strategies. For example, many scholars in the American context justify the overwhelming power of the Supreme Court by saying that it rarely departs from the

299. Loughlin, *supra* note 259, at 453 ("Remedies must be considered that take seriously the need to reinvigorate democratic aspirations. . . . A more balanced appraisal might therefore enquire into the evident deficiencies of the workings of many counter-democratic institutions and take seriously a conception of democracy as a social and cultural practice rather than a mere mechanism for choosing leaders.").

300. MAIR, *supra* note 5, at 137.

301. *See* ROBERTS, *supra* note 101, at 13-17.

views of the general public.[302] Toeing this line provides the Court a sense of legitimacy, but it also displays that the Court is unable to go against political opinion without risking its legitimacy and institutional position. Such strategies also abound in the international court context. Scholars have demonstrated that regional human rights courts are strategic in the way they deliver their judgments, often thinking about things such as when judgments will cause less controversy or when an issue has faded from the political radar.[303] Thus, when push comes to shove regarding many of these non-political or newly independent entities, what we often see is overtly political methods being adopted or some type of explicit or benign alignment with the political class. Some may say that this demonstrates the influence of the political realm has been sustained. Conversely, it may also make one question why these items were removed from the political realm to begin with.

Another interesting parallel between the depoliticizing measures in the economic realm and the democratic distancing provided by the legal realm has been the lack of evidence that these changes have improved performance. As Hay notes, "There is no statistically significant correlation between the granting of independence and improved anti-inflationary performance."[304] This is similar to what has been found in the legal realm regarding the expansion and protection of rights, which have become highly judicialized in recent years. There seems to be no solid or consistent evidence that the move from the political to the judicial realm has increased protections.[305] In fact, some scholars have been highly critical of the overfocus on human rights, noting that "politics has become obsessed *with the protection of human rights to the detriment of any focus on human responsibilities* across a range of dimensions (e.g. to the planet, to other species, or to future generations)."[306]

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302. *See* FRIEDMAN, *supra* note 192, at 4; William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 87, 96-97 (1993).

303. *See* Madsen, *supra* note 274, at 155-57.

304. HAY, *supra* note 5, at 117 (citation omitted).

305. *See* CHILTON & VERSTEEG, *supra* note 256, at 11.

306. FLINDERS, *supra* note 5, at 132 (emphasis added).

Although law has not led the charge in terms of democratic distancing, it has adopted and applied—and therefore furthered—similar depoliticization measures that have arisen within other realms, such as economics.[307] And beyond this, law has also embraced something more sinister: a depiction of the public realm that takes an extremely depressing view of human nature. It views ordinary individuals and the politicians that represent them as dangerous: either they are entirely self-interested and neglect their public duties, or they are debilitated by passions that need to be tamed.[308] And if these people are not acting in self-interest or overcome with emotion, then they are portrayed as ignorant and stupid.[309] This view of the political realm is inaccurate and unacceptable. As Bernard Crick once wrote, "To renounce or destroy politics is to destroy the very thing which gives order to the pluralism and variety of civilized society, the thing which enables us to enjoy variety without suffering either anarchy or the tyranny of single truths . . . ."[310]

Even a cursory look at judicial operation from a comparative perspective demonstrates that "if there were otherwise any doubt . . . the law is applied by human beings some of whom suffer from all the prejudices, vanities and irrationalities common to our species."[311] Ultimately, attempting to renounce the political realm or depoliticize issues because of the supposed dangers present in the political realm does not remove those dangers; it simply camouflages them.

V. ACCEPTING LAW'S ROLE IN DEMOCRATIC DISAFFECTION

Acknowledging that law and legal processes have contributed to democratic disaffection does not absolve the political realm of its pathologies and mistakes, nor does it condemn the legal realm's contributions to upholding and

307. *See supra* notes 91-94 and accompanying text.

308. *See supra* text accompanying notes 95-99, 116-22.

309. *See* HOLMES, *supra* note 116, at 6, 135.

310. BERNARD CRICK, IN DEFENCE OF POLITICS 26 (4th ed. 1992).

311. DAVID PANNICK, I HAVE TO MOVE MY CAR: TALES OF UNPERSUASIVE ADVOCATES AND INJUDICIOUS JUDGES 4 (2008).

furthering democracy and democratic practices. But acknowledging that law is intimately connected to the political realm, and that its outputs can and do affect not just the practicalities or procedures of the elected branches but also the attitudes and feelings citizens possess towards these branches, is something legal professionals (i.e., judges, lawyers, law professors, etc.) must recognize and accept. Law and legal processes may not be the primary drivers of anti-political sentiment, but it would be mistaken to say they do not contribute to it.

Investigations into the rise of democratic disaffection have produced fascinating insights into the evolution and operation of democracy. The phenomenon is certainly complex, and it seems increasingly clear "that there is unlikely to be a single explanation for the declines in" participation seen around the world.[312] As one prominent scholar has noted, "we have to look elsewhere for plausible explanations."[313] Unfortunate as it may be for some to acknowledge, law and legal processes are likely part of democratic disaffection's story. Although law can uphold and enhance democracy and democratic practices,[314] it may also damage and undermine the political realm in various ways.[315] Democratic distancing by judiciaries and the increasing subordination of politics to law have produced very real effects. As Mair points out, some already identify and advocate for democracy under the following formula: "*NGOs (non-governmental organizations) + judges = democracy*."[316] The public vote—and the political realm more generally—is nowhere to be found in this bleak blueprint. Perhaps this view corresponds to the "postelectoral era" that Benjamin Ginsberg and Martin Shefter described before the turn of the century.[317] But if "having governments that pay attention is the aim and constant effort of

312. DALTON, *supra* note 5, at 78.

313. Newton & Norris, *supra* note 76, at 59.

314. *See supra* Section III.B.

315. *See supra* Section III.A.

316. MAIR, *supra* note 5, at 11.

317. BENJAMIN GINSBERG & MARTIN SHEFTER, POLITICS BY OTHER MEANS: THE DECLINING IMPORTANCE OF ELECTIONS IN AMERICA 1 (1990) (emphasis omitted).

democracy,"[318] then too much displacement will make this much-needed attention increasingly unlikely.

Compared to the views of early theorists, the judiciary's trajectory within constitutional government has been nothing short of remarkable. Today, judicial power around the world is far from "next to nothing."[319] Indeed, the power of judgment has proven to be a resilient if not extraordinary institutional quality that rivals or even supersedes force or will, and that can highly influence and affect the political realm. This has been especially true in recent decades, as constitutional supremacy has tried—and in many cases succeeded—to subordinate politics and the political realm.[320] Law and courts have displayed some of the same pathologies found elsewhere. Just as economists worked to "depoliticize" the public realm and establish economic theocracies based on technocrat guardians,[321] so too has law and the legal realm risked asserting its place above politics as the more principled, more thoughtful, and less chaotic realm. Additionally, just as technocrat guardians were asserted as the main players in the economic realm, so-called "constitutional guardians" (i.e., constitutional and supreme court judges) have been implemented in the legal realm, tasked with wide powers to police the entire constitutional state.[322] Far from helping solve the intractable problems located in the political realm, these developments have merely led to the displacement of politics and further distancing of citizens from the idea of self-government.[323]

Given the inseparable relationship between law and politics—including their intimate connection to the operation of government—both realms should be attempting to ennoble, not displace, one another. After all, "diverse groups hold together, firstly, because they have a common interest in sheer survival and, secondly, because they practice politics—not because they agree about 'fundamentals', or some such concept too vague, too

318. ROBERT TOMBS, THIS SOVEREIGN ISLE: BRITAIN IN AND OUT OF EUROPE 151 (2021).

319. MONTESQUIEU, *supra* note 2, at 156.

320. *See supra* text accompanying notes 260-61.

321. *See* ROBERTS, *supra* note 101, at 139.

322. JONES, *supra* note 92, at 131-57.

323. *See supra* Sections IV.A, IV.B, IV.C, IV.D.

personal, or too divine ever to do the job of politics for it."[324] There is little doubt that, at this point in history, the political realm needs ennobling more than ever, and certainly more than the legal realm. Attempting to further subordinate politics to law or further depoliticizing governmental decision-making will not end constitutional tumult. Indeed, this "widening gap between rulers and ruled has facilitated the often strident populist challenge" increasingly present in many democracies.[325]

Law and democracy can coexist without never-ending battles for supremacy and the subordination of the other realm. But that assumes that we still want to live in democracies.[326] And if we do, then it seems clear that now—perhaps more than any time in history—politics needs ennobling, not simply degradation.

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324. CRICK, *supra* note 310, at 24.

325. MAIR, *supra* note 5, at 19.

326. SILVA-LEANDER, *supra* note 6, at 1; ("The number of countries moving in an authoritarian direction in 2020 outnumbered those going in a democratic direction."); *see also* Noam Lupu et al., *Would Americans Ever Support a Coup? 40 Percent Now Say Yes*, WASH. POST (Jan. 6, 2022, 7:45 AM), [https://perma.cc/3LFU-HPE3]; BLACKWELL ET AL., *supra* note 55, at 5 (54% of those surveyed in the 2019 Audit said that Britain needs "a strong leader who is willing to break the rules").

JUSTICE FOR DOGS

Alexander J. Lindvall*

The more I learn about people, the more I like my dog.
—Mark Twain[1]

I. INTRODUCTION

On June 29, 2019, Wendy Love and Jay Hamm pulled their truck into a vacant parking lot in Loveland, Colorado, to let their three dogs stretch and drink some water.[2] A few moments later, Loveland Police Officer Matthew Grashorn pulled into the parking lot to investigate them for trespassing.[3] After Officer Grashorn exited his vehicle, the couple's fourteen-month-old puppy, Herkimer, ran up to greet the officer.[4]

Herkimer wasn't threatening.[5] He wasn't intimidating.[6] And he clearly didn't pose a threat to the officer or anyone else.[7] He was a puppy coming up to say hello. Nonetheless, as Herkimer approached, Officer Grashorn drew his firearm and shot Herkimer in the head and chest.[8] "You just killed my baby! Why did you have to shoot him? He's a puppy!" the owners

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1. *Mark Twain Quotes*, GOODREADS, [https://perma.cc/E6HV-HRXY] (last visited Oct. 7, 2022).

2. Andrea Salcedo, *Body-Cam Footage Shows Police Shoot a 'Playful' Puppy: 'He was Curious and Excited to Greet This Officer'*, WASH. POST (Aug. 27, 2021, 6:27 AM), [https://perma.cc/2DP4-Y6PT].

3. *See id.*

4. *Id.*

5. *See* Sarah Schielke, *Loveland Cop Surprises Family, Shoots Their Dog in Broad Daylight*, YOUTUBE (Aug. 25, 2021), [https://perma.cc/73T2-VD5Q].

6. *See id.*

7. *See id.*

8. Dillon Thomas & Michael Abeyta, *Civil Lawsuit Filed Against Loveland Police Officer Seen on Video Shooting Dog 2 Years Ago*, CBS NEWS COLO. (Aug. 26, 2021, 8:46 AM), [https://perma.cc/NPB4-DJ7G].

pleaded, tears streaming.[9] "Maybe you ought to have your dogs in your truck then!" the officer yelled back.[10]

As Herkimer laid there in the parking lot, bleeding and whimpering, his owners pleaded with the officer to let them take him to the vet.[11] "You're not going to be able to help him," the officer replied.[12] "Why did you have to shoot? You should have shocked him," one owner exclaimed.[13] "Yeah, thanks for telling me how to do my job," he replied.[14] The officer did not let them take Herkimer to the vet.[15] Instead, he charged them with a "dangerous dog" offense (which was later dropped by the local prosecutor's office).[16] Herkimer was euthanized a few days later.[17] The Loveland Police Department investigated the shooting and ultimately determined that the officer acted appropriately.[18] Love and Hamm subsequently sued Officer Grashorn and the City of Loveland for violating their constitutional rights.[19]

This is an atrocious act of police misconduct. One of the quickest ways to erode the public's trust in law enforcement is to let police officers kill family pets without consequences. These dog owners deserve to win their lawsuit—and this Essay will explain why they likely will.

This Essay summarizes the Fourth Amendment's protection of dogs. The Fourth Amendment protects people from unreasonable seizures.[20] And nearly every circuit has held that it is unreasonable (and therefore unconstitutional) for an officer to shoot (seize) a dog without a very good reason.[21] Killing a

9. Schielke, *supra* note 5.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. Schielke, *supra* note 5.
15. *Id.*
16. Salcedo, *supra* note 2.
17. *Id.*
18. *Id.*
19. Michael Karlik, *No Immunity for Loveland Cop Who Shot Puppy*, GAZETTE (Oct. 4, 2022), [https://perma.cc/TW9F-FT7R].
20. U.S. CONST. amend. IV.
21. *See, e.g.*, Maldonado v. Fontanes, 568 F.3d 263, 270-72 (1st Cir. 2009); Carroll v. Cnty. of Monroe, 712 F.3d 649, 651 (2d Cir. 2013); Brown v. Muhlenberg Twp., 269 F.3d 205, 210-11 (3d Cir. 2001); Brown v. Battle Creek Police Dep't, 844 F.3d 556, 566-67 (6th

nonthreatening family pet is one of the most egregious forms of police misconduct. The courts rightfully recognize that the unjustified harming of a dog violates the Fourth Amendment.[22] My hope is that this Essay will help civil-rights attorneys whose clients have lost their pets to police misconduct.

II. CASELAW

The First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits have recognized that it is unconstitutional for a police officer to shoot a nonthreatening dog.[23] Multiple district courts have also reached the same conclusion.[24] This Section summarizes some of the most instructive cases.

In *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, the Ninth Circuit held that the San Jose police acted unconstitutionally when they killed three dogs while executing pre-planned warrants.[25] The officers had been planning to execute high-risk search warrants at several residences owned by members of the Hells Angels Motorcycle Club.[26] Although the officers knew there were guard dogs at these residences, they "developed no realistic plan other than shooting the dogs while serving the search warrants."[27] The officers, in other words,

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Cir. 2016); Viilo v. Eyre, 547 F.3d 707, 710 (7th Cir. 2008); Andrews v. City of West Branch, 454 F.3d 914, 916 (8th Cir. 2006); San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962, 976-78 (9th Cir. 2005); Mayfield v. Bethards, 826 F.3d 1252, 1257-59 (10th Cir. 2016); Robinson v. Pezzat, 818 F.3d 1, 7-8, 11-12 (D.C. Cir. 2016).

22. *See, e.g.*, *Brown*, 844 F.3d at 566-67; *Hells Angels*, 402 F.3d at 977-78.

23. *Maldonado*, 568 F.3d at 270-72; *Carroll*, 712 F.3d at 651-52; *Brown*, 269 F.3d at 210-11; *Brown*, 844 F.3d at 566-67; *Viilo*, 547 F.3d at 710; *Andrews*, 454 F.3d at 918; *Hells Angels*, 402 F.3d at 976-78; *Mayfield*, 826 F.3d at 1257-59; *Robinson*, 818 F.3d at 7-8, 11-12.

24. *E.g.*, Silva v. City of San Leandro, 744 F. Supp. 2d 1036, 1057-58 (N.D. Cal. 2010); Bateman v. Driggett, No. 11-13142, 2012 WL 2564839, at *7 (E.D. Mich. July 2, 2012); Taylor v. City of Chicago, No. 09 CV 7911, 2010 WL 4877797, at *1-3 (N.D. Ill. Nov. 23, 2010); Gaulden v. City of Desloge, No. 4:07CV01637, 2009 WL 1035346, at *12 (E.D. Mo. Apr. 16, 2009); Kincheloe v. Caudle, No. A-09-CA-010, 2009 WL 3381047, at *7-8 (W.D. Tex. Oct. 16, 2009).

25. 402 F.3d at 965, 977-78.

26. *See id.* at 966-69.

27. *See id.* at 976.

planned to kill several dogs on private property without any notice or warning to the owners.[28]

The Ninth Circuit found that these premeditated dog killings violated the Fourth Amendment.[29] Because the officers did not create (or even contemplate) a nonlethal plan to control the guard dogs, the court found that these killings (seizures) were unreasonable under the Fourth Amendment.[30] And the court went on to withhold qualified immunity from these officers, holding that "[a] reasonable officer should have known that to create a plan to enter the perimeter of a person's property, knowing all the while about the presence of dogs on the property, without considering a method for subduing the dogs besides killing them, would violate the Fourth Amendment."[31]

The *Hells Angels* decision shows that the courts do not consider dead dogs to be justified "collateral damage" of police work. The police cannot, as a matter of course, kill dogs while executing a search warrant—even large dogs guarding a known-to-be-dangerous motorcycle gang. To comply with the Fourth Amendment, the police must, at a minimum, develop a realistic plan to avoid killing dogs during the execution of a search warrant.[32]

Similarly, in *Andrews v. City of West Branch*, the Eighth Circuit held that an officer violated the Fourth Amendment when he shot a dog because (a) the dog was in a fenced-in area, (b) it did not pose an imminent threat to anyone, and (c) the dog's owner was nearby and capable of restraining the dog.[33] In *Andrews*, a resident called the police to complain about "a large black dog" that had been terrorizing her neighborhood and bothering other dogs.[34] The responding officer drove to the neighborhood to search for the dog.[35] He "spotted, then lost sight of, the loose dog several times."[36] He eventually came across a

28. *See id.* at 976, 977.
29. *See id.* at 977-78.
30. *See Hells Angels*, 402 F.3d at 976-78.
31. *See id.* at 978.
32. *See id.*
33. *See* Andrews v. City of West Branch, 454 F.3d 914, 916, 918 (8th Cir. 2006).
34. *Id.* at 916.
35. *Id.*
36. *Id.*

large black dog in a fenced-in backyard.[37] He "walked toward the fenced backyard . . . and fired two shots at the dog," severely wounding it.[38] The officer realized almost immediately that "he had shot the wrong dog" because he noticed that the dog's owner "was standing on her back patio just a few feet away from her dog, Riker, when he was shot."[39] The officer then "decided to shoot Riker a third time to end [his] suffering."[40]

Riker's owner subsequently sued this officer under § 1983, arguing that the officer violated her clearly established constitutional rights by shooting her nonthreatening, fenced-in dog.[41] The Eight Circuit agreed.[42] "Riker was not on the loose, growling, acting fiercely, or harassing anyone at the time [the officer] killed him," the court reasoned.[43] Even though the officer thought Riker was at-large and did not realize his owner was standing nearby, the court still found that his actions were unconstitutional because Riker did not pose a danger to anyone, as he was in a fenced-in backyard and was not acting aggressively.[44] The court concluded: "[A]n officer commits an unreasonable, warrantless seizure of property, in violation of the Constitution, when he shoots and kills an individual's family pet when that pet presented no danger and when non-lethal methods of capture would have been successful."[45]

Likewise, in *Criscuolo v. Grant County*, the Ninth Circuit held that a police officer violated the Fourth Amendment when he shot a dog because the dog was retreating and the owner was standing by to leash the dog.[46] Even though this dog had attacked

37. *See id.*
38. *Andrews*, 545 F.3d at 916.
39. *Id.*
40. *Id.*
41. *See id.* at 916, 918.
42. *Id.* at 918.
43. *Andrews*, 545 F.3d at 918.
44. *See id.* at 917-18.
45. *Id.* (citing Brown v. Muhlenberg Twp., 269 F.3d 205, 210-11 (3d Cir. 2001)). The *Andrews* court also went on to hold that the defendant-officer was not entitled to qualified immunity because a reasonable officer in his shoes would have realized that he cannot kill a dog who poses no imminent danger and whose owners were nearby and desirous of retaining custody, especially when the dog appears to be in an enclosed space and there were nonlethal means available. *Id.* at 918-19 (citing *Brown*, 269 F.3d at 211-12).
46. *See* 540 F. App'x 562, 563 (9th Cir. 2013).

the officer's K-9 moments before he fired, the court found that it was unreasonable to shoot this dog because (a) it was retreating toward its owner, (b) it no longer posed an immediate threat to the K-9 or anyone else, and (c) the owner was standing by and wanted to retain custody of the dog.[47] The court concluded that it was "clearly established that it is unreasonable to shoot an unleashed dog—even if it surprises an officer on public property—if it poses no imminent or obvious threat, its owner is in close proximity and desirous of obtaining custody, and deadly force is avoidable."[48]

In contrast, in *Patino v. Las Vegas Metropolitan Police Department*, the Ninth Circuit held that an officer acted reasonably when he shot a dog because the dog was large, seemingly aggressive, and charging toward the officer.[49] In *Patino*, an officer entered a backyard after hearing a gunshot and moaning.[50] When he entered the backyard, a 120-pound pit bull charged across the lawn toward him.[51] Though the officer yelled at the dog to stop, it did not, and the officer shot the dog when it was about two feet away from him.[52] The *Patino* court found that this officer acted reasonably because (a) the officer had roughly five seconds to react to a 120-pound pit bull, (b) the dog was running at him aggressively, (c) another on-scene officer also drew his weapon and perceived the dog to be a threat, (d) the officer yelled at the dog to stop, and (e) the officer did not shoot the dog until it was within two feet of him.[53]

Andrews, *Criscuolo*, and *Patino* show that a dog must present an *imminent* threat of *future* violence before deadly force will be justifiable. It doesn't matter whether the dog was previously aggressive; if the dog is retreating to its owner or in an enclosed space, it is unconstitutional for police to use deadly force on that dog. But if a large, seemingly dangerous dog is at-large

47. *See id.*; The Associated Press, *Grant County Deputy Kills Dog that Attacked K-9*, SEATTLE TIMES (Jan. 27, 2010, 3:31 PM), [https://perma.cc/N4BH-LFEH].

48. *Criscuolo*, 540 F. App'x at 564.

49. *See* (*Patino I*), 207 F. Supp. 3d 1158, 1164-65 (D. Nev. 2016), *aff'd*, (*Patino II*), 706 F. App'x 427 (9th Cir. 2017).

50. *Id.* at 1162.

51. *Patino II*, 706 F. App'x at 428.

52. *Patino I*, 207 F. Supp. 3d at 1164.

53. *Id.*

and poses an imminent danger to the police or others, deadly force against that dog is likely justified.

Following the same reasoning, in *Brown v. Battle Creek Police Department*, the Sixth Circuit held that the police acted reasonably when they shot and killed two large, aggressive pit bulls while executing a search warrant.[54] In *Brown*, the police were executing a raid on a known gang member's house.[55] "[T]he officers were on high alert going into the raid" because the target was known to be dangerous and it was likely that other gang members were also in the house.[56] As the officers approached the house, two large pit bulls began barking aggressively and jumping and scratching at the windows.[57]

When the officers entered, one of the dogs immediately ran toward the door and lunged at the officers.[58] An officer shot and killed this dog almost immediately upon entry.[59] The other dog had run down into the basement.[60] When the officers entered the basement, the dog was standing in the middle of the room, barking.[61] An officer then shot this dog as well because the officers "were unable to safely clear the basement" with this dog on the loose.[62] The *Brown* court held that these officers acted reasonably in shooting these dogs because the dogs were large, aggressive, and preventing the officers from securing the house, which was being occupied by known-to-be-dangerous gang members.[63]

It is well-settled that the "most important" factor in analyzing excessive-force cases is "the safety of the officers [and] others."[64] In *Brown*, the first dog clearly presented a risk of imminent harm to the officers because it was ninety-seven pounds, barking aggressively and lunging at the officers as soon

54. Brown v. Battle Creek Police Dep't, 844 F.3d 556, 566-70 (6th Cir. 2016).
55. *Id.* at 568-69.
56. *Id.* at 569.
57. *Id.*
58. *Id.* at 569-70.
59. *Id.*
60. *Id.* at 570.
61. *Id.*
62. *Id.*
63. *See id.* at 568-70.
64. *E.g.*, Smith v. City of Hemet, 394 F.3d 689, 700-02 (9th Cir. 2005) (en banc).

as they entered the home, and "preventing them from entering the basement and safely sweeping it."[65] The second dog posed a considerable risk to the officers as well because it was fifty-three pounds, also barking aggressively, and preventing them from being able to clear the basement.[66] This basement, moreover, was "filled with various objects," and with the second dog standing guard, it was "difficult to determine if there was anybody in the basement hiding behind one of the large objects."[67] Because the dogs were seemingly trying to attack the officers and because they were preventing the officers from taking the necessary steps to ensure their own safety, the *Brown* court found that the officers acted reasonably in shooting these dogs.[68]

III. THE LEGAL RULE REGARDING DOGS, THE POLICE, AND DEADLY FORCE

These cases show that the police must act reasonably when dealing with dogs—and their failure to act reasonably can lead to § 1983 liability for money damages.[69] This is the obviously correct legal conclusion, and courts that have not addressed the issue should have little trouble concluding that the Fourth Amendment prevents the police from harming dogs without a very strong justification.

Synthesizing these cases, a rule develops: The police may use deadly force on a threatening or aggressive dog only if it poses a risk of serious, immediate harm to others. As a corollary, officers may not use deadly force on a dog if it does not present a threat of serious, immediate harm to others.

The most important factors in analyzing whether a dog poses a sufficiently serious threat to warrant deadly force are (A) whether the dog, because of its age, size, or other factors, was capable of inflicting serious harm; (B) whether the dog was aggressive, threatening, or violent at the time force was used; (C)

65. *See Brown*, 844 F.3d at 569-70.

66. *Id.*

67. *Id.* at 570.

68. *See id.* at 568-70.

69. *See, e.g.*, San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962, 975 (9th Cir. 2005); *see also* 42 U.S.C. § 1983.

whether the dog was retreating when force was used; (D) whether the dog's owner was nearby and desirous to retain custody of the dog; and (E) whether deadly force was avoidable.[70]

These are common-sense factors when put in real-world terms. Factor A means that an officer obviously cannot use deadly force on a Chihuahua, a Pekingese, or a toy poodle, no matter how aggressive or threatening it is, because these breeds are simply incapable of seriously harming people. An officer also cannot use deadly force on elderly, disabled, or restrained dogs because they likewise cannot inflict serious harm on others. And factors B, C, D, and E are meant to show that deadly force against a dog must be a last resort and can only be used if the dog poses an imminent threat of future harm to others.[71] And as a result, an officer cannot use deadly force on a dog when it is retreating or when the dog's owner is nearby and capable of restraining the dog, because the likelihood of the dog harming others under these circumstances is too low to justify actions as drastic as killing the dog.[72]

In other words, phrased in terms of the necessary elements, an officer can use deadly force on a dog only if (i) the dog has the ability to inflict serious, immediate harm to the officer or others; (ii) it reasonably appears that the dog is about to inflict serious harm on the officer or others; and (iii) deadly force is the only practical way to prevent the dog from inflicting serious harm on others.[73] If all these elements are satisfied, deadly force is allowed. But if any of these factors is not present, deadly force is not allowed.

Applying these factors to the case involving Herkimer from this Essay's Introduction, it is clear that the officer's use of deadly

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70. *See, e.g.*, Brown v. Muhlenberg Twp., 269 F.3d 205, 211 (3d Cir. 2001); *Brown*, 844 F.3d at 568-70; Criscuolo v. Grant Cnty., 540 F. App'x 562, 563-64 (9th Cir. 2013); *Hells Angels*, 402 F.3d at 977-78; Robinson v. Pezzat, 818 F.3d 1, 8, 12 (D.C. Cir. 2016); *Patino I*, 207 F. Supp. 3d 1158, 1164, 1166 (D. Nev. 2016).

71. *E.g.*, *Brown*, 269 F.3d at 210-11; *Criscuolo*, 540 F. App'x at 563-64.

72. *See Hells Angels*, 402 F.3d at 977-78; *Criscuolo*, 540 F. App'x at 563-64; *see also Brown*, 844 F.3d at 568 (noting that "[t]here is no dispute that the shooting of . . . dogs" amounts to a "severe intrusion[]" on a person's Fourth Amendment rights "given the emotional attachment between a dog and an owner").

73. *See Brown*, 844 F.3d at 568; *Criscuolo*, 540 F. App'x at 563-64; *Hells Angels*, 402 F.3d at 978.

force was improper and unconstitutional.[74] Herkimer didn't meet any of the above necessary elements. First, he likely didn't have the ability to inflict serious harm on anyone. He was a playful, fourteen-month-old puppy who appeared to weigh about twenty-five pounds.[75] Second, even if Herkimer did have the ability to cause serious harm, he wasn't exhibiting any aggressive or threatening behavior that would have led a reasonable officer to believe he was about to immediately cause serious harm. He was trotting around an empty parking lot, and when the officer used force, he was clearly running up to the officer to say hello.[76] Third, deadly force was clearly not necessary in this case. The officer had many other avenues at his disposal: he could have gotten back into his car; he could have ordered the owners to restrain their dog; he could have tased Herkimer; he could have pepper-sprayed him; he could have fired a warning shot; and so on. But the officer didn't do any of this. Instead, he immediately escalated to deadly force with little hesitation.[77]

This was a rude, trigger-happy officer who shot a puppy for no good reason. If this officer doesn't deserve liability under § 1983, I don't know who does. Herkimer's owners deserve serious compensation for this officer's blatant misconduct. And, as I hope this Essay made clear, they should have little trouble convincing a judge that this officer's shoot-first-ask-questions-later approach violated their clearly established Fourth Amendment rights.

IV. CONCLUSION

People love dogs.[78] When there is dog-related injustice, people tend to lose their minds. Knowing this, one of the quickest

74. *See supra* Part I.

75. *See* Schielke, *supra* note 5.

76. *See* Salcedo, *supra* note 2.

77. *Id.*

78. *See* Emma Bedford, *Number of Pet Owning Households in the United States in 2021/22, By Species*, STATISTA (Feb. 15, 2022), [https://perma.cc/Q3XA-643C] (finding approximately 69 million U.S. households own at least one dog); *The Wonderful Statistics and Facts Behind Dog Walking*, PETBACKER, [https://perma.cc/4LZR-AP53] (last visited Oct. 9, 2022) (an informal survey showing that 95.5% of dog owners consider their dog to be "part of the family").

ways to erode the public's trust or support for law enforcement is to let officers kill innocent dogs without (severe) consequences. Yet there are law enforcement officers out there who don't share the general public's love for dogs. I hope this Essay will help lawyers, litigants, and judges navigate this area of law and achieve justice for dogs.

HITTING THE WALL: THE NEXT STEP IN ADDRESSING THE PINK TAX

Danielle A. Essary*

Don't stop trying because you've hit the wall. Progress is progress, no matter how small. —Unknown

I. INTRODUCTION

For thirty-some-odd years, scholars and consumer advocates have called for the elimination of gender-based price discrimination, also known as the "Pink Tax."[1] Efforts to address this issue have included studies demonstrating the phenomenon's existence,[2] social movements incited to garner public support for the cause,[3] consumer attempts to bring the issue before courts in

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1. The New York City Department of Consumer Affairs' *Gypped by Gender: A Study of Price Bias Against Women in the Marketplace*, published in 1992, constitutes one of—if not the—first in depth study of gender-based price discrimination. Mikayla R. Berliner, *Tackling the Pink Tax: A Call to Congress to End Gender-Based Price Discrimination*, 42 WOMEN'S RTS. L. REP. 67, 69 (2020).

2. *See, e.g.*, ANNA BESSENDORF, N.Y.C. DEP'T OF CONSUMER AFFS., FROM CRADLE TO CANE: THE COST OF BEING A FEMALE CONSUMER (Shira Gans ed., 2015), [https://perma.cc/8R5S-2PCQ].

3. *See, e.g.*, ALARA EFSUN YAZICIOĞLU, PINK TAX AND THE LAW: DISCRIMINATING AGAINST WOMEN CONSUMERS 10 (2018) (discussing "Georgette Sand, a French women's rights group" that "initiated an online petition on *change.org*" with "*#Womantax*" in its title, a term that quickly "evolved into '*taxe rose*,'" which, as one can likely guess, is French for

hopes of judicial intervention,[4] and legislative undertakings at both the state and federal level to craft legislation prohibiting the practice.[5] Yet, gender-based price discrimination has proven evasive of regulation,[6] outside the scope of judicial reach,[7] and difficult to isolate in terms of hard proof.[8] Even agreeing on a definition of the Pink Tax has proven challenging, as the waters surrounding the issue are muddied by other recognized discriminatory practices such as the Tampon Tax and the gender wage gap, which all contribute to the additional financial burden imposed by society onto women.[9] The last several decades reveal the elusiveness of the Pink Tax and demonstrate that, thus far, documented efforts to address the practice are individually insufficient to eliminate the practice.[10] Still, each attempt constitutes a vital step, or misstep, in the path to a final solution.

As it seems we have hit the proverbial wall in the Pink Tax movement, now seems to be an appropriate time to reflect on

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'pink tax'); *see also* Samantha Anthony, *What Is the "Pink Tax"?*, UMKC WOMEN'S CTR. (Oct. 10, 2018), [https://perma.cc/8GNG-3VU8].

4. *See, e.g.*, Schulte v. Conopco, Inc. (*Schulte I*), No. 4:19 CV 2546, 2020 WL 4039221, at *1 (E.D. Mo. July 17, 2020); Goulart v. Edgewell Pers. Care Co. (*Goulart II*), No. 4:19-CV-2568, 2020 WL 4934367, at *1 (E.D. Mo. Aug. 24, 2020); Lowe v. Walgreens Boots All., Inc., No. 21-cv-02852, 2021 WL 4772293, at *1 (N.D. Cal. Sept. 23, 2021).

5. *See, e.g.*, Gender Tax Repeal Act of 1995, CAL. CIV. CODE § 51.6 (West 2020); MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES ch. 8A, art. XIX (1997); Pink Tax Repeal Act, H.R. 5464, 115th Cong. (2018).

6. *See infra* Section II.C.1.

7. *See infra* Section II.C.2.

8. *See* SARAH MOSHARY ET AL., INVESTIGATING THE PINK TAX: EVIDENCE AGAINST A SYSTEMATIC PRICE PREMIUM FOR WOMEN IN CPG 3 (2021), [https://perma.cc/94JE-M5KZ].

9. *See* Bridget J. Crawford, *Pink Tax and Other Tropes*, 34 YALE J.L. & FEMINISM (forthcoming 2022) (manuscript at 2), [https://perma.cc/BE6F-Q4LU]. Professor Crawford offers a unique five-part definition of the Pink Tax, the most inclusive definition to date:

> Generally speaking, gender equality advocates and the popular press often use the phrase "pink tax" in multiple, overlapping, and shifting ways to describe one or more phenomena: (1) the gender wage gap; (2) gender-based pricing differentials in goods or services; (3) expenditures that women are more likely to have, or have at greater levels, than men do, for safety-related travel or for make-up or personal grooming to conform to traditional gender stereotypes; (4) time-based burdens experienced disproportionately by people with responsibility for households and/or caretaking; and (5) state sales taxes on menstrual products.

Id. (manuscript at 32) (footnotes omitted); *see also* YAZICIOĞLU, *supra* note 3, at 12-13 (section titled "From confusion to clarity: a specific term for each different concept").

10. *See infra* Section II.C.

efforts to date to determine the ways such efforts have either fallen short or stalled entirely. To push past this wall, it is essential to keep in mind the very definition of insanity is "doing the same thing over and over, yet expecting different results."[11] With high hopes for further regulation on the horizon on one hand and waning confidence that this is an issue that can or should be addressed on the other, an avenue with unexplored potential may be the tipping point needed to finally achieve desired results.

This Comment explores the path to the current state of the issue of gender-based price discrimination. I will address the challenges stalling regulatory and judicial attempts to combat the pricing practice and consider, in light of what this history reveals, a potential next leg of the relay, which would better get at the heart of the issue.

Part II will provide an overview of the Pink Tax, including proposed justifications for the pricing practice as well as explanations for why those justifications fall short of fully explaining or rationalizing the discriminatory pricing practice. This Part also surveys various attempts to combat the practice, ultimately arriving at the current state of attempts to address the issue.[12]

After canvassing the history of the issue and attempts to address it, Part III then considers whether gender-based price discrimination is, in fact, a problem society should be concerned with and why consumers,[13] particularly in a free market, deserve better protection from this form of discrimination.[14] After all, even in a free market, one should not assume consumers are happy with their market choices merely from the fact that choices

11. Albert Einstein is often credited with this famous quote.

12. *See infra* Part II.

13. While the general consensus is that this practice targets women, a study advanced by the Federal Trade Commission (FTC) asserts that this practice also targets men in some markets. MOSHARY ET AL., *supra* note 8, at 3. Rather than weakening any arguments against the Pink Tax, including those presented in this Comment, such a study is further evidence that consumers—no matter their gender—deserve protection and that gender-based price discrimination pervades our society. *See id.*

14. *See infra* Part III.

were made.[15] People and their decisions are complex creatures requiring a bit more investigation to fully understand.[16]

Finally, after establishing that gender-based price discrimination is a legitimate problem, Part IV will then discuss why efforts to address the Pink Tax thus far have disappointed and will consider a promising avenue for discouraging the practice as a critical missing piece in the struggle towards the finish line.[17] This Comment then concludes briefly with a few parting thoughts—important takeaways from the appraisal of the Pink Tax's history presented here—and some final words of encouragement, which I hope will prompt the renewed energy needed to finally surmount the wall.

II. HEAD IN THE RACE—BACKGROUND

A. The Basics

The "Pink Tax"—which remains a relatively unfamiliar term to most—refers to the general practice of charging more for products marketed towards women than "for identical or substantially similar products" that are gender neutral or marketed towards men.[18] This term has proven popular among people who are aware of the history of this kind of discrimination because, not surprisingly, pink has historically been "a strong cultural symbol of femininity."[19] Notwithstanding this cultural tribute, this practice is also labeled "gender-based price discrimination"—an admittedly more accurate phrase, as this practice affects more than just pink products.[20] Still, the terms are

15. *But see* YAZICIOĞLU, *supra* note 3, at 20 (citing Tim Worstall, *The Pink Tax Is Nothing to Do with Public Policy, Women Can Solve It for Themselves*, FORBES (Nov. 13, 2014, 10:43 AM), [https://perma.cc/35NP-RMKS]). Tim Worstall opined, "Everyone's already got the choice and that they make the choices they do shows that they're entirely happy with the choices they are making." Worstall, *supra*.

16. While Worstall may make a valid point that legislative relief is not the form of relief necessary here, there are many reasons why one's choice is not always indicative of happiness or even satisfaction. Worstall, *supra* note 15; *see infra* Part III.

17. *See infra* Part IV.

18. Berliner, *supra* note 1, at 69.

19. *Id.*; *see also* YAZICIOĞLU, *supra* note 3, at 7-8.

20. Berliner, *supra* note 1, at 69. Gender-based price discrimination is a more apt label than "Pink Tax" in light of evidence that this practice also targets men in specific markets. *See* MOSHARY ET AL., *supra* note 8, at 3. However, those who have studied gender-based

generally considered interchangeable, and both refer to the markup existing on products and services marketed towards women when the increased cost is based on the gender of the intended consumer.[21] This form of routine discrimination has largely gone unnoticed in the wider sphere of discrimination women have confronted in the last fifty years.[22] Yet this practice, though it embodies a subtler form of discrimination, has a tangible and significant impact on women and deserves to be addressed.[23]

New York City's Department of Consumer Affairs conducted one of the earliest studies on the Pink Tax in 1992 after its Commissioner overheard his executive assistant complaining that she was always charged more for her haircuts than men.[24] The study, which surveyed "eighty haircutting establishments in New York City" via telephone, revealed that, without considering factors such as hair length, difficulty of cut, time required, or any factor besides the gender of the caller, sixty-six percent of the establishments quoted women higher baseline prices for a basic cut, shampoo, and blow dry.[25] Though it is often assumed women's haircuts require more time or skill, this is no longer substantiated today, if it ever was, as many women sport shorter haircuts while many men embrace long, flowing locks.[26] Still, studies conducted in the 2000s consistently found that haircut prices quoted to women were on average higher than those quoted

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price discrimination and who use the term "Pink Tax" do not claim such a practice never harms men, and the term "Pink Tax" is still an appropriate label for the phenomenon given that women are more often and more greatly harmed by such discriminatory practices. Crawford, *supra* note 9 (manuscript at 33-57) (discussing ways in which women often pay more than men throughout their lives). "Overall, 'women's products cost more 42 percent of the time while men's products cost more [only] 18 percent of the time.'" Melanie McMullen, Note, *"Equal Outcomes": A Constitutional Comparison of Gender Equality Guarantees in the United States and South Africa*, 86 MO. L. REV. 359, 398 (2021) (alteration in original) (quoting BESSENDORF, *supra* note 2, at 5).

21. Berliner, *supra* note 1, at 69.

22. McMullen, *supra* note 20, at 397.

23. Amy T. Brantly & Jennifer M. Oliver, *The Correlation Between Antitrust Enforcement and Gender Equality*, 31 COMPETITION: J. ANTITRUST & UNFAIR COMPETITION L. SECTION CAL. LAWS. ASS'N 116, 116-17 (2021); *see also* McMullen, *supra* note 20, at 397.

24. Berliner, *supra* note 1, at 69.

25. *Id.* at 69-70.

26. *See id.* at 70.

to "men for practically identical services," again based only on gender and without any consideration of factors bearing on the cost or time required to provide the haircut.[27] This is true for other services as well.[28] But if the existence of price differences for services based entirely on the gender of the recipient is not sufficiently concerning, the cumulative cost is certainly alarming: in 1994, it was estimated that women paid $1,351 more each year for the same services as men.[29]

Though studies began uncovering the Pink Tax's impact in the service industry in the 1990s, studies exposing the Pink Tax on goods did not emerge primarily until the 2010s.[30] Such studies were spurred on in part by small movements on social media to call attention to the price differences between similar men's and women's products.[31] In 2015, New York City's Department of Consumer Affairs, again leading the charge to uncover this practice, published one of the most significant and comprehensive studies addressing the Pink Tax on goods.[32] The study focused on analyzing goods across five industries and found, "compared to men and boys, women and girls paid 7% more for toys and accessories, 4% more for children's clothing, 8% more for adult clothing, 13% more for personal care products, and 8% more for senior home health care products," demonstrating acutely how women pay more at virtually every stage of life to have the same things as men.[33] This study garnered broad media attention for the Pink Tax for virtually the first time, but it unfortunately contributed no thoughts as to a solution—expressing hopeless resignation that this problem is "largely inescapable" while in the

27. *See id.* at 70 (referring to a study conducted in the United Kingdom in 2000 and another conducted at the University of Central Florida and the University of South Carolina-Lancaster in 2011).

28. Such services include dry-cleaning, for example. *See* Kenneth A. Jacobsen, *Rolling Back the "Pink Tax": Dim Prospects for Eliminating Gender-Based Price Discrimination in the Sale of Consumer Goods and Services*, 54 CAL. W. L. REV. 241, 249 (2018).

29. *Id.* at 242. This cost is exacerbated by the fact that women statistically earn less money than men. *Id.* at 242-43.

30. Berliner, *supra* note 1, at 71.

31. *Id.* at 71-72.

32. *Id.* at 72-73.

33. *Id.* at 72.

same breath encouraging consumers to continue to call out the Pink Tax on social media by posting examples.[34]

While its conclusion left much to be desired, New York City's study not only pushed the New York legislature towards action[35] but also helped the issue finally achieve federal attention, resulting in a report published by the United States Congress Joint Economic Committee in 2016 confirming what those familiar with the Pink Tax already knew—"prices for products marketed to women were higher than nearly identical products marketed to men."[36] Studies continued to roll out exposing the premium women pay on goods—each one further illustrating an ever-increasing bill.[37]

B. Possible Explanations of the Pink Tax

There are potential explanations for the price difference, other than the gender of the intended consumer, that must be considered before determining the Pink Tax is truly to blame for the extra costs women shell out. It is generally understood that a product's price reflects both the cost of the materials and labor that went into producing it as well as consumers' willingness to pay for a particular product.[38] Therefore, if the price of the final

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34. *Id.* at 72-73.

35. N.Y. GEN. BUS. LAW § 391-u (McKinney 2020); *A Pending New York State Bill Aims to Eliminate the Sweeping "Pink Tax,"* THE FASHION L. (July 10, 2019), [https://perma.cc/7K53-VPP9].

36. Berliner, *supra* note 1, at 73. *See generally* JOINT ECON. COMM., THE PINK TAX: HOW GENDER-BASED PRICING HURTS WOMEN'S BUYING POWER (2016), [https://perma.cc/UL5T-WH5E].

37. Berliner, *supra* note 1, at 73. The effect of the Pink Tax has even been identified in the military. The Associated Press, *'Pink Tax': Bill Addresses Higher Female Military Uniform Prices*, 5NEWS (Oct. 25, 2021, 9:45 AM), [https://perma.cc/PKS4-NQEH]. A federal bill was recently passed to address the higher costs associated with female uniforms, specifically the outdated standards which lead to women paying more out-of-pocket costs for their uniforms because they are not eligible for certain reimbursements on female-specific uniform items. *See id.*; Military FATIGUES Act of 2021, S. 3016, 117th Cong. (2021); Mariel Padilla, *Congress Votes to Eliminate 'Pink Tax' on Military Uniforms*, THE 19TH (Dec. 15, 2021, 12:23 PM), [https://perma.cc/DN4B-NULV] (stating the Military FATIGUES Act of 2021 was included and passed in the final text of the National Defense Authorization Act (NDAA)).

38. Robert J. Dolan, *How Do You Know When the Price Is Right?*, HARV. BUS. REV., Sept.-Oct. 1995, at 174-75 (discussing that the market determines the best price, but companies must actually set prices, which often primarily includes factoring in product cost and then applying a markup).

product is higher than comparable products, one may infer either the product costs more to produce or that consumer demand is responsible for its higher price.[39] Still, neither can fully explain the Pink Tax phenomenon.[40]

Admittedly, those concerned with the Pink Tax are at times overly aggressive and too indiscriminate with the label. For example, after Congresswoman Alexandria Ocasio-Cortez received significant criticism "for spending $300 on a haircut, lowlights, and gratuity," former Governor of Wisconsin Scott Walker posted about his "$26 (with tip) haircut."[41] Twitter users claimed he had "unknowingly pointed out the Pink Tax on women's services," but the existence of the Pink Tax is not necessarily always proven merely by the fact that a woman has paid more for a service.[42] Here, Congresswoman Ocasio-Cortez also paid for lowlights which, as anyone with professionally colored hair can tell you, is not a cheap or quick service.[43] To determine whether a Pink Tax was truly at play here would first require isolating the cost of the haircut, then comparing the level of skill and amount of time that went into Congresswoman Ocasio-Cortez's and former Governor Scott's haircuts. Further, the fact that Congresswoman Ocasio-Cortez and former Governor Scott were consumers in different geographic markets could have had a significant impact on the prices they paid for haircuts, so isolating any cost difference due to the Pink Tax would also require a comparison of the markets in Wisconsin and Washington D.C.[44] This is one example of when genuine

39. *See id.*

40. Berliner, *supra* note 1, at 74-81 (evaluating tariffs and differentiation costs—which speak to the cost of production—as well as "[p]rice [d]iscrimination and [c]onsumer [w]illingness to [p]ay" as explanations for the Pink Tax and concluding that none are able to "fully explain the Pink Tax on services *or* goods") (emphasis in original)).

41. Berliner, *supra* note 1, at 71.

42. *Id.*

43. *Id.*

44. *See* Scott Walker (@ScottWalker), TWITTER (Oct. 12, 2019, 9:22 AM), [https://perma.cc/QW9X-BY5V] (showing that former Governor Walker got his $26 haircut at a barbershop in Wauwatosa, Wisconsin); Alex Swoyer, *Alexandria Ocasio-Cortez Spends $300 on Hairdo at Last Tangle Salon in Washington, D.C.*, WASH. TIMES (Oct. 9, 2019), [https://perma.cc/4JD5-KS94] (showing that Congresswoman Ocasio-Cortez had her hair cut and colored in a salon in Washington, D.C.).

differences between services provided or varied costs of living could be the cause of the price difference.

However, there are still many instances in which product or service differentiation cannot fully explain the difference in prices. Differences between men's and women's products are often insignificant—if they even exist at all. For example, Excedrin Complete Menstrual was fifty cents more expensive than the comparable bottle of Excedrin Extra Strength, despite containing the same amount of active ingredients.[45]

When genuine differences do exist, they usually cannot fully explain the price difference. Tariffs often discriminate between men's and women's products, and men's products are surprisingly subject to higher tariffs in some instances.[46] But even when there was "a 4% higher tax rate on men's cotton shirts than women's, women's cotton shirts cost 13% more than men's on the market."[47] Studies have also shown that women pay more to dry-clean their shirts before "any additional costs based on the fabric of the item, ornamentation, or pleats" are considered.[48] Despite the example above, the same is often true for haircuts—women are quoted higher standard prices than men when they inquire about the cost of a haircut over the phone.[49] This price difference is imposed before a hairdresser ever sees the female caller's hair or determines what style she wants.[50]

The second common justification for the Pink Tax is women are simply willing to pay more for their gender-specific

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45. *Men Win the Battle of the Sexes*, CONSUMER REPS. (Jan. 2010), [https://perma.cc/2CMC-VG6V]. This study found each gel capsule contained "250 milligrams of aspirin, 250 mg of acetaminophen, and 65 mg of caffeine." *Id.* Though the study did not comment on whether there were differences in the inactive ingredients, it would be difficult to justify how such a variation would be premised on the distinct needs of female consumers.

46. *See* Michael Barbaro, *In Apparel, All Tariffs Aren't Created Equal*, N.Y. TIMES (Apr. 28, 2007), [https://perma.cc/4XJQ-4AUW]; *see also* Berliner, *supra* note 1, at 75 & n.74 (discussing a Federal Circuit case considering an equal protection claim brought to challenge the higher tariff imposed on men's leather gloves, which was dismissed for failure to state a claim and denied certiorari to the Supreme Court).

47. Berliner, *supra* note 1, at 75.

48. Jacobsen, *supra* note 28, at 249.

49. Berliner, *supra* note 1, at 69-70.

50. *Id.* at 70.

products.[51] The free market rests on the assumption that market actors are rational and well-informed.[52] When this is true, the supply curve, which is the "quantity of goods and services that the producers are willing to provide at each price," and the demand curve, which is the quantity of goods and services that consumers are willing to purchase at each price, will meet in what is known as market equilibrium.[53] In theory, the most efficient price for a product depends on the market equilibrium, and therefore, is affected by consumer demand.[54] If consumers refuse to purchase the product, the demand curve shifts left, and the new equilibrium price is less.[55] This is the basis for consumers' power to affect price, but for it to truly work, consumers must be informed and rational.[56]

It is often difficult for consumers to be meaningfully informed. Consumers have always been relegated to their respective halves of the store, as often men's and women's products are showcased in separate aisles of the supermarket.[57] This makes comparing products and their prices less intuitive for consumers who are scanning the shelves of the aisles they regularly frequent.[58] Only the most price-conscious consumers will partake in the scavenger hunt required to fully inform themselves about all the comparable products available throughout the store. One may be hard-pressed to find this level of intentionality among consumers. Many of those who have the time to take on such an endeavor can afford the additional cost, and thus may not be concerned with seeking the best deals. On the other hand, those who perhaps need the benefit of every opportunity to save money likely cannot afford the time it would

51. YAZICIOĞLU, *supra* note 3, at 21. Hence, the phrase: "*shrink it, pink it and women will buy it at a higher price*." *Id.* at 19.

52. *Id.* at 16.

53. *Id.* at 17.

54. *See Supply and Demand*, ENCYC. BRITANNICA (2022), [https://perma.cc/U4SW-XHL7].

55. *See Shifts in Demand*, ECON. ONLINE (Jan. 13, 2020), [https://perma.cc/A9YA-Q3LE].

56. *See* YAZICIOĞLU, *supra* note 3, at 16.

57. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-500, CONSUMER PROTECTION: GENDER-RELATED PRICE DIFFERENCES FOR GOODS AND SERVICES 13 (2018), [https://perma.cc/QS4D-ET77].

58. *See* CAL. CIV. CODE § 55.7 (West 2022).

cost them to pursue such savings opportunities. The rise in online shopping may mitigate this time pressure to some extent, but there are still many consumers who continue to brave the stores the old-fashioned way, and they should not have to do so expecting to pay additional costs because stores are often organized in ways that make it time consuming to be informed.[59]

While comparing prices was arguably more burdensome before the world of new-age shopping, which now allows users to compare prices with a simple search of the internet, the rise in online shopping, grocery pickup, and even delivery is evidence of consumers and businesses adapting to the increasingly fast-paced world we face. People are looking for ways to minimize the time it takes them to complete certain tasks like grocery shopping, and therefore, they are taking less time to investigate products they buy and to compare prices.[60] The new reality is that many consumers never have the opportunity to make side-by-side comparisons of products because they search for exactly what they want, and in some instances, a consumer might not make his or her own decision about a particular product, such as when a substitution is made in his or her pickup or delivery order.

Further, it is particularly difficult to identify the Pink Tax.[61] When it applies, it is built into the price of the product at a different rate or premium each time.[62] If a consumer suspected a product is subject to the Pink Tax, she could not verify it quickly, or at all, because so many factors are unknown to consumers: most notably, the cost of materials used and the manufacturing

59. Berliner, *supra* note 1, at 82.

60. *See* KARL HALLER ET AL., IBM INST. FOR BUS. VALUE, CONSUMERS WANT IT ALL: HYBRID SHOPPING, SUSTAINABILITY, AND PURPOSE-DRIVEN BRANDS 1 (2022), [https://perma.cc/A7XP-SEGJ] (addressing how consumers in 2022 expect integrated shopping experiences that are efficient, experiential, and intuitive). Certain consumer segments appear to be less price sensitive; however, companies should not feel comfortable taking advantage of any perceived price inelasticity because consumer loyalty is unprecedently low. Tamara Charm et al., *The Great Consumer Shift: Ten Charts That Show How US Shopping Behavior Is Changing*, MCKINSEY & CO. (Aug. 4, 2020), [https://perma.cc/K7DW-ZV8P]. One thing consumers are expending time focusing on is whether companies are living "up to their social and environmental responsibility claims." HALLER ET AL., *supra*, at 1; *see also* Charm et al., *supra* (stating that availability, convenience, and value are leading reasons consumers cite for switching brands); discussion *infra* Section IV.B.

61. Berliner, *supra* note 1, at 82.

62. *Id.*

processes employed.[63] For example, in comparing men's and women's white button-down shirts, one might observe the make-up of their fabrics is the same and also that their colors are alike, but what of the buttons or the fit? How do they factor into the price? If the buttons on the women's shirt are daintier than those on the men's shirt and if they are sewn onto the left side of the shirt, rather than the right,[64] can a woman expect to pay an extra $5—or $10—for these differences?[65] If the shirt is more tailored, what can a woman expect that should cost her? These differences are genuine, and likely even preferred,[66] but a female customer cannot be sure what exactly she is paying an additional cost for: the cute buttons on the left side of the shirt, the flattering fit, or her identity as woman. In the end, she will probably just buy the shirt because she needs one, at whatever cost it comes.

Additionally, in part because consumers are not informed and in part because they are humans, consumers are not, on the whole, very rational.[67] In theory, consumers should maximize their own welfare by maximizing utility and minimizing costs.[68] In reality, consumers are affected by a whole host of other influences, and they "operate with an intuitive and heuristic system of thinking, which often results in poor logical analysis."[69] One of the most significant influences, which develops into

63. *Id.*

64. *See* Megan Garber, *The Curious Case of Men and Women's Buttons*, ATLANTIC (Mar. 27, 2015), [https://perma.cc/C5XC-VZ8G]. As a brief side point, why the practice of sewing buttons onto opposite sides of shirts developed is an interesting mystery in its own right. One theory is spite—the story goes that because "[t]he early days of industrialization . . . coincided with the early days of the women's movement," manufacturers sought ways to capitalize on developing standardized manufacturing processes by using "little differences in clothing to emphasize bigger differences between the genders." *Id.* The other theories proffered by Garber are equally, if not more, intriguing. *Id.*

65. Consistent with the earlier line of discussion, if sewing buttons onto the left side of a shirt does cost more, is there an explanation for this price difference other than that the machines used to sew buttons onto shirts were originally designed to sew buttons onto the right side? *See Garber*, *supra* note 64.

66. *See infra* notes 149-50 and accompanying text (discussing the serious repercussions women face when they do not adhere to expected gender norms).

67. YAZICIOĞLU, *supra* note 3, at 16-17.

68. *Id.* at 16.

69. *Id.* at 18.

instinct in individual consumers, is actually gender.[70] From childhood, people "learn the commonly accepted gender-appropriate characteristics and the importance to comply with such characteristics as well as the negative implications of failing to do so from their peers."[71] The hold gender stereotypes have on people is often "so inescapable that [it] determine[s], to some extent, 'who individuals are, what they want and what they choose to do.'"[72] This is true for men and women across the board. A study conducted to "compar[e] consumers' views of strongly gendered products . . . and their gender-neutral equivalents found that *all* consumers displayed a greater intent to purchase the gendered options."[73] In tapping into these social constructs, marketers "seem to have successfully convinced both women and men that the gendered products available on the market are in fact different, not only by their design but also by their ingredients and functionality."[74]

C. A Slow Mile is Better Than No Mile—Attempts to Address the Pink Tax

1. Legislative Attempts

a. State Action

Like the studies, efforts to combat the Pink Tax began on a social level, then moved to the state legislatures, and finally landed at the federal level. Each has ultimately proven insufficient to fully address the widespread practice. But the efforts have contributed to public awareness of the practice, resulting in several class action suits for gender-based price

70. *Id.* at 28-31 (discussing the process known as "gender socialization" that occurs throughout one's life and commenting on the influence that social constructs related to gender have on individuals).

71. *Id.* at 29.

72. Berliner, *supra* note 1, at 83-84 (quoting YAZICIOĞLU, *supra* note 3, at 31).

73. *Id.* at 85 (emphasis added) (citing Miriam van Tilburg et al., *Beyond "Pink It and Shrink It": Perceived Product Gender, Aesthetics, and Product Evaluation*, 32 PSYCH. & MKTG. 422, 426-33 (2015)).

74. YAZICIOĞLU, *supra* note 3, at 31.

discrimination,[75] and have led to conversations about how to effectively discourage businesses from imposing the Pink Tax.[76]

As previously referenced, awareness of the Pink Tax began as commentary from individual women who were tired of paying so much for certain goods or services when men obtained virtually the same goods or services at a lower cost.[77] It so happened some of these women were in positions that allowed them to inspire deeper investigations into the phenomenon.[78] As a tentative awareness on an individual level grew into a more substantiated concern, women with influence in the media began calling attention to it as well—women like Ellen DeGeneres, who humorously pointed out in 2012 that the recently released Bic Pens For Her (the pink and purple counterparts to standard Bic pens) were "just like regular pens, except they're pink, so they cost twice as much."[79]

Public attention continued as a few state legislators began gearing up to formally address the Pink Tax.[80] Recognizing social efforts alone would not be enough—a few state and local legislatures attempted to pass public accommodations laws under their police powers to address gender-based price discrimination: California; Miami-Dade County, Florida; New York City, New York; and even Guam.[81]

Though California's Pink Tax legislation is better known for pioneering the movement against gender-based price discrimination, Guam's Deceptive Trade Practices law—signed into effect in 1991—is due credit as the first piece of legislation passed to prohibit the Pink Tax.[82] Guam's law, which was strides

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75. *See infra* Section II.C.2.

76. *See, e.g.*, Berliner, *supra* note 1, at 106-08 (discussing "Features of Ideal Legislation"); Crawford, *supra* note 9 (manuscript at 71) (discussing how abandoning "Pink Tax" terminology may be a step in the right direction because "[i]nstrumentally speaking . . . it is unlikely that 'pink tax' metaphors will lead directly to legal reform").

77. *See supra* note 24 and accompanying text.

78. Berliner, *supra* note 1, at 69.

79. *Id.* at 67. Ellen's chiding joke still rang true in 2016, as evidenced by the study conducted by the United States Congress Joint Economic Committee, which compared pink Bic pens, priced at $4.97, with black Bic pens, priced at $2.47. JOINT ECON. COMM., *supra* note 36, at 3.

80. Berliner, *supra* note 1, at 91-98 (discussing State and local legislative efforts).

81. *See id.* at 93-98.

82. Guam Pub. L. 21-18 (1991); *see also* 5 GUAM CODE ANN. § 32201(c)(18) (2020).

ahead of its later counterparts, declared the Pink Tax on both products and services unlawful.[83] Specifically, the pricing practice is encompassed in the statute's definition of "false, misleading, or deceptive acts or practices," which is important to note because it highlights the general expectation that pricing decisions should be based on legitimate economic factors that truly affect prices.[84] Despite a lack of case law applying this section of the law, Guam's Attorney General has power under the law "to intervene to prevent Pink Tax pricing," and Guam appears to be signaling a strong public policy against the Pink Tax practice.[85]

Still, it was California's legislation that truly launched state government movement against the Pink Tax, and, therefore, its Gender Tax Repeal Act of 1995 is "one of the most well-known pieces of Pink Tax legislation in the country."[86] The Act states, "No business establishment of any kind whatsoever may discriminate, with respect to the price charged for services of similar or like kind, against a person because of the person's gender."[87] The Act provides guidance for specific business establishments—specifically tailors, hairdressers, and dry cleaners—requiring disclosures geared towards preventing price discrimination in services when such discrimination is not based on legitimate factors such as "time, difficulty, or [the actual] cost of providing the services."[88] These businesses are required to "clearly and conspicuously disclose to the customer in writing the

83. § 32201(c)(18).

84. § 32201(c); Berliner, *supra* note 1, at 97. This position seems to indicate that increasing the price of a product or service is deceptive when the price increase is not grounded in economic factors that actually have some bearing on the cost of the product or service because consumer expectations are that prices will reflect more legitimate factors.

85. Berliner, *supra* note 1, at 98.

86. *Id.* at 93.

87. CAL. CIV. CODE § 51.6(b) (West 2020).

88. CIV. § 51.6. Ironically, though the Act was passed to protect women from this practice, "cases brought under the Act have almost entirely addressed discrimination against men who cannot benefit from 'Ladies' Night' and similar women's discounts." Berliner, *supra* note 1, at 94. *See generally* Reese v. Wal-Mart Stores, Inc., 87 Cal. Rptr. 2d 346, 349 (Cal. Ct. App. 1999); Angelucci v. Century Supper Club, 158 P.3d 718, 719 (Cal. 2007); Surrey v. TrueBeginnings, LLC, 85 Cal. Rptr. 3d 443, 444 (Cal. Ct. App. 2008); Long v. Playboy Enters. Int'l, No. LA CV11-02128, 2012 WL 12869314, at *1 (C.D. Cal. Mar. 7, 2012); Cohn v. Corinthian Colls., Inc., 86 Cal. Rptr. 3d 401, 402 (Cal. Ct. App. 2008); Frye v. VH Prop. Corp., B246991, 2014 WL 69126, at *1 (Cal. Ct. App. Jan. 8, 2014).

pricing for each standard service provided," "provide the customer with a complete written price list upon request," and "display in a conspicuous place" a sign stating: "CALIFORNIA LAW PROHIBITS ANY BUSINESS ESTABLISHMENT FROM DISCRIMINATING, WITH RESPECT TO THE PRICE CHARGED FOR SERVICES OF SIMILAR OR LIKE KIND, AGAINST A PERSON BECAUSE OF THE PERSON'S GENDER. A COMPLETE PRICE LIST IS AVAILABLE UPON REQUEST."[89]

The Act, as one of the first, was important for signaling to the public that the "Pink Tax is intolerable and against public policy."[90] But being one of the first often comes at the price of being unable to glean substantial insight from the attempts of others.[91] Unfortunately, here is no different, and the California legislature's blind spot left holes in the Act concerning effective avenues to seek out violations and how to prove them once discovered.[92] The Act relies primarily on consumers to identify violations and know how to draft complaints that are enforceable against service providers.[93] Additionally, the Act is limited to services, meaning the market for goods is still left entirely to its own devices, without any effort to dissuade Pink Tax practices.[94] In 2016, an attempt to pass legislation to provide protection from the Pink Tax in product markets flamed out, not even reaching a

89. CIV. § 51.6. And yes, it specifies all caps.

90. Berliner, *supra* note 1, at 94.

91. *Id.*

92. *Id.*

93. *Id.*

94. CIV. § 51.6; *see* Lowe v. Walgreens Boots All., Inc., No. 21-cv-02852, 2021 WL 4772293, at *1 (N.D. Cal. Sept. 23, 2021); Angelucci v. Century Supper Club, 158 P.3d 718, 720 & n.5 (Cal. 2007) (where defendants argued that the Gender Tax Repeal Act did "not apply in the first instance to plaintiffs' claim, because defendant's conduct did not involve the provision of 'services'"). The Unruh Civil Rights Act—another significant source of consumer protection in California that preceded the Gender Tax Repeal Act—has been interpreted "as broadly condemning any business establishment's *policy* of gender-based price discounts," but application to product pricing directly remains to be seen. *Angelucci*, 158 P.3d at 726 (considering the effect of Koire v. Metro Car Wash, 707 P.2d 195 (Cal. 1985)). Notably, in *Angelucci*, plaintiffs brought claims under both the Unruh Civil Rights Act and the Gender Tax Repeal Act; the court did not specifically consider the latter act, for injury analysis pursuant to section 52(a) of the California Civil Code would have been the same. *See id.* at 720 & n.5.

vote because of concerns regarding vague language and enforceability.[95]

Following its 1995 Act, California stood alone in the continental United States for two years in formal opposition to the Pink Tax, but in 1997, Miami-Dade County, Florida, joined in the effort, passing the Gender Price Discrimination Ordinance.[96] A pioneer in its own right, this law is one of the first to outlaw the Pink Tax on goods as well as services.[97] Still, it was plagued by similar gaps in its potential for enforcement, with the burden of holding businesses accountable under the legislation falling on the consumers.[98] The ordinance was saddled with a sunset provision, but prior to its expiration, the County amended the law to sever the sunset provision.[99]

Following its influential study on the Pink Tax,[100] New York City passed its own version of Pink Tax legislation in 1998, banning dry cleaners, hair salons, and other retail service establishments from setting prices based on gender.[101] Mayor Rudolph Giuliani signed City Council Bill Number 804-A, thereby amending "the Administrative Code of the City of New York to prohibit the public display of discriminatory pricing based on gender by a retail establishment."[102] Notably, Mayor Giuliani commented that discriminatory prices based on gender were "already prohibited by the City's Human Rights Law," but

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95. Teri Sforza, *'Pink Tax' Bill Dies: You'll Still Pay More for Products Marketed to Women*, ORANGE CNTY. REG. (June 30, 2016, 7:00 AM), [https://perma.cc/A6EF-AS7E].

96. Berliner, *supra* note 1, at 95.

97. MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES ch. 8A, art. XIX (1997).

98. MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES ch. 8A, art. XIX (1997). The ordinance provides a private cause of action, permitting "[a]ny person who suffers a loss as result of a violation of any provision of this article" to recover compensatory damages and expenses related to litigation "from the person committing the violation." MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES ch. 8A, art. XIX, § 8A-405 (1997).

99. Miami-Dade County, Fla., Ordinance Amending Chapter 8A, Article XIX of the Code of Miami-Dade County, Florida, Relating to Gender Price Discrimination; Deleting the Sunset Provision; Providing Severability, Inclusion in the Code, and an Effective Date (June 18, 2002).

100. *See supra* notes 24-29 and accompanying text.

101. Council of City of N.Y. Int. No. 804-A (Jan. 9, 1998) (amending N.Y.C. Admin. Code § 20-750).

102. Press Release, N.Y.C. Mayor's Press Office, Mayor Giuliani Signs City Council Bill No. 804-A into Law, Prohibiting the Public Display of Discriminatory Pricing Based on Gender (Jan. 9, 1998) [hereinafter 1998 NYC Press Release], [https://perma.cc/G9ZV-LKM8].

this Bill permitted New York City's Department of Consumer Affairs to issue violations and fines for such pricing practices.[103]

In addition to prohibiting actual discriminatory pricing, this addition to the Consumer Affairs title of New York City's Administrative Code required these service establishments to post prices in gender-neutral terms and articulate the differences between the services.[104] A primary distinction between this legislation as compared to other attempts is that New York City's law granted the City's Department of Consumer Affairs the authority to "conduct routine inspections and issue violations," lessening the burden on consumers to recognize gender discriminatory practices and take action to report them.[105] However, the fines imposed for violations of the provision are minimal—as low as $50 for first-time offenders and reaching only $500 for repeat offenders—serving as a poor incentive for businesses to change their pricing practices.[106] Further, like in California, New York City's efforts to limit this practice are confined to the service industry, ignoring an entire market in which this practice costs women significantly.[107]

More recently, the State of New York has stepped up to try to close this gap.[108] In 2020, "as [p]art of the FY 2021 Budget" Bill, New York Governor Andrew Cuomo officially banned the Pink Tax.[109] This law prohibits "any individual or entity, including retailers, suppliers, manufacturers or distributors, from

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103. *Id.*

104. *See* BESSENDORF, *supra* note 2, at 16; Berliner, *supra* note 1, at 97. For example, dry cleaners should use language like "shirts with ruffles" rather than "blouses" when quoting their prices for certain garments. Berliner, *supra* note 1, at 97.

105. Berliner, *supra* note 1, at 97.

106. *Id.* In the year preceding the Bill's enaction, "13 actions alleging gender pricing discrimination were filed with the [Human Rights Commission] against dry-cleaning and hair cutting businesses." 1998 NYC Press Release, *supra* note 102. Even after affirmatively signaling that this practice was unacceptable, the issue persisted: In 2014 and 2015, almost two decades later, the N.Y.C. Department of Consumer Affairs "issued 118 and 129 violations[,] respectively," for violations of the gender pricing law. Berliner, *supra* note 1, at 97.

107. *See* 1998 NYC Press Release, *supra* note 102.

108. *See* N.Y. GEN. BUS. LAW § 391-u (McKinney 2020); *see also* Phyllis H. Marcus & Christopher J. Dufek, *New York Implements "Pink Tax" Ban*, NAT'L L. REV. (Oct. 2, 2020), [https://perma.cc/AJ8F-UEN6].

109. *Former Governor Cuomo Reminds New Yorkers "Pink Tax" Ban Goes into Effect Today*, N.Y. DEP'T OF STATE (Sept. 30, 2020), [https://perma.cc/CUN2-9UT5].

charging a different price for two 'substantially similar' goods or services based on the gender" of the intended consumer.[110] This all-too-familiar phrase has left some rightfully anticipated loopholes in the protection offered by the law.[111] While the drafters attempted to offer better guidance by outlining factors to be considered in determining whether a violation occurred, these factors are no more specific than the simple statements included in other legislative efforts, which essentially state that price disparities must be based on legitimate differences between products or services.[112]

Despite these legislative shortcomings, other states are stepping up to the plate as well, or at least considering it.[113] Each of these state's attempts is significant in signaling to businesses and other states that the practice is a problem deserving of attention and action.

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110. Marcus & Dufek, *supra* note 108.

111. *See* John F. Banzhaf, *New York's New "Pink Tax" Ban Has Big Loopholes*, VALUEWALK (Oct. 1, 2020, 1:19 PM), [https://perma.cc/35UA-MCZ7]. "Substantially similar" is defined as:

> (i) two goods that exhibit no substantial differences in: (A) the materials used in production; (B) the intended use of the good; (C) the functional design and features of the good; and (D) the brand of the good; or (ii) two services that exhibit no substantial difference in: (A) the amount of time to provide the services; (B) the difficulty in providing the services; and (C) the cost of providing the services. A difference in coloring among any good shall not be construed as a substantial difference for the purposes of this paragraph.

GEN. BUS. § 391-u(d).

112. GEN. BUS. § 391-u; *see also supra* Section II.A.

113. *See* Katie Cerulle, *Connecticut Committee Considers 'Pink Tax*,*'* CT NEWS JUNKIE (Mar. 2, 2022, 1:22 PM), [https://perma.cc/HJ5J-RARG] (Connecticut); Helena Moreno, *Councilmember Moreno Proposes "Pink Tax" Exemption for New Orleans, Lowering Prices on Diapers & Feminine Hygiene Products*, NEW ORLEANS CITY COUNCIL (Aug. 12, 2020), [https://perma.cc/KTH6-2XHF] (Louisiana; statewide efforts to address the Pink Tax—or rather the Tampon Tax—failed, so New Orleans Councilmember Helena Moreno pushed for local tax exemptions); Prohibition Against Gender-Based Pricing Discrimination Act, S.B. 1412, 220th Leg., Reg. Sess. (N.J. 2022) (New Jersey); JACQUE STORM, S.D. LEGIS. RSCH. COUNCIL, GENDER-BASED PRICE DISCRIMINATION: DOES IT REQUIRE A NEW SOLUTION OR ENFORCEMENT OF AN OLD LAW? 3 (2000), [https://perma.cc/DWQ8-U8B5] (South Dakota, considering whether existing civil rights law is sufficient to prevent gender-based price discrimination); Jaclyn M. Metzinger & Emily Clark, *The Pink Tax: A Litigation and Legislation Update*, AD L. ACCESS (Feb. 1, 2022), [https://perma.cc/MQ6R-5XCG] (Massachusetts).

b. Federal Action

Unfortunately, a handful of states alone is not able to fully tackle the problem, and federal law has not yet touched this widespread issue in any meaningful way.[114] This may in part be because federal action involves unique challenges with respect to federal authority that states, which have the benefit of expansive police power, do not face.

While equality is often emphasized as a fundamental right in the United States, "gender equality was not one of the fundamental rights contemplated for its citizens."[115] The United States Constitution contains no express prohibition on sex discrimination outside of the Nineteenth Amendment guaranteeing women the right to vote.[116] Further, because this is not a "tax" in the usual sense of the word, but rather private action by businesses against their consumers, it may be difficult to see what the federal government can really do or what its interest is in the issue.[117]

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114. The only successful federal action found an unlikely channel to approval in the National Defense Authorization Act. *See* Padilla, *supra* note 37. This Act "eliminates the 'pink tax' on military uniforms and aims to address other financial gender inequities in the military." *Id.* "A recent report from the U.S. Government Accountability Office (GAO) found that women were disproportionately required to pay more out-of-pocket costs as a result of service-wide uniform changes." *Id.* The report specifically "found that a woman in the Army for two decades likely paid more than $8,000 out-of-pocket for uniforms, while a man with the same experience paid around $3,500." *Id.* This is in part because several items specific to women, such as dress pumps, were omitted from the list of items the military replaces for all enlisted members. *Id.* Senator Maggie Hassan (D-N.H.), who sponsored the FATIGUES Act, stated: "This is a pink tax, plain and simple, and one that has no place in our military—or anywhere in American society." *Id.*; *see also* Richard Sisk, *Lawmaker Orders Investigation into 'Pink Tax' on Women's Military Uniforms*, MILITARY.COM (July 17, 2019), [https://perma.cc/WQ8N-9EN9].

115. *See* McMullen, *supra* note 20, at 360-61.

116. *See id.* at 361.

117. *See* Crawford, *supra* note 9 (manuscript at 51). Gender-based price discrimination, in contrast to the Tampon Tax, is not a literal tax imposed on female-specific products, but rather an observable trend in pricing practices. *Id.* Alara Efsun Yazicioğlu made a similar observation, comparing the Pink Tax to Schrödinger's cat:

> This chapter opened the Schrödinger's box of the pink tax and discovered that the cat is both alive and dead. The pink tax does not fit into the legal definition of tax and thereby cannot legally be qualified as such. Hence, the cat is dead. On the other hand, the pink tax economically behaves like a fully hidden selective consumption tax. Thereupon, the cat is simultaneously alive.

One well-recognized source of authority for federal action on issues of discrimination is the Commerce Clause.[118] With respect to the Pink Tax, people are primarily concerned about larger retailers and businesses that operate across state lines and, therefore, are within reach of the Commerce Clause. Smaller, local businesses may also engage in gender-based price discrimination, but they are more sensitive to changes in market factors and could be heavily burdened by such high-level regulations anyway.[119] States are better positioned to address gender-based price discrimination within their respective borders after considering the impact such legislation will have on their small business communities.[120]

A less recognized source of authority could be the Equal Protection Clause of the Fourteenth Amendment.[121] At first glance, the Equal Protection Clause does not seem to be at issue because the Pink Tax is the result of private action.[122] However, state governments reap a disproportionate benefit from the Pink Tax through the imposition of sales taxes. While imposing sales tax is not intentionally discriminatory and is neutral on its face, it has a disparate impact on women when they are already charged more for products they purchase because the resulting tax revenue derived from sales to women is greater based on the underlying prices they pay.

YAZICIOĞLU, *supra* note 3, at 55-56 (dedicating an entire chapter of her book to the question of whether the Pink Tax is a tax).

118. *See* McMullen, *supra* note 20, at 374. In contrast to the South African Constitution, which "specifically grants the power to regulate state discrimination alongside the private actions of individuals," the United States' only power to regulate state discrimination is through the Commerce Clause. *Id.*

119. Steven Bradford, *Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation*, 8 J. SMALL & EMERGING BUS. L. 1, 3, 31 (2004) (discussing the importance of sensitivity "to the impacts of . . . regulations on small business entities" and the purpose of exemptions in "tailoring regulation to maximize its net benefit—by exempting those firms or transactions whose regulation results in a net loss"). "For small businesses, there is simply less margin for error . . . ." Laura Rich, *Small Business Sensitivity*, INC. (July 12, 2004), [https://perma.cc/KU4C-UENT]. This reality is artfully epitomized by a Persian Proverb: "In the ant's house the dew is a flood." Bradford, *supra*, at 1.

120. *See, e.g.*, Small Business Gender Discrimination in Services Compliance Act, CAL. CIV. CODE §§ 55.61-.63 (West 2018).

121. *See* McMullen, *supra* note 20, at 362.

122. *See* Crawford, *supra* note 9 (manuscript at 51).

Though the federal government has been slower to act than state governments, it is not for lack of trying that its efforts have been sluggish. In July 2016, Representative Jackie Speier (D-Cal.) introduced the Pink Tax Repeal Act, a bill "[t]o prohibit the pricing of consumer products and services that are substantially similar if such products or services are priced differently based on the gender of the individuals for whose use the products are intended or marketed or for whom the services are performed or offered."[123] Unfortunately, in a way that echoed the disappointing outcome in California, this Bill died in the Committee on Energy and Commerce.[124] The Pink Tax Repeal Act was revived in 2018 as House Bill 5464 and introduced again by Representative Speier, but it suffered the same fate as its predecessor.[125] This cycle repeated in 2019 with House Bill 2048, although it is worth mentioning the number of cosponsors increased from around thirty for the previous two versions to sixty-eight in the 2019 version.[126] Despite this discouraging pattern of the Pink Tax Repeal Act dying in committee, Representative Speier has faithfully pushed on with a Rosie-esque "We Can Do It" spirit befitting a poster.[127] Representative Speier reintroduced the Act again in June 2021 as House Bill 3853 with only sixty-one cosponsors to date, but chances are not looking good for this revival of the Bill to ever see life outside the Committee, either.[128]

123. Pink Tax Repeal Act, H.R. 5686, 114th Cong. (2016); *see also* Press Release, Congresswoman Speier Introduces Pink Tax Repeal Act to End Gender-Based Pricing Discrimination (July 11, 2016), [https://perma.cc/M8L8-8Q2R].

124. H.R. 5686.

125. Pink Tax Repeal Act, H.R. 5464, 115th Cong. (2018).

126. Pink Tax Repeal Act, H.R. 2048, 116th Cong. (2019).

127. Press Release, Speier, Fitzpatrick, Huffman, DeSaulnier, Casey, and Collins Announce Bipartisan Rosie the Riveter Congressional Gold Medal Act Signed into Law (Dec. 4, 2020), [https://perma.cc/PS7H-THQ6]. "And the iconic image of Rosie the Riveter will continue to inspire generations of young women across America to blaze new trails for years to come." *Id.*; *see also* Press Release, Congresswoman Speier and "Rosie the Riveter" to Discuss Equal Pay with High School Students on Women's Equality Day (Aug. 22, 2016), [https://perma.cc/EB66-LSCN].

128. Pink Tax Repeal Act, H.R. 3853, 117th Cong. (2021).

2. Judicial Attempts

Women in states that do not have legislation tailored to this issue are also recognizing this is a practice from which they deserve protection and are taking matters into their own hands, filing suits under existing law to challenge the protection currently available to them. Missouri in particular seems to be a hotbed of cases challenging the legality of the Pink Tax.[129] In 2020, the Eastern District of Missouri heard at least four suits that were "substantially the same," in which plaintiffs alleged that "unfair 'Pink Tax' pricing of Schick products for women" violated the Missouri Merchandising Practices Act ("MMPA").[130] The complaints in these cases "are identical but for legally immaterial differences such as the named plaintiffs and the particular razors or razor refills at issue."[131] Motions to Dismiss or to Compel Arbitration and to Stay Litigation were filed and granted by the courts in each instance, and Motions to Remand were denied in each instance, allowing the courts to avoid the issue entirely in this set of cases.[132]

Another case before the Eastern District of Missouri did finally force the court to consider gender-based price discrimination under the MMPA.[133] In *Schulte v. Conopco, Inc.*, the plaintiff proposed a class action lawsuit alleging the higher cost of women's antiperspirants—which contained the same active ingredients with only slight differences in inactive ingredients and provided 0.1 ounces less product than the corresponding men's antiperspirants—was discrimination in pricing and violative of the MMPA.[134] "The MMPA protects consumers from unfair practices 'in connection with' the sale or

129. *See Goulart II*, No. 4:19-CV-2568, 2020 WL 4934367, at *2 (E.D. Mo. Aug. 24, 2020).

130. *Id.*; *see also* Goulart v. Edgewell Pers. Care Co. (*Goulart I*), No. 4:19-CV-02559, 2020 WL 3000433, at *3, *7 (E.D. Mo. June 4, 2020); Been v. Edgewell Pers. Care Co., No. 4:19CV2601, 2020 WL 2747293, at *1 (E.D. Mo. May 27, 2020); Been v. Edgewell Pers. Care Co., No. 4:19-cv-02602, 2020 WL 1531015, at *1 (E.D. Mo. Mar. 31, 2020).

131. *Goulart II*, 2020 WL 4934367, at *2. Interestingly, the same lawyers are involved in each of these cases, resulting in nearly identical pleadings. *Id.*

132. *See id.* at *6.

133. *Schulte I*, No. 4:19 CV 2546, 2020 WL 4039221, at *1-2 (E.D. Mo. July 17, 2020).

134. *Id.* at *1.

marketing of a good or service,"[135] and the Act defines "unfair practice . . . as any practice which offends any public policy as it has been established by the Constitution, statutes or common law of Missouri, or by the Federal Trade Commission or is unethical, oppressive or unscrupulous; and presents a risk of, or causes, substantial injury to consumers."[136]

The court was not only unconvinced that gender-based discrimination, as described by the plaintiff, falls under the MMPA as an unfair practice, but appeared entirely unsympathetic towards the plaintiff until the final paragraph, in which the court half-heartedly acknowledged that the plaintiff "highlighted a pervasive issue of women being subjected to *questionable* pricing practices" after helpfully noting men would have to pay the same price as women for any particular deodorant.[137] This insightful observation entirely misses the point of Schulte's argument—it is unfair for women to have to sacrifice the benefits of gender-specific products in order to avoid paying a premium when men do not have to make that choice.[138]

Throughout the opinion, the court clung to the convenient arguments that it could not find discrimination because both "[m]en and women . . . may purchase any brand of Dove antiperspirant" they want, that the free market empowers any consumer to "survey the available alternatives . . . and avoid those that are inadequate or unsatisfactory," and that the practice was not unfair because "the ingredients . . . were [not] hidden or inaccurate."[139] This before finally landing on the one argument

135. *Id.* at *2.

136. *Id.* at *3.

137. *Id.* at *5-6 (emphasis added). Specifically, the court states, "Women are able to purchase any of the Dove antiperspirants for the same price as men regardless of the scent or variety." *Id.* at *6. "Karen Schulte sued numerous companies for violating the Missouri Merchandising Practices Act (MMPA) through their marketing of men's and women's antiperspirants." Schulte v. Conopco, Inc., 997 F.3d 823, 825 (8th Cir. 2021). On appeal from a dismissal of one of her suits, the Eighth Circuit noted that while Schulte might have a preference as to what scent of antiperspirant she uses, "preference-based pricing is not necessarily an unfair practice" as defined by the MMPA. *Id.* at 827.

138. *See Schulte I*, 2020 WL 4039221, at *6. Specifically in this case, "it is unfair for women to have to . . . smell like a man"—rather than a woman, as is presumably their preference—"to get a better price on their deodorant" while men get to smell masculine—as is presumably their preference—and enjoy a lower price by comparison. *Id.* at 2.

139. *Id.* at *5-6. The court equated the facts of this case to those in *Boris v. Wal-Mart Stores, Inc.*, 35 F. Supp. 3d 1163 (C.D. Cal. 2014), in which the court held Walmart "did not

that, if all else fails, the judiciary can usually hide behind when faced with emerging social issues: "Her remedy lies with legislation not litigation."[140] Without providing any justification for why the plaintiff's intentionally limited "claims are not amenable to judicial resolution," the court, in a resigned dismissal of the claim, verbally handed the issue off to legislative efforts that have gone cold.[141]

III. HITTING A WALL—THE HEART OF THE PINK TAX ISSUE

With legislative efforts to combat the Pink Tax either falling flat or stalling entirely and the judiciary sitting on its hands awaiting guidance, the lack of urgency may make one wonder if this is an issue deserving of more significant attention. After all, many posit the Pink Tax is simply the free market working efficiently.[142] Champions of the free market are unconvinced

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violate . . . consumer laws by selling Equate Migraine medication for more than $9 and Equate Extra Strength medications for less than $3 when both products contained the same active ingredients at the same quantity of doses," with the only difference between the products being different colored packaging. *Id.* at *4. The court in *Boris* "found the parties received what they paid for and that 'a consumer's assumptions about a product are not the benchmark for establishing liability.'" *Id.*

140. *Schulte I*, 2020 WL 4039221, at *6.

141. *Id.* Plaintiff conceded "sweeping, overreaching attempts to summarily prohibit gender-based (or any) pricing differentials are better left to legislators, not the judiciary," but pleaded with the court to consider her more limited claim. *Id.* at *4. She stated:

> [I]n certain specific and limited instances, the unique facts and circumstances attendant to in imposition of the "Pink Tax" may be such that a *jury* (not a Court), analyzing and weighing those facts and circumstances, could find that such imposition of the Pink Tax, being wholly or inadequately justified, constitutes an "unfair practice" under the Missouri Merchandising Practices Act.

Id.

142. YAZICIOĞLU, *supra* note 3, at 19-21; *see also Schulte I*, 2020 WL 4039221, at *5 (the court citing the fact that "the FTC has advocated for the free marketplace and requires that an actionable injury 'must be one which consumers could not reasonably have avoided'" and defendants arguing that the plaintiff's claim "'concerns issues of free market pricing and the role of consumer choice in the marketplace' that are not amendable to" suit); Steven Horwitz, *Is There Really a Pink Tax?*, FOUND. FOR ECON. EDUC. (May 13, 2015), [https://perma.cc/Y3WR-2N6R] ("So is this really a 'pink tax' or is it a 'blue discount?' And is it really that firms are somehow punishing women, or is it that women's preferences are such that they are willing to pay more to get exactly the product they want?").

women are without power to snuff out the Pink Tax,[143] and in certain circumstances, they might be right.[144]

On an individual level, a female consumer confronted with choices may choose a gender-neutral or male-specific alternative if it is cheaper, but to tell women this is their only remedy is to hand them a small, insufficient band-aid for a persistent wound. This "solution" is predicated on a number of assumptions that are no longer true, if they ever were.

Most importantly, the point remains that the issue is *not* that women pay more for gender-specific products—claiming this is a gross, if not deliberate, mischaracterization of the current reality. The real issue is women pay more for their gender-specific products *while men do not have to*. Men's products are considered the baseline[145] (as there are often no gender-neutral options), and the premium charged on female-specific products, at its core, is a premium charged for not being male.[146] Whether

143. It is also important to recognize antitrust concerns may be in play here, as an efficient free market depends in part on sufficient competition. YAZICIOĞLU, *supra* note 3, at 17; *see also* JOINT ECON. COMM., *supra* note 36, at 5. The persistence of the Pink Tax may be evidence that some markets are not "fully competitive, and competitors who would drive down inexplicably high prices for women's versions of products and services may be prevented from entering the market." JOINT ECON. COMM., *supra* note 36, at 5. "As a result, firms holding a significant share of market power would be able to continue charging more for goods and services targeting women." *Id.* This is one argument in support of government intervention, "as the federal government takes an active role in maintaining competitive markets." *Id.* This also presents an opportunity for businesses to develop in ways that focus on this potentially underserved market, as Georgina Gooley recognized when she co-founded women's razor subscription service, Billie. Leah Bourne, *The Pink Tax Revolution Is Here, and It's Being Led by Women*, GLAMOUR (May 7, 2018), [https://perma.cc/9WHL-VSN9]. Gooley explained she "was looking at the shaving category, and wondering why a women's subscription service hadn't been created, and why women have been an afterthought in the category . . . . Do women not shave? It didn't make sense." *Id.* Billie's success is certainly evidence that women comprise a responsive and profitable market. *See infra* notes 209-17 and accompanying text.

144. *See* YAZICIOĞLU, *supra* note 3, at 20-21.

145. Berliner, *supra* note 1, at 86-87 (discussing androcentrism).

146. YAZICIOĞLU, *supra* note 3, at 19. "Prices . . . do not merely reflect costs and efforts of service [or product] providers, they also reflect the 'prestige'" or perceived value of what is purchased. *Id.* Is it so surprising women would want to benefit from products tailored to them, as men do already? Horwitz, *supra* note 142. Horwitz's comment that telling women they will "just have to smell like a man" to avoid the Pink Tax "implies that women might *care* about how the products smell more than men do" and mischaracterizes reality. *Id.* Men might value smelling like a man, or other male-specific products, just as much, but we would not know it as things stand because no premium is applied to test the

men and women are equal has historically been contested, but men and women have always existed.[147] Therefore, there should have either been two distinct baselines or one gender-neutral baseline. If this were the case, either everyone would have paid the premium for gender-specific products or no one would have. Telling women they can choose different products to avoid the Pink Tax misses the mark because the only real choice is whether to sacrifice the female-specific product in order to pay what men pay for their male-specific product or to simply accept that they must pay more in order to get the female-specific product.

If this is a choice, it is more accurately described as a Hobson's choice.[148] First, it has been shown that women who do not adhere to gender norms face serious repercussions.[149] For example, a woman's physical appearance is generally more closely tied to her professional success than a man's.[150] Though her appearance may not always hold her back, it is a risk society asks her to shoulder when it tells her that her only option, if she does not want to pay the Pink Tax, is to avoid female-specific products and services. The message is she must select the ill-fitted men's white button-down shirt over the tailored women's white button-down shirt to save money, but then turn the other cheek if she is told she looks unprofessional because her clothes are baggy or frumpy.

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price elasticity of male-specific products or services. *See id.* ("[P]rice discrimination takes place because the different groups have different price elasticities for the product.").

147. *See* YAZICIOĞLU, *supra* note 3, at 5 (discussing the definition of sex, stating that there are two biological labels for sex, one of which is assigned to individuals "at the time of their birth on the basis of a number of anatomical criteria"). Still, because gender is an expression of a person's identity that must "be signaled and performed," there are at least three forms of gender expression—masculine, feminine, and androgynous—which are also deserving of consideration in this conversation surrounding an appropriate "baseline." *See id.* at 4-6.

148. A Hobson's choice is defined as "an apparently free choice when there is no real alternative" or "the necessity of accepting one of two or more equally objectionable alternatives." *Hobson's Choice*, MERRIAM-WEBSTER, [https://perma.cc/CM5J-XQYN] (last visited Oct. 15, 2022). Depending on one's perception of gender-norms, one or both definitions apply here.

149. YAZICIOĞLU, *supra* note 3, at 34.

150. *Price Waterhouse v. Hopkins*, in which a female employee's partnership application was put on hold because she failed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry," provides a concrete example of this unfortunate reality. 490 U.S. 228, 235 (1989).

Second, even if she does opt to forgo female-specific products or services when she can, she still cannot escape the Pink Tax entirely.[151] There are instances in which women cannot choose differently. On the service side, "[w]omen do not get the option to order a 'men's service' and thereby to pay the 'men's price.'"[152] For example, when a woman receives the same haircut as a man, she is generally charged more, although the services are identical.[153]

Additionally, multi-vitamins are gender-distinct and developed to recognize inherent differences in men's and women's bodies.[154] The differences are based on biology, not preferences. So, when women's vitamins are more expensive than men's, should a woman really be expected to sacrifice what is healthiest for her if that is what it takes for her to avoid the Pink Tax? While there are differences in the products, two arguments exist for why those differences should not result in a higher price. One, men require higher dosages of certain vitamins because of specific biological needs and because statistically they are larger; therefore, they often receive more product even though they pay less.[155] Two, the product may vary and the cost of producing it may even vary, but consumers' expectations are the same for both men and women. Regardless of gender, a person purchasing a

151. *See* YAZICIOĞLU, *supra* note 3, at 35-36 ("[The Pink Tax] cannot be avoided by being reasonably attentive. It cannot be avoided by becoming a 'market maven[.'] It cannot be avoided without facing social, economic and psychological repercussions.").

152. *Id.* at 35.

153. Berliner, *supra* note 1, at 70 ("In a 2000 study in the United Kingdom, even when the caller specified that the male customer and his wife had almost identical hairstyles, 150 unisex salons gave price quotes for the woman's haircut at a 43% markup, on average.").

154. Interestingly, it has been shown that standardized doses for gender-neutral medications are based off the average man—still more evidence of the how the historic view that men are the "normal" (and women are variations) has shaped our society. Louise Lerner, *Women Are Overmedicated Because Drug Dosage Trials Are Done on Men, Study Finds*, UNIV. CHI. NEWS (June 22, 2020), [https://perma.cc/KP3E-LHFV]; *see also Male Bias in Drug Development Trials Creates Overmedication*, OPEN ACCESS GOV'T (Aug. 14, 2020), [https://perma.cc/7842-ZMGV]; Berliner, *supra* note 1, at 86.

155. Jenn Sinrich, *What's the Difference Between Men's and Women's Multivitamins?*, VITAMIN SHOPPE (Mar. 8, 2021), [https://perma.cc/JER2-ATJA]; Lerner, *supra* note 154; *see also What's the Difference Between Men's and Women's Daily Supplements?*, NAT. WELLBEING (May 20, 2018), [https://perma.cc/B5GT-T9ZH]. There are certain vitamins women require more of as well, such as iron and folic acid. Sinrich, *supra*. Still, a consumer cannot easily tell whether certain vitamins are more expensive and whether the cost justifies the price difference between men's and women's multivitamins.

multi-vitamin is paying for the combination of vitamins that is optimal for improving and maintaining his or her health.[156] Women pay more for this same expectation.

Figure 1

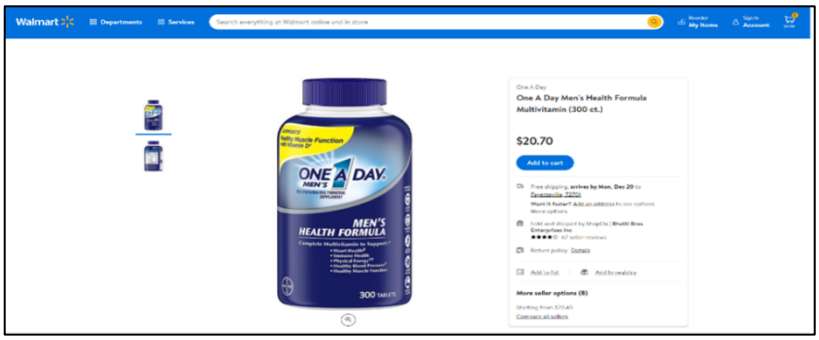

Figure 1: The price of a men's multivitamin on Walmart.com[157]

Figure 2

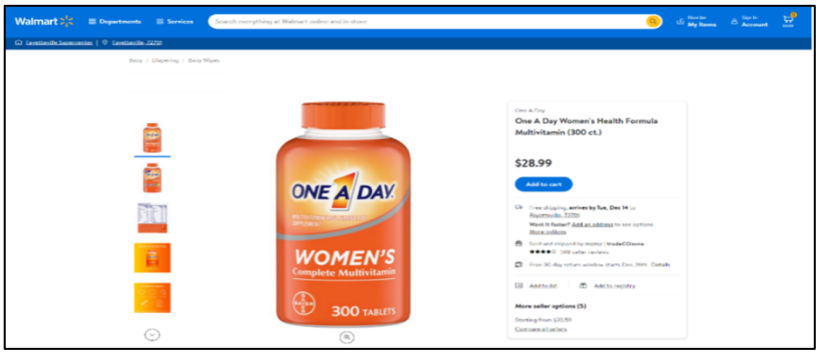

Figure 2: The price of a comparable women's multivitamin on Walmart.com[158]

156. Or at least what is optimal without the high cost of personalized vitamins. *See What's the Difference Between Men's and Women's Daily Supplements?*, *supra* note 155.

157. One a Day Men's Health Formula Multivitamin (300 ct.), WALMART INC., https://walmart.com (last visited Dec. 3, 2021).

158. One A Day Women's Health Formula Multivitamin (300 ct.), WALMART INC., https://www.walmart.com (last visited Dec. 3, 2021). These images serve as an example of the price difference consumers may encounter—and that this author actually did encounter—when searching for gender-specific products on a major retailer's website.

Defining products by their purpose or by the average consumer's expectation is unorthodox, but it gets at the heart of the issue.[159] When consumers share the same expectations of their respective products, the costs should be the same.[160] While the price differences between these products may even be valid in some instances, one could argue it should not justify the price difference between products with the same purpose: "If the American . . . analysis of sex discrimination were focused simply on the discriminatory outcome and impact—without the restrictions of discriminatory purpose—true substantive equality could be within reach."[161]

Some have expressed fears that artificially forcing the prices between these types of men's and women's products to be equal would unfairly harm businesses,[162] and others have even

159. Some courts have been hung up on the fact that the products at issue are different, seemingly without considering whether this should be the standard used to evaluate this issue—the Eighth Circuit in *Schulte v. Conopco*, for example, "ruled that the plaintiff would have to allege that the *only* difference between the products was the price and the intended target of the marketing." Metzinger & Clark, *supra* note 113 (reporting "on an emerging legislative and litigation trend relating to the 'pink tax'").

160. As one observer remarked:

> Though there may be legitimate drivers behind some portion of the price discrepancies unearthed . . . these higher prices are mostly unavoidable for women. Individual consumers do not have control over the textiles or ingredients used in the products marketed to them and must make purchasing choices based only on what is available in the marketplace. As such, choices made by manufacturers and retailers result in a greater financial burden for female consumers than for male consumers.

BESSENDORF, *supra* note 2, at 6. When there are opportunities to make products better suited for female or male consumers, we should encourage pursuing such opportunities and encourage consumers to select the product best suited for them. However, particularly in instances where a manufacturer cannot fully explain why a comparable product is more expensive for one gender, it should spread the cost difference to the product's gendered counterpart to better reflect consumers' identical expectations that they are purchasing a product best suited to their gender.

161. McMullen, *supra* note 20, at 401. This highlights the distinction between "formal equality versus substantive equality," which "illustrates how equal outcomes sometimes require unequal treatment." *Id.* at 360. As it has become that clear consumers' rights in the free market alone are insufficient to combat the Pink Tax, some additional step is apparently required to achieve substantive equality for a "historically disadvantaged class." *Id.*

162. *See, e.g.*, YAZICIOĞLU, *supra* note 3, at 21 (stating that one would not expect a producer to stop profiting off of cashews simply because "people tend to eat a bowl of them against their best interest."); Sforza, *supra* note 95 (reporting that the California Chamber of Commerce branded a bill to end gender-based price discrimination a "job killer" and that the California Retailers Association believed that the legislation would "result in confusion, inaccurate pricing and increased costs").

expressed skepticism that the true motivation behind the call to end the Pink Tax is a desire for equality.[163] Yet, if businesses depend so greatly on the Pink Tax that ending the practice even for this small sub-set of products[164] would legitimately cause such substantial harm, then skeptics can no longer deny the practice. Further, even if these concerns are valid, it must be noted that not one of these critics has, in good faith, suggested spreading the cost of the Pink Tax to men's products as a solution to simultaneously level the playing field and protect businesses.[165] It seems they are perfectly happy to continue to let the fate of businesses rest on women's wallets.[166]

Ultimately, statements instructing women to simply make better market choices to avoid the Pink Tax assume the problem lies with them[167]—that they are either failing to be educated consumers or lacking the necessary self-control to make decisions that accurately represent their values. Claiming women are irrational consumers is comically underinclusive: all consumers are irrational on some level.[168] Men are not rational simply because they choose men's products, and men's products happen to be cheaper. Studies have proven "human beings possess only 'bounded rationality,'" which falls short of the "Olympian rationality" presumed by the pure free market approach.[169] It is no secret "who individuals are, what they want and what they choose to do all are determined to a certain extent by the gender stereotypes of the society they live in."[170] Marketers have

163. *See, e.g.*, Horwitz, *supra* note 142 ("[I]t's interesting that the call here is for sellers to cut their prices for women, rather than raise their prices for men. We see the same phenomenon with the wage gap, where it's always a reason to raise women's wages and not to cut men's wages.").

164. Specifically, products for which consumers' expectations are exactly the same, regardless of gender.

165. Steven Horwitz mentioned spreading the cost across men's products but as a criticism of those calling for an end to the Pink Tax, not as a solution offered in furtherance of the call. *See* Horwitz, *supra* note 142.

166. Or vice versa in instances in which men are targeted by gender-based price discrimination. *See supra* note 11 and accompanying text.

167. YAZICIOĞLU, *supra* note 3, at 20. "If you don't like the 'pink tax[,'] then you don't have to play the game. Buy the men's products. Or better yet, buy whatever's on clearance." *Id.*

168. *Id.* at 17.

169. *Id.*

170. *Id.* at 31.

capitalized on gender stereotypes, convincing consumers the products are different between genders, and "most consumers, and not just women, opt for items that 'match' their gender, regardless of their price."[171]

IV. IT'S A RELAY, NOT A SPRINT

I hope it is clear the Pink Tax is an issue we, as a society, should be concerned about and that there is no single, magical solution to the problem. This practice is deeply entrenched into business practices and to change this norm will require action on multiple levels affecting the market. For this reason, efforts to combat the Pink Tax are best described as a relay, not a sprint, with each segment comprising a distinct and vital role in confronting the Pink Tax.

A. Legislation—The First Leg

There is currently little state legislation in place to address the Pink Tax and no widespread federal legislation at all.[172] But, even if there were more pervasive legislation concerning the Pink Tax, there are reasons to believe it would not be as effective as some believe. First, as previously discussed, gender-based price discrimination can be difficult to identify and to describe.[173] There are many legitimate reasons why a product might be priced differently. One example is certain color dyes might be more expensive because they are more costly to obtain or concentrate—it is possible pink is one of those more expensive dyes.[174] These

171. *Id*. Further, to the extent that self-control plays a role, statistically, women have more self-control than men, even as children. *See id.* at 22-23. The Marshmallow Test is a "test created by the psychologist Walter Mischel" "to measure the willpower, i.e. the ability to delay gratification and resist temptations, of individuals" by presenting "a choice between one reward," a marshmallow that one can eat immediately, "and a larger reward," two marshmallows that one must wait to eat. *Id.* at 22. In conducting this study, "Mischel observed that even when the reward values were equated and the motivation was the same, girls usually waited longer than boys." *Id.*

172. Outside of the federal legislation addressing the Pink Tax in the military, an important but narrow scope. *See* Military FATIGUES Act of 2021, S. 3016, 117th Cong. (2021).

173. *See* discussion *supra* Section II.B.

174. In reality, this could be the result of androcentrism, the concept of "male-centeredness." Berliner, *supra* note 1, at 86. Historically, goods marketed towards men were

other factors make it difficult to tell when the price difference is genuinely because of gender-based price discrimination,[175] which makes the practice difficult to articulate in legislation. States that have acted on this issue have proven this.[176] Generally, state legislation has been virtually indistinguishable: businesses may not charge different prices for "substantially similar" products on the basis of gender.[177] While this represents the right spirit, "substantially similar" has proven to be a particularly difficult term to nail down. In the bill pending before Congress, the definition of the key phrase is "no substantial differences," which offers no more guidance than the phrase itself.[178] Efforts in New York to define the phrase more specifically are admirable. The State defines "substantially similar or like kind" as goods that "share the same functional components" and "share ninety percent of the same materials or ingredients."[179] However, it is

considered "normal" and goods marketed towards women were the "variation" or "luxury." *See id.* This initial belief sets the tone for which goods and materials along the chain of production should cost more to make or obtain, not necessarily because it was genuinely more expensive but because the material was valued differently. *See* YAZICIOĞLU, *supra* note 3, at 18-19. This effect can be seen in other areas, too. For example, "in *Boyd v. Ozark Air Lines*, the Eighth Circuit held that a minimum height requirement . . . for plane pilots did not discriminate against women because the qualification was needed for the pilot to reach the controls in the cockpit." Berliner, *supra* note 1, at 87 (footnote omitted). However, cockpits were initially designed to fit men when women were not permitted to fly, so when women finally could serve as pilots, they were punished for failing to meet a standard designed for someone else. *See id.* The saying "it's a man's world" carries some bit of truth, as most sayings do, and even though society has begun moving away from this reality, the fact that it started off as such still affects the state of things today. *See id.*

175. Much legislation provides exceptions for price differences based on legitimate differences, often including "differences passed from the manufacturer to the retailer that are out of the retailer's control." Therefore, if the manufacturer prices certain materials higher that tend to be used for women's products, or if the retailer uses a more expensive manufacturer altogether for those materials, then the retailer can continue to charge a higher price for those products, even if in the end the reason for the initial price difference of the materials is gender-based. Berliner, *supra* note 1, at 101.

176. *See* discussion *supra* Section II.C.1.a.

177. *See supra* notes 110-11 and accompanying text.

178. Pink Tax Repeal Act, H.R. 3853, 117th Cong. § 2(d) (2021). Truly, this is the functional equivalent of a circular definition.

179. S. 2679 § (1)(b)(ii)-(iii), 2019-2020 Leg., Reg. Sess. (N.Y. 2019). To be sure, this definition offers greater clarity than others. For example, it is worth noting here that the Excedrin and likely the multivitamins previously discussed would be captured by this definition and, therefore, impacted by this legislation. *See supra* notes 45, 154-56 and accompanying text.

yet to be seen whether this definition fully resolves the ambiguity plaguing other states' definitions of "substantially similar."

The second reason legislation may be less effective in addressing the Pink Tax than some expect is because the legislation is extremely difficult to enforce. In part, this is because the statutes themselves are vague, as was just discussed.[180] But additionally, the enforcement mechanisms are just not practical. In states offering a private right of action, consumers are ill-equipped to pursue recourse. They are certainly not privy to the inner workings of the retailer or manufacturer of the product and cannot see the factors that might be at play in setting the price. This can either manifest in consumers not bringing claims at all because they are unsure if their claims are valid or in an abundance of invalid claims that waste administrative or judicial resources.

Further, the opportunities to compare products are also becoming less frequent, particularly with online shopping. Now, consumers simply search the products they wish to purchase, and depending on what they search, they may never see the male counterpart or even gender-neutral alternatives.[181] Similarly, in states where enforcement of the Pink Tax legislation relies on an attorney general, or some other regulatory agency, to take action against a business, it may take a significant investigation into product pricing before ultimately being able to conclude whether a business is violating Pink Tax legislation. This is not to say it cannot be done, but with the vast and ever-increasing number of

180. *See supra* notes 177-78 and accompanying text.

181. To take this point one step further, with the pervasiveness of targeted advertising, a search may not even be necessary. A search engine or social media platform may detect a user's gender and prompt him or her with ads for only male-specific or female-specific products. *See* Tanya Kant, *Identity, Advertising, and Algorithmic Targeting: Or How (Not) to Target Your "Ideal User"*, MIT CASE STUDIES IN SOC. & ETHICAL RESPS. OF COMPUTING, Summer 2021, at 2-3, 11. Kant explains that "[t]argeting mechanisms use a dizzyingly extensive list of categories to profile people" and lists gender first as one of these factors. *Id.* at 2-3. She further explains that profiling consumers is "made useful and profitable through establishing 'like-to-like users' who are aggregated with and against other groups of users." *Id.* at 3. She warns that, "Despite (or indeed because of) its monetizable qualities, targeting creates a host of stark ethical problems in relation to identity articulation, collective privacy, data bias, raced and *gendered discrimination* and socioeconomic inequality." *Id.* (emphasis added). To combat this type of targeted advertising, users must actively beat an algorithm many of them have never seen.

products offered by businesses, this raises concerns about how many "boots on the ground" it would actually take to keep up with the market and effect real change this way—all the while women remain subject to potentially violative prices and continue to overpay.

Another reason why legislation might not be effective is it is relatively easy for businesses to circumvent. In order to be effective, there must be a threshold by which businesses can determine whether they are in compliance, like the New York bill attempts to provide, but this same threshold also describes to businesses exactly how they can avoid being subject to the legislation at all.[182] If the standard is whether ninety percent of the materials or ingredients are the same, businesses can adjust their products just slightly so that only eighty-nine percent of the components are the same.[183] Given the intended effect of Pink Tax legislation is to decrease the profits businesses earn disproportionately from women, it is not a huge stretch to believe many businesses will seek ways to get around these laws.

Additionally, at a higher level, the conversation surrounding gender-based price discrimination may be leading legislative efforts astray.[184] As Bridget Crawford insightfully points out, "calling something a 'tax' does not mean that it is, at least in the ways that economists and tax scholars tend to talk about taxes."[185] Perhaps by clinging to the pithy, short-hand term of "Pink Tax," legislators are impelled to take action in certain ways that are not best suited to the problem.[186] Moving beyond this imprecise language and elevating discussion of the Pink Tax may remove blinders that limit creative solutions to the real issue at hand.[187]

Ultimately, one cannot help but wonder whether such legislation is even worth pursuing when it seems the odds are stacked against the efforts. But really, it still might be worthwhile. Legislation has significant value even outside of its

182. *See* S. 2679.

183. *See* S. 2679.

184. *See* Crawford, *supra* note 9 (manuscript at 1, 2, 10).

185. *Id.* at 10.

186. *See id.* at 2, 10.

187. *See id.* As Professor Crawford eloquently states, "[C]oncrete legal change requires greater clarity than figurative tax talk can provide in naming and norming a vision for the future." *Id.* at 9.

most basic purpose of establishing standards. Legislative efforts can capture the attention of the media and the public, making it a powerful tool for raising awareness of an issue. Particularly because consumers may not realize this practice is real or as pervasive as it is, public awareness is vital to reaching a point when consumers are making informed decisions about their purchases in ways that enable the market to work efficiently. This can place some power back into the hands of consumers because their dissatisfaction with this practice can be communicated through their demand, which, in theory, should affect the prices of these female-oriented products.[188]

Further, legislation, specifically at the federal level, could also raise awareness among states that have not yet acted on this issue and among businesses directly through its signaling effect. Bringing this issue to the forefront of states' dockets may amplify efforts to raise awareness and encourage states to impose regulations that touch small businesses within their borders.[189] Still, such legislation would likely continue to be plagued by the same defects previously identified in existing legislation.[190] But, as previously stated, raising awareness could be an effective step towards addressing gender-based price discrimination.

Arguably, the signaling effect of such legislation may be significantly more meaningful than enforcement anyways. Admittedly, the value of signaling is probably tied to how seriously businesses take the threat of this surging opposition to gender-based price discrimination. If a business does not anticipate such a movement really capturing the attention of consumers, they will find ways to circumvent legislation.[191] However, if a business appreciates the policy behind legislation prohibiting gender-based price discrimination, it could prove to be an excellent opportunity to distinguish itself from its

188. *See supra* notes 51-56 and accompanying text; *see also infra* Section IV.C. *But see supra* notes 57-74 and accompanying text (explaining why consumer power in the free market alone is insufficient to combat the Pink Tax).

189. *See* Small Business Gender Discrimination in Services Compliance Act, CAL. CIV. CODE §§ 55.61-.63 (West 2018).

190. *See supra* Section II.C.1. Further, any effectiveness of legislation may be better addressed at a more local level in order to touch businesses of all sizes and scopes. *See* CIV. §§ 51.61-.63.

191. *See supra* note 175 and accompanying text.

competitors, particularly today, when stakeholder interests are becoming more central to a business's success.[192]

B. ESG—The Second Wind

With legislative efforts to reach this issue lacking as well as consumer protection and civil rights claims failing to gain traction in courts, the question becomes, "How else can businesses be motivated to stop imposing the Pink Tax?" The answer to this question could be the missing force needed to finally push past this wall we seem to be hitting in making progress against the Pink Tax. Consumers and shareholders alike are demonstrating more often they expect businesses to consider and report on environmental, social, and governance ("ESG") topics.[193] In a quasi-extension of the era of corporate social responsibility and a period of renewed dedication to stakeholder interests, businesses who focus on operating ethically and responsibly, not just on maximizing short-term profits, are experiencing sustainable profitability and consumer loyalty.[194] ESG disclosures are not only directly affecting investment decisions but are also presenting a unique "opportunity for companies to highlight the integration of ESG factors into longer-term business strategies."[195] In this instance, ESG also presents the best chance

192. Michal Barzuza et al., The Millennial Corporation (Sept. 6, 2021) (unpublished manuscript), [https://perma.cc/X72W-H7G2].

193. Even "accounting firms are jumping on [the] bandwagon," excited about a new direction for their firms with the increasing popularity of these reporting metrics and the chance to "rebrand a scandal-plagued profession as experts on climate change, diversity and winning consumers' trust." Michael O'Dwyer & Andrew Edgecliffe-Johnson, *Big Four Accounting Firms Rush to Join Sustainability Trend*, FIN. REV. (Sept. 1, 2021, 4:27 PM), [https://perma.cc/5T5Y-SAYB].

194. *See* Subodh Mishra, *ESG Matters*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (Jan. 14, 2020), [https://perma.cc/49UK-WRJ2] (discussing the apparent "link between ESG . . . and financial performance" and considering various explanations for this relationship, including the effect of "better managing its material ESG risks" and "the younger generation's push to consider social issues").

195. *See* David M. Silk et al., *Wachtell Lipton Discusses ESG Disclosures — Considerations for Companies*, COLUMBIA L. SCH.: THE CLS BLUE SKY BLOG (Mar. 10, 2020), [https://perma.cc/J5DN-NWMW]; *see also* WACHTELL, LIPTON, ROSEN & KATZ, ADVANCING STANDARDIZED SUSTAINABILITY/ESG METRICS AND DISCLOSURES 1 (2020), [https://perma.cc/7H44-6DGY].

> In a bid to bring clarity, simplicity and coherence to the alphabet soup of ESG disclosure frameworks and prevent companies from being overwhelmed by the

companies have of avoiding poorly drafted, burdensome, or just simply ineffective legislation. If companies act now, of their own volition, against the Pink Tax, they can make the rules and set the standards for themselves.[196]

Companies are already considering similar social issues in their annual 10-K statements.[197] For example, CVS Health Corporation's 2021 10-K report includes ESG goals the company has set out to accomplish before 2030.[198] Under the heading "Healthy Business," CVS states it is "committed to operating a healthy business for all [its] stakeholders, including [its] patients, customers, stockholders, clients, partners, communities and colleagues."[199] As part of this initiative, CVS expresses a commitment "to acting responsibly with respect for human rights,

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> hundreds, if not thousands, of potential ESG-related data points and metrics, the International Business Council (IBC) of the World Economic Forum (WEF), in collaboration with the four major accounting firms, has released its final recommendations for a set of universal, standardized, and industry-agnostic ESG and sustainability metrics and disclosures. . . . Based on "a belief that the interrelation of economic, environmental and social factors is increasingly material to long-term value creation," the IBC/WEF framework defines a set of "Stakeholder Capitalism Metrics" for companies to use and publicly report performance against broader dimensions of sustainable value and ESG factors on a more standardized and consistent basis. These metrics can also be used to track a company's contributions toward the Sustainable Development Goals (SDGs).

Id.

196. "If you look at how many women are CEOs of Fortune 500 companies . . . it's easy to see how this got neglected." Bourne, *supra* note 143; *see also* Emma Hinchliffe, *The Female CEOs on This Year's Fortune 500 Just Broke Three All-Time Records*, FORTUNE (June 2, 2021, 5:30 AM), [https://perma.cc/DG97-MRPK] ("In 2021, the number of women running businesses on the *Fortune* 500 hit an all-time record: 41."). While this number is beginning to grow, ESG offers the opportunity to motivate companies to address this issue much sooner, without having to wait for more women to finally be, as the inimitable Justice Ruth Bader Ginsburg said, "in all places where decisions are being made." Mary Kate Cary, *Ruth Bader Ginsburg's Experience Shows the Supreme Court Needs More Women*, U.S. NEWS (May 20, 2009, 12:06 PM), [https://perma.cc/AP8P-CFBT].

197. "A 10-K is a comprehensive report filed annually by a publicly-traded company . . . and is required by the U.S. Securities and Exchange Commission (SEC)." Will Kenton, *10-K: Definition, What's Included, Instructions, and Where to Find It*, INVESTOPEDIA (Apr. 18, 2022), [https://perma.cc/XB7Y-64VJ]. Information provided in a 10-K includes the company's "history, organizational structure, financial statements, earnings per share, subsidiaries, executive compensation," management's discussion and analysis, and identified risks the company faces. *Id.*

198. *See* CVS Health Corp., Annual Report (Form 10-K) 17-18 (Feb. 9, 2022) [hereinafter 2021 CVS 10-K], [https://perma.cc/U55T-BN6Y].

199. *Id.* at 17.

privacy, information security, public policy, marketing and advertising," and a focus on "diversity, equity and inclusion . . . ."[200] Working towards better price equality or at least disclosures regarding price disparities in their advertisements for products could easily be part of this goal. Further, in the section for a "Healthy Community," CVS claims it is working to reduce health disparities, promote and enhance equity, and ensure "at-risk communities can thrive."[201] Because some products subject to the Pink Tax are health products, working towards price equality is a step towards this goal as well.

Microsoft's 2021 10-K included a section regarding "Pay Equity," in which it highlighted its 2020 Diversity and Inclusion Report.[202] The report compared what women in its U.S. operations earned as compared to their male counterparts.[203] In similar fashion, companies could begin to include a "Price Equity" section, in which they monitor what the final prices of their products are and compare the final prices of men's and women's products. While this may seem challenging logistically, companies are in the best position to monitor the Pink Tax within their organization as part of their supply-chain operations. Individual companies are certainly in a much better position than state or federal governments to isolate and address the issue at its

200. *Id.*

201. *See id.* After this Comment was selected for publication in 2022, CVS announced that, during a period of significant inflation and in the face of supply-chain issues impending a shortage, it planned to "lower prices on CVS Health and Live Better tampons, menstrual pads, liners, and cups" and pay "the sales taxes on menstrual products in 12 states," including Arkansas. Beth Ann Mayer, *CVS Dropping Price of Tampons and Paying the 'Pink Tax': What to Know*, HEALTHLINE (Oct. 18, 2022), [https://perma.cc/J3HZ-YY75]. In many of the articles reporting on CVS's decision, the sales tax on menstrual products is dubbed the Pink Tax. *See, e.g.*, *id.*; Tom Ryan, *CVS Battles the 'Pink Tax'*, RETAILWIRE (Oct. 17, 2022), [https://perma.cc/NGE3-WVGJ]. While this particular action does not address the Pink Tax as this author defines it, but rather the Tampon Tax, it is certainly evidence that CVS is living up to their words in addressing forms of inequity women face. Mayer, *supra* (discussing "menstrual inequity," "period poverty," and other circumstances affecting women's abilities to access these vital products); *see also Here for Women.*, CVS, [https://perma.cc/VC65-GKGZ] (last visited Jan. 12, 2023) (indicating CVS has considered the impact of the Pink Tax as well, stating the company does not "think women should pay more than men for the same thing").

202. *See* Microsoft Corp., Annual Report (Form 10-K) 9 (July 29, 2021) [hereinafter 2021 Microsoft 10-K], [https://perma.cc/X5WH-HBU2].

203. *See id.*

source. Whether companies are willing to invest in such efforts is something else entirely.

However, with legislation clearly on the horizon, if not already arrived in some jurisdictions, companies would be wise to proactively eliminate the Pink Tax and to communicate their stance on the practice to gain favor with consumers now.[204] Companies are unquestionably recognizing the threats posed by the dangerous waters of stakeholder interests. Their reputations and bottom lines are increasingly jeopardized by what consumers, employees, and, quite frankly, any member of social media say about them.[205] To this point, ESG concerns will sneak into corporations' 10-Ks whether they like it or not. Even if companies refuse to get ahead of ESG issues, such as gender-based price discrimination, and fail to disclose a plan of action to address stakeholder concerns, they will still have to report these issues as risks in their 10-K, particularly as these concerns gain attention.[206] At a certain point, stakeholders will likely complain about the company's failure to address their concerns.[207] They may even initiate shareholder proposals to try to force companies' hands in adjusting their business practices to mitigate the Pink Tax or address other ESG concerns.[208]

Voluntarily addressing gender-based price discrimination is a strategy that has worked well for companies that have spearheaded the call against the Pink Tax at the corporate level.[209] After realizing it was perpetuating the Pink Tax,[210] Boxed, a bulk

204. *See supra* Section II.C.1; KPMG, CORPORATE TAX: A CRITICAL PART OF ESG 7 (2019), [https://perma.cc/ET84-QMJU].

205. *See* Barzuza et al., *supra* note 192, at 28-33.

206. *See, e.g.*, 2021 CVS 10-K, *supra* note 198, at 36. Yet another Hobson's choice, but it does not feel good when the shoe is on the other foot. *See supra* note 148 and accompanying text. Even if companies do not explicitly list ESG concerns, many admit their success depends in large part on the public perception of the company, which implicates ESG concerns if the public finds such concerns notable. *See, e.g.*, Target Corp., Annual Report (Form 10-K) 5 (Mar. 10, 2021), [https://perma.cc/PLR6-CVS3].

207. *See* Barzuza et al., *supra* note 192, at 28-33.

208. *See* Matteo Tonello, *2022 Proxy Season and Shareholder Voting Trends*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (Mar. 30, 2022), [https://perma.cc/Y55M-CJ3J].

209. *See* Bourne, *supra* note 143.

210. *See id.* Without realizing it, Boxed was passing along the cost of the Pink Tax, imposed by everyone before it on the supply chain, to its consumers. *Id.* It was only after Nitasha Mehta, the female "head of vendor marketing at Boxed," became angry after

online retailer, not only changed its prices so its "customers pay equal prices for equal products, regardless of their gender," but it also "reduced the list price on feminine hygiene products in states where they are taxed to compensate for the unfair tax treatment."[211] By adopting their "#RethinkPink" campaign, Boxed actually began "absorbing the price difference" for its female consumers, but it has more than made up for the decreased profit margins on female-specific products "by bringing in new customers."[212]

Not long after Boxed adopted its Pink Tax-conscious business model, Billie, "a women's razor subscription service," launched to continue the efforts.[213] In addition to providing more affordable women's razors by adopting the subscription service model that has been relatively limited to men's razor companies, part of Billie's model includes offering a "Pink Tax Rebate" to customers who refer friends to the subscription service.[214] The new company reached its "12-month goal in four-and-a-half months" and has benefitted from significant support to the tune of $4.5 million in funding.[215] Other efforts to combat the Pink Tax have included launching marketing campaigns such as the European Wax Centers #AxThePinkTax campaign[216] as well as

realizing "she was paying more than men for lots of the same personal care products" that she looked "into her own company's prices." *Id.* At this point, it is not that every supplier or retailer intends to charge women more, but gender-price discrimination is so pervasive in the supply chain, despite being relatively unheard of, that people do not think about it or its cumulative effect on women. *Id.* (stating that Boxed was simply "getting its prices from manufacturers" and had to make a concerted effort to set prices that countered the effects of the Pink Tax).

211. *Pink Tax: Why Boxed Is Taking a Stand Against Unfair Gender Pricing*, BOXED: BLOG (Mar. 1, 2019), [https://perma.cc/P27P-EEPE]. While the reduction in list price to accommodate taxes on feminine hygiene products is addressing the Tampon Tax, not the Pink Tax, it deserves attention as an example of companies proactively addressing gender discrimination in the marketplace.

212. *See* Bourne, *supra* note 143.

213. *See id.*

214. *See The Pink Tax Rebate*, BILLIE, [https://perma.cc/6EMM-LF36] (last visited Oct. 16, 2022). "On behalf of the razor companies out there—we're sorry you've been overpaying for pink razors. It's time you got some money back." *Id.* While the Rebate averages only $1 per referral, in this gesture of goodwill, Billie is not only helping raise awareness of the issue but recognizing in a tangible way that women do overpay. *See id.*

215. Bourne, *supra* note 143.

216. *See id.* The company says it has always charged men and women the same prices for the equivalent services but wanted to help contribute to the cause. *See id.*

creating gender-neutral brands such as Soapwalla and Mender CBD Apothecary.[217]

These companies recognize that apathy towards this issue is just as harmful as discriminatory intent.[218] In contrast, a representative from Target, who was asked about pricing differentials within the company, stated Target's "competitive shop process ensures that [it is] competitively priced in local markets," attributing such differences potentially to "production costs or other factors."[219] While this may explain price differentials, it does not justify them:

> [M]eeting competitors' prices in local [or national] markets is not a business justification under the civil rights laws. The fact that your competitors are price-gouging on [female-specific products] doesn't mean that you have to. Price-gouging is never a business justification for discrimination—even if it really helps a seller raise its profits.[220]

So far, efforts to combat the Pink Tax have been mostly concentrated in retailers and smaller start-ups.[221] Though there are few to speak of, the companies that have taken stances against the Pink Tax show it can be profitable. Their success is evidence of consumers' receptivity to Pink Tax-conscious companies, but in order for more companies, particularly larger ones, to adjust their business practices to be more sensitive to the Pink Tax, greater evidence of a collective consumer desire for an end to the Pink Tax is required.

C. Consumers—Closing the Gap

Despite some legislatures and companies stepping up to address the Pink Tax, it will likely take some time before the practice is truly driven from the market, and even when the dust has settled, there may be instances when the Pink Tax rears its

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217. Amy Flyntz, *The Pink Tax: What It Is + How These Brands Are Leading the Change Against It*, WELL INSIDERS, [https://perma.cc/7WBD-678N] (last visited Oct. 16, 2022).

218. *See supra* notes 209-17 and accompanying text.

219. Ian Ayres, *Which Retailers Charge the Largest 'Pink Tax'?*, FORBES (Jan. 7, 2016, 10:39 AM), [https://perma.cc/YM3R-2TKP].

220. *Id.*

221. Bourne, *supra* note 143.

ugly head. When all else fails, one must be her own advocate. In this case, filling these gaps requires taking advantage of the one point that has been consistently raised to curb efforts to eliminate the Pink Tax: consumers must make meaningful market choices to help combat the Pink Tax.[222]

However, in order for this to be an option, female consumers must be aware of this practice.[223] Every couple of years, there seems to be a resurgence of attention to the Pink Tax, specifically social media trends pointing out the price differences on products.[224] Yet there are still many who are not aware of the practice, so as legislation and corporate initiatives work at a high level to raise awareness, consumers must work on the ground to raise awareness amongst themselves.

Rachel Winard, founder of Soapwalla, advises consumers to live by the saying, "If you see something, say something."[225] Consumers should take note of when prices differ between men's and women's services, such as dry-cleaning, and make their case for why the service provider should honor the men's price for its female customers.[226] This approach obviously will work better with locally owned businesses, which generally have more flexibility than large retailers, but it is a step in the right direction.

With respect to larger companies, consumers should focus on shopping brands and purchasing from stores that are mindful of the Pink Tax, and they should be aware of which companies impose the largest Pink Tax.[227] Unfortunately, many companies who make this list are popular: Club Monaco, Urban Outfitters, Levi's, Carter's, CVS, Target, and Walgreens, among others.[228] When armed with such knowledge, and while awaiting more protection, consumers will either have to put their money where

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222. *See supra* notes 52-56 and accompanying text.

223. *See supra* notes 57-59 and accompanying text.

224. *See* Berliner, *supra* note 1, at 67, 71, 89-90 (noting Ellen's announcement of the Pink Tax, Twitter's burst of attention on the Pink Tax, and other social media movements such as #PinkTax and #AxthePinkTax); *see also* YAZICIOĞLU, *supra* note 3, at 10.

225. *See* Flyntz, *supra* note 217.

226. *Id.*

227. *See* Ayres, *supra* note 219.

228. *Id.* This study was conducted by compiling a report of "the average gender disparities of different retailers" sorted by product type categories. *Id.*

their morals are and shop elsewhere or surrender once and for all to the free market rationale of the Pink Tax.[229]

V. CONCLUSION

The purpose of this Comment is two-fold: first, to raise awareness of an issue that still seems to be largely lurking in the shadows—eluding exposure of the discrimination it embodies[230]—and second, to steer the conversation surrounding the Pink Tax in a new direction in hopes of sparking new ideas for how to combat the practice.[231] The purpose is not to disparage or discourage legislative efforts, past or pending,[232] nor is the purpose to decry the free market, as an efficient market is almost surely vital to a final resolution of this issue.[233] The Pink Tax is complicated and is deeply woven into today's business practices—any and all attempts to weed it out are noble and indeed worthy of celebration. Still, we must learn from instances in which efforts have fallen short in order to craft a meaningful solution.

A reflection on the last thirty years of the Pink Tax plight leaves us with some insightful observations to carry forward into what is hopefully a new wave of progress on this issue. Perhaps most importantly, a consensus must be reached on what the issue actually is.[234] So long as people continue to trivialize gender-based price discrimination, particularly by mischaracterizing the

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229. *See supra* notes 15-16, 51 and accompanying text.

230. *See supra* Parts II, III.

231. This is a purpose which hopefully reflects a similar motivating spirit to that of Bridget Crawford in her article. Professor Crawford begins her argument clearly outlining her ultimate goal:

> Slogans referring to figurative taxes are less likely to influence law and human behavior, despite their descriptive force in both popular and academic literature as a short-hand for group-based disparities. This Article catalogues and evaluates what makes for effective tax talk, in terms of impact on the law generally as well as day-to-day actions on the ground. With this roadmap, lawyers, policy makers and others will be able [to] make more forceful and precise arguments aimed at reforming the law and changing human behavior.

See Crawford, *supra* note 9 (manuscript at 1).

232. *See supra* Section II.C.1.

233. *See supra* Part III.

234. *See supra* notes 137-41 and accompanying text.

phenomenon, progress will be stunted.[235] Additionally, because the Pink Tax is not a true tax and is particularly difficult to capture in both language and practice, it requires a unique approach which must lean heavily on the spirit of the issue.[236] Finally, as history evinces, a force is missing in our current approach to address this issue: social attention and research on the Pink Tax merely lay the groundwork,[237] legislation alone misses the mark,[238] and consumer power is not enough to close the remaining gaps.[239] These are but three legs of a race that is proving more and more reminiscent of a relay, and progress in each—while still progress—is slow. The ESG movement, which is steadily gaining momentum, holds great potential to be a much needed second wind.[240] The unique flexibility and natural incentives captured by the ESG movement are unlike that of any previous efforts, giving this path a certain edge in motivating change that may prove to be the missing force in the Pink Tax movement.[241]

The combined efforts of each of these legs is sure to be the key to pushing past this wall the Pink Tax movement has hit, but there is still much race to be run even after overcoming this hurdle—as "comfort is the enemy of progress,"[242] we must not rest in the norm, but always challenge it by envisioning something better.

235. *See supra* notes 137-41 and accompanying text.
236. *See* Crawford, *supra* note 9 (manuscript at 1-2).
237. *See supra* notes 24-37 and accompanying text.
238. *See supra* Section IV.A.
239. *See supra* Part III.
240. *See supra* Section IV.B.
241. *See supra* Section IV.B.
242. P.T. Barnum is often credited with this quote.

SENTENCED TO PRISON, NOT TO DEATH: HOME CONFINEMENT DURING THE PANDEMIC AND MOVING BEYOND COVID-19

Sydney McConnell*

INTRODUCTION

A prison sentence should "not include incurring a great and unforeseen risk of severe illness or death."[1] But for the 2.3 million people[2] housed in our nation's prisons and jails during the COVID-19 ("COVID") pandemic, their sentences have included just that. The United States boasts the world's highest incarceration rate,[3] and as difficult and deadly as the pandemic has been for people globally, incarcerated populations have been hit especially hard. Within mere weeks of the first cases reaching the United States, 70% of inmates tested were positive for the virus.[4] By May 2020, seven of the ten largest COVID clusters were prisons or jails.[5] Despite a lack of widespread testing in correctional facilities, by the end of 2020, an estimated "one in

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1. United States v. Rodriguez, 451 F. Supp. 3d 392, 407 (E.D. Pa. 2020).

2. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), [https://perma.cc/E5QQ-6T7F].

3. *Id.*

4. Lee Kovarksy, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 71, 73 (2020) (this number only included those that were tested, but with testing in jails and prisons reported as sporadic at best, it can be assumed the actual rate of infection was much higher).

5. *Id.*

every five prisoners had COVID-19, compared to one in twenty in the general population."[6]

On March 13, 2020, President Donald Trump declared the pandemic a national emergency.[7] To rapidly reduce the incarcerated population and keep inmates and correctional facility staff safe, then-Attorney General William Barr issued a memorandum encouraging the Bureau of Prisons ("BOP") to "utilize home confinement, where appropriate, to protect the health and safety of BOP personnel and the people in [its] custody."[8] The day after Barr's memo was released, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") granted the Director of the BOP the authority to expand the use of home confinement to alleviate the strain on BOP functioning.[9] On April 3, 2020, Barr exercised that authority, stating:

> [T]he CARES Act now authorizes me to expand the cohort of inmates who can be considered for home release upon my finding that emergency conditions are materially affecting the functioning of the Bureau of Prisons. I hereby make that finding and direct that . . . you give priority in implementing these new standards to the most vulnerable inmates at the most affected facilities . . . .[10]

Since the beginning of the pandemic, the BOP has transferred approximately 49,068 inmates to home confinement.[11] The decision to expand home confinement is an important one. It is a step in the right direction to address another

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6. Eda Katharine Tinto & Jenny Roberts, *Expanding Compassion Beyond the COVID-19 Pandemic*, 18 OHIO STATE J. CRIM. L. 575, 577 (2021).

7. Discretion to Continue the Home-Confinement Placements of Federal Prisons After the COVID-19 Emergency, 45 Op. O.L.C. 1, 3 (Dec. 21, 2021) [hereinafter Discretion to Continue Home Confinement].

8. Memorandum from William Barr, Att'y Gen., to Michael Carvajal, Dir., Bureau of Prisons (Mar. 26, 2020) [hereinafter Att'y Gen. Memorandum], [https://perma.cc/93W7-5EPK].

9. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281, 516 (2020).

10. Memorandum from William Barr, Att'y Gen., to Michael Carvajal, Dir., Bureau of Prisons (Apr. 3, 2020), [https://perma.cc/9A8X-9DHT].

11. *Frequently Asked Questions Regarding Potential Inmate Home Confinement in Response to the COVID-19 Pandemic*, FED. BUREAU OF PRISONS, [https://perma.cc/2HB4-PR4H] (last visited Oct. 30, 2022); Discretion to Continue Home Confinement, *supra* note 7, at 2, 4.

broader, and distinctly American, issue: mass incarceration. Lawmakers on both sides of the political aisle have reached the consensus "that the uniquely American policy of mass incarceration is both fiscally and morally unsustainable."[12] If anything, the pandemic has shown we are capable of exacting meaningful change in a short period of time. The extension of home confinement demonstrates that America's position as the world's largest incarcerator does not have to remain the status quo. There are realistic, workable solutions for change in the criminal justice system, and home confinement presents one such opportunity.

This Comment argues that we have a perfect opportunity to stretch the utility of home confinement in a way that extends beyond the pandemic and addresses our overincarceration problem. Even though this Comment, and the current expansion of home confinement, deals only with federal prisons, state prisons could also benefit from increased utilization of this alternative to incarceration. Because of the CARES Act, there are already inmates that do not conform to the traditional eligibility requirements serving their sentences at home.[13] As a result, there is a national experiment already underway to see if expanded home confinement can achieve the goals of imprisonment while limiting the cost to the public and allowing inmates to remain close to their families and communities. Home confinement, as it currently operates, admittedly is not a perfect solution. However, even considering some of the potential drawbacks, home confinement has benefits prison cannot hope to deliver. In addition to substantial cost savings,[14] home confinement allows inmates to maintain proximity to the communities they are expected to reenter upon the completion of their sentence.[15] The value of extended home confinement does not have to end at merely a temporary solution to address the lasting effects of a global pandemic—not when it has the potential to be so much more.

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12. Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 113 (2018).

13. *See* Discretion to Continue Home Confinement, *supra* note 7, at 1, 4 & n.1.

14. *See infra* note 106 and accompanying text.

15. *See infra* note 108 and accompanying text.

In the sections that follow, Part I provides information related to the historical factors leading to America's unenviable position as the world's largest incarcerator, including current racial disparities in inmate populations and the devastating impact COVID has had in American correctional facilities. Part II outlines home confinement as an alternative sanction and highlights the potential benefits and limitations of it as a long-term alternative to incarceration. Part III briefly describes the reasons we punish, the limits of incarceration in achieving those goals, and why home confinement is ultimately a winning alternative. Finally, this Comment offers recommendations for expanded home confinement beyond the pandemic and concludes home confinement is a better option than prison and can serve as one option to address mass incarceration.

I. HOW WE GOT HERE

To fully appreciate the impact expanded home confinement could have on individual inmates and the broader criminal justice system, we first need to understand why COVID had such devastating results in American prisons. The reason the pandemic had such a detrimental impact on American incarcerated populations can be summarized by three predominating factors: (1) the United States puts people in prison more often and for longer periods of time than other countries, (2) the people we incarcerate experience health problems at higher rates than the general population, and (3) American carceral facilities are overcrowded, poorly ventilated, and unsanitary. These three facets combined had deadly consequences for America's inmates when COVID crossed our borders.

A. Mass Incarceration

The first reason the pandemic was so harmful to U.S. incarcerated populations is what is commonly known as mass incarceration. Despite housing only 5% of the world's population, the United States is home to 25% of the world's

prisoners.[16] The U.S. incarceration rate, when considering both prisons and jails, "is roughly 12 times the rate in Sweden, eight times the rate in Italy, seven times the rate in Canada, five times the rate in Australia, and four times the rate in Poland." [17] "American jails and prisons hold half a million more people" than China, a nation with around four times the number of people.[18] While the origins of mass incarceration are many and complex, the drastic increase in U.S. prison populations in the mid to late twentieth century can be summarized as (1) the merging of social War on Poverty initiatives with more targeted War on Crime programs in the 1960s, (2) the 1980s War on Drugs and sentencing policies such as mandatory minimums, and (3) racially biased and discriminatory practices at other key touchpoints in the criminal justice system. It is because of these three factors that today:

> The American criminal justice system holds almost 2.3 million people in 1,833 state prisons, 110 federal prisons, 1,772 juvenile correctional facilities, 3,134 local jails, 218 immigration detention facilities, and 80 Indian Country jails as well as in military prisons, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories.[19]

1. Merging the War on Poverty with the War on Crime

While Lyndon Johnson's presidency is often associated with landmark civil rights legislation and the social programs that made up his vision for a Great Society, it also marks the point at which Johnson vowed "the 'Federal Government [would] henceforth take a more meaningful role in meeting the whole spectrum of problems posed by crime.'"[20] The 1960s saw the migration of many Black Americans from the rural south to

16. JUST. POL'Y INST., FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS 3 (2011).

17. Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), [https://perma.cc/Y35B-3PNB].

18. *Id.*

19. Sawyer & Wagner, *supra* note 2.

20. ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 27 (2016).

northern cities.[21] This, combined with numerous incidences of civil unrest, many of which were tied to the Civil Rights Movement, led to public outcry for "law and order" and the need for lawmakers to be "tough on crime."[22] While many of these uprisings occurred in response to the continued presence of deeply entrenched racial inequality despite substantive federal action, like the passing of the Civil Rights Act of 1964, the heavily publicized images of urban unrest helped to solidify the connection between Black people and criminality in the minds of many white Americans.[23]

Rather than taking steps to address the systems and institutions presenting barriers to full equality, the Johnson Administration instead chose to increase spending on the surveillance of Black communities and law enforcement to combat crime. In 1965, Johnson sent the Law Enforcement Assistance Act to Congress, allocating the modern-day equivalent of $223 million for police departments to purchase "bulletproof vests, helicopters, tanks, rifles, gas masks and other military-grade hardware for police departments."[24] This legislation helped to merge Johnson's social agenda, dubbed the "War on Poverty," with a newly declared "War on Crime" and "established a direct role for the federal government in local police operations, court systems, and state prisons" for the first time in American history.[25] The War on Crime fostered the idea that street crime, illegal drug use, and delinquency were not themselves byproducts

21. *Id.* at 29 ("By the early 1960s, 31 percent of African Americans lived in twelve northern cities, their living conditions characterized by the isolation, marginalization, and exclusion that stemmed from segregation.").

22. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 40-41, 54 (2012); Elizabeth Hinton, *"A War Within Our Own Boundaries": Lyndon Johnson's Great Society and the Rise of the Carceral State*, 102 J. AM. HIST. 100, 100 (2015) (noting there were over 250 incidences of civil disorder during the summers of Johnson's presidency alone).

23. HINTON, *supra* note 20, at 56; Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 707 (2010); Hinton, *supra* note 22, at 100.

24. Elizabeth Hinton, *Why We Should Reconsider the War on Crime*, TIME (Mar. 20, 2015, 7:00 AM), [https://perma.cc/7G4R-L9DD].

25. *Id.*

of poverty, but were instead merely the cultural character failings of those who were poor.[26]

2. The War on Drugs

The War on Drugs is perhaps the most formidable cause of mass incarceration. Even though President Nixon declared drugs to be "public enemy number one"[27] in 1971, it was during Ronald Reagan's presidency that the War on Drugs as it is known today took shape.[28] Funding for federal law enforcement to combat drug-related crimes increased from $8 million to $95 million between 1980 and 1984 alone.[29] In 1986, the House of Representatives allocated another $2 billion to fight the drug war.[30] Additionally, the War on Drugs was not waged indiscriminately. Black communities were especially negatively impacted, as the focus was directed towards policing inner-city areas more than it was drug prevention and treatment programs.[31] Penalties for drug offenses also differed depending on the typical user, most famously exemplified with the discrepancy between crack and powder cocaine.

The Anti-Drug Abuse Act of 1986 established mandatory minimum penalties for various drug trafficking offenses depending on the quantity.[32] Despite the chemical structures of crack and powder cocaine being nearly identical,[33] the punishment for the possession and sale of crack cocaine was far more severe. For a first-time offense involving as little as five grams of crack cocaine, the form associated with Black users, the federal minimum imposed a five-year mandatory sentence.[34] For powder cocaine, however, the version of the drug associated with

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26. ALEXANDER, *supra* note 22, at 45.

27. *Thirty Years of America's Drug War: A Chronology*, PBS: FRONTLINE, [https://perma.cc/NGB9-V8VH] (last visited Oct. 30, 2022).

28. ALEXANDER, *supra* note 22, at 49.

29. *Id.*

30. *Id.* at 53.

31. MARC MAUER & RYAN S. KING, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 1, 19 (2007).

32. U.S. SENT'G COMM'N., COCAINE AND FEDERAL SENTENCING POLICY 2-3 (2007).

33. *What Is the Difference Between Cocaine and Crack?*, DRUG POL'Y ALL., [https://perma.cc/9N5N-LS8Z] (last visited Oct. 30, 2022).

34. U.S. SENT'G COMM'N. *supra* note 32, at 2-3.

white and Hispanic users, it would have taken a trafficking offense involving 500 grams or more of powder cocaine to impose the same penalty.[35] This "100-to-1 drug quantity ratio," resulted in crack cocaine offenders serving sentences "three to [] six times longer . . . than [] powder cocaine offenders with equivalent drug quantities."[36]

The harsh policy approach to drugs and crime did not waiver in the 1990s. President Bill Clinton's "tough on crime" policies "resulted in the largest increases in federal and state prison [populations] of any president in American history."[37] Clinton's Violent Crime Control and Law Enforcement Act of 1994 provided state governments with "$30 billion to add 100,000 new police officers, [] more prisons, [] more prison guards, [and more] funding for crime prevention programs."[38] Clinton also endorsed the idea of a federal "three strikes and you're out" law, mandating life sentences for three-time offenders.[39]

As a result of these policies, prison populations soared in the 1980s and 1990s, with minimal impact on the illegal drug trade.[40] While less than 25,000 people were in federal prisons in 1980, that number had risen to almost 220,000 by 2013, an increase of almost 800%.[41] The length of time spent in prison has increased as well. In 1986, inmates spent an average of twenty-two months in prison for federal drug offenses.[42] In 2017, the average length of a sentence for offenders convicted of a drug crime with a mandatory minimum was ninety-four months.[43] Today, nearly

35. *Id.*

36. *Id.* at 3.

37. JUST. POL'Y INST., TOO LITTLE TOO LATE: PRESIDENT CLINTON'S PRISON LEGACY 2-3 (2001).

38. *Id.* at 4.

39. ALEXANDER, *supra* note 22, at 56.

40. Mauer, *supra* note 12, at 115, 120.

41. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-275T, CONTINUED ACTION NEEDED TO ADDRESS INCARCERATION CHALLENGES AND OFFENDERS' REENTRY 7 (2017), [https://perma.cc/7DG2-S4LW] (much of this increase can likely be attributed to mandatory minimums and punitive drug policies; however, these numbers encompass total federal prison growth and not merely those attributable to drug crimes).

42. *Criminal Justice Facts*, THE SENT'G PROJECT, [https://perma.cc/84VS-CCYQ] (last visited Oct. 30, 2022).

43. U.S. SENT'G COMM'N., MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 4 (2017).

half of the inmates in federal prisons are in for drug offenses.[44] What is especially troubling is that while Black Americans are "consistently documented by the U.S. government [as using] drugs at similar rates to people of other races,"[45] Black inmates account for nearly 40% of the incarcerated population despite making up only 13% of total people in the U.S.[46]

3. Other Touchpoints in the Criminal Justice System

This is not to say that there have not been important steps taken to remedy the harm caused by punitive drug and crime policies. The Fair Sentencing Act of 2010 reduced the disparity between powder and crack cocaine from 100-to-1 to 18-to-1, and "eliminated the mandatory minimum sentence for simple possession of crack cocaine . . . ."[47] The First Step Act of 2018 "ma[de] the Fair Sentencing Act retroactive" so people serving outdated sentences for crack cocaine could be "resentenced to shorter prison terms,"[48] and included reforms like eliminating the use of restraints on pregnant inmates and placing inmates in facilities closer to their families.[49] Despite this progress, the United States still has a long way to go to address mass incarceration and conditions in prisons. A critical facet of this story, one inextricably intertwined with our nation's history, is the extent to which incarceration, and by extension COVID, disproportionately impacts minority populations and people of color.

Black Americans today are five times more likely to be incarcerated as their white counterparts, despite their making up

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44. *See Offenses*, FED. BUREAU OF PRISONS (Oct. 1, 2022), [https://perma.cc/5TMU-C97R].

45. DRUG POL'Y ALL., THE DRUG WAR, MASS INCARCERATION, AND RACE 1 (2015), [https://perma.cc/Z3VE-RAJT].

46. *See Inmate Race,* FED. BUREAU OF PRISONS (Oct. 22. 2022), [https://perma.cc/Z3P4-L2Q4]; *QuickFacts United States*, U.S. CENSUS BUREAU, [https://perma.cc/H4H5-3VB6] (last visited Oct. 30, 2022).

47. U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010, at 3 (2015), [https://perma.cc/3L2L-EDPH].

48. Ames Grawert, *What Is the First Step Act—And What's Happening with It?*, BRENNAN CTR. FOR JUST. (June 23, 2020), [https://perma.cc/57VM-FP2F].

49. *Id.*

only 13% of the U.S. population.[50] Young Black men in particular are far more likely to be incarcerated than any other demographic group.[51] Marc Mauer, former Executive Director of The Sentencing Project, a non-profit organization dedicated to promoting a more fair and effective justice system, estimated in 2016 that if the incarceration rate were to continue at the current trajectory, "one of every three [B]lack males born today can expect to go to prison in his lifetime, one in every six Latino males, [and] one of every seventeen white males."[52]

An important reason for this disparity is that Black individuals are moved through the various touchpoints of the criminal justice system at higher rates than people of other races and ethnicities.[53] A variety of factors, "including disproportionate offending rates, the concentration of policing in inner-city communities, and (sometimes blatant) disparities in criminal justice outcomes across races all have contributed to" stark racial disparities in U.S. prison populations.[54] Inner-city areas are more likely to be policed, regardless of actual local crime rates,[55] leading to the increased likelihood of interactions with law enforcement and arrests.[56] Once arrested, "people of color are more likely to be assessed as safety or flight risks and detained pretrial because they lack resources to pay fines, fees, and bail and because they are more likely than white people to have a criminal record."[57] Being held in pretrial detention "increase[s] odds of conviction, sentences to prison, and longer

50. Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL'Y INITIATIVE (May 28, 2014), [https://perma.cc/4G7T-538K].

51. TODD R. CLEAR & NATASHA A. FROST, THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA 26 (2014).

52. Marc Mauer, *Race to Incarcerate: The Causes and Consequences of Mass Incarceration*, 21 ROGER WILLIAMS U. L. REV. 447, 449 (2016).

53. CLEAR & FROST, *supra* note 51, at 26-27.

54. *Id.*

55. SUSAN NEMBHARD & LILY ROBIN, URBAN INST., RACIAL AND ETHNIC DISPARITIES THROUGHOUT THE CRIMINAL LEGAL SYSTEM 3 (2021), [https://perma.cc/ZYG5-QUH5].

56. THE SENT'G PROJECT, RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2018), [https://perma.cc/Y3A7-727Y].

57. NEMBHARD & ROBIN, *supra* note 55, at 5.

sentences."[58] Black Americans are also more likely to serve longer prison sentences than their white counterparts.[59]

B. The Premature Aging and Sickness of Prison Populations

Because of the practices described above, and the resulting prison population boom over the last forty years, it is no surprise the virus swept through American carceral facilities so swiftly. However, the number of people in prison is only part of the problem. Another reason COVID took such a stronghold in prisons has to do with the characteristics of those who make up incarcerated populations. While those aged sixty-five and older are considered to be "geriatric" by health care professionals outside of the prison system, incarcerated individuals are considered to be "older prisoners" by their early fifties.[60] Those who are incarcerated experience "accelerated aging," not only because prison can be very hard on the body, but also because those individuals are "more likely to have experienced profound stress and/or trauma over their lifetime, to have a history of substance use disorder and/or homelessness, and to have had limited access to quality health-care and education."[61]

The population of prisoners aged fifty-five and older tripled between 1990 and 2009, the result of a variety of factors, including "mandatory minimum sentencing laws, more older adult arrests, [the] reintroduction of indeterminate and life sentences, and third-strike legislation."[62] More than that, older prisoners experience several chronic medical conditions, such as "hypertension, diabetes mellitus, and pulmonary disease," at higher rates than younger inmates and non-prisoners.[63] In addition to physical ailments, older inmates are also more likely to have undiagnosed and untreated mental illnesses and

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58. *Id.*

59. THE SENT'G PROJECT, *supra* note 56, at 1.

60. Rachael Bedard et al., *Ageing Prisoners: An Introduction to Geriatric Health-Care Challenges in Correctional Facilities*, 98 INT'L REV. RED CROSS 917, 919 (2016).

61. *Id.*

62. Brie A. Williams et al., *Addressing the Aging Crisis in U.S. Criminal Justice Health Care*, 60 J. AM. GERIATRICS SOC'Y 1150, 1151 (2012).

63. *Id.*

psychiatric conditions.[64] Ultimately, "prisoners tend to be less healthy with more preexisting medical issues than the general population, making them more susceptible to the virus."[65]

C. Prisons, Meet COVID-19

When considering the demographics of the prison population, as well as overcrowding, unsanitary conditions, poor ventilation, and general unpreparedness, it is no wonder COVID absolutely ravaged U.S. prisons and jails.[66] The Centers for Disease Control and Prevention ("CDC") published guidelines at the start of the pandemic about how to protect yourself and others from the virus.[67] Suggested measures included wearing a mask, staying six feet away from other people, avoiding poorly ventilated and crowded common spaces, washing your hands frequently, and cleaning and disinfecting surfaces daily.[68] All of these guidelines are virtually impossible to execute properly in a prison.

Social distancing proved to be incredibly difficult, if not impossible, despite instating preventative measures such as quarantining and discontinuing social visits.[69] Even though prisoner movement was heavily restricted, inmates often came into contact with correctional officers and staff who moved throughout the building as well as outside of the facility in the surrounding community.[70] In dormitory-style prisons, where beds are stacked two, sometimes three high, inmates are so close together that they can often reach out and touch the bunk next to

64. *Id.*

65. Carrie Leonetti, *What Coronavirus Has Taught Us About Unnecessary Incarceration*, 58 AM. CRIM. L. REV. ONLINE 36, 39 (2020).

66. Katie Park et al., *A Half-Million People Got COVID-19 in Prison. Are Officials Ready for the Next Pandemic?*, THE MARSHALL PROJECT (June 30, 2021), [https://perma.cc/YU4R-FBCQ].

67. *See How to Protect Yourself and Others*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 19, 2022), [https://perma.cc/ET7V-VJ84].

68. *Id.*

69. *COVID-19 Action Plan: Phase Five*, FED. BUREAU OF PRISONS (Mar. 31, 2020), [https://perma.cc/6W75-T5S6]; *BOP Modified Operations*, FED. BUREAU OF PRISONS (Nov. 25, 2020), [https://perma.cc/2U9M-W7F5] .

70. Ahlman v. Barnes, 445 F. Supp. 3d 671, 679 (C.D. Cal. 2020).

theirs.[71] Population density like this means that not only is it hard to distance during the day, while people are constantly moving around, but at night, inmates may sleep within six feet of "as many as five or eight other people."[72] Social distancing was even more unlikely in the absence of procedures to prevent bottlenecking in walkways, causing inmates and staff to stand close to each other while waiting in line for food or to be seen at the medical clinic.[73]

Additionally, there was widespread, undisputed testimony from some facilities that cleaning protocols did not change at all as a result of the pandemic. A janitor at one facility testified that "just as before the pandemic, the cleaning solution provided to the cleaning crews was frequently depleted by midafternoon," and that he "received only one pair of gloves to share with his co-janitor, an arrangement medical experts described as tantamount to no gloves at all."[74] Other inmates reported that the cloth masks they were provided were "not replaced for weeks or [were] made from blood- and feces-stained sheets."[75] Inmates sometimes requested soap and did not receive any for days, and were not allowed to disinfect their hands with hand sanitizer as it has long been considered a contraband item in prisons due to the alcohol content.[76] In one Ohio prison, inmates "resort[ed] to 'hanging bedsheets from the top rack of their bunks to protect themselves from others' coughing, sneezing, and breathing.'"[77] To make matters worse, even when they were not feeling well, some inmates "reported being hesitant to admit to being COVID-symptomatic out of fear of being placed in" medical isolation, a term equated with "solitary confinement."[78] It was under these dire circumstances that former Attorney General Barr declared

71. Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, U. CHI. L. REV. ONLINE, Nov. 2020, at pt. I.

72. *Id.*

73. *Id.* at pt. II.

74. Valentine v. Collier, 140 S. Ct. 1598, 1599 (2020).

75. *Barnes*, 445 F. Supp. 3d at 682.

76. Dolovich, *supra* note 71, at pt. I; NATHAN JAMES & MICHAEL A. FOSTER, CONG. RSCH. SERV., R46297, FEDERAL PRISONERS AND COVID-19: BACKGROUND AND AUTHORITIES TO GRANT RELEASE 3 (2020), [https://perma.cc/95RG-3WA6].

77. Dolovich, *supra* note 71, at pt. II.

78. *Id.*

the virus to be materially impacting the functioning of the Bureau of Prisons and expanded home confinement began.[79]

II. HOME CONFINEMENT

As incarceration rates soared in the 1980s and 1990s, so did the use of alternative, community-based sanctions.[80] While home confinement has been in practice all over the world for centuries, its use in the United States emerged in the 1970s and 1980s as states sought a way to "divert nonviolent offenders from costly jail and prison beds, to reduce jail and prison overcrowding, and to strengthen existing community-based sanctions such as probation or parole."[81] The focus of many state home confinement programs is the reduction of prison populations; in the federal system, however, home confinement has largely been used as a way to still punish offenders without incarceration and facilitate their reentry to society near the end of their sentences.[82]

A. Home Confinement as an Alternative Sanction

Historically, home confinement has been used as a transitional period at the end of an inmate's sentence to help them acclimate back to society prior to their release.[83] Under current law, home confinement is only granted for the shorter of 10% of an inmate's sentence or six months.[84] At its core, home confinement is "[a]ny circumstance in which the inmate is required to remain in the home during specified hours."[85] Participants are required to remain at home unless authorized to leave for "employment, education, treatment, or other specified

79. *See* Att'y Gen. Memorandum, *supra* note 8, at 1.

80. ENCYCLOPEDIA OF COMMUNITY CORRECTIONS 62 (Shannon M. Barton-Bellessa ed. 2012).

81. *Id.* at 204.

82. Robert N. Altman & Robert E. Murray, *Home Confinement: A '90s Approach to Community Supervision*, 61 FED. PROB. 30, 30-31 (1997).

83. Alan Ellis & J. Michael Henderson, *The U.S. Bureau of Prisons' Pre-Release Program: Getting Out Early*, 31 CRIM. JUST., Winter 2017, at 20, 20.

84. 18 U.S.C. § 3624(c)(2).

85. FED. BUREAU OF PRISONS, HOME CONFINEMENT 2 (1995) [hereinafter HOME CONFINEMENT PROGRAM STATEMENT], [https://perma.cc/5Y3G-XT8X].

reasons."[86] One of the purposes of home confinement is to allow the inmate to "assume increasing levels of personal responsibility while providing sufficient restriction to promote community safety and continue the sanction of the sentence" prior to their release.[87] Electronic monitoring is often coupled with home confinement to monitor offender whereabouts and ensure they are either in their homes or at one of their approved locations.[88]

The present road to get to home confinement is not a straight one; there are strict procedural hurdles and eligibility requirements. According to the Second Chance Act of 2007, all federal inmates are eligible for home confinement, though the "BOP's placement decisions are supposed to be driven by an individual assessment weighing an inmates need for reentry services against the risk to the community."[89] Importantly, the BOP currently does not have statutory authority to place an inmate in home confinement at the beginning of their sentence.[90] The BOP must place an inmate in "any available penal or correctional *facility* that meets minimum standards of health and habitability established by the Bureau."[91] As a result, because inmates are only eligible for home confinement for the shorter of the last 10% or the last six months of their sentence, most inmates placed on home confinement will have served a period of incarceration and been placed under the supervision of a Community Corrections Center ("CCC") or a Residential Re-Entry Center ("RRC") before they are even considered eligible to serve the rest of their sentence at home.[92]

Inmates must undergo a series of evaluations before home confinement, or any community-based sanction, can be granted.

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86. Darren Gowen, *Overview of the Federal Home Confinement Program 1988-1996*, 64 FED. PROB. 11, 12 (2000).

87. HOME CONFINEMENT PROGRAM STATEMENT, *supra* note 85, at 1.

88. Gowen, *supra* note 86, at 12-13.

89. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., AUDIT OF THE FEDERAL BUREAU OF PRISONS' MANAGEMENT OF INMATE PLACEMENTS IN RESIDENTIAL REENTRY CENTERS AND HOME CONFINEMENT, at i (2016) [hereinafter BOP AUDIT], [https://perma.cc/QY6G-BLF9].

90. HOME CONFINEMENT PROGRAM STATEMENT, *supra* note 85, at 1.

91. 18 U.S.C. § 3621(b) (emphasis added).

92. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., AUDIT OF THE HOME CONFINEMENT PROGRAM IN THE BUREAU OF PRISONS 2 (1996), [https://perma.cc/57EE-D2CW].

As the eligibility period for pre-release community-based sanctions approaches towards the end of an inmate's sentence, correctional facility staff will refer inmates for pre-release placement to a Community Corrections Manager ("CCM").[93] The CCM evaluates the inmate's referral material to determine the most appropriate program, among some of the options being placement in a CCC, a Comprehensive Sanctions Center ("CSC"), home confinement, or another community program.[94] Once the inmate is approved for a particular program, they must agree to all imposed conditions of the placement; inmates do not have a choice in their pre-release programing or the ability to apply for alternatives. [95]

Only on occasion, and only pending the determination that a candidate bears "no obvious risk" to the public and that an electronic monitoring program is available, will an inmate be placed directly on home confinement from their incarceration facility.[96] An inmate may only be considered for direct placement on home confinement if he or she (1) "has no public safety [concerns]," (2) "had excellent institutional adjustment," (3) "has a stable residence with a supporting family," (4) "has confirmed employment (if employable)," and (5) "has little or no need for the services of a CCC."[97] For inmates released from BOP custody from October 2013 through April 2016, approximately 94,000 inmates, only 4%, went directly into home confinement from a BOP facility, while another 21% were "released directly from a BOP institution" without any transition period.[98]

B. The Benefits of Home Confinement

As those numbers illustrate, home confinement has historically been underutilized despite being called the "preferred

93. HOME CONFINEMENT PROGRAM STATEMENT, *supra* note 85, at 4.
94. *Id.*
95. *Id.*
96. *Id.* at 5, 7.
97. *Id.* at 7.
98. BOP AUDIT, *supra* note 89, at i.

pre-release option" for "low need/low risk inmates."[99] So underutilized, in fact, that recent "data on placement of minimum and low security inmates" revealed the "BOP placed only 6 percent of even those lower risk inmates directly into home confinement . . . ."[100] Not employing home confinement to the extent permitted "may [] further strain high security BOP institutions that are already well above capacity."[101]

As of October 2022, 79,745 inmates, which makes up just over 50% of the total number of people in federal prisons, were classified as either "minimum" or "low" security risks.[102] Increased utilization of home confinement, "[i]n addition to reintegrating inmates more quickly into their communities, . . . will help mitigate our critical population/capacity issues" in carceral facilities.[103] Aside from being able to address overcrowding and reducing prison populations, permanent expansion of home confinement would allow for increased realization of a myriad of other benefits that come from prison alternatives, some of which include material cost savings and the ability of the inmate to maintain close ties to their families and contribute to their communities.

1. Cost Savings

Home confinement, and community supervision in general, is far more cost effective than incarceration. Prisons, as they currently operate, have severe costs to American taxpayers. It is estimated the United States pays more than $80 billion each year to keep roughly 2.3 million people in prison and jail.[104] That figure does not include the multitude of other costs imposed on families of incarcerated individuals in commissary account

99. Memorandum from Blake R. Davis, Assistant Dir., Corr. Programs Div., to Reg'l Dirs., Wardens, and Residential Reentry Managers 2 (May 24, 2013) [hereinafter Corr. Programs Memorandum], [https://perma.cc/4EA4-8CQN].

100. BOP AUDIT, *supra* note 89, at ii.

101. *Id.* at ii-iii.

102. *Prison Security Levels*, FED. BUREAU OF PRISONS, [https://perma.cc/A363-84AN] (last visited Oct. 30, 2022).

103. Corr. Programs Memorandum, *supra* note 99, at 3.

104. Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, THE MARSHALL PROJECT (Dec. 17, 2019), [https://perma.cc/26AK-RAWA].

deposits, phone calls, emails, care packages, and court fees.[105] It costs an average of $37,500 per year, which amounts to roughly $102.74 per day, to house an inmate in a federal prison.[106]

Home confinement, on the other hand, costs a comparatively minimal $13,000 a year, or around $35.62 per day per inmate.[107] This is a material savings of $67.12 per inmate per day, or what amounts to approximately 65%. This money, that could go towards other, more productive and societally beneficial means, is instead being sunk to keep people locked up. If home confinement was utilized on a larger scale, the BOP would have increased funds that could be reallocated to further develop education, substance abuse treatment, therapy, and employment programs to enable offenders to be less likely to recidivate and better able to contribute to society upon the completion of their sentence.

2. Community Proximity and Relationship Maintainence

The biggest benefit of home confinement compared to other punitive measures like incarceration is that it allows the offender to remain in a "reasonably regular social environment and maintain social relationships with family, friends, and the community, while potentially avoiding offender networks."[108] Home confinement allows inmates to be "productive, tax-paying members of society," with the potential for them to earn money to pay restitution, support dependents, provide childcare, and ultimately reduce the "drain on welfare and foster child systems."[109] Additionally, the beauty of home confinement is that it can be tailored to meet the unique needs of individual inmates. With the variety of conditions and resources that can be utilized

105. *Id.*

106. Zolan Kanno-Youngs & Maura Turcotte, *Thousands of Prisoners Were Sent Home Because of Covid. They Don't Want to Go Back*, N.Y. TIMES (Aug. 30, 2021), [https://perma.cc/G6LN-D3NN].

107. *Id.*

108. Jessica Bouchard & Jennifer S. Wong, *The New Panopticon? Examining the Effect of Home Confinement on Criminal Recidivism*, 13 VICTIMS & OFFENDERS 589, 591 (2018).

109. PAUL J. HOFER & BARBARA S. MEIERHOEFER, FED. JUD. CTR., HOME CONFINEMENT: AN EVOLVING SANCTION IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1987).

as part of a home confinement placement, like "community service, drug testing and treatment, [and] education and job training—judges can dispense both justice and rehabilitative treatment while significantly incapacitating the offender."[110]

There is concrete evidence suggesting this expanded home confinement experiment is working. One of the principal arguments against the expansion of home confinement is that allowing previously non-eligible inmates to serve their sentences at home exposes the surrounding communities to those who might commit additional crimes.[111] A *New York Times* article written in June 2021, when there were around 24,000 people that had benefitted from the Director of the BOP's expanded authority, reported most inmates "had only weeks or months left on their sentences and completed them without incident."[112] "Three people committed new crimes," only one of which was violent, and around 150 were returned to prison for violations of their home confinement placement.[113] If home confinement is given increased attention and is continually improved upon, the criminal justice system would be vastly improved for both the agencies that operate federal prisons and the people they serve without exposing the public to an elevated risk of criminal activity.

C. The Addressable Limitations of Life at Home

Despite the potential benefits, this Comment does not purport that home confinement, as it currently operates, is a perfect solution to mass incarceration. Home confinement is anything but a get out of jail free card. Upon their admittance to a home confinement placement, inmates must sign a "Conditions of Home Detention" form, where they pledge to adhere to a number of rules, among them being: (1) always answering calls from Residential Re-Entry Center staff and wearing their electronic monitoring devices, (2) continuing any mental health, psychiatric, or substance abuse treatment, (3) not owning any

110. *Id.*
111. *See* HOFER & MEIERHOEFER, *supra* note 109, at 7-8.
112. Kanno-Youngs & Turcotte, *supra* note 106.
113. *Id.*

deadly weapon or being in the company of someone with a weapon, (4) not drinking alcoholic beverages of any kind or using or possessing any narcotics, (5) remaining steadily employed and not changing employment without approval, (6) not driving a vehicle without authorization, and (7) understanding the inmate themselves are personally responsible for "all costs of [] housing, meals, and general subsistence."[114]

As difficult as adhering to the guidelines of a home confinement placement might be, there are also significant labor requirements for being a home confinement case manager. Home confinement "officers are 'on call' 24 hours a day, 7 days a week because they must respond anytime there is a potential violation."[115] This kind of work can be very demanding when "alerts average 10 per officer per day in the federal program, many after normal working hours."[116] This hurdle, though, might be overcome if a portion of the savings from reduced prison populations could go towards training and employing more case managers. Furthermore, with increased funds to allocate to case managers, we might be able to be more selective as to who we employ to take on those roles. Case managers could be social workers, healthcare professionals specializing in substance abuse or mental illness, or other people with expertise valuable to help the inmates they serve. Home confinement offers the potential for unique, individualized rehabilitation and reentry to community life that is difficult to achieve from a prison cell.

Another potential drawback of home confinement is that between the constant invasion of privacy that comes with electronic monitoring and random urinalysis, home confinement can be stressful. Inmates on an electronic monitoring program have to wear a transmitter and stay within 200 feet of a receiver installed at the inmate's home containing the inmate's schedule.[117] When the receiver is "notified of a change in the inmate's status, [the computer] compares the time with the schedule to determine if a break in contact is authorized. If not

114. FED. BUREAU OF PRISONS, FORM BP-A0460 (2010), [https://perma.cc/9BW4-6MQT] (last visited Oct. 31, 2022).

115. Altman & Murray, *supra* note 82, at 31.

116. *Id.*

117. HOME CONFINEMENT PROGRAM STATEMENT, *supra* note 85, at 2.

authorized, the computer sends an alert" and, unless the inmate is able to resolve the discrepancy with their case manager, they might be sent back to a correctional facility for violating the rules of their placement.[118] Alerts can be triggered for any number of reasons, including "unauthorized absences from the residence," "failure to return to the residence from a scheduled absence," "late arrivals," "early departures from the residence," "equipment malfunctions," "tampering with the monitoring equipment," or "loss of electrical power or telephone service."[119] Inmates are also subject to random calls and visits from their case manager throughout the day to make sure they are where they are supposed to be and are adhering to program guidelines.[120]

Because of the ever-present fear that even the slightest violation of protocol will result in the revocation of home confinement and a prolonged prison sentence, some studies have shown inmates with prison experience would prefer prison time rather than taking a chance on an alternative sanction.[121] Some offenders who have had experienced community-based sanctions have reported "working every day, submitting to random urinalysis, and having their privacy invaded was *more* punitive than a brief prison term."[122] Prison, though a far cry from being rehabilitative and with its obvious restriction of freedom, offers a more predictable routine with fewer unknowns.[123] Alternative sanctions are a gamble, and "[r]esearch indicates that many offenders would prefer to complete their prison terms and be released with no strings attached rather than invest significant time in an alternative with a strong perceived likelihood of revocation."[124] These kinds of inmate preferences are revealing, as they indicate prison is not as effective as some would like to believe.

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118. *Id.*

119. Altman & Murray, *supra* note 82, at 31.

120. *See* HOME CONFINEMENT PROGRAM STATEMENT, *supra* note 85.

121. Alisha Williams et al., *The Lesser of Two Evils? A Qualitative Study of Offenders' Preferences for Prison Compared to Alternatives*, J. OFFENDER REHAB., no. 3-4, 2007-2008, at 71, 86.

122. David C. May & Peter B. Wood, *What Influences Offenders' Willingness to Serve Alternative Sanctions?*, 85 PRISON J. 145, 147 (2005).

123. Williams et al., *supra* note 121, at 73-76.

124. May & Wood, *supra* note 122, at 147.

Electronic monitoring presents its own set of unique issues. There is no disputing that home confinement with electronic monitoring is more cost effective per inmate than incarceration.[125] However, one reason for this savings is that the costs of incarceration shift from the taxpayer to the inmate and the inmate's family once placed in home confinement. The offenders themselves are often the ones required to pay for electronic monitoring,[126] in addition to other costs like urinalysis, "meals, medical treatment, clothing or incidentals, laundry services or other subsistence items," all of which would be provided to them if they were serving their sentence in prison.[127] Electronic monitoring has also been argued to be stigmatizing, making it hard for monitored offenders to find employment, housing, and maintain healthy relationships with their significant others and children.[128]

Cost shifting may not only result in financial hardship for the individual offender and their family, but it also significantly limits the number of people who can participate in home confinement, "potentially creating an unjust gap between the correctional options available to offenders of low socioeconomic status."[129] While of course putting the inmate in the best position possible to be successful upon the completion of their sentence should be the ultimate goal of any punitive sanction, the reality is that only those inmates who have supportive families and gainful employment can utilize home confinement. There are also studies that show offender preferences differ starkly along racial lines. When considering whether a community-based sanction would best serve inmate needs, "[s]omeone who sees their neighborhood as ridden with crime, poverty, unemployment, [and] poor recreational opportunities . . . might be less inclined toward a

125. *See* Kanno-Youngs & Turcotte, *supra* note 106.

126. Bouchard & Wong, *supra* note 108, at 591.

127. HOME CONFINEMENT PROGRAM STATEMENT, *supra* note 85, at attach. B.

128. OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., ELECTRONIC MONITORING REDUCES RECIDIVISM 2 (2011), [https://perma.cc/D6WK-AQTU].

129. Bouchard & Wong, *supra* note 108, at 591.

sentence that would keep them in that community," even when the alternative is incarceration.[130]

Black Americans in particular have shown a preference to incarceration over alternative sanctions because the alternatives are viewed as a "hassle, involving intrusive restrictions and harassment from supervising officers."[131] Some Black offenders were less likely to want to serve their sentence under an alternative sanction if they were from neighborhoods where many others had done prison time because they are "less inclined to see imprisonment as something to be avoided."[132] The heartbreaking reality that this research brings to light is that minority populations, and Black Americans in particular, are less likely to see prison as punitive because incarceration is seen as an expected eventuality, an unavoidable rite of passage.[133] For many, it is not "if," but "when" they will experience incarceration.

These drawbacks could be avoided as well if even a portion of the cost savings from reduced prison populations could be diverted to families who opt to support and sponsor their family member inmate in a home confinement placement. Offering financial subsidies to offset the costs of electronic monitoring, urinalysis, and other subsistence the inmate might require would reach families who might not otherwise be able to utilize home confinement and would allow their family member to reenter their community while serving the duration of their sentence.

III. WHY HOME CONFINEMENT WINS

When searching for alternatives to incarceration, it is important to first ask "does prison work?" and if not, "where does it fall short, and how can we make it better?" According to the U.S. Sentencing Commission, an imposed sentence would ideally accomplish four goals: (1) retribution, (2) deterrence, (3)

130. Brandon K. Applegate, *Of Race, Prison, Perception: Seeking to Account for Racially Divergent Views on the Relative Severity of Sanctions*, 39 AM. J. CRIM. JUST. 59, 63 (2014).

131. *Id.* at 72.

132. *Id.* at 73.

133. *Id.* at 72-73.

incapacitation, and (4) rehabilitation.[134] Incapacitation is one area in which prison certainly excels. It is difficult to commit crimes if you are cut off from the rest of society. When it comes to the other goals, however, in particular deterrence, evidence suggests that prison often falls short of its intended purpose. Pertaining to drugs in particular, an important facet of this conversation as nearly half of federal prisoners are locked up for drug crimes, some argue incarceration "does not deter unlawful drug activity . . . [and] incapacitating a low-level drug seller for a long time prevents little, if any, drug selling; the crime is simply committed by someone else."[135]

Arguments can also be made that prison fails to rehabilitate offenders and only stifles and hides problems from public view. "As massive numbers of homeless, hungry, unemployed, drug-addicted, illiterate, and mentally ill people vanish behind [prison] walls, the social problems of extreme poverty, homelessness, hunger, unemployment, drug addiction, illiteracy, and mental illness become more ignorable too."[136] Even once inmates are released, incarceration has been linked to multiple negative side effects, from "increased criminal activity," the "enduring stigma that affects future employment opportunities," and "poor physical and mental health outcomes."[137] Regarding recidivism rates, "[a]bout one-third of those who go to prison once come back again; of those who go to prison a second time, four-fifths will return repeatedly."[138]

Incarceration has severe costs, not merely in terms of dollars, but also in terms of the long-lasting, multi-generational impacts felt by inmates and their families. One study reported,

> "More than half of fathers in state prison report being the primary breadwinner in their family . . . ." Should the family attempt to stay together through incarceration, the loss of

134. U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 4 (2020), [https://perma.cc/N4KB-YXCU].

135. Lynn Adelman, *Sentencing Drug Offenders Justly While Reducing Mass Incarceration*, 34 FED. SENT'G REP. 2, 3 (2021).

136. MAYA SCHENWAR, LOCKED DOWN, LOCKED OUT: WHY PRISON DOESN'T WORK—AND HOW WE CAN DO BETTER 12 (2014).

137. Bouchard & Wong, *supra* note 108, at 589.

138. Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 98 (2008).

> income only increases, as the mother must pay for phone time, travel costs for visits, and legal fees. The burden continues after the father returns home, because a criminal record tends to injure employment prospects. Through it all, the children suffer.[139]

As of 2015, "2.7 million children are growing up in U.S. households in which one or more parents is incarcerated," with "[t]wo-thirds of these parents [being] incarcerated for nonviolent offenses, including a substantial proportion who are incarcerated for drug law violations."[140] The data also suggests impacts are felt disparately among communities of color. A staggering "[o]ne in nine Black children has an incarcerated parent, compared to . . . one in 57 white children."[141] Some studies suggest parental incarceration "makes [a] child three to four times more likely to develop a record for juvenile delinquency" and is linked to "school failure, underemployment, and illegal drug use."[142]

Not only is incarceration damaging to family ties, but it also hurts community and economic development when residents are put in prison. The unemployment rate for formerly incarcerated individuals is "nearly *five times higher* than the unemployment rate for the general United States population."[143] When going to prison reduces your ability to get a job, "then neighborhoods where many people have been to prison are also neighborhoods where those people have trouble in the job market."[144] Not only are previously incarcerated individuals less likely to find employment and earn as much as people who have not been incarcerated, they are also less likely to engage and be able to participate in the political process. Studies show "[m]ore than 5.3 million people . . . are estimated to have been prohibited from voting as a consequence of their criminal records."[145] Additionally, "[p]eople with felony arrests who may legally vote

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139. Coates, *supra* note 17, at 20.

140. DRUG POL'Y ALL., *supra* note 45.

141. *Id.*

142. Clear, *supra* note 138, at 110.

143. Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (July 2018), [https://perma.cc/LGD3-MLBE].

144. Clear, *supra* note 138, at 107-08.

145. *Id.* at 116.

are 18 percent less likely to vote than those who have not been arrested; people in prison who are allowed to vote are 27 percent less likely to do so than their nonincarcerated counterparts."[146] As these numbers demonstrate, incarceration does not just impact our families and our communities; incarceration also impacts our democracy. "[G]rowth in the penal system, especially prisons, has resulted in a series of collateral problems that produce inequality and reproduce injustice in ways that are inconsistent with sound democratic policy."[147]

Ultimately, the overall effectiveness of prison is a mixed bag, and studies show that it can be a factor that both increases and decreases crime. Being in prison "tends to reduce crime through incapacitation and deterrence but . . . also tends to increase crime through destabilization of families and by undermining other sources of informal social control."[148] The current mass incarceration crisis is not only a reflection of the huge numbers of people being admitted to prisons, but also has much to do with the length of their stays.[149] While time served is a "significant component of the rising prison population," it is not believed to reduce recidivism, or contribute to general deterrence but it does have significant costs, both monetary and in terms of the erosion of community ties.[150] Home confinement on the other hand, even though constant surveillance through electronic monitoring has its downsides, appears to be "an effective deterrent for offenders who are arrested or convicted of an offense," because it is a "tool to encourage [] self-regulatory behavior."[151]

There is much we have yet to explore regarding the full utility of home confinement. The BOP itself does not currently have a full picture of how successful RRC and home confinement programs can be. A recent audit of the programs revealed the BOP focuses on hitting target goals for utilization, sometimes at

146. *Id.* at 116-17.

147. CLEAR & FROST, *supra* note 51, at 16.

148. Clear, *supra* note 138, at 108.

149. Marc Mauer, *The Hidden Problem of Time Served in Prison*, 74 SOC. RSCH. 701, 701 (2007).

150. *Id.*

151. Bouchard & Wong, *supra* note 108, at 601.

the expense of transitioning inmates too early, but it "lacks adequate performance measures to evaluate the success of [] home confinement programming."[152] Additionally, viewpoints of the overall impact home confinement has on recidivism is split. Some studies conclude "home confinement does little to impact recidivism," but instead merely suppresses "criminal behavior during the period of time the offender is being monitored or serving a period of home confinement."[153] Others, contrastingly, have found a strong positive correlation between reduced recidivism and home confinement, claiming "offenders who are sentenced to home confinement are significantly less likely to commit a subsequent offense in comparison with offenders who are released from a custodial facility."[154]

One insight that these studies have not yielded, however, is that home confinement makes recidivism worse. As one author put it, "[I]f alternative sanctions are equally effective (or ineffective) as incarceration [] in reducing recidivism, perceived by offenders as equally punitive, and significantly less expensive than imprisonment, there seems good reason to expand their use."[155] We will not know the full spectrum of the benefits to be wrought by increased utilization of home confinement until we try. The expanded eligibility made available under the CARES Act during the COVID pandemic has shown us that there is still much that can be done to improve the criminal justice system and to serve the people it imprisons.

CONCLUSION

As a nation, addressing mass incarceration must be a priority. While the ultimate goal should be to address the systemic inequalities and policies that put so many people in prisons and jails in the first place, home confinement is one way to address the negative impacts prison has on inmates, their families, and our communities while those policy changes take shape. We need to ask ourselves what we hope to accomplish

152. BOP AUDIT, *supra* note 89, at iii.
153. ENCYCLOPEDIA OF COMMUNITY CORRECTIONS, *supra* note 80, at 205.
154. Bouchard & Wong, *supra* note 108, at 601.
155. Williams et al., *supra* note 121, at 87.

through punishment in a prison setting. If the ultimate goal of prison is for inmates to learn from their mistakes and reenter and contribute to society after their sentence has elapsed and not recidivate, how is it helpful for people to sit in cells, sometimes for years, without the adequate training and preparation they need to be successful on the outside? Home confinement offers the potential for us to save and reallocate funds for education, substance abuse treatment, and employment programs which in turn can contribute to breaking vicious cycles related to multi-generational substance abuse and poverty. Not only that, but the shift to remote work over the course of the pandemic has created more opportunities than ever for people to work from home and support their families.

If there is even the slightest chance that home confinement can be better than prison at allowing inmates to "maintain employment, get off drugs, or stay in school,"[156] why would we not at least try? We have a perfect subset of inmates through which we can see the impact of extended home confinement. The inmates currently serving their sentences at home, who are not traditional candidates for home confinement but that have been released under the CARES Act during the pandemic, offer a perfect ongoing national experiment to see if home confinement can accomplish the goals of imprisonment while limiting the costs to the public and allowing inmates to remain close to those they love.

Not only should we permit those already serving their sentences in home confinement to remain there, even after the pandemic is declared to no longer be an emergency, we should also continue to expand home confinement to include other classes of non-violent offenders to identify the full spectrum of benefits to be realized by the alternative sanction. The cost savings from reduced prison populations can be diverted to incentivize participation in home confinement for families who would otherwise be excluded by lack of financial ability or to hire case managers with the qualifications to meet inmates' unique needs.

156. HOFER & MEIERHOEFER, *supra* note 109, at 50.

Our current criminal justice system is one of unequal outcomes, and one in which an offender's age, education, race, and socioeconomic background will have a substantial impact on the effectiveness of their punishment. Addressing mass incarceration will require an examination of what we hope to achieve through imprisonment as well as exploration into viable alternatives. Home confinement is one such alternative. It is more than merely pre-trail detention or a pre-release adjustment period. It is more than an emergency pandemic protocol. It is an underutilized alternative sanction with huge potential to be part of a bigger solution. At the end of the day, a prison sentence should not be a death sentence, pandemic or not. Our people, our families, and our communities are worth it.

LOSING THE VEEPSTAKES: HOW THE CONTEMPORARY VICE PRESIDENCIES OF MIKE PENCE AND KAMALA HARRIS RENEW THE CASE FOR VICE-PRESIDENTIAL INDEPENDENCE

Jace Motley*

I. INTRODUCTION

The concept of an independent American vice presidency is nothing new,[1] and historians and scholars have wrestled with the idea at length.[2] In fact, one of the central debates around the adoption of the Twelfth Amendment—the constitutional amendment that requires separate electoral votes for President and Vice President[3]—was the degree of political independence that the Constitution should afford the vice presidency.[4] Over the past two centuries, multiple attempts have been made to address the office's shortcomings, as evidenced by the fact that nearly

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1. *See infra* notes 4-11 and accompanying text.

2. *See, e.g.*, Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703, 1726-29 (1988); Akhil Reed Amar & Vik Amar, Essay, *President Quayle?*, 78 VA. L. REV. 913, 944-45 (1992); Jamin Soderstrom, *Back to the Basics: Looking Again to State Constitutions for Guidance on Forming a* More Perfect *Vice Presidency*, 35 PEPP. L. REV. 967, 1005-08 (2008).

3. U.S. CONST. amend. XII.

4. *See* Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 WM. & MARY L. REV. 1501, 1550-52 (2014).

twenty-three percent of the post-Bill of Rights amendments to the Constitution have either directly or indirectly implicated the Vice President.[5] Today, the unprecedented vice presidencies of Michael ("Mike") R. Pence and Kamala D. Harris have ushered in several historic firsts for the office and have spawned contemporary political and constitutional considerations for revisiting the Vice President's role in government. In light of these developments, this Comment presents a renewed case for vice-presidential independence and proposes going one step further: electing the Vice President independently at the midterm elections.

Part II provides an overview of the vice presidency's constitutional origins, as well as the initial challenges that led to the ratification of the Twelfth Amendment. Section II.A discusses the emergent necessity for modern Vice Presidents to break procedural and legislative ties in the Senate. Section II.B analyzes the historical implications for serving next in line to the President and addresses how today's vice-presidential selection process deviates from all other federal officeholders. Section II.C explains how the Twenty-Fifth Amendment fundamentally redefined the Vice President's constitutional duties during instances of presidential inability and how these duties—when coupled with contemporary political realities and a quasi-democratic selection process—create an inherent conflict of interest that contravenes the purpose of the Amendment. Part III of this Comment explores the concept of an independent vice presidency through the lens of the current and most recent Vice Presidents, examining how the present state of national affairs could have been or might be improved with added democratic oversight for an office that presently wields executive and legislative prowess unrivaled by past occupants.

5. Joel K. Goldstein, *History and Constitutional Interpretation: Some Lessons from the Vice Presidency*, 69 ARK. L. REV. 647, 680-82 (2016) [hereinafter *History and Constitutional Interpretation*] ("The Twelfth Amendment changed the manner of electing Vice Presidents (and Presidents), the Twentieth and Twenty-fifth Amendments addressed presidential succession and inability, and the Twenty-second Amendment imposed presidential term limits, a formal change that impacted the second office, too.").

II. THE VICE PRESIDENCY MATTERS

The American vice presidency is widely considered to have been an "afterthought" during the Constitutional Convention of 1787, with its inception occurring only weeks before the delegates adjourned.[6] The mechanics of selecting a President had plagued the delegates for months, and after no proposals had been able to win over a working majority, the Convention finally settled on a second officeholder, the "Vice" President, as a means of forcing electors to cast at least one electoral vote for a presidential candidate from outside their home states.[7] This rushed compromise of an office produced varying degrees of uneasiness among those present at the Convention, but those worries ultimately gave way to the more pressing concern of efficiently electing the President.[8] As a consequence, the Vice President was tasked with only two duties: stepping into the presidency in the event of a vacancy and presiding over the Senate, breaking ties when necessary.[9]

After only four presidential elections, however, the electoral expediency that the vice presidency had purportedly created had become much more of a problem than a solution. While President George Washington received unanimous support in both the 1788 and 1792 elections, the election of 1796 resulted in systemic efforts to undermine the outcome in the Electoral College, and the election of 1800 produced an electoral tie that had to be broken by the House of Representatives.[10] Subsequently, out of a fear that the ill-conceived system might destroy the union, Congress passed the Twelfth Amendment in December 1803, requiring separate electors for President and Vice President.[11] In July 1804,

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6. Edward J. Larson, *A Constitutional Afterthought: The Origins of the Vice Presidency, 1787 to 1804*, 44 PEPP. L. REV. 515, 516 (2017); *see also* Chiafalo v. Washington, 140 S. Ct. 2316, 2320 (2020).

7. The delegates felt that giving electors two votes rather than one would increase the likelihood of presidential candidates receiving a majority in the Electoral College. The presidential candidate with the second-most votes would become Vice President. *See* Larson, *supra* note 6, at 517-21; *History and Constitutional Interpretation*, *supra* note 5, at 659.

8. *See* Larson, *supra* note 6, at 522; *Chiafalo*, 140 S. Ct. at 2320.

9. U.S. CONST. art. II, § 1; *id.* art. I, § 3, cl. 4.

10. Larson, *supra* note 6, at 525-28.

11. *Id.* at 530-31.

just months before the 1804 presidential election, the Twelfth Amendment was ratified by the states, and the vice presidency as we presently understand it was born.[12]

Although the Twelfth Amendment effectively mooted the chief function that the vice presidency had been created to serve, it reaffirmed in no uncertain terms that the office was here to stay.[13] In the years since, the Vice President's place in government and politics has been one of a chimera, oscillating between the executive and legislative branches at varying frequencies throughout history.[14] Moreover, the adoption of the Twenty-Fifth Amendment in 1967 created additional constitutional responsibilities for the Vice President, giving her a critical role during instances of presidential inability.[15] To be sure, the modern vice presidency is a far cry from the "the most insignificant office that ever the invention of man or his imagination conceived" as former Vice President John Adams once put it.[16] Rather, the vice presidency has evolved into an "indispensable governmental office" that has steadily grown in significance since its inception.[17]

A. Someone Has to Break the Ties

The Constitution first references the Vice President in Article I, Section 3, installing her as the President of the Senate, but withholding from her the authority to cast a vote "unless [the Senate] be equally divided."[18] In doing so, the Constitution provides for the Vice President's Article I legislative powers before making any mention of the Vice President's dormant but more ubiquitous Article II role—ascending to the presidency in

12. *See id.* at 527-31 ("[T]he Twelfth Amendment[] fundamentally changed the vice presidency from an independent office to a partisan accessory to the presidency.").

13. *See* Hawley, *supra* note 4, at 1554-55.

14. *See* Roy E. Brownell II, *A Constitutional Chameleon: The Vice President's Place Within the American System of Separation of Powers, Part I: Text, Structure, Views of the Framers and the Courts*, 24 KAN. J.L. & PUB. POL'Y 1, 4-5 (2014).

15. Ryan T. Harding, *Preventing Presidential Disability Within the Existing Framework of the Twenty-Fifth Amendment*, 40 U. ARK. LITTLE ROCK L. REV. 1, 10-12 (2017); *see also* U.S. CONST. amend. XXV, § 4.

16. Larson, *supra* note 6, at 524.

17. *History and Constitutional Interpretation*, *supra* note 5, at 684-87.

18. U.S. CONST. art. I, § 3, cl. 4.

the event of its vacancy.[19] The Founders understood that the Vice President's power to break ties would be paramount to achieving finality in the Senate's affairs,[20] or, as Alexander Hamilton put it, "to secure at all times the possibility of a definite resolution of the" Senate.[21] Accordingly, when the Vice President exercises her tie-breaking authority, she becomes the final arbiter on matters that the Senate was unable to decide on its own. In that respect, game theory suggests that "the Vice President has nearly the same voting power as each senator."[22]

1. The Historical Use of the Vice President's Article I Powers

With only a few exceptions, Vice Presidents have broken ties relatively infrequently throughout history.[23] For example, John C. Calhoun cast thirty-one votes as Vice President—more than any other—while thirty-one Vice Presidents cast four or fewer tie-breaking votes during their time in office.[24] Historically, the limited use of tie-breaking votes may be attributed to the less polarizing political climates of a bygone era.[25] For instance, although the Senate has been equally divided in terms of partisan membership only four times in the Nation's history, two of those instances have been in the past twenty-one years.[26]

The prevalence of filibusters and the difficulty invoking cloture has also undoubtedly played a major role in thwarting the

19. *Id.* art. II, § 1; *id.* amend. XXV.

20. Samuel Morse, Essay, *The Constitutional Argument Against the Vice President Casting Tie-Breaking Votes on Judicial Nominees*, 2018 CARDOZO L. REV. DE-NOVO 142, 147.

21. THE FEDERALIST NO. 68 (Alexander Hamilton).

22. Vikram David Amar, *The Vice Presidency in Five (Sometimes) Easy Pieces*, 44 PEPP. L. REV. 623, 627-28 (2017) [hereinafter *Vice Presidency in Five Pieces*].

23. Morse, *supra* note 20, at 143.

24. *See Occasions When Vice Presidents Have Voted to Break Tie Votes in the Senate*, SENATE HIST. OFF., [https://perma.cc/SN88-EQNC] (last visited Oct. 8, 2022); *Votes to Break Ties in the Senate*, U.S. SENATE, [https://perma.cc/ZW5T-GVEQ] (last visited Oct. 8, 2022).

25. *See* Gary C. Jacobson, *Partisan Polarization in American Politics: A Background Paper*, 43 PRESIDENTIAL STUD. Q. 688, 690-91 (2013).

26. The Senate chamber has been equally divided during the 47th Congress (1881-1883), the 83rd Congress (1953-1955), the 107th Congress (2001-2003), and the 117th Congress (2021-2023). *See Party Division*, U.S. SENATE, [https://perma.cc/2S49-5TH4] (last visited Oct. 9, 2022).

need for tie-breaking votes.[27] Before 1917, there was no formal mechanism by which the Senate could end debate and bring a measure up for a vote,[28] and it was only after obstructionist abuse of the filibuster that the body embraced the concept of cloture.[29] In 1917, the Senate amended its rules to allow for a two-thirds vote to end debate on a measure and clear the way for it to receive a final vote by the full Senate.[30] Then, in 1975, the Senate adjusted its cloture threshold to three-fifths of the members present and voting.[31] These exceedingly high barriers often precluded contentious matters from being presented to the Senate for a final vote and likely played a significant role in reducing the occurrence of ties.[32]

Notably, however, that trend appears to be breaking. In November 2013, Senate Democrats invoked the "nuclear option," a procedural change enabling lower-court judicial nominees, cabinet-level appointees, and other presidential nominees to clear the Senate's cloture hurdle by a simple majority.[33] Then again, in April 2017, Senate Republicans followed suit by extending the nuclear option to U.S. Supreme Court nominees,[34] effectively teeing up the Vice President to cast tie-breaking votes for lifetime positions on the highest court in the land.[35] One need only look to the tie-breaking votes of the current and most recent Vice Presidents to understand the unprecedented ramifications that these political and procedural changes are having on the Vice President's role as a tie-breaker.

2. The Tie-Breaking Votes of Mike Pence and Kamala Harris

Vice President Mike Pence presided over the Senate during the 115th and 116th Congresses, both of which operated under

27. *See Vice Presidency in Five Pieces*, *supra* note 22, at 628-29; *see also About Filibusters and Cloture: Historical Overview*, U.S. SENATE, [https://perma.cc/VV3V-UBYN] (last visited Oct. 9, 2022).

28. *About Filibusters and Cloture: Historical Overview*, *supra* note 27.

29. *See id.*

30. *Id.*

31. *Id.*

32. *See* Morse, *supra* note 20, at 144.

33. *Id.* at 145.

34. *Id.* at 146.

35. *Id.*

slender majorities.[36] Pence cast thirteen tie-breaking votes during his time in office, several of which represented momentous firsts for the vice presidency. In February 2017, he voted to confirm Betsy DeVos, a controversial nominee for Secretary of Education,[37] which marked the *first* time in American history that a Vice President had voted to confirm a Cabinet Secretary.[38] Then, in November 2018, Vice President Pence broke the tie to invoke cloture on the nomination of Jonathan Kobes—a federal judicial nominee with an American Bar Association rating of "Not Qualified"[39]—to the Eighth Circuit Court of Appeals.[40] Weeks later, Pence voted to confirm Kobes,[41] which similarly marked the *first* time that a Vice President had ever broken a tie to confirm a federal judge.[42] Other notable tie-breakers were Pence's vote to pass legislation that allowed states to block federal funding for Planned Parenthood,[43] his vote to give parents federal assistance to pay for private and religious K-12 schools,[44] and his vote to overturn a Consumer Financial Protection Bureau rule that could result in more consumer lawsuits against banks.[45] Accordingly, Vice President Pence was "essential" in achieving President Donald Trump's legislative priorities.[46]

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36. *See Party Division*, *supra* note 26; *About the Vice President: Vice Presidents of the United States*, U.S. SENATE, [https://perma.cc/6VTH-F5T7] (last visited Oct. 9, 2022).

37. *Votes to Break Ties in the Senate*, *supra* note 24; *see* Alia Wong, *Education Secretary Betsy DeVos Has Already Affected Public Education*, ATLANTIC (Feb. 7, 2017), [https://perma.cc/KQV9-C7XD].

38. Morse, *supra* note 20, at 146.

39. *Ratings of Article III and Article IV Judicial Nominees: 115th Congress*, AM. BAR ASS'N (Dec. 13, 2018), [https://perma.cc/6QRS-PTE9].

40. *Votes to Break Ties in the Senate*, *supra* note 24; *Ratings of Article III and Article IV Judicial Nominees: 115th Congress*, *supra* note 39.

41. *Votes to Break Ties in the Senate*, *supra* note 24.

42. Jason Silverstein, *Federal Judge Becomes First in U.S. History Confirmed by Tiebreaker in the Senate*, CBS NEWS (Dec. 11, 2018, 7:23 PM), [https://perma.cc/A6ET-6S68].

43. Ryan Struyk, *Mike Pence is Breaking Ties in the Senate at a Record-Setting Pace*, CNN: POL. (Jan. 24, 2018, 10:05 PM), [https://perma.cc/M2S7-DNKP].

44. *See* Tara Golshan, *Mike Pence's Tie-Breaking Vote Was Key to Republicans' Strategy in 2017*, VOX (Dec. 29, 2017, 8:00 AM), [https://perma.cc/3RMA-JSBZ]; s*ee also* Erica L. Green, *Tax Bills Could Expand Private School Benefits and Hurt Public Education*, N.Y. TIMES (Dec. 4, 2017), [https://perma.cc/U6S7-R52K].

45. *See* Golshan, *supra* note 44.

46. Alicia Cohn, *Pence Became Ultimate Tie-Breaker in 2017*, HILL (Dec. 31, 2017, 10:00 AM), [https://perma.cc/5GXK-AXYR].

In that same vein, Vice President Kamala Harris, at the time of writing, currently presides over a fifty-fifty Senate in the 117th Congress.[47] As an initial matter, it warrants mention that by virtue of Vice President Harris being a Democrat, she effectively cemented the Senate Democrats' majority status in the chamber, a fact that is decisive in determining committee assignments, chairmanships, and the body's legislative calendar.[48] After just over a year into her first term, she has already cast *twenty-six* tie-breaking votes[49]—putting her on track to cast more tiebreakers than any other Vice President in American history, should circumstances remain unchanged.[50]

To date, Vice President Harris has had the final say on a key procedural hurdle that was needed to advance a $1.9 trillion coronavirus relief package, a measure that received no support from Senate Republicans.[51] She has also voted to confirm the nominations of multiple senior-level officials in President Joseph ("Joe") R. Biden's administration, breaking ties to confirm Kiran Ahuja as the Director of the Office of Personnel Management,[52] Jennifer Abruzzo as General Counsel of the National Labor Relations Board,[53] Catherine Lhamon as Assistant Secretary for Civil Rights in the Department of Education,[54] and Julia Ruth Gordon as Assistant Secretary of Housing and Urban

47. *See Party Division*, *supra* note 26.

48. *See* Mark Strand & Tim Lang, *Who's in Charge in a 50-50 Senate?*, CONG. INST. (Feb. 5, 2021), [https://perma.cc/A62A-FUTQ].

49. *Votes to Break Ties in the Senate*, *supra* note 24.

50. Philip Bump, *No Vice President Has Broken More Senate Ties as Early as Kamala Harris Has*, WASH. POST (Apr. 22, 2021, 5:28 PM), [https://perma.cc/7RSZ-3MXG].

51. Marisa Schultz, *Kamala Harris Casts Tie-Breaking Vote to Launch Debate Over $1.9 Trillion COVID-19 Bill*, FOX NEWS (Mar. 4, 2021, 4:18 PM), [https://perma.cc/VLW6-DQ8N].

52. *See Votes to Break Ties in the Senate*, *supra* note 24; *Nomination of Kiran Arjandes Ahuja as Director of the Office of Personnel Management*, P.N. 220, 117th Cong. (1st Sess. 2021), [https://perma.cc/KZT2-ZB3T].

53. *Votes to Break Ties in the Senate*, *supra* note 24; *Nomination of Jennifer Ann Abruzzo as General Counsel of the National Labor Relations Board*, P.N. 126, 117th Cong. (1st Sess. 2021), [https://perma.cc/398D-BVQM].

54. *Votes to Break Ties in the Senate*, *supra* note 24; *Nomination of Catherine Elizabeth Lhamon as Assistant Secretary of Civil Rights for the Department of Education*, P.N. 572, 117th Cong. (1st Sess. 2021), [https://perma.cc/TY9F-JLNE].

Development.[55] She even cast the tie-breaking vote to discharge the nomination of Colin Kahl, President Biden's nominee to be Undersecretary of Defense for Policy, after his nomination had stalled in the Senate Armed Services Committee,[56] a move that ultimately resulted in his confirmation by the full Senate.[57] Notably, in November 2021, Vice President Harris cast the pivotal tie-breaking vote to discharge the nomination of Jennifer Sung, President Biden's nominee to the Ninth Circuit Court of Appeals, after a deadlocked Senate Judiciary Committee failed to advance Sung's nomination.[58] This marked the first time that Harris had to break a tie for a judicial nominee,[59] and her intervention proved to be indispensable to Sung's ultimate confirmation, as the full Senate could not have otherwise given her a vote just over a month later.[60]

Given the weakened procedural rules that have made it easier for contentious votes to come to the floor and the narrow partisan majorities that have characterized the Senate in recent years,[61] it is becoming increasingly imperative for the Vice President to exercise her Article I powers in accordance with the will of the electorate, rather than the individual who gave her the job. The unprecedented tie-breaking votes of Vice Presidents Pence and Harris shed considerable light on the modern vice presidency's rapidly changing legislative role and present a case for greater electoral accountability in the future.

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55. *Votes to Break Ties in the Senate*, *supra* note 24; *Nomination of Julia Ruth Gordon as Assistant Secretary of Housing and Urban Development*, P.N. 1523, 117th Cong. (2d Sess. 2022), [https://perma.cc/3JTC-S8VV].

56. Joe Gould, *DoD Nominee Colin Kahl Advances in Senate as Vice President Casts Tie-Breaking Vote*, DEF. NEWS (Apr. 21, 2021), [https://perma.cc/9G8V-EDJM].

57. *Nomination of Colin Hackett Kahl as Under Secretary of Defense for Policy*, P.N. 79-6, 117th Cong. (1st Sess. 2021), [https://perma.cc/WN2G-ATJ4].

58. James Arkin, *Harris Breaks Senate Tie to Move Snug Closer to 9th Circ.*, LAW360 (Nov. 3, 2021, 9:04 PM), [https://perma.cc/2YGS-YP3M].

59. *Id.*

60. *Nomination of Jennifer Sung to be United States Circuit Judge for the Ninth Circuit*, P.N. 807, 117th Cong. (1st Sess. 2021), [https://perma.cc/5LSB-HZED].

61. *See supra* notes 23-35 and accompanying text.

B. Next in Line

For the reasons stated above, the modern Vice President is far more than a de facto number two. However, the Constitution provides that her ancillary (but perhaps more quintessential) role is to outlast the sitting President in the event he or she becomes incapable of serving.[62] In fact, nine Vice Presidents have become President on account of the incumbent President either dying in office or resigning.[63] Put another way, out of the forty-five men that have served as President,[64] one in five of them earned the distinction by default after the presidency had devolved upon them.

Among these accidental Presidents are John Tyler, Millard Fillmore, Andrew Johnson, Chester Arthur, Theodore Roosevelt, Calvin Coolidge, Harry Truman, Lyndon Johnson, and Gerald Ford.[65] While it is beyond the scope of this Comment to address the relative successes and failures that each President experienced during his time in office, it warrants mention that only four men—Roosevelt, Coolidge, Truman, and Lyndon Johnson—were subsequently elected to the office in their own right.[66]

Six more Vice Presidents have become President upon later being elected to the office but without first having ascended to fill a vacancy; the most recent example being President Biden. Others in this category include John Adams, Thomas Jefferson, Martin Van Buren, Richard Nixon, and George H.W. Bush.[67] Indeed, for much of American history the vice presidency has

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62. *See* U.S. CONST. art. II, § 1, cl. 6.

63. *See* Friedman, *supra* note 2, at 1703; *About the Vice President: Vice Presidents of the United States*, *supra* note 36.

64. *Presidents*, THE WHITE HOUSE, [https://perma.cc/FW3P-KSLG] (last visited Oct. 9, 2022).

65. *See Presidents, Vice Presidents, & Coinciding Sessions of Congress*, U.S. HOUSE OF REPRESENTATIVES, [https://perma.cc/A6T7-TM9U] (last visited Oct. 9, 2022); Joseph Uscinski, *Smith (and Jones) Go to Washington: Democracy and Vice-Presidential Selection*, 45 POL. SCI. & POL. 58, 58 (2012).

66. *See Presidents, Vice Presidents, & Coinciding Sessions of Congress*, *supra* note 65; Scott Bomboy, *Gerald Ford's Unique Role in American History*, NAT'L CONST. CTR. (July 14, 2022), [https://perma.cc/CY7T-44UJ].

67. *See Presidents, Vice Presidents, & Coinciding Sessions of Congress*, *supra* note 65.

been considered "the best springboard to the presidency,"[68] and some have even sought out the office in hopes of leveraging it into the presidency.[69] Once again, while this Comment does not seek to evaluate the performance of each President in this class, it is notable that only two men—Jefferson and Nixon—were re-elected.[70] History, however, remains to be written for Biden.

Altogether, fifteen Vice Presidents have gone on to serve as President,[71] or in other words, one in three Presidents have formerly served as Vice President. But why should any of this matter? The rate at which Vice Presidents have become President is significant because the modern nomination process, the crucible through which we select Presidents, largely denies voters the same degree of participation in selecting *Vice* Presidents. Instead, major party presidential nominees—not the voters—typically choose the vice-presidential nominee at or around the same time as their party's nominating convention.[72] This presents voters with the squarely undemocratic choice of either ratifying the presidential nominee's vice-presidential pick or voting against their first choice for President.[73]

Take Vice President Harris, for example. Once a top-tier contender for the 2020 presidential election, Harris was forced to drop out of the race nearly two months before caucusing even began, citing insufficient funds and lethargic poll numbers.[74] In a turn of events, however, Democratic presidential nominee Joe Biden chose her as his running mate in August 2020,[75] and Harris was sworn in as Vice President to the oldest President in

68. Joel K. Goldstein, *The Rising Power of the Modern Vice Presidency*, 38 PRESIDENTIAL STUD. Q. 374, 376 (2008) [hereinafter *Modern Vice Presidency*].

69. *See id.* at 375.

70. *See Presidents, Vice Presidents, & Coinciding Sessions of Congress*, *supra* note 65.

71. *About the Vice President: Vice Presidents of the United States*, *supra* note 36.

72. *Vice Presidency in Five Pieces*, *supra* note 22, at 631; *see also* Uscinski, *supra* note 65, at 59-60.

73. Uscinski, *supra* note 65, at 60.

74. Scott Detrow & Asma Khalid, *Kamala Harris Drops Out of Presidential Race*, NPR (Dec. 3, 2019, 3:25 PM), [https://perma.cc/2XC6-33BP].

75. Christopher Cadelago & Caitlin Oprysko, *Biden Picks Kamala Harris as VP Nominee*, POLITICO (Aug. 11, 2020, 7:09 PM), [https://perma.cc/F225-N4KV].

American history just over a year after the national electorate had rejected her bid for higher office.[76]

Vice President Pence's meteoric rise to the number two spot also sheds light on the inherently undemocratic system of vice-presidential selection. Pence, then a one-term Governor from Indiana, had been experiencing underwater approval ratings and was in the midst of a hotly contested re-election campaign[77] when 2016 Republican presidential nominee Donald Trump chose him as his running mate.[78] Pence, facing an uncertain re-election bid to stay on as his state's Governor,[79] found himself as the Vice President-elect less than four months later.[80] In January 2017, Pence was sworn-in as Vice President to, at the time, the oldest President in American history.

The historical regularity with which Vice Presidents have been thrust into the presidency is decidedly incongruous with the electoral marathon required of modern presidential candidates. Today's presidential campaigns are "nearly two-year affairs"[81] and give "voters ample time to learn about the candidates and make an educated choice."[82] Even congressional candidates are subjected to a more protracted vetting process, with campaign "[f]undraising for the next election begin[ning] as soon as the last election ends."[83] Accordingly, the limited time and manner with which the electorate can express a preference for Vice President raises significant questions as to "whether the vice president is an

76. Chelsea Janes & Cleve R. Wootson Jr., *Kamala Harris Sworn into History with Vice-Presidential Oath*, WASH. POST. (Jan. 20, 2021, 8:20 PM), [https://perma.cc/X5NM-P8GB].

77. Matthew Nussbaum, *Trump Flirts with Unpopular Pence*, POLITICO (July 12, 2016, 1:51 PM), [https://perma.cc/4DQC-LYMZ].

78. Kelly O'Donnell, *It's Official: Trump Announces Mike Pence as VP Pick*, NBC NEWS (July 15, 2016, 10:02 AM), [https://perma.cc/ABE2-R6Y2].

79. Brian Slodysko, *Gov. Mike Pence Facing Tough Re-Election After Social Issues Stands*, INDIANAPOLIS STAR (May 27, 2016, 7:11 AM), [https://perma.cc/6BPV-7NBZ].

80. *See* Brian Eason, *Donald Trump and Indiana's Mike Pence Win Presidential Race*, INDIANAPOLIS STAR (Nov. 9, 2016, 6:58 AM), [https://perma.cc/EU48-D596].

81. Sarah Mervosh & Matt Flegenheimer, *How Early Do Presidential Campaigns Start? Earlier than You May Think*, N.Y. TIMES (Dec. 31, 2018), [https://perma.cc/S2YN-7FQ2].

82. John Haltiwanger, *Americans Are Already Exhausted with the 2020 Election, and It's Just Getting Started. Other Countries Have Laws Limiting the Length of Campaigns.*, BUS. INSIDER (Feb. 10, 2020, 8:52 AM), [https://perma.cc/L3SE-XW4S].

83. *The Fundraising Never Stops*, OPENSECRETS, [https://perma.cc/8E7Z-SS7C] (last visited Oct. 10, 2022).

elected official in the customary meaning of the term."[84] Indeed, voters have elected a number of Vice Presidents "who could never have won the vice presidency, to say nothing of the presidency, head to head against their leading opponent."[85] Thus, in the historical context in which one in three Vice Presidents have become President, the vice-presidential nomination and election process is decidedly "less democratic compared to other elected offices."[86]

C. Additional Constitutional Considerations: The Twenty-Fifth Amendment

While four of the seventeen constitutional amendments that were ratified after the Bill of Rights either directly or indirectly implicated the vice presidency,[87] the most significant among them is the Twenty-Fifth Amendment. "The Twenty-[F]ifth Amendment constitutionalized new ideas regarding the vice presidency" and "reflected the idea that the Vice President was an indispensable governmental office that must be filled whenever it became vacant."[88] Particularly, it expanded the Vice President's constitutional duties during instances in which the President may become unable to exercise the powers and duties of his office.[89]

Section 1 of the Twenty-Fifth Amendment essentially codified over a century's worth of precedent that, upon the death, resignation, removal, or inability of the President to fulfill his duties, the Vice President actually *becomes* President, as opposed to the *acting* President.[90] Additionally, in the event of a

84. Uscinski, *supra* note 65, at 59 ("[T]he selection of the vice-presidential running mate has instead fallen into the hands of only one person: the presidential nominee.").

85. Akhil Reed Amar, *Applications and Implications of the Twenty-Fifth Amendment*, 47 HOUS. L. REV. 1, 24 (2010).

86. Uscinski, *supra* note 65, at 59.

87. *See History and Constitutional Interpretation*, *supra* note 5, at 680-81.

88. *Id.* at 684; *see also* Soderstrom, *supra* note 2, at 1000; Harding, *supra* note 15, at 2.

89. *See History and Constitutional Interpretation*, *supra* note 5, at 685.

90. *See* Harding, *supra* note 15, at 10. The original vice-presidential succession clause provides only that, in the event of the President's death, resignation, removal from office, or inability to fulfill his duties, "the Same shall devolve on the Vice President." U.S. CONST art. II, § 1, cl. 6. This language was ambiguous as to whether the Vice President actually became President or, if rather, the Vice President was simply to act as President until a new President was chosen. However, upon the death of President William Henry Harrison in

vice-presidential vacancy, Section 2 permits the President to nominate a new Vice President, subject to "confirmation by a majority vote of both Houses of Congress."[91] Sections 3 and 4 provide for the voluntary and involuntary transfers of power during times of presidential disability.[92]

Multiple instances of presidential inability had plagued governmental operations and raised "several succession-related questions" before the adoption of the Twenty-Fifth Amendment.[93] Principally, although the Constitution made it clear that the Vice President would take over in the event the President was unable to discharge his official duties, it was silent on *who* was responsible for determining any such inability.[94] Accordingly, Congress provided clarity with the Twenty-Fifth Amendment. When contemplating Sections 3 and 4 of the Twenty-Fifth Amendment, Congress sought to maintain the checks and balances among the separate branches by vesting only the President and Vice President with the authority to make an initial determination of presidential inability, thus ensuring that any transfer of presidential power would originate from within the executive branch.[95]

Section 3 concerns the *voluntary* transfer of power from the President to the Vice President.[96] Under this section, the Vice President becomes the "Acting President" when the President informs the Speaker of the House and the President Pro Tempore

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April 1841, Vice President John Tyler took the presidential oath and "insisted that he was President, not simply Vice President acting as President." *See History and Constitutional Interpretation, supra* note 5, at 671-72. After Congress voted to address Tyler as "President" in May 1841, the precedent was established, and seven other Vice Presidents preceding the passage of the Twenty-Fifth Amendment followed the "Tyler Precedent" after their predecessors' deaths. *Id.* at 672-73.

91. U.S. CONST. amend. XXV, § 2.

92. U.S. CONST. amend. XXV, §§ 3-4.

93. THOMAS H. NEALE, CONG. RSCH. SERV., R45394, PRESIDENTIAL DISABILITY UNDER THE TWENTY-FIFTH AMENDMENT: CONSTITUTIONAL PROVISIONS AND PERSPECTIVES FOR CONGRESS 23 (2018). Examples include: President Garfield's assassination in 1881, President Cleveland's various surgeries in 1893, President Wilson's stroke in 1919, President Franklin Roosevelt's deteriorating health in 1944-45, and President Eisenhower's multiple hospitalizations between 1955 and 1957. *See id.* at 23-26.

94. *See id.* at 21-22.

95. Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 989 (2010) [hereinafter *Taking from the Twenty-Fifth Amendment*].

96. Harding, *supra* note 15, at 11.

of the Senate that he or she is "unable to discharge the powers and duties of his [or her] office."[97] However, once the President informs the Speaker and President Pro Tempore that his inability has been lifted, he "reclaim[s] [his duties] immediately without review."[98] Presidents have invoked Section 3 four times in the past thirty-seven years[99] and have given it serious consideration on a number of other occasions.[100]

In 1985, Ronald Reagan became the first President to take advantage of Section 3 when he underwent elective colon cancer surgery.[101] In 2002 and 2007, President George W. Bush again utilized Section 3 to transfer power to Vice President Dick Cheney while he underwent "routine medical procedure[s]."[102] Most recently, in November 2021, Vice President Harris became the first woman to exercise presidential authority when, for eighty-five minutes, she stepped in as Acting President while President Biden was anesthetized for a colonoscopy.[103] In contrast, and perhaps to underscore the voluntary nature of Section 3, President Trump reportedly refused to transfer power to Vice President Pence on two separate occasions: once during a routine colonoscopy—for which he allegedly declined anesthesia to avoid "temporarily relinquish[ing] his presidential

97. U.S. CONST. amend. XXV, § 3.

98. *See Taking from the Twenty-Fifth Amendment*, *supra* note 95, at 989; U.S. CONST. amend. XXV, § 3.

99. *See* Gerhard Peters, *List of Vice-Presidents Who Served as Acting President Under the 25th Amendment*, AM. PRESIDENCY PROJECT (Nov. 19, 2021), [https://perma.cc/8XQ9-UTPR].

100. *See Taking from the Twenty-Fifth Amendment*, *supra* note 95, at 976-77.

101. Peters, *supra* note 99.

102. *See* Letter to Congressional Leaders on Temporary Transfer of the Powers and Duties of President of the United States, 1 PUB. PAPERS 1083 (June 29, 2002); Letter to Congressional Leaders on the Temporary Transfer of the Powers and Duties of the President of the United States, 2 PUB. PAPERS 1003-04 (July 21, 2007).

103. *See* Peters, *supra* note 99; Kate Sullivan, *For 85 Minutes, Kamala Harris Became the First Woman with Presidential Power*, CNN: POL. (Nov. 19, 2021, 12:29 PM), [https://perma.cc/GK7A-E36S].

powers"[104]—and once while he was hospitalized for COVID-19.[105]

On the other hand, Section 4 of the Twenty-Fifth Amendment concerns the *involuntary* transfer of power and created an active constitutional duty for the Vice President by making her "a necessary participant in disability determinations."[106] Under Section 4, the Vice President becomes Acting President when she and a majority of the Cabinet "transmit to the President [P]ro [T]empore of the Senate and the Speaker of the House . . . their written declaration that the President is unable to discharge the powers and duties of his office."[107] Notably, Congress retains the authority to substitute the Cabinet for "some other body" as it may deem appropriate, but under no circumstances can it dispense of the Vice President's constitutional role in determining presidential disability.[108] The requirement that the Vice President participate in involuntary transfers of power ensures that a member of the executive branch always has "an effective veto" when determining presidential disability.[109] Only after such a determination has been made is Congress called upon to be the final authority on presidential disability.[110]

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104. Grace Panetta & Jake Lahut, *Trump Skipped Anesthesia for a Previously Unreported Procedure at Walter Reed to Avoid Giving Pence Temporary Power, According to New Book*, BUS. INSIDER (Sept. 28, 2021, 9:40 AM), [https://perma.cc/SK78-284L].

105. *See* Melissa Quinn, *O'Brien Says Trump Transfer of Power "Not Something That's on the Table"*, CBS NEWS (Oct. 4, 2020, 11:37 AM), [https://perma.cc/P3ZW-S4VA].

106. *Taking from the Twenty-Fifth Amendment*, *supra* note 95, at 985.

107. U.S. CONST. amend. XXV, § 4.

108. *Taking from the Twenty-Fifth Amendment*, *supra* note 95, at 988.

109. *Id.*

110. *See* U.S. CONST. amend. XXV, § 4. Once the Vice President and a majority of the Cabinet transmit their findings of presidential disability to Congress, "the Vice President immediately assumes the powers of the presidency" and becomes Acting President. Harding, *supra* note 15, at 11. However, if the President notifies Congress in writing that no disability exists, he regains the powers of his office. In the event the President does so, the Vice President and the Cabinet have four days to again declare the President unable to serve, in which case the Vice President regains and *retains* the status of Acting President until Congress settles the question of presidential disability within twenty-one days. A congressional determination of presidential disability requires a two-thirds vote by both chambers, and if Congress fails to do so, the President regains the powers and duties of his office. *See id.* at 11-12.

The Vice President's role in initiating an involuntary transfer of power was partly premised on the "judgment that executive officials would be most likely to recognize presidential inability and . . . determine when the disability had ended."[111] And while Section 4 has never been invoked, it was at least contemplated by senior administration officials on three separate occasions: first, following the assassination attempt on President Reagan in 1981;[112] second, when a presidential aide found President Reagan in an "inattentive and inept" state in 1987;[113] and third, in the wake of President Trump's perceived involvement in the January 6, 2021, attack on the U.S. Capitol.[114] In this regard, Section 4—without defining what constitutes presidential inability[115]—may be viewed as converting the Vice President from a powerless number two during instances of legitimate presidential inability into a "watchdog"[116] over the executive branch from *within* the executive branch.[117]

111. *Taking from the Twenty-Fifth Amendment*, *supra* note 95, at 989.

112. *Id.* at 977-78.

113. NEALE, *supra* note 93, at 17.

114. *See June 28th Select Committee Hearing: Hearing Before the H. Select Comm. to Investigate the January 6th Attack on the U.S. Capitol*, 117th Cong. (2022), [https://perma.cc/5RM9-2U54] (statement of Cassidy Hutchinson, Former Special Assistant to the President and Aide to the Chief of Staff); Jordan Williams, *Pompeo, Mnuchin Among Trump Cabinet Members Who Discussed 25th Amendment: Report*, HILL (Jan. 8, 2021, 9:21 AM), [https://perma.cc/RWX7-E378]; Natalie Prieb, *DeVos Says She Talked 25th Amendment, Resigned After Trump Crossed 'Line in the Sand' on Jan. 6*, HILL (June 9, 2022, 11:24 AM), [https://perma.cc/942M-2YR4] ("[DeVos] said that she spoke with other Cabinet members about the option of invoking the 25th Amendment to remove [Trump], noting that there were 'more than a few people' in the White House who considered the move.").

115. *See* Adam R. F. Gustafson, Note, *Presidential Inability and Subjective Meaning*, 27 YALE L. & POL'Y REV. 459, 461 (2009) ("[T]he Amendment describes presidential inability as the President's being 'unable to discharge the powers and duties of his office.' That phrase is never defined, and the Constitution offers no measure of physical debility, mental infirmity, or emotional instability that would satisfy it.").

116. Amar & Amar, *supra* note 2, at 944.

117. *See Taking from the Twenty-Fifth Amendment*, *supra* note 95, at 987-91; *see also* Harding, *supra* note 15, at 20 ("[W]hen in doubt, it would be preferable for the Vice President to err on the side of decisiveness during times of potential inability. If a power vacuum occurs in the executive branch, it is preferable that this vacuum is filled by the Vice President, who was elected by the people of the United States and has a constitutional responsibility to them . . . .").

III. THE CASE FOR AN INDEPENDENT VICE PRESIDENCY

In light of the growing need for vice presidential tiebreakers in the Senate, the rate at which Vice Presidents historically become President, and the Vice President's constitutional role in preserving the functionality and integrity of the executive branch during instances of presidential inability, the United States should ratify a constitutional amendment that provides for the Vice President to be independently elected every four years during the midterm elections. This proposal does nothing to alter the Vice President's existing constitutional duties, but instead, simply amplifies the present framework in a way that provides the American people with a more democratic role in selecting a constitutional officer who materially affects their everyday lives.

A. Vice Presidential Independence and Executive Branch Functionality

The case for vice presidential independence cannot be sufficiently weighed without also addressing the potential implications for the Vice President's relationship with the President. As an initial matter, the impulse that it is *necessary* for the President and Vice President to work together in consort, frankly, conflates reality. The argument for executive branch unity has been met with haphazard support among the states and has only become mainstream at the federal level in recent decades.[118] But most importantly, the modern Vice President's increased prominence in legislative matters and her obligations under Section 4 of the Twenty-Fifth Amendment present contemporary arguments in favor of vice-presidential independence.

118. *See* Louis Jacobson, *The Challenges of Electing Governors and Lieutenant Governors Separately,* UVA CTR. FOR POL. (Jan. 27, 2022), [https://perma.cc/TH2L-F9U6]; Joshua Holzer, *What Does the Vice President Do?*, THE CONVERSATION (Jan. 19, 2021, 12:07 PM), [https://perma.cc/4382-244N].

1. The States on Independently Elected Executive Branch Officers

The model various states use to structure their executive departments pointedly undermines the argument that functional governments require a uniformly elected executive branch. State Lieutenant Governors are "much like the vice president on the federal level: [t]hey serve as a backup in case of death or resignation from office, and they don't have a lot of other specific duties in their portfolio."[119] A simple survey of all fifty state constitutions, however, suggests that executive branch unity at the state level has not been a point of critical concern.[120] Of the forty-three state constitutions that provide for a Lieutenant Governor, seventeen of them require the Governor and Lieutenant Governor to be elected separately.[121] A number of states even go a step further, "provid[ing] for the popular election of up to seven executive officials who each have constitutional duties assigned to them and who each are accountable to the electorate."[122] For example, the Arkansas Constitution provides for a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, each of whom are separately elected officers of the state's executive branch.[123]

Notably, this model "permits split-party election results,"[124] and it is not uncommon for voters in these states to elect executive officers—namely, Governors and Lieutenant Governors—from different political parties.[125] In light of this reality, these states have nonetheless elected to maintain the way in which they structure their executive departments. It follows, then, that to the extent any of these states have experienced governmental dysfunction as a result of holding separate elections for various executive officers, any such dysfunction has yet to spur a change to their respective constitutions.

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119. Jacobson, *supra* note 118.
120. *See* Soderstrom, *supra* note 2, at 1015-16.
121. *See* Jacobson, *supra* note 118.
122. Soderstrom, *supra* note 2, at 1012-13.
123. *See* ARK. CONST. art. 6, § 1.
124. Soderstrom, *supra* note 2, at 1015.
125. Jacobson, *supra* note 118.

2. The Vice President's Emergent Role in Executive Branch Affairs

For much of history, "Vice [P]residents rarely had an important voice in White House policy making."[126] For example, in describing his participation in President Woodrow Wilson's administration, Vice President Thomas Marshall wrote, "I was of no importance to the administration beyond the duty of being loyal to it . . . ."[127] Moreover, when President Eisenhower was asked to name a "major idea" that Vice President Nixon had brought to the table, he famously replied, "If you give me a week, I might think of one. I don't remember."[128] In fact, Vice President Lyndon Johnson felt so sidelined during his time in President Kennedy's administration that he insinuated his only real job was to remind the President of his mortality, remarking, "Every time I came into John Kennedy's presence, I felt like a goddamn raven hovering over his shoulder. . . . I detested every minute of it."[129]

Indeed, the centralized executive role that modern Vice Presidents now play in their respective presidential administrations only began to take hold in 1976, when President Jimmy Carter and Vice President Walter Mondale jointly set out to integrate the vice presidency into the West Wing's business.[130] Mondale believed that "such a significant vice presidential role could only occur in the executive branch," since, as he explained, his constitutional duties in the Senate were largely "ceremonial with the exception of casting tie-breaking votes."[131] Under Mondale's watch, the vice presidency developed into a "significant role in the executive branch," and contemporary Presidents have continued to utilize their Vice Presidents for

126. *Modern Vice Presidency*, *supra* note 68, at 376.

127. Ronald G. Shafer, *He Thought the Vice Presidency Was Useless—Until Woodrow Wilson Had a Stroke*, WASH. POST (Dec. 14, 2021, 7:00 AM), [https://perma.cc/6SCN-KPSL].

128. *Modern Vice Presidency*, *supra* note 68, at 376.

129. DORIS KEARNS GOODWIN, LYNDON JOHNSON AND THE AMERICAN DREAM 251 (Open Rd. Integrated Media, Inc. 2015) (1976).

130. *Modern Vice Presidency*, *supra* note 68, at 377-78.

131. *Id.* at 378 (quoting Memorandum from Walter Mondale to Jimmy Carter on the Role of the Vice President in the Carter Administration (Dec. 9, 1976), [https://perma.cc/PC6C-ZTMT]).

certain "roles that can only be performed at the highest levels."[132] As a result, the modern vice presidency practically serves as "an extension of the presidency," with the Vice President primarily acting as the President's agent.[133]

3. Modern Considerations for Vice-Presidential Independence

The vice presidencies of Mike Pence and Kamala Harris offer new considerations for the appropriate degree of deference that Vice Presidents should afford to Presidents. While the apparent benefits of a devoted Vice President are not de minimis, the notion that our national interests are best served by a Vice President who is subservient to the President implicitly rests on the premise that such a relationship benefits the *Chief* Executive, plainly ignoring the Vice President's auxiliary constitutional duties under both Article I and Section 4 of the Twenty-Fifth Amendment. This Section merely argues that the benefits of a subordinate Vice President do not outweigh the inherent conflicts of interest presented by the modern vice presidency's unprecedented involvement in legislative affairs and its role in maintaining the functionality and integrity of the executive branch. Put another way, present political realities now make it such that democratic principles are more susceptible to subversion when the President and Vice President operate in unison, as opposed to at arm's length.

Unlike Vice President Mondale, who cast only one tie-breaking vote during his time in office,[134] Mike Pence and Kamala Harris have demonstrated how today's hyper-partisan political climate and diminished procedural hurdles for holding votes in the Senate have resulted in the Vice President playing an outsized role in passing legislation, installing high-level administration officials, confirming lifetime-tenured judges, and solidifying partisan majorities.[135] And although it has become widely accepted that the Vice President is expected to carry out

132. *Id.* at 387.

133. Morse, *supra* note 20, at 154.

134. *Occasions When Vice Presidents Have Voted to Break Tie Votes in the Senate*, *supra* note 24.

135. *See supra* Part II.

the *President's* agenda in the event of an equally divided Senate,[136] the fact remains that the Constitution vests the tie-breaking authority in the *Vice* President.[137] Certainly, had the Founders wished, they could have cut out the middleman by simply gifting that function to the President. In this way, the modern vice presidency's excessive integration into the executive branch has "distort[ed] the separation of powers between the branches," particularly, when the Vice President casts tie-breaking votes to confirm presidential nominees.[138]

Furthermore, in the context of declaring presidential inability under the Twenty-Fifth Amendment, there are conceivable scenarios in which unwavering vice-presidential loyalty might undermine basic democratic principles. For the reasons discussed below, Vice President Pence's final days in office, at a minimum, legitimize concerns about whether the President's handpicked number two should reasonably be expected to identify instances of presidential inability with objectivity.[139] Indeed, rudimentary logic suggests that an independently elected Vice President would be in a far superior position to "serve as a watchdog for the American people by sniffing out possible executive misconduct and self-dealing."[140]

Finally, electing the Vice President independently at the midterm elections would not preclude Presidents and Vice Presidents from belonging to the same party, nor would it prevent the two from maintaining a congenial relationship. As many states have seen, it is quite common for Chief Executives and their understudies to maintain "good working relationship[s]" even

136. *See* Morse, *supra* note 20, at 155 ("When vice presidents cast a tie-breaking vote on a legislative or procedural matter in the Senate, the operative effect is that the Executive Branch resolves an issue that arose in the Senate.").

137. U.S. CONST. art. I, § 3, cl. 4.

138. Morse, *supra* note 20, at 155 (discussing how vice presidential participation in selecting cabinet members and federal judicial nominees makes "a mockery of the advice and consent process" when the Vice President is required to break a tie to confirm those very nominees).

139. *See infra* notes 157-59 and accompanying text. This Comment takes no position on the merits behind Vice President Pence's decision not to invoke Section 4 of the Twenty-Fifth Amendment in the wake of the January 6, 2021, Capitol riots. This author simply includes the example to illustrate the principles discussed.

140. Amar & Amar, *supra* note 2, at 944.

when they do not agree on everything.[141] Given the vice presidency's historic lack of involvement in executive affairs, this Section simply contends that it is not *necessary* for the two to function in lockstep, and that rather, democratic ideals are best served when there is no obligation to do so.

B. Increased Accountability for the Federal Government

Electing the Vice President separately at the midterm elections would provide the national electorate with additional democratic oversight for both the executive and legislative branches. The fundamental difference between this proposal and others that call for an independently elected Vice President[142] is its temporal focus. Electing (or re-electing) the Vice President two years after the presidential election would enable voters to take into consideration the present state of national affairs as well as the incumbent President's job performance. But more importantly, it would unshackle the Vice President from being "a partisan accessory to the presidency"[143] and enable her to exercise independent judgment on behalf of the American people who expressly gave her the job. The vice presidencies of Mike Pence and Kamala Harris provide a contemporary and useful context for how such a proposal could strengthen democratic accountability for the federal government.

1. Accountability for the Executive Branch

The executive branch is held accountable by the national electorate only once every four years,[144] and given that the Twenty-Second Amendment limits the Chief Executive to two terms,[145] an individual who is re-elected to the presidency effectively serves out the entirety of his second term with no direct electoral accountability. Of course, the executive branch may be checked in other respects, such as Congress's power to

141. Jacobson, *supra* note 118.

142. *See, e.g.*, Friedman, *supra* note 2, at 1726, 1728-29; Amar & Amar, *supra* note 2, at 944-45; Soderstrom, *supra* note 2, at 1005-06.

143. Larson, *supra* note 6, at 527.

144. U.S. CONST. art. II, § 1, cl. 1.

145. U.S. CONST. amend. XXII, § 1.

impeach[146] or an Article III court's ability to intervene,[147] but the electorate's role in influencing executive branch operations—particularly, in voters' ability to express approval or disapproval for the President's performance—is limited to the midterm *congressional* elections. Thus, electing the Vice President at the midterms would ensure that the executive branch is subject to at least some degree of direct electoral accountability every two years.

Mike Pence's vice presidency demonstrates the office's potential for checking executive abuse from within the executive branch and illustrates how additional democratic oversight might have reshaped recent national affairs. Although President Trump lost the popular vote in 2016, he was elected President in what was perhaps the single largest electoral upset in American history.[148] Following the 2018 congressional midterm elections, Republicans lost control of the House of Representatives after voters gave Democrats a majority for the first time in eight years.[149] In fact, 2018 saw the highest voter turnout for a midterm election in a century, and Democrats performed seven points higher in the national popular vote than they had in 2016, besting Republicans by nine points overall.[150] Were the Vice President also on the ballot in 2018, it would take little imagination to conceive a reality in which voters might have chosen a Democrat, a result that could have dramatically re-characterized the final weeks of Trump's presidency.

During his final two years in office, President Trump became the only Chief Executive to be impeached twice.[151] The House first impeached him on December 18, 2019, charging one count

146. U.S. CONST. art. 1, § 2, cl. 5.

147. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

148. *See* Shane Goldmacher & Ben Schreckinger, *Trump Pulls Off Biggest Upset in U.S. History*, POLITICO (Nov. 9, 2016, 3:58 AM), [https://perma.cc/6M6B-EMGU].

149. *See Party Divisions of the House of Representatives, 1789 to Present*, U.S. HOUSE OF REPRESENTATIVES, [https://perma.cc/3HAU-55XD] (last visited Oct. 13, 2022).

150. *See* Scott Keeter & Ruth Igielnik, *Democrats Made Gains from Multiple Sources in 2018 Midterm Victories*, PEW RSCH. CTR. (Sept. 8, 2020), [https://perma.cc/FSZ2-NKS9].

151. *See* Jacob Pramuk, *Trump Becomes First President to Be Impeached Twice, as Bipartisan Majority Charges Him with Inciting Capitol Riot*, CNBC (Jan. 14, 2021, 7:08 AM), [https://perma.cc/89AV-3KH4].

of obstruction of Congress and one count of abuse of power.[152] Both counts were dispensed with along largely party-line votes in the Democrat-controlled House and in the Republican-controlled Senate, and President Trump was ultimately acquitted on both charges.[153] The second impeachment, however, came in the wake of the January 6, 2021 attack on the United States Capitol, in which rioters were seemingly encouraged by President Trump to siege the Capitol shortly before Congress was scheduled to certify Joe Biden as the winner of the 2020 presidential election.[154] In response, the House again impeached President Trump on January 13, 2021, charging one count of inciting an insurrection, with every Democrat and ten Republicans supporting the measure.[155] Nevertheless, the Senate again acquitted President Trump, but this time with seven Republicans voting to convict him, and only *after* he had left office.[156]

Given the relatively short window of time between President Trump's charged conduct and the inauguration of President-elect Joe Biden, congressional leaders called on Vice President Pence to invoke Section 4 of the Twenty-Fifth Amendment and declare the President unfit to serve out the remainder of his term.[157] In fact, among congressional leaders' chief concerns with impeaching the President so close to the expiration of his term was the procedural inability to hold a trial in the Senate before he left office.[158] Although Vice President Pence ultimately declined to invoke the Twenty-Fifth Amendment, a valid question presented itself as to whether an independently elected Vice President—Republican or Democrat—would have chosen the same course of action.

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152. *President Donald Trump Impeached*, HIST., [https://perma.cc/U6GF-WMJU] (last visited Oct. 13, 2022).

153. *Id.*

154. *See* Sam Levine & Lauren Gambino, *Donald Trump Acquitted in Second Impeachment Trial*, GUARDIAN (Feb. 13, 2021, 7:12 PM), [https://perma.cc/CHW7-YZQ7].

155. *See* Pramuk, *supra* note 151.

156. Levine & Gambino, *supra* note 154.

157. *See* Jacob Jarvis, *Donald Trump Facing Second Impeachment as 25th Amendment Hits Dead End*, NEWSWEEK (Jan. 8, 2021, 6:41 AM), [https://perma.cc/86NR-MCZA].

158. Jim Acosta & Pamela Brown, *Pence Has Not Ruled Out 25th Amendment, Source Says*, CNN: POL. (Jan. 9, 2021, 10:08 PM), [https://perma.cc/RC99-L3QZ].

The foregoing series of events presents a compelling case for electing the Vice President separately at the midterm elections. After observing two years of the Trump Administration and assessing President Trump's approach to governing, voters could have affirmed or repudiated the President's performance by selecting a Vice President who best represented their interests for the remainder of the President's term. Had such a hypothetical Vice President decided to invoke Section 4 of the Twenty-Fifth Amendment in the aftermath of January 6, 2021, she would have done so with the assurance that the American people had expressly entrusted her with that authority under the Constitution. In effect, she would serve as the people's "watchdog."[159]

2. Accountability for the Legislative Branch

As President of the Senate, the Vice President ensures finality in the Senate's business by casting a tie-breaking vote when the Senate is equally divided on a matter.[160] Moreover, in the event the Senate's composition is equally divided—i.e., fifty Republicans and fifty Democrats—the Vice President's party effectively decides which party controls the chamber.[161] Thus, Vice President Harris's procedural influence in a fifty-fifty Senate perhaps illustrates the most significant way in which the American people might utilize the vice presidency as a means of checking Congress's legislative agenda at the midterms.

At the time of writing, the possibility of yet another equally divided Senate appears quite plausible. In the wake of the 2022 congressional midterm elections, three Senate races—Arizona, Georgia, and Nevada—remain too close to call.[162] In such an event, Vice President Harris would again be the dispositive factor in securing Democrats' majority control of the chamber,[163] even

159. Amar & Amar, *supra* note 2, at 933 (describing how an independently elected Vice President would serve as a "watchdog" within the Executive branch).

160. *See supra* note 18 and accompanying text.

161. *See* Strand & Lang, *supra* note 48.

162. Zach Montellaro & Madison Fernandez, *Hundreds of Thousands of Votes Still Being Counted in Key Senate States*, POLITICO (Nov. 11, 2022, 9:50 AM**),** **[**https://perma.cc/8ZGE-RHKV] ("If the two parties split Arizona and Nevada, Senate control would once again come down to Georgia, just as it did in 2020.").

163. *See* Strand & Lang, *supra* note 48.

if Republicans were to carry the national popular vote. This is a peculiar, yet not infrequent, consequence of when and how the Constitution provides for the election of Senators.[164]

Unlike the House of Representatives, in which the entire chamber must answer to the voters every two years,[165] Senators are elected to six-year terms, meaning that only a third of all Senate seats are voted on during the biennial congressional elections.[166] Consequently, the Senate's unique electoral scheme produces a somewhat anomalous result in which—once every six years—voters in each state are precluded from expressing any electoral preference as to the Senate's composition for a full, two-year session of Congress (hereinafter referred to as the "Sexennial Dilemma").[167] For example, Michigan's two Senate seats belong to Senate Classes I and II.[168] In 2018, Michigan elected Debbie Stabenow to the Senate as its member from Class I.[169] Then, in 2020, Michigan elected Gary Peters to the Senate as its member from Class II.[170] Accordingly, during the 2022 midterms, when only Senators from Class III will be on the ballot,[171] the Sexennial Dilemma will prevent Michiganders from exercising any degree of direct electoral oversight as to their representation in the Senate.

Of course, there are reoccurring instances in which a state's Sexennial Dilemma does not fall within a midterm year. This pattern is cyclical and relatively straightforward. For example, Arkansas did not hold Senate elections in 2000 (presidential cycle), 2006 (midterm cycle), 2012 (presidential cycle), and 2018

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164. *See* Frances E. Lee & Bruce I. Oppenheimer, *Senate Apportionment: Competitiveness and Partisan Advantage*, 22 LEGIS. STUD. Q. 3, 18-19 (1997).

165. U.S. CONST. art. I, § 2, cl. 1.

166. U.S. CONST. art. I, § 3, cl. 1.

167. The Constitution divides Senators into three separate classes, generally referred to as Classes I, II, and III. Because each state is only given two Senators, no state will have a member from all three classes. *See id.* at cl. 2.

168. *Class I—Senators Whose Term of Service Expire in 2025*, U.S. SENATE, [https://perma.cc/6TZH-3UEX] (last visited Oct. 14, 2022); *Class II—Senators Whose Terms of Service Expire in 2027*, U.S. SENATE, [https://perma.cc/ZS2U-YVF7] (last visited Oct. 14, 2022).

169. *Class I—Senators Whose Term of Service Expire in 2025*, *supra* note 168.

170. *Class II – Senators Whose Terms of Service Expire in 2027*, *supra* note 168.

171. *Class III—Senators Whose Terms of Service Expire in 2023*, U.S. SENATE, [https://perma.cc/65KW-XZCY] (last visited Oct. 14, 2022).

(midterm cycle);[172] and Arkansas will not hold Senate elections in 2024 (presidential cycle) and 2030 (midterm cycle).[173] As the system is currently structured, Arkansans have no direct electoral impact on the Senate's affairs when there is a Sexennial Dilemma during a *midterm* election. However, the same cannot be said when there is a Sexennial Dilemma during a *presidential* election, since the winner of the presidential race will determine which nominees and appointees get sent to the Senate in the first place, and the new President would have the authority to veto any legislation that he or she found disagreeable. Accordingly, holding vice-presidential elections in tandem with the midterm elections would simply ameliorate the under-democratic phenomenon that is the Sexennial Dilemma.

Again, using Michigan as an example, Michiganders under this proposed scheme would be presented with a meaningful opportunity to influence the Senate's legislative affairs during their Sexennial Dilemma without directly changing the Senate's composition, since the newly elected Vice President would determine majority control of the chamber in the event of another fifty-fifty Senate. On the other hand, even if the Senate were not equally divided along partisan lines—as was the case with Vice President Pence[174]—an independently elected Vice President would nonetheless have a far greater incentive to cast tie-breaking votes in line with national attitudes, as opposed to those emanating from the Oval Office. Thus, the constitutional process for electing Senators prompts additional considerations for how electing the Vice President separately at the midterms could produce greater congressional accountability.

In sum, when the Vice President is called upon to dislodge a procedural or legislative logjam in the Senate, her judgment not simply affects, but rather determines, which individuals may lead

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172. *See Election Results*, ARK. SEC'Y OF STATE, [https://perma.cc/KC3Y-FLK7] (last visited July 24, 2022) (election results from Arkansas's 2000, 2006, 2012, and 2018 elections can be found by clicking on the respective links listed on the elections results homepage); ARK. SEC'Y OF STATE, HISTORICAL REPORT OF THE SECRETARY OF STATE 356-66 (2018), [https://perma.cc/DFP5-9JS2].

173. *See Historical Report of the Secretary of State*, *supra* note 172, at 356-66; *Class III—Senators Whose Terms of Service Expire in 2023*, *supra* note 171; *Class II—Senators Whose Terms of Service Expire in 2027*, *supra* note 168.

174. *See Party Division*, *supra* note 26.

federal departments and agencies, which individuals may serve for life on the federal bench, which party will control the body's chamber, and which federal policies will advance or die.[175] In that regard, a Vice President who merely acts as a proxy for the President inherently "circumvent[s] the important check the Framers placed on executive power."[176] Accordingly, electing the Vice President independently at the midterms would endow the American people with a more democratic avenue for assessing their Vice President's judgment before she is called upon to represent their interests, while also facilitating greater electoral accountability for Congress.

IV. CONCLUSION

The American vice presidency, originally conceived as "an afterthought at the Constitutional Convention" of 1787,[177] has evolved into an indispensable federal office that ensures finality on legislative and procedural matters in the Senate, while also maintaining the continuity and integrity of the executive branch. Mike Pence and Kamala Harris, two Vice Presidents from two different parties with two different backgrounds, are similar in at least one respect: their vice presidencies demonstrate the remarkable rate at which modern Vice Presidents are being called upon to exercise their office in ways that have real and lasting effects on American society.

Without changing the duties or structure of the office, the existing constitutional powers delegated to the vice presidency make it an effective agent for furthering democratic principles and equip the American people with a powerful tool for holding the federal government accountable. Accordingly, voters would be in a better position to leverage the democratic utility of the vice presidency if they were given the occasion to elect her separately during the midterm elections. Such a change, viewed through the lens of the current and most recent Vice Presidents, would have appreciable benefits for the institution of American democracy.

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175. *See, e.g.*, *supra* Section II.A.
176. Morse, *supra* note 20, at 156.
177. Larson, *supra* note 6, at 516.

RECENT DEVELOPMENTS

ARMSTRONG V. THURSTON[1]

Petitioners submitted a proposed state constitutional amendment to the Secretary of State of Arkansas with the required signatures and following title: "An Amendment to Authorize the Possession, Personal Use, and Consumption of Cannabis by Adults, to Authorize the Cultivation and Sale of Cannabis by Licensed Commercial Facilities, and to Provide for the Regulation of those Facilities."[2]

The State Board of Election Commissioners did not certify the popular name and ballot title of the proposed amendment, stating that the ballot title was misleading. The Arkansas Supreme Court considered two questions: the ability of the Board to deny certification and whether the ballot title was misleading.

First, the court held that Article 5, Section 1 of the Arkansas State Constitution required the Board to certify the ballot title to the Secretary of State. Second, the court found that the ballot title was not fatally misleading. The petition was granted and the Secretary of State was ordered to certify the proposed amendment.

In deciding whether the ballot title was misleading, the court considered five arguments made by the respondents:

> (1) the ballot title is misleading because it omits that the proposed amendment would repeal [A]mendment 98's THC dosage limits in food and drink containing usable marijuana; (2) the ballot title is misleading because it does not explain that requirements for child-resistant packaging and restrictions on advertising that appeals to children are already found in [A]mendment 98 and gives the false impression that the proposed amendment will strengthen those protections; (3) the ballot title is misleading because it does not explain the effects of the proposed amendment on the industrial-hemp industry; (4) the ballot title omits

1. Armstrong v. Thurston, 2022 Ark. 167, 652 S.W.3d 167 (2022).
2. *Id.* at 2, 652 S.W.3d at 171.

> material information about the proposed amendment's creation of Tier One and Tier Two facilities; and (5) the ballot title omits the proposed amendment's definition of an adult as a person twenty-one years of age or older.[3]

Ultimately, the court concluded that (1) "a ballot title need not summarize existing law"[4] but "must accurately reflect the general purposes and fundamental provisions of the proposed amendment";[5] (2) "[t]he ballot title need not contain a synopsis of the proposed amendment or cover every detail of it";[6] (3) speculative effects of a proposed amendment are outside of ballot title review because "[a] ballot title does not need to include every possible consequence or impact of a proposed measure, and it does not need to address or anticipate every possible legal issue";[7] (4) "[t]he ballot title adequately describes Tier One and Tier Two facilities as created by the proposed amendment";[8] and (5) "[n]ot every term must be defined in the ballot title[,]"[9] and the definition of "adult" is "not a fundamental provision of the proposed amendment."[10]

The court ordered the Secretary of State to include the proposed amendment on the November 2022 general election ballot.

GIBSON V. BUONAUITO[11]

In a previous appeal, the Arkansas Supreme Court "held that tax funds levied from Amendment 91 to the Arkansas Constitution could only be used for constructing or improving four-lane highways and that the use of Amendment 91 funds for two projects . . . constituted an illegal exaction."[12] As a result, $121,109,391.84 was to be reimbursed to the Amendment 91 fund.

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3. *Id.* at 7-8, 652 S.W.3d at 174.
4. *Id.* at 10, 652 S.W.3d at 175.
5. *Id.* at 11, 652 S.W.3d at 176.
6. *Armstrong*, 2022 Ark. 167, at 13, 652 S.W.3d at 176.
7. *Id.* at 13, 652 S.W.3d at 177.
8. *Id.* at 14, 652 S.W.3d at 177.
9. *Id.* at 15, 652 S.W.3d at 177.
10. *Id.* at 15, 652 S.W.3d at 178.
11. Gibson v. Buonauito, 2022 Ark. 206, 655 S.W.3d 59 (2022).
12. *Id.* at 2, 655 S.W.3d at 62.

On remand, the circuit court awarded the appellant's attorneys $18,160,000.00 in attorney's fees (approximately a 15% contingency fees) and $6,896.70 in costs. The state appealed this award for abuse of discretion.

The court held that this award was an abuse of discretion because attorney's fees were not authorized by statute[13] or warranted under the common-fund exception or the substantial-benefit exception.

Justices Baker, Hudson, and Wynne dissented, noting that a substantial benefit was realized by Arkansas citizens. The dissent specifically cited one expert's claim that a total of $448,191,448.45 would have been improperly allocated in absence of the lawsuit.

BLACKBURN V. LONOKE COUNTY BOARD OF ELECTION COMMISSIONERS[14]

Appellant ran as an independent candidate for Lonoke County Judge. An employee of the County Clerk's office told Appellant that he was required to furnish 367 signatures by May 1, 2022, to appear on the ballot. Appellant furnished exactly 367 signatures to the County Clerk's office before the deadline. The County Clerk's office employee later informed Appellant that an error was made and 618 signatures were required to appear on the ballot. This placed the Appellant below the signature threshold. Appellant filed a lawsuit in Lonoke County Circuit Court on June 13, 2022, seeking fourteen additional days to furnish the signatures.

Lonoke County Circuit Court dismissed Appellant's claims with prejudice. On appeal, the Arkansas Supreme Court upheld the dismissals but modified them to be without prejudice.

HOUSTON DOWNES

13. Specifically, the court stated that ARK. CODE ANN. § 26-35-902(a) was not applicable to this case. That provision permits an award of attorney's fees in certain illegal exaction cases.

14. Blackburn v. Lonoke Cnty. Bd. of Election Comm'rs, 2022 Ark. 176, 652 S.W.3d 574 (2022).