

# WISCONSIN JOURNAL OF LAW, GENDER & SOCIETY

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## STATEMENT OF PURPOSE

The *Wisconsin Journal of Law, Gender & Society* grew out of two traditions: the University of Wisconsin Law School's "law in action" approach and the interdisciplinary design of gender studies. Through "law in action" we look beyond the statutes and cases to study the practical effects of the law on individuals, marginalized communities, and society at large. The interdisciplinary approach, with an emphasis on gender identity, offers different perspectives through which to expand and challenge our understanding of the law and its implications on society.

The Journal, originally the *Wisconsin Women's Law Journal*, one of the earliest in the nation devoted to the study of women and the law, has strived to contribute insightful scholarship to this evolving field of study. Recognizing that women are a diverse group with differing beliefs and interests, and moreover that gender stereotyping and gender identity discrimination of any kind inhibits each individual's full equality under the law, we encourage articles that examine the intersection of law and gender with issues of race, ethnicity, socioeconomic status, and sexual orientation.

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# A NATIONAL TRUTH COMMISSION FOR NATIVE AMERICANS

*Sara L. Ochs<sup>†</sup>*

## *Abstract*

Native Americans have endured centuries of genocide. What began as a systemic attempt by European colonialists to decimate the indigenous population subsequently evolved into more subtle, devastating acts intended to destroy indigenous culture. Today, Native Americans remain the subject of ongoing discrimination and human rights abuses, especially pertaining to the forced removal of children from Native homes in violation of federal law. Despite the egregiousness of these wrongs, Native Americans have yet to be provided with a true sense of justice for the historical and ongoing crimes committed against them. This paper will argue that transitional justice is imperative for Native Americans to collectively move past the trauma associated with these wrongs. By drawing on the experiences of international truth commissions designed to address past wrongs against indigenous people, as well as the achievements made by the domestic Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission, this paper will specifically advocate for the creation of a national truth commission to address recent and ongoing discriminatory child welfare practices conducted against Native Americans in violation of federal law.

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## INTRODUCTION

In June 2015, an official report formally recognized a long-ignored dark truth of American history. In this report, the Commissioners of the Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission (the Maine Wabanaki Commission) determined that government-sanctioned conduct against the Wabanaki people of Maine constituted genocide,<sup>1</sup> pursuant to the definition set forth in the United Nation's 1948 Convention on the Prevention and Punishment of the Crime of Genocide.<sup>2</sup> This Convention, which the United States ratified in 1988, nearly forty years after its passage,<sup>3</sup> defines genocide in relevant part as "causing serious bodily or mental harm to" or "forcibly transferring children" from a "national, ethnical, racial or religious group," "with the intent to destroy, in whole or in part," that group.<sup>4</sup>

The conduct to which the Maine Wabanaki Commissioners specifically referred were the discriminatory practices employed by federal and state officials in forcibly removing children of the Wabanaki Tribe to foster care and relocating them in non-familial and non-Native households, in violation of procedures set forth in federal law. However, the genocide against Native Americans,<sup>5</sup> first by Europeans, and later by Americans, has been long-running. The history of

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1. BEYOND THE MANDATE: CONTINUING THE CONVERSATION, REPORT OF THE MAINE WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMMISSION 8 (June 14, 2015), [https://d3n8a8pro7vbmh.cloudfront.net/mainewabanakireach/pages/17/attachments/original/1468974047/TRC-Report-Expanded\\_July2015.pdf?1468974047](https://d3n8a8pro7vbmh.cloudfront.net/mainewabanakireach/pages/17/attachments/original/1468974047/TRC-Report-Expanded_July2015.pdf?1468974047) [<https://perma.cc/56SH-4VZA>] [hereinafter BEYOND THE MANDATE].

2. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 1951 U.N.T.S. 278, available at <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf> [<https://perma.cc/E29D-X3JP>] [hereinafter Genocide Convention].

3. Genocide Convention Implementation Act of 1987 (Proxmire Act) Pub. L. No. 100-606, 102 Stat. 3045 (1988); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 416 (2000).

4. Genocide Convention, *supra* note 2, at art. II.

5. This article uses the term "Native Americans" to broadly refer to the indigenous peoples of the United States, including those individuals who identify as American Indians and Alaskan Natives.

wrongful conduct against Native Americans is vast and incapable of adequate coverage within the scope of this relatively brief paper. However, in sum, the United States and various state governments therein have supported conduct involving the forced removal of Native Americans from their native lands;<sup>6</sup> the creation of Congressionally-funded boarding schools for Native American children,<sup>7</sup> which were created with the goal of forcibly assimilating Native Americans into white culture pursuant to the famous theory of “kill[ing] the Indian in [them to] save the man”;<sup>8</sup> the forced sterilization of Native American women by the federally created Indian Health Service;<sup>9</sup> and, of course, the murders of Native Americans in more than 1,500 government authorized “wars, attacks, and raids” that nearly destroyed the entire Native American population in the late 19<sup>th</sup> Century.<sup>10</sup> The Maine Wabanaki Report, while unique in its status, did not present a wholly new idea. Scholars, experts, and even political officials have repeatedly recognized the centuries-long cultural tirade endured by Native Americans as genocide.<sup>11</sup>

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6. See Jeffrey Ostler, *Genocide and American Indian History*, 10 OXFORD RSCH. ENCYCS., AM. HIST. (Mar. 2, 2015), <https://doi.org/10.1093/acrefore/9780199329175.013.3> [<https://perma.cc/2LED-6537>] (explaining the 19th century policy formalized under the Indian Removal Act of 1830 of forcibly removing Native Americans living east of the Mississippi River to Indian Territory).

7. *Boarding Schools*, UPSTANDER PROJECT, <https://upstanderproject.org/firstlight/boarding> (last visited Dec. 9, 2020) [<https://perma.cc/9HHU-7S96>].

8. Capt. Richard H. Pratt, Kill the Indian, and Save the Man, in OFF. REP. NINETEENTH ANN. CONF. CHARITIES & CORR., 1892, at 46-59, [http://carlisleindian.dickinson.edu/sites/all/files/docs-resources/CIS-Resources\\_PrattSpeech.pdf](http://carlisleindian.dickinson.edu/sites/all/files/docs-resources/CIS-Resources_PrattSpeech.pdf) (last visited Dec. 9, 2020) [<https://perma.cc/FTE7-2CTP>].

9. See generally Jane Lawrence, *The Indian Health Service and the Sterilization of Native American Women*, 24 AM. INDIAN Q. 400 (2000) (thoroughly analyzing the Indian Health Service’s widespread practice of sterilizing Native American women without their knowledge or consent throughout the 1960s and 1970s); Erin Blakemore, *The Little-Known History of the Forced Sterilization of Native American Women*, JSTOR DAILY (Aug. 25, 2016), <https://daily.jstor.org/the-little-known-history-of-the-forced-sterilization-of-native-american-women/> [<https://perma.cc/D6MZ-23QW>] (explaining that the forced sterilization resulted in significant impacts to Native Americans tribes, such as increased rates of divorce and depression and tribes’ loss of political power).

10. *Mass Killings of Native Americans*, EQUAL JUST. INITIATIVE (Sept. 20, 2019), <https://eji.org/news/history-racial-injustice-mass-killings-of-native-americans> [<https://perma.cc/RB7E-SLXL>]; Donald L. Fixico, *When Native Americans were Slaughtered in the Name of ‘Civilization’*, HISTORY (Oct. 26, 2020), <https://www.history.com/news/native-americans-genocide-united-states> [<https://perma.cc/2X5J-T7CD>].

11. See, e.g., Ann Piccard, *Death by Boarding School: “The Last Acceptable Racism” and the United States’ Genocide of Native Americans*, 49 GONZ. L. REV. 137, 156 (2013) (recognizing that the Genocide Convention’s definition of genocide “describe[s] with complete accuracy the United States’ use of Indian boarding schools to obliterate” Native American culture); Andrew Oxford, *California Governor Calls Native American Treatment Genocide*, ASSOC. PRESS (June 18, 2019), <https://apnews.com/article/982b507a846a4ad6bc184b3e7f99ec70> [<https://perma.cc/59VK-39NH>] (describing California Governor Gavin Newsom’s formal apology to California tribal

Despite this history of wrongful conduct against Native Americans, the United States Government has done relatively little to provide Native Americans with justice or to support them in moving forward from the mass wrongdoings committed against them. For communities recovering from periods of genocide or mass atrocities, transitional justice is imperative. This justice—whether it takes the form of criminal prosecutions, an investigatory commission aimed at developing a historical record of wrongs, public apologies, reparations, or other forms—serves to recognize victims’ suffering and allow post-conflict communities to learn the truth about the history and the legacy of the crimes committed against them.<sup>12</sup> Transitional justice specifically assists post-conflict communities in moving beyond periods of wrongdoing and towards peace, stability, and a stronger appreciation for the rule of law.<sup>13</sup> Those post-conflict states who fail to implement transitional justice mechanisms to address widespread past crimes face higher likelihoods of recurrent human rights abuses and violence.<sup>14</sup>

Without transitional justice, Native American communities continue to struggle with the trauma of the wrongs committed against them. Due to the lack of a large-scale transitional justice mechanism dedicated to Native Americans, many Native American communities are stuck in a recurring cycle of crime and poverty. This cycle can only be broken by providing Native Americans with an official recognition of the crimes committed against them, allowing them to share their histories and stories of the wrongs committed against them, and providing them opportunities to confront their oppressors and work towards healing.

The Maine Wabanaki Commission has made significant gains in achieving justice for several Native American communities, but its reach is limited to a relatively small geographic area of the country. Despite the small victories

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leaders, in which he stated that the California Government’s past treatment of Native Americans should be described as “genocide” in the “history books”). However, an ardent debate still exists regarding the classification of U.S. conduct against Native Americans as genocide. See, e.g., Brendan Rensink, *Genocide of Native Americans: Historical Facts and Historiographic Debates*, in 8 GENOCIDE OF INDIGENOUS PEOPLES 15 (Samuel Totten & Robert K. Hitchcock eds., 2011), <https://core.ac.uk/download/pdf/188062763.pdf> (summarizing the ongoing scholarly debate over whether Native Americans can be considered the victims of genocide).

12. See Dustin N. Sharp, *Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice through the Lens of Critique*, 14 CHI. J. INT’L L. 165, 175 (2013); Matthew F. Putori, *The International Legal Right to Individual Compensation in Nepal and the Transitional Justice Context*, 34 FORDHAM INT’L L.J. 1131, 1146-48 (2011).

13. See Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 47 (2002) (noting that “[t]ruth and accountability are essential if traumatized societies are to begin resolving their political, ethnic, racial, and religious conflicts through democratic processes, rather than through torture, rape, and genocide”).

14. *Breaking the Ground on Peace and Stability: Transitional Justice and the Rule of Law*, INT’L CTR. FOR TRANSITIONAL JUST. (May 15, 2012), <https://www.ictj.org/news/breaking-ground-peace-and-stability-transitional-justice-and-rule-law> [<https://perma.cc/X4YJ-FXZF>]; see also Aukerman, *supra* note 13, at 47 (“Without some form of accounting, past atrocities inevitably fuel future ones.”); Richard Goldstone, *Exposing Human Rights Abuses—A Help or Hindrance to Reconciliation*, 22 HASTINGS CONST. L. Q. 607, 609 (1994).



obtained by the Commission, it is nowhere near sufficient to provide the truth and justice the Native American community as a whole needs to move forward from its widespread disenfranchisement and the recurring crimes and human rights violations committed against it. However, the Commission certainly serves as a strong starting point for further justice and recovery.

This paper will advocate for a national truth commission to address past and present government-instituted wrongs against the Native American population pertaining to the forced removal of Native children from their families and associated discriminatory child welfare practices in violation of federal law. Drawing on the experiences of and successes obtained by truth and reconciliation commissions created to address mass crimes committed against indigenous peoples globally, including the Maine Wabanaki Commission, this paper will argue that transitional justice is imperative for Native Americans to collectively move forward as a society.

Part I will begin by exploring the general concepts and goals of transitional justice, with a specific emphasis on the use of truth commissions to investigate and promote healing for past wrongs. It will then analyze the work and impact of several past and current international truth commissions designed to address state-sponsored wrongdoing against indigenous people. Part II will then examine the background, creation, work, and legacy of the Maine Wabanaki Commission. Part III will advocate for the creation of a national truth commission in the United States to build on the work of the Maine Wabanaki Commission and will identify lessons that can be drawn from similar truth commissions used domestically and internationally to effectively create such a mechanism.

## I. TRANSITIONAL JUSTICE

Transitional justice seeks to address gaps in accountability for widespread crimes as well as to provide more holistic recovery to communities previously subjected to periods of genocide, other mass atrocities, or prolonged human rights abuses. The United Nations defines this term as “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”<sup>15</sup> Likewise, scholars have recognized transitional justice as “a broad framework, based on international law, that aims to guide states to adopt a holistic approach to repair the damage of mass violence and to prevent its recurrence.”<sup>16</sup>

The notion of transitional justice is comprehensive, rather than limited to one strict idea of justice. The United Nations recognizes various components enshrined within the concept of transitional justice, including “the right to justice,

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15. Guidance Note of the U.N. Secretary-General: United Nations Approach to Transitional Justice, 2 (Mar. 2010), [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf) [<https://perma.cc/PCD3-VY6D>] [hereinafter UN Guidance Note on Transitional Justice].

16. Laurel E. Fletcher, *What Can International Transitional Justice Offer U.S. Social Justice Movements?*, 46 N. KY. L. REV. 132, 135-36 (2019).

the right to truth, the right to reparations, and the guarantees of non-recurrence of violations (duty of prevention).<sup>17</sup> Additionally, scholars and experts have concluded that retribution through criminal sentences alone is largely insufficient to provide a post-conflict state with a level of healing and justice necessary to move forward as a society.<sup>18</sup> Thus, while transitional justice can—and oftentimes does—encompass elements of punitive accountability, both through criminal prosecutions and civil cases, it also extends to work performed by non-judicial mechanisms, including reparations, vetting and lustration, and other efforts at instituting broad institutional reform.<sup>19</sup>

Transitional justice is especially necessary when “traditional justice,” in the form of retribution through courts, including international tribunals and domestic judicial systems, is unavailable. This occurs often when perpetrators remain in positions of power and retain the ability to block domestic prosecutions against them for their criminal actions.<sup>20</sup> Transitional justice mechanisms propose an alternative to traditional justice by publicly acknowledging the wrongdoings and pain rendered to the victims, while simultaneously spurring the community to reject the mindset and conduct that caused that pain.<sup>21</sup> These mechanisms also provide benefits often lacking in purely retribution-focused mechanisms. Rather than conducting trials in accordance with internationally determined procedures—generally recognized as the “white man’s” perception of justice—transitional justice seeks to deliver justice in a way that conforms with the cultural norms and practices of the victimized community.<sup>22</sup>

Notably, truth commissions are one of the mechanisms most commonly used by post-conflict communities to come to terms with periods of atrocities, especially where criminal proceedings are impossible or inadequate. The remainder of this section will examine the goals and general structures of truth commissions, before exploring how such mechanisms have been utilized to assist indigenous people in addressing past wrongs committed against them.

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17. U.N. Guidance Note on Transitional Justice, *supra* note 15, at 3-4.

18. See Melissa S. Williams & Rosemary Nagy, *Introduction* to TRANSITIONAL JUSTICE 1, 8 (Melissa S. Williams et al. eds., 2012) (noting that transitional justice requires both backward-looking justice, such as through providing accountability for wrongs, as well as forward-looking justice with a focus on healing and stability).

19. See *id.*; see also Dustin N. Sharp, *Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice*, 35 FORDHAM INT’L L.J. 780, 781 (2012) (listing the various efforts and mechanisms that fall within the “transitional justice ‘toolbox’”).

20. See John Elster, *Justice, Truth, Peace*, in TRANSITIONAL JUSTICE 78, 82 (Melissa S. Williams et al. eds., 2012) (recognizing that transitional justice mechanisms, such as truth commissions, can serve as a compromise where leaders of an autocratic regime retain enough power to block or limit criminal proceedings).

21. Fletcher, *supra* note 16, at 135-36 (explaining how transitional justice encompasses approaches beyond traditional accountability).

22. See Williams & Nagy, *supra* note 18, at 4.

### A. Truth Commissions

Truth commissions, also referred to as truth and reconciliation commissions, are governmental or independently created mechanisms designed to investigate and determine the causes, consequences, and perpetrators of periods of mass violence and/or prolonged human rights abuses.<sup>23</sup> Truth commissions generally seek to achieve four primary goals: establishing a historical record; obtaining justice for victims; facilitating reconciliation; and deterring future crimes and abuses.<sup>24</sup> While truth commissions can also carry other, secondary purposes, such as gathering evidence to be used in later criminal prosecutions,<sup>25</sup> often the work of a truth commission does not lead to criminal accountability.<sup>26</sup>

Truth commissions are recognized as a form of “prospective justice,” in that they seek to expose past wrongs to affirm and instill a commitment to societal values and to prevent the future recurrence of these wrongs.<sup>27</sup> They can also facilitate acknowledgment of wrongdoing by political leaders and prompt states to accept responsibility for their wrongs.<sup>28</sup> Truth commissions are not judicial institutions; they do not conduct prosecutions or impose sentences.<sup>29</sup> Instead, they focus on establishing the truths underlying periods of atrocity crimes or human rights abuses, including the identity of the perpetrators, the causes and circumstances of the crimes or abuses, and the impact of these acts on the victims.<sup>30</sup>

Each truth commission is created to respond to the particular wrongdoings committed against and the unique circumstances present in the post-conflict

23. *Truth and Reconciliation Commissions*, INT’L JUST. RES. CTR., <https://ijrcenter.org/cases-before-national-courts/truth-and-reconciliation-commissions/> (last visited Dec. 14, 2020) [<https://perma.cc/3GGK-89U4>]; *Truth Commissions*, INT’L CTR. FOR TRANSITIONAL JUST., <https://www.ictj.org/gallery-items/truth-commissions> (last visited Dec. 14, 2020) [<https://perma.cc/5G5X-VPTW>].

24. Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMPAR. & INT’L L. 375, 379 (1997); see also Rose Weston, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, 18 ARIZ. J. INT’L & COMPAR. L. 1017, 1023 (2001) (explaining that truth commissions “can further a society’s knowledge and understanding of events, heal cultural wounds, and prevent future human rights abuses”).

25. Scharf, *supra* note 24, at 380.

26. Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 604 (1994).

27. Jeremy Webber, *Forms of Transitional Justice*, in TRANSITIONAL JUSTICE 98, 104-05 (Melissa S. Williams et al. eds., 2012).

28. Weston, *supra* note 24, at 1023; see also Elster, *supra* note 20, at 90 (noting that one of the most important effects of truth commissions is “to make it impossible [for the government] to deny that massive wrongdoings took place”).

29. Heather Parker, *Truth and Reconciliation Commissions: A Needed Force in Alaska?*, 34 ALASKA L. REV. 27, 29 (2017).

30. INT’L CTR. FOR TRANSITIONAL JUST., TRUTH SEEKING: ELEMENTS OF CREATING AN EFFECTIVE TRUTH COMMISSION 3-4 (Eduardo González & Howard Varney eds., 2013), available at <https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf> [<https://perma.cc/M483-2UZG>] [hereinafter TRUTH SEEKING].

community it is designed to serve. As a result, truth commissions are especially diverse in their work and operations,<sup>31</sup> making it difficult to draw broad generalities from all truth commissions. However, in terms of creation, governmental truth commissions are commonly created through political means, either through executive action, as was done for the commissions in Morocco and East Timor, or by legislative establishment, as was done in South Africa.<sup>32</sup> However, when a commission lacks sufficient political will or capability, it may be created outside of the state system, either by local government, non-governmental organizations, or other civil society organizations.<sup>33</sup> Regardless of the means by which a truth commission is created, its establishing body bestows it with a specific mandate that delineates its scope insofar as its length of operation, the crimes and time periods subject to investigation, and the powers upon which the commission may rely in performing its investigation.<sup>34</sup>

In carrying out their mandates, truth commissions engage in significant investigatory processes in which they consider personal testimony, including that of perpetrators, victims, and other witnesses, as well as documentary evidence, archive research, and other data.<sup>35</sup> The evidence which these commissions examine is usually extensive; South Africa's Truth and Reconciliation Commission, for example, collected over 22,000 testimonies in its three years of operation.<sup>36</sup> The Maine Wabanaki Commission, which operated on a much smaller scale, obtained 159 official statements from witnesses, and conducted informal interviews and focus groups with many others.<sup>37</sup> The powers through which truth commissions can obtain this evidence are outlined in the commissions' mandates, which may permit the commission to issue subpoenas, grant witnesses immunity from prosecution in exchange for testimony, or impose fines or penalties on individuals who knowingly provide false testimony or otherwise interfere with the commission's work.<sup>38</sup> Some commissions, like Tunisia's Truth and Dignity Commission and South Africa's Truth and Reconciliation Commission, have employed public hearings as a means of

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31. *Truth Commission Digital Collection*, U.S. INST. OF PEACE (Mar. 16, 2011), <https://www.usip.org/publications/2011/03/truth-commission-digital-collection> [https://perma.cc/WK4U-9XSW].

32. TRUTH SEEKING, *supra* note 30, at 9-10.

33. *Id.*

34. Eric Brahm, *Truth Commissions*, BEYOND INTRACTABILITY (June 2004), <https://www.beyondintractability.org/essay/truth-commissions> [https://perma.cc/QWG8-V63B].

35. TRUTH SEEKING, *supra* note 30, at 11; see also *Public Hearings: Platforms of Truth, Dignity, and Catharsis*, INT'L CTR. FOR TRANSITIONAL JUST. (Mar. 23, 2017), <https://www.ictj.org/news/public-hearings-platforms-truth-dignity> [https://perma.cc/D939-UPW6].

36. TRUTH SEEKING, *supra* note 30, at 11.

37. BEYOND THE MANDATE, *supra* note 1, at 14, 77-79.

38. *Rule-of-Law Tools for Post-Conflict States, Truth Commissions*, OFF. OF THE UNITED NATIONS HIGH COMM'R FOR HUM. RTS. 1, 10-11 (2006), <https://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf> [https://perma.cc/M3ZT-V928].

gathering testimony from both victims and perpetrators.<sup>39</sup> Doing so, and broadcasting these hearings on radio and television, have granted a transparency to the Commissions' proceedings and have provided testifying victims with a form of psychological healing.<sup>40</sup>

Following the conclusion of a truth commission's investigation, the commission will generally issue a final written report.<sup>41</sup> This report will detail its findings and provide concrete recommendations for reform to achieve reconciliation between feuding parties and to prevent the recurrence of the violence or abuses within the commission's mandate.<sup>42</sup> Ultimately, the success of these recommendations is dependent on the will of policymakers and governmental officials to implement them.<sup>43</sup>

Most truth commissions are utilized during a country or region's period of transition, such as the political transition from an authoritarian government to a functioning democracy or upon the alleged completion of a period of mass violence, such as an armed conflict, or human rights abuses.<sup>44</sup> However, a truth commission need not always be implemented in the immediate aftermath of a conflict or in the throes of a transition. Indeed, as scholar Matiangai V.S. Sirleaf has identified, truth commissions may actually function *more* effectively in non-transitional states that enjoy significant institutional strength, such as the United States.<sup>45</sup>

While truth commissions hold significant benefits for individual and community healing following periods of violence or instability, they are not fail-safe solutions for post-conflict communities. Recently, truth commissions have borne criticism for failing to achieve meaningful change and instead serving as an "empty gesture" to victims.<sup>46</sup> Indeed, the success of a truth commission, both in terms of providing psychological healing to victims and in enacting reform, is largely dependent on factors such as the degree of moral consensus within a nation regarding the wrongs at issue; societal and political support for the commission; and the strength of the nation's political and legal institutions.<sup>47</sup> Moreover, truth commissions alone are not sufficient to provide comprehensive justice for a period of atrocities. Instead, as the Office of the United Nations High

39. *Public Hearings: Platforms of Truth, Dignity, and Catharsis*, *supra* note 35.

40. *Id.*

41. Weston, *supra* note 24, at 1026; Parker, *supra* note 29, at 32.

42. Weston, *supra* note 24, at 1026; Parker, *supra* note 29, at 32.

43. Parker, *supra* note 29, at 32.

44. Hayner, *supra* note 26, at 604; TRUTH SEEKING, *supra* note 30, at 9.

45. Matiangai V.S. Sirleaf, *The Truth About Truth Commissions: Why They Do Not Function Optimally in Post-Conflict Societies*, 35 CARDOZO L. REV. 2263, 2333 (2014) (explaining that a national truth commission in the United States designed to investigate allegations of torture and war crimes committed during the War on Terror could be successful given the country's institutional strength, as well as the small number of victims and perpetrators who would be involved in the process).

46. Parker, *supra* note 29, at 33; Ming Zhu, *Power and Cooperation: Understanding the Road Towards a Truth Commission*, 15 BUFF. HUM. RTS. L. REV. 183, 184 (2009).

47. Parker, *supra* note 29, at 33; Sirleaf, *supra* note 45, at 2332.

Commission for Human Rights advocates, truth commissions must be utilized as one component of a broader, holistic transitional justice scheme, and should be considered in tandem with other types of justice initiatives, such as criminal prosecutions, reparations, and other reform programs.<sup>48</sup> Under the proper circumstances, however, truth and reconciliation commissions have proven extremely successful in prompting recovery and healing in post-conflict and post-authoritarian communities, especially for wrongdoing against indigenous populations.

### *B. Truth & Reconciliation among Indigenous Populations*

Settler states<sup>49</sup> have recently begun employing transitional justice to address harms done to their indigenous peoples and to restore relationships between indigenous peoples and the states' majority populations. This section will analyze the experiences of three settler nations who have employed truth commissions to achieve these goals: Canada, Greenland, and Norway.<sup>50</sup>

#### *i. The Truth and Reconciliation Commission of Canada*

Canada's Truth and Reconciliation Commission (TRC) aimed to address the wrongs perpetrated through the nation's Indian Residential School program.<sup>51</sup> Under this program, between 1883 and 1988, the Canadian Government forcibly separated Aboriginal Canadian children from their families and transported them to "residential schools," created to "break their link to their [Aboriginal] culture and identity" and forcibly assimilate them into white,

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48. *Rule-of-Law Tools for Post-Conflict States*, *supra* note 38, at 5.

49. Settler states or societies are those that are "founded by migrant groups who assume a superordinate position vis-à-vis native inhabitants," so as to become "politically dominant over natives." RONALD WEITZER, *TRANSFORMING SETTLER STATES: COMMUNAL CONFLICT AND INTERNAL SECURITY IN NORTHERN IRELAND AND ZIMBABWE* 24-25 (1990), available online at <https://publishing.cdlib.org/ucpressebooks/view?docId=ft2199n7jp;brand=ucpress> [https://perma.cc/8EXD-UG9S].

50. It should also be noted that truth commissions utilized by other nations like Guatemala and Peru to address widespread crimes and human rights abuses perpetrated during periods of large-scale violence also focused much of their work in indigenous communities. Joanna Rice, *Indigenous Rights and Truth Commissions*, CULTURAL SURVIVAL (Mar. 2011), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/indigenous-rights-and-truth-commissions> [https://perma.cc/ZC52-DVME]. New Zealand has also implemented governmental programs with similar objectives to truth commissions, such as the Waitangi Tribunal, a standing commission of inquiry tasked with determining whether the New Zealand Government has breached promises made to the indigenous Māori population under the Treaty of Waitangi. *About the Waitangi Tribunal*, WAITANGI TRIBUNAL, <https://waitangitribunal.govt.nz/about-waitangi-tribunal/past-present-future-of-waitangi-tribunal/> (June 16, 2017).

51. TRUTH AND RECONCILIATION COMM'N OF CAN., *HONORING THE TRUTH, RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA* (2015) [http://nctr.ca/assets/reports/Final%20Reports/Executive\\_Summary\\_English\\_Web.pdf](http://nctr.ca/assets/reports/Final%20Reports/Executive_Summary_English_Web.pdf) [https://perma.cc/3UNM-G9WA] [hereinafter *HONORING THE TRUTH*].

Canadian culture, as part of a “coherent policy to eliminate Aboriginal people as distinct peoples.”<sup>52</sup>

Following various legal campaigns, in 1988, the Canadian Government issued a Statement of Reconciliation and, shortly thereafter, coordinated an alternative dispute resolution process for Aboriginals affected by the Indian Residential School Program that established an out-of-court mechanism for obtaining compensation and psychological support.<sup>53</sup> This process prompted the creation of the Indian Residential Schools Settlement Agreement, recognized as the largest class-action settlement in Canadian history, which provided for the federal establishment of the TRC.<sup>54</sup> The TRC was tasked with compiling the truth and history of the residential schools and documenting the harms perpetrated against Aboriginal peoples and communities, as well as “guid[ing] and inspir[ing] a process of truth and healing, leading toward reconciliation within Aboriginal families, and between Aboriginal peoples and non-Aboriginal communities, churches, governments, and Canadians, generally.”<sup>55</sup> The Canadian Government provided \$72 million in funding for the TRC.<sup>56</sup>

Between 2009 and 2015, the TRC held events throughout Canada, which were visited by 155,000 individuals, and gathered 6,750 statements from residential school survivors, survivors’ family members, and other individuals impacted by the Indian Residential School program.<sup>57</sup> The TRC also conducted 238 days of local hearings in 77 communities throughout Canada, and held other “town halls” to draw more members of the community into conversations about healing and reconciliation.<sup>58</sup> The TRC issued its final report in 2015, in which it made 94 “calls to action,” pertaining to everything from Aboriginal child welfare, to health and education, to modification of the language of the Canadian Oath of Citizenship.<sup>59</sup> Notably, in its report, the TRC concluded that the creation and operation of the Indian residential schools constituted “cultural genocide,” which it defined as “the destruction of those structures and practices that allow the group to continue as a group.”<sup>60</sup> The TRC additionally established the National Centre for Truth and Reconciliation to house the materials related to its

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52. *Id.* at 2-3; Parker, *supra* note 29, at 53.

53. Tabitha Marshall, *Indian Residential Schools Settlement Agreement*, THE CAN. ENCYC. (July 11, 2013), <https://www.thecanadianencyclopedia.ca/en/article/indian-residential-schools-settlement-agreement> [https://perma.cc/PU7P-35FC].

54. *Truth and Reconciliation Commission of Canada*, GOV’T OF CAN., <https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525> (last modified Dec. 15, 2020) [https://perma.cc/7994-8V49]; *Indian Residential School Settlement Agreement, Schedule “N”: Mandate for the Truth and Reconciliation Commission*, RESIDENTIAL SCHS. SETTLEMENT (May 8, 2006), [http://www.residentialschoolsettlement.ca/SCHEDULE\\_N.pdf](http://www.residentialschoolsettlement.ca/SCHEDULE_N.pdf) [https://perma.cc/Z9GZ-JLL9].

55. HONORING THE TRUTH, *supra* note 51, at 23.

56. *Truth and Reconciliation Commission of Canada*, *supra* note 54.

57. HONORING THE TRUTH, *supra* note 51, at 25.

58. *Id.*

59. *Id.* at 319-37.

60. *Id.* at 1.

mandate, including witness statements and historical records, which are now available to the general public.<sup>61</sup>

Since the TRC's 2015 report, the Canadian Government has iterated its intent to implement the report's calls for actions.<sup>62</sup> It has helped facilitate settlements in related civil class actions throughout Canada pertaining to residential schools, including further efforts aimed at truth and healing, and even prompted an emotional public apology from Prime Minister Justin Trudeau.<sup>63</sup> However, as of 2019, only nine of the report's 94 calls for action had been completed, and crises continue to afflict Canadian Aboriginals, with much reconciliation and structural reform still needed.<sup>64</sup> Even so, the Canadian TRC made broad achievements, and has even been used as a model for subsequent transitional justice mechanisms aimed at addressing past wrongs against indigenous peoples in other nations.<sup>65</sup>

## ii. The Greenland Reconciliation Commission

In 2014, the Greenland Reconciliation Commission launched to investigate human rights abuses committed against Greenland's Indigenous Peoples<sup>66</sup> during

61. *Id.* at 34-35.

62. See *Delivering on Truth and Reconciliation Commission Calls to Action*, GOV'T OF CAN., <https://www.rcaanc-cirnac.gc.ca/eng/1524494530110/1557511412801> (last modified Feb. 15, 2019) [<https://perma.cc/4MXD-2TJ2>] (setting forth clear strategies for how the Canadian Government aims to implement each category of recommendations in the TRC's report).

63. *Newfoundland and Labrador Residential Schools Healing and Commemoration*, GOV'T OF CAN., <https://www.rcaanc-cirnac.gc.ca/eng/1511531626107/1539962009489#sec1> (last modified Feb. 15, 2019) [<https://perma.cc/5F5F-G2UZ>]; Ian Austen, *Trudeau Apologizes for Abuse and 'Profound Cultural Loss' at Indigenous Schools*, N.Y. TIMES (Nov. 24, 2017), <https://www.nytimes.com/2017/11/24/world/canada/trudeau-indigenous-schools-newfoundland-labrador.html> [<https://perma.cc/9YXB-8F42>].

64. Eva Jewell & Ian Mosby, *Calls to Action Accountability: A Status Update on Reconciliation*, YELLOWHEAD INST. (Dec. 17, 2019), <https://yellowheadinstitute.org/2019/12/17/calls-to-action-accountability-a-status-update-on-reconciliation/>; see also *The Road to Reconciliation*, INDIGENOUS PEOPLES ATLAS OF CAN., <https://indigenouspeoplesatlasofcanada.ca/article/the-road-to-reconciliation/> (last visited Dec. 22, 2020) [<https://perma.cc/K379-X5LU>].

65. Bonny Ibhawoh, *Do Truth and Reconciliation Commissions Heal Divided Nations?*, THE CONVERSATION (Jan. 23, 2019), <https://theconversation.com/do-truth-and-reconciliation-commissions-heal-divided-nations-109925> [<https://perma.cc/SNE3-YW7C>] (noting that Canada's TRC has inspired Australia and New Zealand to come to terms with their historical treatment of their indigenous peoples).

66. Greenland's Indigenous Peoples broadly encompass three groups: First Nations, Inuit, and Métis. Julia Christensen & Jens Heinrich, *In Conversation: Shifting Narratives of Colonialism Through Reconciliation in Greenland and Canada*, 14 KULT POSTKOLONIAL TEMASERIE 38, 38-39 (2016), available at [https://rucforsk.ruc.dk/ws/files/59281234/4\\_Christensen\\_and\\_Heinrich\\_final.pdf](https://rucforsk.ruc.dk/ws/files/59281234/4_Christensen_and_Heinrich_final.pdf) [<https://perma.cc/VB77-ZZL5>]. This article will refer to these groups collectively as Greenland's Indigenous Peoples.



the nation's time as a Danish colony.<sup>67</sup> Rather than focusing on a specific policy program, as did Canada's TRC, the Greenland Commission sought to broadly investigate wrongs against Greenland's Indigenous Peoples committed during this extensive colonial period, including forced relocation, the separation of children from their families, and the imposition of Danish culture on Greenland's Indigenous Peoples to the exclusion of Indigenous culture.<sup>68</sup> The Greenland Commission did not receive support from the Danish Government, which refused to participate in the Commission's work.<sup>69</sup> As such, the Greenland Commission focused primarily on recognizing history and building social memory, as opposed to obtaining formal apologies.<sup>70</sup> Its goals emphasized reconciliation: between the Greenlandic people and their background; between the Greenlandic people and their history; between groups within Greenland; and between generations.<sup>71</sup>

The Greenland Commission issued its final report in 2017.<sup>72</sup> The recommendations set forth therein included the establishment of a knowledge center for history and reconciliation, the creation of a reconciliation fund to contribute to further treatment and healings, and the development of a shared set of values for raising children in future Greenlandic generations.<sup>73</sup> The Commission also called for Greenland's Self-Rule Authority to initiate a national debate on public apologies for past treatment.<sup>74</sup>

### iii. The Norwegian Truth and Reconciliation Commission

In 2017, the Norwegian Parliament approved the establishment of the federally funded Norwegian Truth and Reconciliation Commission, formally known as "The Commission to Investigate the Norwegianization Policy and

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67. Greenland was colonized by Denmark in the eighteenth century and achieved Home Rule in 1979. *Id.* at 38.

68. *Id.* at 38, 43.

69. *Greenland Reconciliation Commission Finds Colonization Did 'a Lot of Damage'*, CBC (Jan. 4, 2018), <https://www.cbc.ca/news/canada/north/greenland-reconciliation-commission-report-1.4471695> [<https://perma.cc/9SZR-FU8M>].

70. *Id.* at 39.

71. *Id.*

72. Vi forstår fortiden Vi tager ansvar for nutiden Vi arbejder for en bedre fremtid [We Understand the Past, We Take Responsibility for the Present, We Work for a Better Future], Grønlands Forsoningskommission (Dec. 2017) <https://saammaatta.gl/~media/Forsoningskommission/Diverse/Endelig%20bet%C3%A6nkning%20DK.pdf> [<https://perma.cc/5H59-E8TQ>] (report only made available in Danish and Kalaallisut, a Greenlandic dialect); *Greenland Reconciliation Commission Finds Colonization Did 'a Lot of Damage'*, *supra* note 69.

73. Arne Finne, *Abuse and Colony Era Still Marks Greenlanders*, HIGH N. NEWS (Elisabeth Bergquis trans.) (last updated Oct. 25, 2018), <https://www.highnorthnews.com/en/abuse-and-colony-era-still-marks-greenlanders> [<https://perma.cc/NE57-DZFK>].

74. *Id.*

Injustice against the Sámi and Kven/Norwegian Finnish Peoples.”<sup>75</sup> The Norwegian Commission was primarily created to investigate the activities and impact of Norwegianization, a state practice implemented between roughly 1850 and 1980, which forced assimilation and stifled indigenous culture.<sup>76</sup> However, the Commission self-identifies its perspective as “forward-looking,” with the objective of establishing a foundation for reconciliation between Norwegian indigenous groups and Norway’s majority population.<sup>77</sup>

The Norwegian Commission’s mandate encompasses three discrete tasks: (1) identifying or “mapping” the policy and activities carried out as part of the Norwegianization Policy; (2) investigating the modern-day impacts of Norwegianization; and (3) proposing measures for reconciliation between Norway’s majority and indigenous populations.<sup>78</sup> The Commission is conducting these tasks through archival research and by compiling witness testimonies.<sup>79</sup> While the Commission has conducted community meetings to date, sources note that victims and witnesses have not been invited to testify publicly, and have instead been asked to provide written or audio/video recorded statements, although all materials will be made publicly available following the conclusion of the Commission’s mandate.<sup>80</sup> At the time of publication, the Commission’s work remains ongoing. The Commission’s mandate requires it to complete its work by September 2022, at which point it must deliver a report to the Presidium of the Norwegian Parliament.<sup>81</sup>

Additional truth commissions aimed to assist Indigenous Peoples are also forthcoming. Following previous transitional justice efforts and extensive calls for a truth commission to address past wrongs against Australian Aboriginals, the Australian state government of Victoria has announced that it will begin working with Aboriginal communities to establish the nation’s first truth and justice process “to formally recogni[z]e historic wrongs—and address ongoing

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75. Commission, THE TRUTH AND RECONCILIATION COMM’N, [https://uit.no/kommisjonen/mandat\\_en](https://uit.no/kommisjonen/mandat_en) (last visited Dec. 22, 2020) [<https://perma.cc/C6AK-XT5U>].

76. Henry Minde, *Assimilation of the Sami—Implementation and Consequences*, 3 J. INDIGENOUS PEOPLES RTS. 6, 6-7 (2005) <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1248&context=aprc> i [<https://perma.cc/9XWD-L3RT>].

77. Commission, *supra* note 75.

78. *Id.*

79. *Id.*

80. Franck Petit, *Indigenous Peoples: The Norwegian Truth Commission’s Timid First Steps*, JUSTICEINFO.NET (Jan. 28, 2020), <https://www.justiceinfo.net/en/truth-commissions/43682-indigenous-peoples-norwegian-truth-commission-timid-first-steps.html> [<https://perma.cc/3VFJ-HPDA>].

81. Commission, *supra* note 75.

injustices—for Aboriginal Victorians.”<sup>82</sup> The program’s work is anticipated to begin in 2021.<sup>83</sup>

## II. THE MAINE WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMMISSION

Compared to indigenous societies in other nations, Native Americans have experienced minimal transitional justice at the federal level of government. Indeed, many Native Americans are still waiting for a formal apology and recognition of the governmental wrongdoing against them from our nations’ leaders. The closest the head of state of the U.S. Government has come to issuing a direct apology and accepting responsibility was in 2010, with President Obama’s signing of the 2010 Department of Defense Appropriations Act,<sup>84</sup> in which the House of Representatives had tucked a brief, indirect apology made on “behalf of the people of the United States” for the “violence, maltreatment and neglect” they had inflicted on Native Americans.<sup>85</sup> Yet, President Obama made no subsequent public apology, and the bill was passed into law with minimal media attention and no public statement from the White House on the apology.<sup>86</sup>

Actions under the most recent Trump Administration have further eroded the possibility for federal recognition of past human rights abuses against Native American tribes. Indeed, Former President Trump’s initiative to implement a more “pro-American curriculum” in U.S. schools, and to de-emphasize American history as it pertains to systemic racism against minorities sought to further undercut public attention to injustices against Native Americans.<sup>87</sup>

However, much stronger developments in terms of transitional justice have been made at the state and regional levels. For instance, in 2019, California

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82. *Delivering Truth and Justice for Aboriginal Victorians*, PREMIER OF VICT. (July 10, 2020), <https://www.premier.vic.gov.au/delivering-truth-and-justice-aboriginal-victorians> [https://perma.cc/R2U2-DHZZ]; Caitlin Reiger, *Australia’s First Truth Commission: Transitional Justice to Face Colonial Legacies*, JUSTICEINFO.NET (July 30, 2020), <https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/opinion/45000-australia-s-first-truth-commission-transitional-justice-to-face-colonial-legacies.html> [https://perma.cc/24R5-LAQJ].

83. Joseph Dunstan, *What Australia’s First Aboriginal Truth and Justice Commission Might Look Like*, ABC NEWS (Dec. 11, 2020), <https://www.abc.net.au/news/2020-12-12/australian-aboriginal-truth-and-justice-commission-what-is-it/12956326> [https://perma.cc/F699-TYKS].

84. Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, 123 Stat. 3410.

85. Rob Capriccioso, *A Sorry Saga: Obama Signs Native American Apology Resolution; Fails to Draw Attention to it*, INDIAN L. RES. CTR. (Jan. 13, 2010), <https://indianlaw.org/node/529> [https://perma.cc/7MCU-G68B].

86. *Id.*

87. Alana Wise, *Trump Announces ‘Patriotic Education’ Commission, A Largely Political Move*, NPR (Sept. 17, 2020), <https://www.npr.org/2020/09/17/914127266/trump-announces-patriotic-education-commission-a-largely-political-move> [https://perma.cc/HDA3-XZZF].

Governor Gavin Newsom formally apologized for California's dark treatment of Native Americans, admitting that this conduct amounted to genocide.<sup>88</sup> That formal apology has since paved the way for the enactment of several laws strengthening Native American rights in California,<sup>89</sup> as well as the recent creation of the California Truth & Healing Council.<sup>90</sup>

Despite California's developments, Maine is the state in which the most progress has been made in terms of transitional justice for Native Americans. The creation, operation, and conclusion of the Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission marked the first use of a truth commission collaboratively established by Native American tribes and state government to address wrongdoings against Native Americans in the United States.<sup>91</sup> It also provides an excellent case study for use in creating future truth commissions with similar mandates throughout the country, including one at the federal level.

#### A. Background & Creation

The Wabanaki are descendants of the original inhabitants of Maine and parts of coastal Canada and can trace their ancestry back 12,000 years.<sup>92</sup> Today, the Wabanaki are composed of four distinct tribes throughout the state of Maine, primarily in the northern and eastern portions of the state.<sup>93</sup> As of 2016, Maine's Wabanaki population totaled approximately 8,000 members.<sup>94</sup> Like many native communities throughout the United States, the Wabanaki have endured a long

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88. Oxford, *supra* note 11.

89. Mary Louise Kelly & Emma Bowman, *With 1 of Their Own in the Statehouse, Native Americans in California Win New Rights*, NPR (Dec. 2, 2020), <https://www.npr.org/2020/12/02/941542606/california-assemblymember-expands-rights-for-native-american-tribes> [<https://perma.cc/A5EG-JKJT>] (noting the passage of three laws bolstering Native American rights in California pertaining to: the retrieval of sacred artifacts and ancestral remains from museums and institutions; the creation of a task force to increase voter participation among California indigenous groups; and providing authorization to the California Department of Justice to assist local law enforcement in conducting criminal investigations in Native American communities).

90. *See generally About the California Truth & Healing Council*, CAL. OFF. OF THE TRIBAL ADVISOR, <https://tribalaffairs.ca.gov/cthc/about/> (last visited Apr. 19, 2021) [<https://perma.cc/5W33-6DWU>] (explaining that the California Truth & Healing Council is to record and examine "California Native American narratives regarding the historical relationship between the State of California and the California Native Americans in order to clarify the historical record of such relationship in the spirit of truth and healing").

91. *State and Wabanaki Tribes Sign Truth and Reconciliation Mandate*, UNIV. OF S. ME.: CUTLER INST., <https://usm.maine.edu/cutler/state-and-wabanaki-tribes-sign-truth-and-reconciliation-mandate> (last visited Mar. 22, 2021) [<https://perma.cc/VS5V-WVU4>].

92. *The Wabanaki: People of the Dawnland*, NAT'L PARK SERV. (Oct. 28, 2020), <https://www.nps.gov/acad/learn/historyculture/wabanaki.htm> [<https://perma.cc/M3UG-FN82>] [hereinafter *The Wabanaki*]; *Wabanaki Tribes*, FOUR DIRECTIONS DEV. CORP., <http://www.fourdirectionsmaine.org/wabanaki-tribes/> (last visited Dec. 21, 2020) [<https://perma.cc/G5UF-87WS>].

93. *The Wabanaki*, *supra* note 92; *History Impacts*, WABANAKI REACH (July 1, 2016), [http://www.mainewabanakireach.org/history\\_impacts](http://www.mainewabanakireach.org/history_impacts) [<https://perma.cc/9RMJ-8Y9R>].

94. *History Impacts*, *supra* note 93.

history of discriminatory child welfare practices and forced family separation instituted by state child welfare services and the U.S. Department of Health and Human Services (DHHS).<sup>95</sup>

In response to the widespread separation of Native American families nationwide, in 1978, the U.S. Congress passed the Indian Child Welfare Act (ICWA).<sup>96</sup> In the ICWA, Congress first recognized “that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”<sup>97</sup> The ICWA bestowed greater protections on Native Americans by instituting minimal federal standards that must be met in order to justify the removal of Native American children from their homes, so as to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.”<sup>98</sup> These protections included providing Native American tribes with exclusive jurisdiction over all child custody matters involving Native American children, as well as the right to intervene in any state court proceeding for foster care placement or termination of parental rights to a Native American child living off reservation land.<sup>99</sup>

Yet, despite the ICWA’s passage, Maine continued to experience high rates of child removal from Native homes,<sup>100</sup> and by 1999, Maine had the highest rate of Native American child removal of any state in the United States.<sup>101</sup> That same year, a federal review program identified ongoing violations of the ICWA by Maine governmental agencies, and in response, the State formed a working group of Wabanaki tribal members and non-Native individuals, including DHHS and tribal child welfare workers,<sup>102</sup> which ultimately evolved into Maine-Wabanaki REACH (Restoration-Engagement-Advocacy-Change-Healing).<sup>103</sup> The group

95. *See id.*

96. *See generally* 25 U.S.C. §§ 1901-1963.

97. *Id.* § 1901 (4).

98. *Id.* § 1902; *see also* Angelique EagleWoman & G. William Rice, *American Indian Children and U.S. Indian Policy*, 16 TRIBAL L. J. 1, 21 (2016).

99. 25 U.S.C. § 1911(a), (c).

100. *See History Impacts, supra* note 93; Esther Altvater Attean et al., *Truth, Healing, and Systems Change: The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission Process*, 91 CHILD WELFARE 15, 20 (2013) [https://d3n8a8pro7vnmx.cloudfront.net/mainewabanakireach/pages/17/attachments/original/1468975303/Truth\\_Healing\\_and\\_Systems\\_Change\\_CWLA\\_Special\\_Issue\\_2013\\_.pdf?1468975303](https://d3n8a8pro7vnmx.cloudfront.net/mainewabanakireach/pages/17/attachments/original/1468975303/Truth_Healing_and_Systems_Change_CWLA_Special_Issue_2013_.pdf?1468975303) [<https://perma.cc/5P7B-Q6XJ>].

101. Valerie Vande Panne, *Reflecting on the Maine-Wabanaki Child Welfare TRC Commission Five Years Later*, NATIVE NEWS ONLINE (Nov. 5, 2020), <https://nativenewsonline.net/currents/reflecting-on-the-maine-wabanaki-child-welfare-trc-commission-five-years-later> [<https://perma.cc/2AGW-QTGB>].

102. Attean, et al., *supra* note 100, at 20.

103. *See The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission*, UPSTANDER PROJECT, <https://upstanderproject.org/firstlight/trc> (last visited Dec. 21, 2020) [<https://perma.cc/L5CW-A2X6>] (explaining that the working group initially began as the ICWA Work Group, before becoming the TRC Convening Group, and ultimately

initially succeeded in developing improved policies and training for child welfare workers on ICWA compliance, but determined that additional work was necessary to help heal the fraught relationship between the Wabanaki tribes and the State.<sup>104</sup> Maine-Wabanaki REACH and other groups lobbied the Maine Government to establish a truth and reconciliation commission to investigate the fate of the children unlawfully removed from their tribal families and to propose steps to move forward with healing.<sup>105</sup>

In June 2012, five Wabanaki tribal chiefs and then-Governor of Maine, Paul LePage, jointly signed a Mandate creating the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission.<sup>106</sup> Between February 2013 and June 2015, tribal and governmental officials worked hand in hand in furtherance of the Commission's stated goals, which included creating a historical account of the Wabanaki people in the state-child welfare system, improving child-welfare practices, and promoting "individual, relational, systemic and cultural reconciliation."<sup>107</sup> However, the Maine Wabanaki Commission was funded exclusively through private donations as well as donations from Maine-based and national foundations; it received no funding from the State of Maine or tribal governments.<sup>108</sup>

### B. Investigation & Report

As part of its investigation, the Commission reviewed archival documents dating back to the 1940s that depicted well-documented and long-running biases against Wabanaki people and potential reasons for the discriminatory child welfare practices utilized against them.<sup>109</sup> The documents revealed that as of 1972, one out of every 3.3 Native American children in Maine's Aroostook County was in foster care, and that, between 1960 and 2014, there had been an inconsequential change in the percentage of Native American children in foster care within Maine.<sup>110</sup>

In addition to archival research, the Commission obtained 159 individual statements taken from both members of the Wabanaki Tribe and DHHS and child welfare representatives, and conducted 15 informal interviews, including with

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Maine-Wabanaki REACH); BEYOND THE MANDATE, *supra* note 1, at 12; *see also* About, WABANAKI REACH, <http://www.mainewabanakireach.org/about> (last visited Jan. 2, 2021) [<https://perma.cc/5UAL-CWAK>] (providing explanation of the REACH acronym).

104. BEYOND THE MANDATE, *supra* note 1, at 12.

105. *See The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission*, *supra* note 103.

106. Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission Mandate (June 29, 2012), <https://static1.squarespace.com/static/5c2e615b4611a08076e730e4/t/5cdc67814785d36f890b5370/1557948290076/Maine+Wabanaki-State+Child+Welfare+Truth+and+Reconciliation+Commission+Mandate.pdf> [<https://perma.cc/22RJ-GN86>] [hereinafter Maine Wabanaki Commission Mandate].

107. BEYOND THE MANDATE, *supra* note 1, at 13.

108. *Id.*

109. *Id.* at 21.

110. *Id.*, at 20-21.

the Chief Justice of Maine.<sup>111</sup> The Commission also conducted a number of “focus groups” in various Wabanaki communities, including at the Maine Correctional Center, in which Wabanaki and non-Native individuals discussed their experiences with the Maine child welfare system.<sup>112</sup> The Commission has archived all oral and written statements at Bowdoin College.<sup>113</sup>

In June 2015, the Commission issued its formal report titled “Beyond the Mandate: Continuing the Conversation.”<sup>114</sup> Therein, the Commission set forth the formal findings from its investigation, including its determination that between 2002 and 2015, Wabanaki children in Maine entered the foster care system at 5.1 times the rate of non-Native children and, once in foster care, were less likely to be adopted.<sup>115</sup> The Commission further concluded that the causes of this disproportionality included “institutional racism in state systems and the public; the effects of historical trauma; and a long history of contested sovereignties and jurisdictions between the state and the tribes.”<sup>116</sup> The Commission ultimately labeled the conduct against Wabanaki families as “cultural genocide” pursuant to the definition of genocide set forth in the Genocide Convention.<sup>117</sup>

Following its findings, the Commission’s report also included a list of fourteen recommendations to prevent the continued use of discriminatory child welfare practices against the Wabanaki and to promote healing among tribal members.<sup>118</sup> These included: developing legal and judicial trainings for DHHS to recognize bias, build cultural awareness, and ensure ICWA compliance; inspiring the creation of more Native foster homes and providing better support for non-Native foster and adoptive families to maintain Wabanaki children’s ties to their culture; supporting the continued work of Maine-Wabanaki REACH and continuing to promote truth-telling conversations within tribal communities, agencies that work with Wabanaki people, and the general public; and continuing to grow the archive at Bowdoin College.<sup>119</sup>

### C. Legacy

The Maine Wabanaki Commission’s Report includes a number of statements from witnesses—both Wabanaki individuals who had experienced

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111. *Id.* at 14.

112. *Id.* at 78-79. Other sources refer to these focus groups as “listening circles” and “ceremonial gatherings.” Penthea Burns, *Truth and Reconciliation: The Findings on Wabanaki Child Welfare in the State of Maine*, CULTURAL SURVIVAL (Dec. 2015), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/truth-and-reconciliation-findings-wabanaki-child-welfare> [<https://perma.cc/8BPH-WFQC>].

113. BEYOND THE MANDATE, *supra* note 1, at 80-81.

114. *See generally id.*

115. *Id.* at 64.

116. *Id.*

117. *Id.*

118. *Id.* at 66-67.

119. *Id.* The archive is accessible at <https://digitalcommons.bowdoin.edu/maine-wabanaki-trc/> [<https://perma.cc/E9GY-XMWR>].

trauma from discriminatory child welfare practices and non-Native DHHS workers—who speak positively of their experiences participating in the Commission.<sup>120</sup> Likewise, following the conclusion of the Commission’s mandate and the release of its report, witnesses have explained that the Commission’s process helped them recognize and work through their trauma.<sup>121</sup> Other participants have noted that the Commission’s work has prompted further conversations geared towards healing, both among tribal communities and within individual families.<sup>122</sup>

While the practical impact of the Commission’s work is difficult to measure, representatives for DHHS have explained that since the Commission issued its recommendations, DHHS has “revamp[ed] the training for all of the state and child welfare workers,” added tribal foster homes, and worked to focus on keeping Native children with their families and tribes.<sup>123</sup> However, the work between State and Wabanaki relations in Maine is far from complete. Rates of Native American children within the Maine foster care system remain high.<sup>124</sup> Tensions between Wabanaki and state officials persist over an array of highly contentious issues, ranging from land and fishing rights, to the use of Indian mascots for local Maine sports teams.<sup>125</sup> And, most importantly, the root causes that often provided child welfare services with the guise for removing Wabanaki children from their families—such as widespread unemployment, poverty, and drug and alcohol use among Wabanaki tribes—have yet to be adequately addressed.<sup>126</sup>

However, despite these persistent issues, the Maine Wabanaki Commission’s work and culminating report has drawn attention to the wrongs committed against the Wabanaki and has inspired further change for indigenous peoples throughout the nation. And although the Commission has officially concluded its mandate, Maine Wabanaki REACH—the organization created in the wake of the 1999 federal review, which was instrumental in creating the

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120. *See id.* at 10 (quoting a DHHS supervisor who participated in the Commission as saying “[t]his has been an amazing journey to bring truths to light . . . [and] to move through and past pain toward healing”); *id.* at 19 (quoting another Wabanaki witness as stating, “I believe this is about . . . healing and identity”).

121. Vande Panne, *supra* note 101; Robin Young, ‘Dawnland’ Documents Maine’s Efforts to Reconcile Indian Child Removal, WBUR (Nov. 5, 2018), <https://www.wbur.org/hereandnow/2018/11/05/dawnland-maine-native-children-removal> [<https://perma.cc/Y2RE-XPY5>] (quoting a witness who testified before the Commission as saying, “[a] lot of good has come from this. The reason I did decide to testify to give a public statement [despite initial reluctance] was so that it might help other people. And I do believe that it will do that.”).

122. Vande Panne, *supra* note 101.

123. *Id.*

124. CHILDREN’S BUREAU, CHILD WELFARE OUTCOMES REPORT DATA FOR MAINE, <https://cwoutcomes.acf.hhs.gov/cwodatasite/pdf/maine.html> (last visited Dec. 21, 2020) [<https://perma.cc/K7MX-XXYX>] (noting that the 2018 rate of Native Americans entering foster care reached 4.3%, the highest level it had been for at least four years).

125. Virginia M. Wright, *Shattered, Down E.*, <https://downeast.com/features/wabanaki-people-shattered/> (last visited Dec. 21, 2020) [<https://perma.cc/3WDG-V3EU>].

126. *Id.*



Maine Wabanaki Commission—continues to work to implement the Commission’s recommendations.<sup>127</sup> It does so by facilitating the development of relationships between the Wabanaki and Maine governmental leaders, such as through educational presentations that inform non-Natives about the “shared history of the Maine and Wabanaki people.”<sup>128</sup> It also continues to promote healing, wellness, and wellbeing in Wabanaki communities through programs such as educational events, workshops, and healing circles.<sup>129</sup>

### III. A FEDERAL TRUTH & RECONCILIATION COMMISSION FOR NATIVE AMERICANS

Despite the great achievements made by the Maine Wabanaki Commission, much of the healing and reconciliation achieved through the Commission was geographically limited to Maine. Unfortunately, rampant discriminatory child welfare practices continue to disproportionately impact Native Americans throughout the nation. A 2019 report compiled by the National Indian Child Welfare Association concluded that Native American children, who represent only 1% of all children in the United States, disproportionately represent a total of 2.6% of children in foster care – more than 2.6 times greater than their proportion to the general population.<sup>130</sup> The report further recognized that as of 2017, several states were specifically impacted by disproportional child welfare practices, including Wisconsin, with a disproportionality rate of 5.4%, and Minnesota, with a staggering disproportionality rate of 16%.<sup>131</sup>

Yet, these ongoing discriminatory practices are certainly not the only issues plaguing Native American communities throughout the country. Indeed, these discriminatory practices can often be attributed to more wide-spread, engrained problems afflicting Native Americans. According to 2018 U.S. Census Data, Native Americans endure the highest poverty rate among all races in the United States, with 25.4% of the Native American population living in poverty, which is more than double 2018’s overall poverty rate of 11.8%.<sup>132</sup>

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127. *Strengthening Systems and Organizations*, WABANAKI REACH, [http://www.mainewabanakireach.org/strengthening\\_systems\\_and\\_organizations](http://www.mainewabanakireach.org/strengthening_systems_and_organizations) (last visited Dec. 22, 2020) [https://perma.cc/WHC9-BL8C].

128. *Community Building*, WABANAKI REACH, [http://www.mainewabanakireach.org/community\\_building](http://www.mainewabanakireach.org/community_building) (last visited Dec. 22, 2020) [https://perma.cc/35SE-DG42].

129. *Wabanaki Health, Wellness and Self-Determination*, WABANAKI REACH, [http://www.mainewabanakireach.org/wabanaki\\_health\\_wellness\\_and\\_self\\_determination](http://www.mainewabanakireach.org/wabanaki_health_wellness_and_self_determination) (last visited Dec. 22, 2020) [https://perma.cc/Q6UN-NHXZ].

130. NAT’L INDIAN CHILD WELFARE ASS’N, DISPROPORTIONALITY IN CHILD WELFARE, FACT SHEET 1 (2019), <https://www.nicwa.org/wp-content/uploads/2019/10/2019-AIAN-Disproportionality-in-Child-Welfare-FINAL.pdf> [https://perma.cc/UAP4-4AJ6] (the term Native American refers to the report’s classification of children as American Indian or Alaska Native).

131. *Id.* at 2 (also noting that 27.2% of children in foster care in Minnesota were Native American).

132. *The Population of Poverty USA*, POVERTY USA, <https://www.povertyusa.org/facts> (last visited Dec. 9, 2020) [https://perma.cc/DH8G-3SWE].

Moreover, while data reporting for crimes committed against Native Americans is notoriously unreliable,<sup>133</sup> the statistics available paint a bleak portrayal of crime levels within Native American communities, especially compared to national averages. As of 2016, the National Congress of American Indians Policy Research Center concluded that 81.6% of male Native Americans and 84.3% of female Native Americans had experienced violence in their lifetimes.<sup>134</sup> The report also concluded that 56.1% of female Native Americans had experienced sexual violence in their lifetimes.<sup>135</sup> The Center further calculated that Native American women are almost two times as likely to have been raped and almost three times as likely to be murdered as compared to non-Hispanic White women.<sup>136</sup> Moreover, in 2020, the U.S. Department of Justice determined the local jail incarceration rate for Native Americans was nearly double the rate for local incarceration across all race demographics.<sup>137</sup>

Tribal communities throughout the United States also suffer significant physical and mental health issues.<sup>138</sup> These include, but are not limited to, greater rates of suicide, anxiety, disordered eating, and substance abuse among Native Americans.<sup>139</sup> Unsurprisingly, Native Americans have also been disproportionately affected by the ongoing COVID-19 pandemic.<sup>140</sup>

Scholars have recognized that these challenges—poverty, increased crime, and mental health crises—largely stem from the sustained trauma associated with centuries of government-sponsored or sanctioned wrongdoings inflicted against

133. See Sam Wilson & Mike Kordenbrok, *Native American Homicide Rates are Soaring, but Causes Aren't Clear Due to Inconsistent Data*, BILLINGS GAZETTE (Apr. 14, 2019), [https://billingsgazette.com/news/state-and-regional/mmiw/native-american-homicide-rates-are-soaring-but-causes-aren-t-clear-due-to-inconsistent-data/article\\_cd39d5e5-0bae-5f6d-9da5-994e3e8bdbd6.html](https://billingsgazette.com/news/state-and-regional/mmiw/native-american-homicide-rates-are-soaring-but-causes-aren-t-clear-due-to-inconsistent-data/article_cd39d5e5-0bae-5f6d-9da5-994e3e8bdbd6.html) [<https://perma.cc/SQ92-M9QL>] (analyzing the inconsistency and unreliability in data pertaining to Native American homicide rates and examining the reasons therefor).

134. André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, NAT'L INST. OF JUST. (June 1, 2016), <https://nij.ojp.gov/topics/articles/violence-against-american-indian-and-alaska-native-women-and-men> [<https://perma.cc/Z67E-5MUS>] (calculating violence among Native Americans to include both American Indians and Alaskan Natives).

135. *Id.*

136. *Id.*; NAT'L CONG. OF AM. INDIANS POL'Y RSCH. CTR., RESEARCH POLICY UPDATE: VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN 2 (Feb. 2018), [https://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA\\_Data\\_Brief\\_FINAL\\_2\\_1\\_2018.pdf](https://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief_FINAL_2_1_2018.pdf) [<https://perma.cc/3MLE-QUL9>].

137. U.S. DEP'T OF JUST., TRIBAL CRIME DATA-COLLECTION ACTIVITIES, 2020 at 3, (July 2020) (concluding that American Indians were incarcerated in local jails at a rate of 401 per 100,000 individuals, whereas the local jail incarceration rate for persons nationally totaled 226 per 100,000 individuals).

138. Aila Hoss, *COVID-19 and Tribes: The Structural Violence of Federal Indian Law*, 2 ARIZ. ST. L.J. ONLINE 162, 165-66 (2020).

139. *Id.*

140. See generally *id.* (discussing the unequal effects of COVID-19 on Native American tribes); Liz Mineo, *For Native Americans, COVID-19 is 'the Worst of Both Worlds at the Same Time'*, HARV. GAZETTE (May 8, 2020), <https://news.harvard.edu/gazette/story/2020/05/the-impact-of-covid-19-on-native-american-communities/> [<https://perma.cc/QN6M-BFXG>].

Native American communities.<sup>141</sup> By failing to provide any large-scale nationwide effort for recovery, healing, or justice for these wrongs, the United States Government continues to perpetuate the trauma impacting these communities. This section will address the continuing need for future efforts designed to foster healing and uncover truths of past and recent wrongdoing against Native American tribes throughout the nation, especially as they pertain to the past and ongoing forced removal of children from their families. Specifically, it will advocate for the creation of a federal truth commission designed to address discriminatory child welfare practices as a beginning to providing transitional justice for Native Americans. It will then draw on the experiences, successes, and potential shortcomings of the Maine Wabanaki Commission and other international truth commissions to identify necessary features for this proposed national truth commission.

#### *A. The Need for a National Truth Commission for Native Americans*

Given the ongoing problems facing Native American tribes throughout the country—many of which stem from historical abuses committed against them—greater recovery and healing from lifetimes of inequality and human rights abuses is imperative. A national truth commission addressing recent and ongoing state and federally sanctioned wrongs against Native Americans, specifically as they pertain to discriminatory child welfare practices, would provide numerous benefits to Native American communities throughout the nation. As discussed previously, scholars and experts widely acknowledge the theoretical benefits of transitional justice, specifically those obtained through truth commissions. These benefits are especially pertinent to the current plight of Native Americans in the United States.

First, criminal accountability for wrongs committed against Native Americans—both for those historical and more recent wrongs—is highly unlikely and, in most cases, impossible. Given that some of the more egregious wrongs, especially as they pertain to violence and large-scale atrocities, were committed centuries ago, the perpetrators most responsible—both those direct perpetrators and those individuals with command responsibility—are long dead. While the more recent wrongs, including the discriminatory child welfare practices instituted against Native Americans, may sometimes warrant criminal

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141. Iris PrettyPaint & Corrine Taylor, *Native Aspirations: Addressing the Contagion of Violence in the Context of Historical Trauma*, in QUESTION OF VIOLENCE: WORKSHOP SUMMARY 83, 83-85 (Inst. Of Med. et al. eds., 2013), [https://www.ncbi.nlm.nih.gov/books/NBK190337/pdf/Bookshelf\\_NBK190337.pdf](https://www.ncbi.nlm.nih.gov/books/NBK190337/pdf/Bookshelf_NBK190337.pdf) [<https://perma.cc/DU8H-9QPT>]; see generally Kathleen Brown-Rice, *Examining the Theory of Historical Trauma Among Native Americans*, THE PRO. COUNS., <https://tpcjournal.nbcc.org/examining-the-theory-of-historical-trauma-among-native-americans> (last visited Dec. 30, 2020) [<https://perma.cc/KL3U-X4QB>] (examining how historical traumas have created lasting problems for Native Americans).

accountability, prosecution—or even civil liability<sup>142</sup>—is unlikely given that these government policies were approved at high levels of government.

While a national truth commission designed to address recent wrongs would not focus on “traditional” retributive justice, it could still promote political accountability and acceptance of responsibility for past and recent wrongdoings. Specifically, as scholar Laurel Fletcher notes, truth commissions can “elevate the continuities of power and bring attention to the ways in which wrongdoers of the past maintain privilege in the present.”<sup>143</sup> The potential for this public acknowledgement is evidenced by the impact of Canada’s TRC, which prompted the settlement of a civil class action related to the wrongdoings investigated by the TRC, as well as a publicized apology from Canada’s prime minister.<sup>144</sup>

A national truth commission within the United States holds the potential to do the same. It could prompt the national apology for which Native Americans have been patiently waiting for centuries, and it could unearth evidence to assist in potential civil litigation and class actions against government officials and agencies, such as DHHS. Likewise, as the Maine Wabanaki Commission did, a national truth commission could prompt real change and modification of painful and discriminatory welfare practices instituted by state and national governmental agencies throughout the United States.

Second, a national truth commission could bring the dark history of human rights abuses against Native Americans into the public realm. While many are familiar with the acts of violence committed against Native Americans during the European colonialists’ original settling of the United States, much less is widely known regarding the more recent child separation policies and discriminatory child welfare practices implemented against Native American tribes. Although statistics are available regarding the amount of Native American children in foster care,<sup>145</sup> the numbers fail to show the reasons that prompted family separation or to tell these families’ stories. Likewise, these statistics do not explain which child separations were lawful and which resulted from personal biases and ICWA violations.<sup>146</sup>

Only by identifying the causes of human rights abuses can a truth commission produce recommendations for moving forward from these abuses and preventing their future recurrence. By gathering testimony and statements from both Native American families affected by child separation practices and state child welfare officials, the Maine Wabanaki Commission was able to

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142. See, e.g., Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, 123 Stat. 3409 § 8113(b) (including within the brief apology made to Native Americans in the 2010 Department of Defense Appropriations Act a clear disclaimer that nothing within the apology “authorizes or supports any claim against the United States”).

143. Fletcher, *supra* note 16, at 138-39.

144. *Newfoundland and Labrador Residential Schools Healing and Commemoration*, *supra* note 63; Austen, *supra* note 63.

145. See DISPROPORTIONALITY IN CHILD WELFARE, FACT SHEET, *supra* note 130, at 1.

146. *About ICWA*, NAT’L INDIAN CHILD WELFARE ASSOC., <https://www.nicwa.org/about-icwa/> (last visited Dec. 30, 2020) [<https://perma.cc/E73A-D76N>] (noting that many separations and out-of-home placements can be attributed to violations of federal law).

conclusively determine that a primary reason for many instances of child separation was the underlying bias and racism against Wabanaki in child welfare institutions and in Maine culture more generally.<sup>147</sup> The same could likely also be said for other states and regions in the nation. Further investigation and compilation of victim and witness statements at a broader scale, such as through a proposed national truth commission, can help identify the underlying issues in national child welfare practices that need to be cured in order to stop continued discriminatory practices and prevent their future recurrence.

Third, and arguably most importantly, a national truth commission would provide greater opportunity for Native Americans to confront the crimes against them and work towards healing and reconciliation. Many of the most serious challenges facing Native Americans today, such as poverty, crime, and physiological and psychological health concerns, can be attributed to past abuses inflicted against them.<sup>148</sup> However, given the lack of completed transitional justice processes in the United States outside of Maine, most Native Americans have not been provided the opportunity to address their traumatic pasts or work towards emotional healing.

The Maine Wabanaki Commission evidences the type of healing a truth commission can provide on a regional stage. For many participants, the Commission provided them with an opportunity to share their stories of family separation for the first time and begin down a path of healing that had never before been available to them.<sup>149</sup> This has prompted further efforts for individuals to work through their trauma, and to heal both individually and as family units and communities.<sup>150</sup> Providing this level of healing and trauma relief at a national level could produce profound results in Native American communities throughout the country.

#### *B. Necessary Features of a National Truth Commission*

While a full, detailed strategy for the creation of a national truth commission (hereafter the Proposed Commission) falls outside the scope of this paper, this section will aim to identify several of the more salient features the Proposed Commission must possess to achieve its transitional justice goals. The Proposed Commission should be stylized more analogously to the national indigenous truth commissions instituted in Canada, Greenland, and Norway, and expand the reach and scope of the work done by the Maine Wabanaki Commission. In addition to this generalized geographic reach, the Proposed Commission should also feature the following: governmental support; a clearly

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147. BEYOND THE MANDATE, *supra* note 1, at 21.

148. See generally PrettyPaint & Taylor, *supra* note 141; Brown-Rice, *supra* note 141; see also BEYOND THE MANDATE, *supra* note 1, at 65 (finding that many Wabanaki carry trauma from experiences pertaining to family separation).

149. Genevieve Beck-Roe, *The Maine Wabanaki-State TRC: Healing from Historic Trauma to Create a Better Future*, AM. FRIENDS SERV. COMMITTEE (Jan. 27, 2016), <https://www.afsc.org/blogs/acting-in-faith/maine-wabanaki-state-trc-healing-historic-trauma-to-create-better-future> [<https://perma.cc/8SEK-YN76>].

150. Vande Panne, *supra* note 101.

delineated substantive mandate; participation of members of multiple Native American tribes at all levels of the Commission's creation and work; and publicly accessible, victim-centered hearings.

### i. Governmental Support

For the Proposed Commission to achieve its goals, it is imperative that it receive the support of the federal government. One of the most common criticisms leveled against truth commissions is their issuance of lofty recommendations without the ability to make real, concrete change.<sup>151</sup> However, truth commissions' success at inspiring real change is directly correlative to the level of political funding and support they receive.<sup>152</sup> For governmentally created truth commissions, political support determines the commission's powers, including the ability to issue enforceable subpoenas or penalties for noncompliance.<sup>153</sup> Additionally, political support increases the likelihood that the government will assist in implementing the commission's recommendations set forth in its final report. Likewise, having federal governmental support for a truth commission will draw positive national and international attention to the commission's work.

Accordingly, achieving Congressional support and funding should be a priority in creating a national truth commission for Native Americans. While such a feat will certainly be difficult, recent events and changes in the U.S. political administration provide concrete hope that such support is attainable. Notably, on September 29, 2020, Representative Deb Haaland of New Mexico—who now serves as U.S. Secretary of the Interior—and Senator Elizabeth Warren jointly introduced legislation in the House of Representatives and Senate, respectively, calling for the establishment of a Truth and Healing Commission on Indian Boarding School Policy.<sup>154</sup> While, at the time of writing, no concrete action has yet been taken on either the House Bill or the Senate Resolution,<sup>155</sup> the mere introduction of these bills indicates the potential for federal governmental support for a commission designed to address wrongs against Native Americans.

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151. Parker, *supra* note 29, at 32-33.

152. See *Rule-of-Law Tools for Post-Conflict States*, *supra* note 38, at 6 (noting that “[a] commission is likely to be most successful if there is genuine political will for rigorous investigation and truth reporting”).

153. See Brahm, *supra* note 34 (explaining that state support provides a truth commission with “greater access to information, greater security, and increased assurance that its findings will be taken under serious consideration”).

154. H.R. 8420, 116th Cong. (2020); S. 4752, 116th Cong. (2020).

155. *H.R. 8420 – Truth and Healing Commission on Indian Boarding School Policy Act*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/8420/all-actions?overview=closed#tabs> (last visited Mar. 27, 2021) [<https://perma.cc/L7P6-3D7L>] (noting that the House Bill was referred to the Committee on Education and Labor and the Committee on Natural Resources the day it was introduced); *S. 4752-Truth and Healing Commission on Indian Boarding School Policy Act*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/4752> (last visited Mar. 27, 2021) [<https://perma.cc/NA3U-X6NK>] (noting that the Senate resolution was read twice on the day of introduction and referred to the Committee on Indian Affairs).

Moreover, recently elected President Joe Biden and Vice President Kamala Harris have publicized a number of initiatives designed to restore rights for Native Americans and improve health care, violence, crime, and other challenges facing Native American tribes, as well as promising to provide “healing and supportive services in Native American communities.”<sup>156</sup> President Biden has already begun to act on these initiatives, by nominating Representative Deb Haaland of New Mexico, the proponent of the aforementioned House bill for the creation of a truth commission on Indian Boarding School Policy, to lead the Department of the Interior.<sup>157</sup> Following her confirmation by the Senate on March 15, 2021, Secretary Haaland, a member of New Mexico’s Laguna Pueblo, officially became the United States’ first Native American Cabinet Secretary.<sup>158</sup>

## ii. Development of a Clear Substantive Mandate

One challenge that the Proposed Commission may encounter is that wrongdoings against Native Americans span centuries and encompass acts including bias, discrimination, violations of federal laws, sexual violence, and even murder committed on a large scale. Attempting to limit investigation and inquiry into only one set of wrongs will likely seem to many Native Americans as superficial and insufficient. However, given the limited resources available for the Proposed Commission, insofar as time, funding, and human resources, a full-scale investigation into all governmentally sponsored wrongs against Native Americans is impractical.

Instead, in creating its mandate, the Proposed Commission must focus on one discrete set of wrongs committed broadly across the United States. One of the most recent and heavily documented set of wrongs is the discriminatory practices involving child removal and placement in non-Native foster or adoptive homes in violation of the ICWA. The Maine Wabanaki Commission adopted these wrongs as the substantive scope of its mandate,<sup>159</sup> and the Proposed Commission should follow suit by investigating the same substantive wrongs on a much broader geographic scale, encompassing the effect of these policies in all fifty states. Additionally, in its mandate, the Proposed Commission should clearly delineate its period of operation and the temporal reach of its work, namely the time-period over which violations within its substantive mandate occurred. Accordingly, it would be prudent to limit the Proposed Commission’s

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156. *Biden-Harris Plan for Tribal Nations*, BIDEN HARRIS, <https://joebiden.com/tribalnations/> (last visited Dec. 30, 2020) [<https://perma.cc/32SN-7K85>].

157. Nathan Rott, *In Historic Move, Biden to Pick Native American Rep. Haaland as Interior Secretary*, NPR (Dec. 17, 2020, 4:47 PM), <https://www.npr.org/2020/12/17/937259525/in-historic-move-biden-to-pick-native-american-rep-deb-haaland-as-interior-secre> [<https://perma.cc/SRQ9-V75P>].

158. Nathan Rott, *Deb Haaland Confirmed as 1<sup>st</sup> Native American Interior Secretary*, NPR (Mar. 15, 2021, 6:21 PM), <https://www.npr.org/2021/03/15/977558590/deb-haaland-confirmed-as-first-native-american-interior-secretary> [<https://perma.cc/TRH7-CKFS>].

159. Maine Wabanaki Commission Mandate, *supra* note 106, at 1.

substantive mandate over discriminatory child welfare practices to violations which occurred between 1978—the year the ICWA was passed<sup>160</sup>—and present day.

The legislation proposed in Congress by Representative Haaland and Senator Warren provides a clear starting point for the substantive scope of a Commission mandate. That legislation proposes a “Truth and Healing Commission on Indian Boarding School Policy in the United States,” which would focus on the historical crimes conducted under the Indian Boarding School Policy, but would also “study the impact and ongoing effects of historical and intergenerational trauma in Tribal communities,” and would further address “other cultural genocide practices, including recommendations to stop the continued removal of [Native American] children from their families under modern-day assimilation practices carried out by State social services departments, foster care agencies, and adoption services.”<sup>161</sup> Yet, even the relatively narrow breadth of this proposed purpose may be too broad. It is vitally important that the Proposed Commission focus primarily on contemporary and ongoing acts of genocide—namely those perpetrated as violations of the ICWA and similar predatory child welfare practices—to shine national notoriety on these practices and develop recommendations to prohibit recurring ICWA violations moving forward. While it is necessary to address past wrongs to provide healing for trauma, such as those promulgated pursuant to the Indian Boarding School Policy, it is much more critical to first focus on righting ongoing wrongs to stop their recurrence.

Moreover, limiting the Proposed Commission’s mandate to ICWA violations does not necessarily exclude discussion and investigation into other related, historical wrongs. Instead, witness testimony and statements may shed light on other crimes and wrongs falling outside of the substance or temporal scope of the mandate, such as the Indian Boarding School Policy. However, a narrow mandate focused primarily on contemporary and ongoing acts of genocide perpetrated through discriminatory child welfare practices will ensure that national and governmental attention is focused on those practices that most desperately require change. Further, should the Proposed Commission be successful, it could inspire additional national truth commissions to investigate different sets of crimes, such as one similar to that proposed by Secretary Haaland and Senator Warren, which would focus exclusively on human rights violations perpetrated under cover of the Indian Boarding School Policy. However, by delineating a clear substantive set of wrongs for the Proposed Commission, the public and the Proposed Commission itself will more easily be able to identify clear objectives and measure the success of its work.

### iii. Victim Participation

For the Proposed Commission to achieve goals associated with healing and reconciliation, it must engage Native Americans from as many tribes as possible

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160. 25 U.S.C. §§ 1901-1963.

161. H.R. 8420, 116th Cong. § 3(1)-(2) (2020); S. 4752, 116th Cong. § 3(1)-(2) (2020).



in all facets of the Proposed Commission's creation, implementation, and operation. As the United Nations Security Council has recognized, no "transitional justice initiative imposed from the outside can hope to be successful or sustainable."<sup>162</sup> Instead, victims must not only participate in transitional justice, but also help to create, craft, and operate the initiative, so as to ensure it aligns with their expectations.

As the International Center for Transitional Justice recommends, in truth commissions designed to benefit indigenous people, the commission should include indigenous people at all levels of operation, including as commissioners, monitors, and staff, and it should select these individuals through a fair and transparent process.<sup>163</sup> Doing so will ensure that the commission's objectives—and the means by which they are obtained—are in compliance with the cultures and beliefs of the indigenous people designated to benefit from the commission's work. Lessons can be drawn from the shortcomings of other transitional justice efforts, such as those in Guatemala, which failed to provide the intended justice to indigenous Guatemalans living in rural areas because the justice efforts were "predominantly guided by Western views of human rights" that were incompatible with indigenous values and beliefs.<sup>164</sup> Incorporating Native Americans into the Proposed Commission's work will ensure cultural compatibility between the Commission's creators and participants, and will guarantee greater success in achieving its goals.

With a mandate to investigate and provide transitional justice for past discriminatory child welfare practices committed against Native Americans across the United States, the Proposed Commission will need to accommodate hundreds of different Native American tribes and ensure that its practices and goals align with their respective cultures and beliefs. Again, on this challenge, the Proposed Commission may seek guidance from the Maine Wabanaki Commission. While the Maine Wabanaki Commission's reach was limited to wrongs committed against the Wabanaki, the Wabanaki encompass multiple tribes, each with its own government and leaders.<sup>165</sup> The Maine Wabanaki Commission included each Wabanaki tribal government in the creation and

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162. U.N. SECURITY COUNCIL, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General* 7 (Aug. 23, 2007), <https://www.un.org/ruleoflaw/files/2004%20report.pdf> [<https://perma.cc/54YU-AN38>].

163. INT'L CTR. FOR TRANSITIONAL JUST., STRENGTHENING INDIGENOUS RIGHTS THROUGH TRUTH COMMISSIONS: A PRACTITIONER'S RESOURCE 50 (2012), <https://www.ictj.org/sites/default/files/ICTJ-Truth-Seeking-Indigenous-Rights-2012-English.pdf> [<https://perma.cc/27QZ-BPLZ>] [hereinafter STRENGTHENING INDIGENOUS RIGHTS THROUGH TRUTH COMMISSIONS].

164. Belkis Izquierdo & Lieselotte Viaene, *Decolonizing Transitional Justice from Indigenous Territories*, PEACE IN PROGRESS 4 (June 2018), <https://www.ohchr.org/Documents/Issues/IPeoples/SR/IPAndJustice/22-LViaene.pdf> [<https://perma.cc/WR2G-TZ34>].

165. *About the Wabanaki Nations*, ABBE MUSEUM, <https://www.abbemuseum.org/about-the-wabanaki-nations> (last visited Jan. 3, 2020) [<https://perma.cc/5H7Y-Z5G9>].

signing of its mandate,<sup>166</sup> and made significant efforts to involve leaders from all tribes in its work.<sup>167</sup> Following the guidance provided by the Maine Wabanaki Commission, it is imperative that the Proposed Commission incorporate voices and representation from all affected tribes nationwide within the development of its mandate and its work.

#### iv. Public Hearings

Unlike traditional justice in the form of criminal prosecutions, which places the focus on the perpetrator of the crime, transitional justice experts have repeatedly emphasized the need for transitional justice, especially in the form of truth commissions, to be “victim-centered” or “victim-focused.”<sup>168</sup> To achieve this, many truth commissions have focused on encouraging victims to share their experiences in public hearings. While “serious measures” must be taken to avoid negative mental health impacts associated with recounting past traumatic experiences,<sup>169</sup> allowing victims to testify as to their experiences—when done correctly—holds enormous potential for healing and trauma recovery, both on an individual and community level.<sup>170</sup>

Allowing victims to share their stories in public fora also provides significant benefits to truth commissions’ fact-finding objectives. By establishing an accurate record of past violence or human rights abuses, a truth commission can draw public recognition to “unsilence” a period of atrocities that would otherwise go undiscussed or unremembered.<sup>171</sup> By drawing significant public attention to victims’ experiences resulting from government-sponsored wrongdoing, truth commissions can help societies understand the impact of the violence and abuses and ultimately assist in preventing their recurrence.<sup>172</sup> Further, hearings open to the public—either in person or through television or other media, or ideally, both—can provide truth commissions with a greater level of legitimacy, both among victims and the public. Public hearings can lend

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166. The Maine Wabanaki Commission Mandate, *supra* note 106, at 4.

167. BEYOND THE MANDATE, *supra* note 1, at 16.

168. E.g., Fletcher, *supra* note 16, at 138; Sison: *Transitional Justice Needs “Victim-Centered Approach,”* INT’L PEACE INST., <https://www.ipinst.org/2015/10/civil-society-and-transitional-justice-processes#11> (last visited Mar. 27, 2021) [<https://perma.cc/7R8Y-PQPB>] (reflecting the views of Michele J. Sison, Deputy Permanent Representative of the United States to the United Nations); Raquel Aldana, *A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities*, 5 J. HUM. RTS. 107, 107 (2006), <https://www.tandfonline.com/doi/full/10.1080/14754830500485916> [<https://perma.cc/2L88-ZPP6>].

169. Marie Soueid et al., *The Survivor-Centered Approach to Transitional Justice: Why a Trauma-Informed Handling of Witness Testimony is a Necessary Component*, 50 GEO. WASH. INT’L L. REV. 125, 127 (2017).

170. *Public Hearings: Platforms of Truth, Dignity, and Catharsis*, *supra* note 35.

171. Priscilla B. Hayner, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 20 (2d ed. 2011).

172. STRENGTHENING INDIGENOUS RIGHTS THROUGH TRUTH COMMISSIONS, *supra* note 163, at 4.

transparency to a commission's inner-workings and allow the public to evaluate that commission's work with concrete facts and experiences.<sup>173</sup>

Accordingly, the Proposed Commission should conduct hearings publicly. With proper mental health measures and safeguards in place, victims should be permitted—if they so choose—to provide testimony and statements at public hearings. Further, when possible, these hearings should be broadly televised or made available through other media and streaming services so that individuals unable to attend the hearings in person can also participate in the Commission's work. By including this feature, the Proposed Commission will not only guarantee greater healing for its participants, but will also foster legitimacy in its work and increase the likelihood that its final recommendations come to fruition.

### CONCLUSION

The creation of a national truth commission for Native Americans pertaining to unlawful child removal and family separation would be a significant pathway towards healing for centuries of genocide committed against our nation's indigenous peoples. However, it certainly would not be a full-scale solution to the numerous issues afflicting Native American communities as a result of long-running historical trauma at the hands of our government, including extreme poverty, high crime and violence levels, and widespread mental and physical health conditions among Native American tribes. Native American communities have endured centuries of trauma without government reparation or widespread healing and are in need of and entitled to holistic transitional justice. The creation of a federally established national truth commission should be the first step in this transitional justice process.

This is not the first scholarly call for the United States Government to institute transitional justice initiatives for Native American populations.<sup>174</sup> However, it is important that this call be reiterated in light of the achievements of similar truth commissions designed to address wrongdoing against indigenous peoples, including the Maine Wabanaki Commission and those established in other nations, as well as the recent push towards the creation of regional and local truth commissions in the United States, including those seeking to promote healing among Native Americans and other racial minorities.<sup>175</sup>

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173. See *Public Hearings: Platforms of Truth, Dignity, and Catharsis*, *supra* note 35 (explaining that public hearings give the public “an opportunity to see for themselves how the commission operates”).

174. See generally, e.g., Weston, *supra* note 24 (advocating for the truth commission framework to be used to address the historic treatment of Native Americans in the United States); Parker, *supra* note 29 (arguing for a truth commission to be utilized in Alaska).

175. As previously mentioned, California has already created the California Truth & Healing Council designed to promote healing and preserve history of Native Americans. *About the California Truth & Healing Council*, *supra* note 90. Likewise, Iowa City, Iowa and the City of Minneapolis, Minnesota are two of several local governments that have passed legislation to create truth and reconciliation commissions designed to promote healing,

While no justice will be able to provide complete healing and reparation for the sustained traumas Native American society has endured at the hands of its government, a truth commission is necessary to begin the healing process. And although the proposed national truth commission on discriminatory child welfare practices will not be a complete solution, it will serve as a vital step towards obtaining healing and justice for centuries of genocide against one of the most disenfranchised groups in the United States.

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reconciliation, and truth surrounding racial disparities in their cities. *See, e.g., Ad Hoc Truth and Reconciliation Commission*, IOWA CITY GOV'T, <https://www.icgov.org/city-government/boards-commissions-and-committees/ad-hoc-truth-and-reconciliation-commission> (last visited Apr. 19, 2021) [<https://perma.cc/H57L-KKNZ>] (detailing the Iowa City Council's establishment of Ad Hoc Truth and Reconciliation Commission designed to "bear witness to the truth of racial injustice in Iowa City and to carry out restorative justice"); JENKINS, MINNEAPOLIS, MINN., RES. NO. 2020R-278, ESTABLISHING A TRUTH AND RECONCILIATION PROCESS FOR THE CITY OF MINNEAPOLIS (2020), (Oct. 16, 2020), <https://lms.minneapolismn.gov/Download/RCA/15173/Truth%20and%20Reconciliation%20Process%20Resolution.pdf> [<https://perma.cc/WE8B-7UPW>] (establishing a working group to explore the creation of a Truth and Reconciliation process with the "ultimate objective" of "nam[ing] and address[ing] the harms that have perpetuated racial disparities by implementing specific solutions with a prioritized focus on healing with historically Black/American Descendants of Slavery and American Indian/Indigenous communities").

# WHEN JUSTICE DOES NOT WORK: A SOLUTION FOCUSED APPROACH TO VIOLENCE AGAINST NATIVE WOMEN IN INDIAN COUNTRY

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## INTRODUCTION

[Diana] Millich, a member of the Southern Ute tribe of southwestern Colorado, called tribal police many times from her home on the reservation. But because her husband was not an American Indian, tribal police had no authority over him. Colorado's La Plata County overlaps the reservation, but county sheriffs had no jurisdiction over crimes committed against Indians on Indian land . . . . After Millich left her husband for good, he stormed into her office with a gun, swearing to kill her. A co-worker saved her life by pushing her out of the way, taking a bullet to the shoulder. This violent assault is what it took to finally trigger an arrest.<sup>1</sup>

Stories like Diana's are not uncommon. The jurisdictional maze between tribal, state, and federal governments is often a barrier to justice for Native<sup>2</sup> victims. Determining who has the authority to hold perpetrators responsible can be a daunting task given the centuries of legal groundwork that regulates such protections. Diana goes on to share that law enforcement officers used a tape measure to ascertain whether the attempted murder took place on or off the reservation, and thus, determine what law enforcement agency had jurisdiction. But in determining jurisdiction this is only one of many considerations. The majority of perpetrators of violence against Native women are non-Indian.<sup>3</sup> At

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1. Lorelei Laird, *Reclaiming Sovereignty: Indian tribes are retaking jurisdiction over domestic violence on their own land*, A.B.A. J., Apr. 2015, at 46–53, 47–48.

2. We use this term to include American Indians and Alaska Natives.

3. ANDRÉ B. ROSAY, NAT'L INST. OF JUST., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN: 2010 FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 44 (2016). The term "Indian" is used mostly in U.S. federal

this time, some tribes have limited authority to prosecute non-Indians who commit crimes in Indian country<sup>4</sup> and limited authority over non-Indians in civil matters.<sup>5</sup> The federal government has jurisdiction over most of these crimes, but they often do not prosecute.<sup>6</sup>

This paper will look at different possible ways to address violence against Native women given the various restrictions on the tribal government. Solutions that must come from the federal government are discussed, such as expanding definitions of crimes of violence against women, specifying full civil jurisdiction to tribes over protection orders, giving limited concurrent criminal jurisdiction over all perpetrators of domestic and dating violence in Indian country, and having a centralized database that logs pertinent information of Natives who are victims of gender-based violence. Possible cross-jurisdictional solutions such as cross deputization of law enforcement officers, coordinating evidence collection, and utilizing protection orders can become the norm with some communication and proceduralization. Possible solutions at the tribal government level include possible civil procedures, such as peacemaking, utilizing traditional ceremonies to assist with healing for the victim and community, and increasing social services to focus on protecting Native women in ways that the justice system is not.

## I. VIOLENCE AGAINST NATIVE WOMEN

Violence against Native women is a crisis and egregious violation of human rights. Native peoples are victims of violent crime at a rate of almost 2.5 times the national rate.<sup>7</sup> Lifetime violence has been experienced by eighty-four percent of Native women.<sup>8</sup> A majority of the violence against Native women is inter-racial. Ninety-six percent of sexual violence and ninety percent of intimate partner physical violence experienced by Native women described the perpetrator as inter-racial.<sup>9</sup> Native women are murdered at the second-highest rate in the U.S. compared to other racial and ethnic groups, and nearly half of

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legislation to determine jurisdiction. It generally refers to members (and those eligible for membership) of federally recognized tribes, including American Indian and Alaska Natives. “Non-Indian” is someone who is not a member (and not eligible to become a member) of a federally recognized tribe.

4. 18 U.S.C. § 1151 (defining Indian country as: “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”).

5. *Montana v. United States*, 450 U.S. 544, 565 (1981).

6. U.S. Department of Justice Declinations of Indian Country Criminal Matters. GAO-11-167R; 12/13/10

7. U.S. GOV’T ACCOUNTABILITY OFF., *GAO-11-167R*, U.S. DEP’T JUST. DECLINATIONS OF INDIAN COUNTRY CRIMINAL MATTERS 1 (2010).

8. ROSAY, *supra* note 3, at 44.

9. *Id.* at 19, 26.

Native homicide victims are killed by an intimate partner.<sup>10</sup> There is also an overrepresentation of Native women who are targeted for and victims of human trafficking.<sup>11</sup> Statistics for violent crimes in Indian country are not comprehensive and are an underestimate.<sup>12</sup> This effect is exacerbated as Native women often do not report such crimes to law enforcement officers. Amnesty International exposed how extreme this problem really is, compiling statistics from all over the U.S.<sup>13</sup> Having the facts and data to hold agencies and governments accountable spurred a response from many different organizations and governments, but change has been slow.

## II. JURISDICTIONAL PROBLEMS

### A. Criminal Jurisdiction in Indian Country

*“Dealing with deviant and criminal behavior is a central aspect of every culture, but for a century or longer Indian tribes have not been able to choose how to define or to deal with criminal behavior within their respective territories.”*<sup>14</sup> - Matthew L. M. Fletcher

#### i. Federal Policy

The federal government has dictated criminal jurisdiction in Indian country, piece by piece, through legislation and court decisions. This piecemeal approach has left jurisdictional gaps for non-Indians who commit crimes in Indian country. In criminal matters, *Ex Parte Crow Dog* (1883) affirmed that tribes are sovereign and have jurisdiction over tribal members unless expressly taken away by Congress.<sup>15</sup> In response to this ruling, Congress enacted several pieces of legislation to diminish tribal jurisdiction. The Major Crimes Act (1885) gave the federal government jurisdiction over enumerated major crimes,<sup>16</sup> which was upheld in *United States v. Kagama* (1886).<sup>17</sup> Almost a century later, the Supreme

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10. EMIKO PETROSKY ET AL., CTRS. FOR DISEASE CONTROL AND PREVENTION, RACIAL AND ETHNIC DIFFERENCES IN HOMICIDES OF ADULT WOMEN AND THE ROLE OF INTIMATE PARTNER VIOLENCE — UNITED STATES, 2003–2014, at 741-46 (2017).

11. Alexandra Pierce & Suzanne Koeplinger, *New Language, Old Problem: Sex Trafficking of American Indian Women and Children*, VAWNET, 3 (2011), [http://www.ncdsv.org/images/VAWnet\\_NewLanguageOldProblemSexTraffickingAmIndianWomenChildren\\_10-2011.pdf](http://www.ncdsv.org/images/VAWnet_NewLanguageOldProblemSexTraffickingAmIndianWomenChildren_10-2011.pdf) [<https://perma.cc/BB8A-MSM5>].

12. Jonathan Mills & Kara Brown, *Law Enforcement in Indian Country: The Struggle for a Solution*, 1-2 (2001), <https://www.standupca.org/Local%20Government/federal-deputization-agreements/indiancountry.pdf> [<https://perma.cc/F9BA-PVXX>].

13. See *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA*, AMNESTY INT’L (2007) <https://www.amnestyusa.org/wp-content/uploads/2017/05/mazeofinjustice.pdf> [<https://perma.cc/F9BA-PVXX>] [hereinafter *Maze of Injustice*].

14. MATTHEW L.M. FLETCHER, ADDRESSING THE EPIDEMIC OF DOMESTIC VIOLENCE IN INDIAN COUNTRY BY RESTORING TRIBAL SOVEREIGNTY 4 (2009).

15. *Ex Parte Crow Dog*, 109 U.S. 556, 560 (1883).

16. Major Crimes Act, 18 U.S.C. § 1153.

17. *United States v. Kagama*, 118 U.S. 375 (1886).



Court decided in *Oliphant v. Suquamish Indian Tribe* (1978) that tribes do not have criminal jurisdiction over non-Indians.<sup>18</sup> Exceptions included criminal contempt in court, enforcement of subpoenas, and exclusion from the reservation (except federal officials on duty). Next, the Supreme Court decided that tribes did not have criminal jurisdiction over non-member Indians<sup>19</sup> who commit crimes on Indian land in *Duro v. Reina* (1990).<sup>20</sup> Congress then enacted the *Duro Fix* by amending the Indian Civil Rights Act of 1968 (ICRA) to state that that tribes have the inherent power to exercise criminal jurisdiction over all Indians, including non-member Indians.<sup>21</sup> This was upheld in *United States v. Lara* (2004), affirming that tribes can prosecute non-member Indians.<sup>22</sup> Thus, tribes only have criminal jurisdiction over Indians committing non-major crimes and non-Indians can only be criminally prosecuted in federal court (major crimes) or in state courts.

Most recently, tribal sovereignty was affirmed in *McGirt v. Oklahoma* (2020) in a landmark Supreme Court ruling where the 1866 Muscogee (Creek) Nation treaty was legitimized and the definition of “Indian Country” was upheld.<sup>23</sup> Yet, tribal sovereignty is again under question as the Supreme Court granted certiorari for *United States v. Cooley*.<sup>24</sup> In his dissent, Ninth Circuit Judge Collins stated, “[r]aising the bar for tribal investigations of non-Indian misconduct on fee lands from reasonable suspicion to ‘probable-cause-plus’ is a very big deal [it] literally may have life-or-death consequences for many of the hundreds of thousands of persons who live on Indian reservations . . . .”<sup>25</sup>

In 2013, Congress reauthorized the Violence Against Women Act (VAWA)<sup>26</sup> and tribes saw a partial restoration of tribal criminal jurisdiction. VAWA contained a provision recognizing Indian tribes’ inherent sovereign power to exercise criminal jurisdiction over non-Indians under certain limited circumstances.<sup>27</sup> Non-Indians who commit intimate partner violence against an Indian spouse/domestic partner/dating partner or violate a qualifying protection order on tribal lands falls under Special Domestic Violence Criminal Jurisdiction (SDVCJ) of VAWA and may be prosecuted by participating tribes.<sup>28</sup> The SDVCJ has been implemented by only 27 of the 574 federally recognized tribes in the

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18. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203 (1978).

19. This term refers to Indians who are not members of the tribe seeking criminal jurisdiction, but are usually members of a different tribe

20. *Duro v. Reina*, 495 U.S. 676, 679 (1990).

21. Indian Civil Rights Act of 1968, 25 U.S.C. § 1301(2) (amending 25 U.S.C. § 1301).

22. *United States v. Lara*, 541 U.S. 193 (2004).

23. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2464, 2468 (2020).

24. *United States v. Cooley*, 947 F.3d 1215 (9th Cir.), *cert. granted*, 141 S. Ct. 870 (2020).

25. *Id.* at 1236 (Collins, J., dissenting).

26. Violence Against Women Act (VAWA) Reauthorization of 2013, Pub. L. 113-4, 127 Stat. 54.

27. *Id.* § 904.

28. *Id.*

U.S.<sup>29</sup> as tribes must comply with a series of federal statutory requirements, which can be burdensome.

VAWA's SDVCJ does not generally cover crimes of the following nature: where both the victim and offender are non-Indian, where the victim and offender are strangers, when the offender commits the crimes outside of Indian country, or in cases of elder or child abuse where an order of protection is not violated or does not exist.<sup>30</sup> Though additional protections are available, this legislation does not go far enough and as a result, it affords limited protections for Native women.

American Indians within Indian country must heavily rely on the federal government for protection as the federal government has almost exclusive jurisdiction over crimes committed against American Indians by non-Indians (with the exception of the PL-280 states,<sup>31</sup> in which the state has exclusive jurisdiction) and at least concurrent jurisdiction for most felonies committed against American Indians. Generally, tribes have criminal jurisdiction only over Indians in Indian country and have sentencing limitations imposed by the federal government of a maximum of 1 year in jail and a \$5,000 fine.<sup>32</sup> The Tribal Law and Order Act allows for enhanced sentencing of a maximum of 3 years in jail and a \$15,000 fine for those tribes who follow provisions designed to provide protections to defendants in these cases.<sup>33</sup> The state has jurisdiction over matters that occur between non-Indians in Indian country and those states that the federal government has passed on jurisdiction through legislation (PL-280).<sup>34</sup>

It is challenging to protect Native women under the current legal framework which is plagued by loopholes and largely undermines tribes' sovereignty. This leads to people feeling unsafe on their own land, in their own homes. These federal laws have contributed to the violence against women crisis in Indian country today.<sup>35</sup>

## ii. Policing, Investigations, and Evidence Collection

Another jurisdictional issue occurs within the policing and investigation realms. Policing and investigation in Indian country are handled mainly through tribal police, the Bureau of Indian Affairs (BIA), and the Federal Bureau of

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29. *Currently Implementing Tribes*, NAT'L CONG. AM. INDIANS, <https://www.ncai.org/tribal-vawa/get-started/currently-implementing-tribes> (last updated Feb. 2021) [<https://perma.cc/QQC8-VXE3>].

30. *Violence Against Women Act (VAWA) Reauthorization 2013*, DEPT. OF JUST., <https://www.justice.gov/tribal/violence-against-women-act-vawa-reauthorization-2013-0> (last visited Mar. 30, 2021) [<https://perma.cc/WJ7R-PM66>].

31. *Public Law 280*, TRIBAL CT. CLEARINGHOUSE, <http://www.tribal-institute.org/lists/pl280.htm> (last visited May 19, 2021) [<https://perma.cc/C5D7-QXK6>].

32. 25 U.S.C. § 1302(a)(7)(B).

33. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2258, 2279.

34. For a more in-depth discussion of jurisdiction in Indian country, see Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L.J. 123 (2001).

35. See generally *Maze of Injustice*, *supra* note 13.

Investigation (FBI).<sup>36</sup> Which agency has jurisdiction in each case can be complicated due to the constraints on criminal jurisdiction discussed above. In some cases, the BIA has contracted with the tribal government for the tribal government to provide law enforcement to the tribe.<sup>37</sup> In these situations, the tribal law enforcement still only has the jurisdiction allowed to any tribal law enforcement agency. A lack of communication between agencies leads to further delays, as no one is accountable.<sup>38</sup>

There are very few law enforcement officers in Indian country and often those officers have to cover a large area of land. It is estimated that there are 1.3 full-time law enforcement officers for every 1,000 Natives in Indian country, compared to 2.9 law enforcement officers for rural, non-Indian communities.<sup>39</sup> This results in officers being forced to prioritize which calls they respond to first, and if the calls are located great distances from each other, it could be hours before the officer is able to respond to the next call. Within a certain jurisdiction, law enforcement officials may only enforce the jurisdictional laws in which they are deputized.<sup>40</sup>

One further consideration is the race of the perpetrator(s) and victim(s), as tribal police officers only have jurisdiction over Indians in Indian country.<sup>41</sup> Generally, if an officer responds to a call in which the perpetrator is non-Indian and the victim is Indian, tribal officers may detain, but not arrest, a non-Indian.<sup>42</sup> This can become a large problem if the federal government does not come and make an arrest. Additionally, tribal law enforcement may not pursue a non-Indian once they leave Indian country. Thus all a perpetrator has to do is flee from tribal police and make it out of the reservation boundary onto state land, where the tribal officer does not have jurisdiction. Once on state land, the state police officer potentially has jurisdiction, but unless a state officer happens to be waiting there and has reason to apprehend, the perpetrator has successfully fled the crime. Many people in Indian country have stated they do not often call the

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36. INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS, U.S. DEP'T JUST. 5-6 (2018); see generally Stewart Wakeling, Miriam Jorgensen, & Susan Michaelson, *Policing on American Indian Reservations*, NAT'L INST. JUST. J. 1 (2001).

37. These "638 contracts" between BIA and the tribes are based on Public Law 93-638. See Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203.

38. MONT. DEPT. JUST., LOOPING IN NATIVE COMMUNITIES, REPORT TO THE STATE-TRIBAL RELATIONS INTERIM COMMITTEE 21 (2020).

39. *Tribal Law Enforcement*, TRIBAL L. & POL'Y INST., <https://www.tribal-institute.org/lists/enforcement.htm> (last visited May 19, 2021) [<https://perma.cc/23UT-U5KT>].

40. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.07, at 763 (2005) ("a valid arrest may not be made outside the territorial jurisdiction of the arresting authority.") (citing WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.3(e) n.2 (West 3d ed. 2000)); see also State v. Eriksen, 259 P.3d 1079 (Wash. 2011); State v. Hook, 476 N.W.2d 565 (N.D. 1991).

41. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); Mills & Brown, *supra* note 12 at 1-2.

42. Mills & Brown, *supra* note 12 at 2; see *id.*; RONET BACHMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 102 (2008).

police as they see it as ineffective<sup>43</sup> and this is evidenced through the jurisdictional complications, delays in response, and not knowing which agency is to respond.

Investigations have the same issues as arrests. A lack of resources leads to long delays before investigations occur, often resulting in decompensation of evidence. Non-Indian agency investigators often show inappropriate responses, especially around stereotypes of race and alcohol.<sup>44</sup> Federal investigators often lack specific training to deal with domestic violence and sexual assault matters. Law enforcement officials who are not part of the tribal communities often lack cultural knowledge and respond in ways that can lead to additional traumatization.<sup>45</sup> A 2014 study found that only about one-third (31%) of 650 Native American lands are within 60 miles of any sexual assault services (i.e. sexual assault examiner and/or sexual assault response team programs).<sup>46</sup> All of these delays put the victim at further risk<sup>47</sup> as the crime has been reported, the perpetrator likely identified, but no arrest yet made.

### iii. High Rates of Federal Declination

The third major issue with addressing violence against Native women from a criminal perspective is lack of prosecution. The Government Accountability Office (GAO) looked into declinations of criminal matters by the federal government in Indian country.<sup>48</sup> Using data from the federal case tracking system, there was an overall declination rate of 50% of cases from Indian country that were referred for prosecution from all agencies.<sup>49</sup> Cases involving assault and sexual abuse comprised over half of the cases referred to the federal government.<sup>50</sup> Declination rates by crimes most relevant to violence against women were: Assault 46%;<sup>51</sup> Sexual abuse and related offenses 67%;<sup>52</sup> other

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43. See Melissa Tehee & Cynthia Willis Esqueda, *American Indian and European American Women's Perceptions of Domestic Violence*, 23 J. FAM. VIOLENCE 25, 31 (2008) (stating that almost 3/4 of American Indian women would need to require medical attention before they would consider calling police); Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564 (2016).

44. *Maze of Injustice*, *supra* note 13, at 16, 47.

45. *Id.* at 51.

46. Ashley Juraska et al., *Sexual Assault Services Coverage on Native American Land*, J. FORENSIC NURSING 92, 94 (2014).

47. *Maze of Injustice*, *supra* note 13, at 48.

48. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 7, at 1.

49. *Id.* at 16-17. This data is from the years 2005 through 2009 and comes from the Legal Information Office Network System (LIONS). *Id.* at 2, 16-17. LIONS does not have a category for tribal law enforcement or tribal prosecutor under the referring agency. Tribal referrals may be categorized under "other" or "state/county/municipal authorities." *Id.* at 8.

50. *Id.* at 9 (noting that these cases accounted for 55% of Indian country matters received).

51. *Id.* at 14, 24 (citing the relevant statute as 18 U.S.C. Chapter 7).

52. *Id.* (citing the relevant statutes as 18 U.S.C. Chapter 109A (sexual abuse), Chapter 109B (sex offender registration requirements), Chapter 110 (child pornography), and Chapter 117 (involving transportation of the victim for illegal sexual activity)).

offenses involving threats, force, or violence 55%;<sup>53</sup> Homicide, including attempts 47%.<sup>54</sup> Another report looked at felony cases referred by tribal prosecutors, and the estimated declination rate was 85%.<sup>55</sup> Given that most of the victims of these violent crimes are Native, the federal government has a long way to go to provide safety for Indian women in Indian country.

There are a couple of factors that lend to the high declination rate. The most common reason documented for not prosecuting a case is “weak or insufficient admissible evidence.”<sup>56</sup> This response was given on 42% of the cases from the GAO data.<sup>57</sup> This could be a problem of law enforcement investigations and/or in communication between agencies. There is not a lot of funding that goes towards federal law enforcement in Indian country.<sup>58</sup> There are often long delays once someone has contacted law enforcement as there are few officers and long distances to cover.<sup>59</sup> It may take days or weeks for an investigation to occur. The integrity of physical evidence decreases over time and often there is no one to collect it for days, months, sometimes years, if at all.<sup>60</sup> Other factors in the high declination rate include the distance between where the crime took place and where the crime is prosecuted.<sup>61</sup> There are many barriers for both the victim(s) and any witnesses to travel off of the reservation and to a federal court. Additionally, federal prosecutors are bound by federal statutes as to the type of crimes they can prosecute.<sup>62</sup>

Given the lack of resources that the federal government has for Indian country, it is no wonder why the declination rates for domestic violence are high. Often the types of evidence are more time-sensitive and often not as concrete for domestic violence and sexual assault as for other crimes, such as theft, where the evidence might be found in the possession of the perpetrator. Many federal prosecutors only move forward on cases they are confident they will win.<sup>63</sup> It is hard to believe that the federal government is equipped to prosecute domestic violence cases when they are declining to prosecute almost half of homicide cases.

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53. *Id.* (citing the relevant statutes as 18 U.S.C. Chapter 41 (extortion and threats), Chapter 55 (kidnapping), Chapter 90A (protection of unborn children), and Chapter 110A (domestic violence and stalking)).

54. *Id.* (citing the relevant statute as 18 U.S.C. Chapter 51).

55. *Law Enforcement in Indian Country, Hearing Before the Comm. on Indian Affs.*, 110th Cong. 46 (2007) (statement of Hon. Joe Garcia, President of the National Congress of American Indians).

56. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 7, at 3.

57. *Id.*

58. FLETCHER, *supra* note 14, at 5.

59. *Id.* at 6.

60. *See generally id.*

61. *Id.* at 6.

62. *Id.*

63. *Maze of Injustice*, *supra* note 13, at 66.

There is also a perception that these “run of the mill” cases are not important enough for the federal government to prosecute.<sup>64</sup> The phrase “don’t make a federal case out of it” lends to this perception.<sup>65</sup> Many federal prosecutors went the federal route to work on high profile cases and often Indian country is not a desired position.<sup>66</sup>

#### iv. Missing and Murdered Indigenous Women, Girls, and Two Spirit (MMIWG2)

There is little in the way of data that accurately captures the realities of violence (i.e. sexual assault, domestic violence, dating violence, human trafficking, and missing and murdered Indigenous women, girls, and two-spirit) experienced by Native peoples. Some agencies across the country have collected data on certain crimes, but there are gaps. For example, some agencies may collect domestic violence data in their state but MMIWG2 data collection efforts, by and large, have been nonexistent at a state and national level.<sup>67</sup> To address this, Indigenous grassroots efforts led the way and created a database specifically for gathering and housing MMIWG2 data.<sup>68</sup> A growing number of states have recently introduced and passed legislation (e.g. North Dakota, Montana, Arizona, Washington, Wyoming), that at a basic level, requires their state to collect and store MMIWG data.<sup>69</sup> Additionally, Savanna’s Act was signed into federal law on October 10, 2020.<sup>70</sup> Under Savanna’s Act, law enforcement agencies are required to generate protocols and guidelines to address cases of missing and murdered Native Americans.<sup>71</sup> This act also requires law enforcement to collect and enter data by law enforcement into a database. State legislation and Savanna’s Act are building blocks for further legislative protections for Native women - but there is more to be done.

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64. Michael Riley, *Promises, Justice Broken*, DENVER POST (May 7, 2016, 4:58 PM), <https://www.denverpost.com/2007/11/10/promises-justice-broken/> [https://perma.cc/EHJ6-V37L].

65. See Kevin K. Washburn, *Tribute: American Indians, Crime and The Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 ARIZ. ST. L.J. 1003, 1013–14 (2008).

66. See Riley, *supra* note 64.

67. Based on authors’ experiences. See also URB. INDIAN HEALTH INST., MISSING AND MURDERED INDIGENOUS WOMEN & GIRLS: A SNAPSHOT OF DATA FROM 71 URBAN CITIES IN THE UNITED STATES (2018), <http://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf> [https://perma.cc/NQ6T-HWRA].

68. See MMIWG2 Database, SOVEREIGN BODIES INST. (last visited July 28, 2021), <http://www.sovereign-bodies.org/mmiw-database> [https://perma.cc/AJN2-PFKK].

69. Melissa Tehee & Kee Straits, *Missing and murdered: Act now for comprehensive protection of Indigenous women and girls*, THE HILL (Feb. 22, 2020), <https://thehill.com/blogs/congress-blog/politics/484201-missing-and-murdered-act-now-for-comprehensive-protection-of> (Most states have not yet pushed to recognize two-spirit people in their databases).

70. Savanna’s Act, Pub. L. No. 116-165, 134 Stat. 760 (2020).

71. *Id.*

Many agencies that provide lifesaving services to victims/survivors of violence are significantly underfunded, with grants often making up a substantial portion of their budget.<sup>72</sup> Funding from grants is often contingent upon the data a victim services or tribal victim services agency provides in their grant proposal. The awarded amount of funding may also vary based upon the demonstrated need, and thus accurate data collection is imperative when seeking funding and resources. With funding, agencies are better able to appropriately address the crisis of violence against Native women. Without data and a centralized database, the country is unable to see the magnitude of violence that exists and Native people are denied access to important resources and outcomes.

*B. Civil Jurisdiction in Indian Country*

For civil jurisdiction to be vested, the court must have both personal jurisdiction over the parties and subject matter jurisdiction over the matter at hand. In *Williams v. Lee* (1959), the Supreme Court ruled that civil suits against an Indian arising on Indian land must be taken to tribal court, as state courts have no jurisdiction.<sup>73</sup> In *Montana v. United States* (1981), the Supreme Court applied *Oliphant* and ruled that inherent sovereign powers of Indian tribes do not extend to non-members subject to these exceptions:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter a *consensual relationship* with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements . . . . A tribe may also [regulate] the conduct of non-Indians on fee lands within its reservation when that *conduct threatens* or has some direct effect on the political integrity, the economic security, or the *health or welfare* of the tribe.<sup>74</sup>

*Nevada v. Hicks* (2001) was a civil action by a tribal member in tribal court against state officials in their individual capacities arising from tort and civil rights violations while executing a search warrant on tribal land.<sup>75</sup> The Supreme Court held that tribal court (adjudicatory) jurisdiction does not exceed tribal legislative (regulatory) jurisdiction and thus, tribes do not necessarily have regulatory authority over non-members on tribal lands.<sup>76</sup>

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72. See *Funding & Appropriations*, NAT'L NETWORK END DOMESTIC VIOLENCE, <https://nnedv.org/content/funding-appropriations/> (last visited May 19, 2021) [<https://perma.cc/J362-9UFJ>].

73. *Williams v. Lee*, 358 U.S. 217, 221–23 (1959).

74. *Montana v. United States*, 450 U.S. 544, 548, 565–66 (1981) (emphasis added) (citations omitted) (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

75. *Nevada v. Hicks*, 533 U.S. 353, 355–57 (2001).

76. *Id.* at 364.

### III. POSSIBLE SOLUTIONS

#### A. Amend Federal Legislation

##### i. Definitions

Federal statutes define what crimes the federal government has the authority to prosecute. These definitions may hamper the ability of federal prosecutors to move forward with a case involving domestic violence. For example, 18 U.S.C. § 113, Assaults within the Maritime and Territorial Jurisdiction, defines what types of assaults can be prosecuted along with maximum punishments.<sup>77</sup> Most domestic violence assaults fall into categories with a maximum sentence of one year.<sup>78</sup> Domestic assaults on Native Americans by non-Indians resulting in *substantial bodily injury*<sup>79</sup> are only subject to a maximum sentence of five years based on federal statutes. Federal statute does allow for an increased sentence, but the assault must result in *serious bodily injury*,<sup>80</sup> which is a much more extreme standard.

VAWA (2013) amended three common offenses experienced in Indian country domestic violence. These changes include making assault by strangling or suffocating punishable by up to ten years, an assault resulting in substantial bodily injury punishable up to five years, and an assault by striking, beating, or wounding punishable up to one year.<sup>81</sup> Federal definitions of crimes should be amended so that the federal government can prosecute more types of crimes with more appropriate sentences.

##### ii. Specify Full Civil Jurisdiction for Full Faith and Credit Clause

Despite the large problem of violence against women, Congress failed to reauthorize VAWA in 2019 and adopt new provisions that would better protect women, including Native women. Presently, VAWA (2013) remains in effect. VAWA's Full Faith and Credit clause pertains to civil orders of protection, as the purpose is to ensure that every protection order is recognized and enforced. VAWA (2013) begins to address a jurisdictional gap that prevents tribes from granting full faith and credit to criminal enforcement to orders of protection violated by non-Indian perpetrators and the ability to prosecute civilly.

However, aspects of VAWA remain ambiguous, such as the extent to which tribes must criminally enforce orders of protection violated by non-Indian

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77. 18 U.S.C. § 113(a).

78. 18 U.S.C. § 113 (a) (4) "Assault by striking, beating, or wounding, by a fine under this title or imprisonment for not more than six months, or both; (5) Simple assault, by a fine under this title or imprisonment for not more than six months, or both . . . ."

79. 18 U.S.C. § 113 (b)(1) "the term "substantial bodily injury" means bodily injury which involves: (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty."

80. 18 U.S.C. § 1365 (3) "the term "serious bodily injury" means bodily injury which involves: (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

81. Violence Against Women Act, *supra* note 26.



perpetrators.<sup>82</sup> It is also unclear if the tribe must meet the adjudicatory jurisdiction requirements that the Supreme Court has laid out, or if these requirements are considered met for the purposes of enforcing a valid protection order from a jurisdiction that met the requirements when the protection order was issued. Clarifying these potential jurisdiction gaps would make tribal communities safer and allow for deterrence of these violent crimes on Indian land. Then tribal courts could fully utilize their sovereignty in enforcing both tribally issued and state issued protection orders, thus not letting anyone escape consequences due to the gap.

iii. Expand Tribal Jurisdiction for Domestic Violence

*“Native women should not be abandoned to a jurisdictional loophole.”*<sup>83</sup> - Senator Tom Udall

The most obvious way to combat domestic violence in Indian country is to hold violators accountable for their actions. Criminal prosecution is a common way of doing this, but since 1978, tribes have been unable to prosecute non-Indians for criminal acts committed in Indian country<sup>84</sup> and the federal government has not been prosecuting these cases. One way to protect Native women and to deal with the lack of prosecution of domestic violence in Indian country is to directly deal with the main issue – jurisdiction. This started to be addressed by VAWA (2013), but it still requires that the defendant must have sufficient ties to the prosecuting tribal community, such as living or working in Indian country or being the spouse or intimate partner of a member of the tribe.<sup>85</sup> This jurisdiction would be concurrent with the state and federal government, as it is based on inherent sovereignty not delegated federal authority and does not take away any federal power. The defendant would be afforded the same constitutional protections from the tribal court that would be given in a state or federal court.<sup>86</sup>

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82. Melissa L. Tatum, *Law Enforcement Authority in Indian Country*, 4 TRIBAL L.J. 2, 20-25 (2004).

83. Jonathan Weisman, *Measure to Protect Women Stuck on Tribal Land Issue*, N.Y. TIMES (Feb. 10, 2013), <https://www.nytimes.com/2013/02/11/us/politics/violence-against-women-act-held-up-by-tribal-land-%0aissue.html> [<https://perma.cc/53YE-N5Z7>].

84. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211–12 (1978).

85. See NAT’L CONGRESS AM. INDIANS, VAWA 2013’S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION (SDVCJ) OVERVIEW, [https://www.ncai.org/tribal-vawa/overview/VAWA\\_Information\\_-\\_Technical\\_Assistance\\_Resources\\_Guide\\_Updated\\_November\\_11\\_2018.pdf](https://www.ncai.org/tribal-vawa/overview/VAWA_Information_-_Technical_Assistance_Resources_Guide_Updated_November_11_2018.pdf) (last visited May 19, 2021) [<https://perma.cc/LW5S-93KW>].

86. See Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234(c), 124 Stat. 2258, 2280 (guaranteeing same rights).

*B. Inter-Jurisdictional Solutions*

i. Protection Orders and the Violence Against Women Act

*"A protection order's value, however, is only as broad as its enforceability."*<sup>87</sup> – Melissa Tatum

A protection order is a legal document issued by a court of law to provide protection to victims of domestic violence. Due to the high rates of violence against Native women, these orders are especially important. However, because tribal courts are limited in their jurisdiction, protection orders granted by tribal courts also have limitations. VAWA remedies some of these obstructions to safety and defines a protection order as:

(A) any . . . order issued by a *civil or criminal* court for the purpose of preventing violent or threatening acts . . . against another person . . . ; and (B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law . . .<sup>88</sup>

Tribal courts should fully utilize the provisions allowed in part B, such as child support, exclusive use of the home and/or vehicle, along with other civil remedies such as paying for ceremonies for the victim and community service, as well as exclusion from tribal lands if necessary.<sup>89</sup>

VAWA's Full Faith and Credit clause allows courts to enforce a protection order from another jurisdiction.<sup>90</sup> It should be noted that federal courts are not included.<sup>91</sup> This allows for the enforcement of a protection order in a jurisdiction that, prior to the violation, would not have had personal jurisdiction over the offender.<sup>92</sup> One of the major benefits is that the protected party does not need to provide notice to the offender in each new jurisdiction, thus not alerting the offender of where to find the victim.<sup>93</sup>

The enforcing jurisdiction must enforce the protection order "as if it were its own."<sup>94</sup> This includes all provisions of the protection order. Tribes need to have civil penalties in the tribal code so that they can administer penalties when a protection order has been violated. Tribes can "enforce any order through civil

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87. Melissa L. Tatum, *Establishing Penalties for Violations of Protection Orders: What Tribal Governments Need to Know*, 13. KAN. J.L. & PUB. POL'Y 125, 125 (2003) [hereinafter Tatum 2003].

88. 18 U.S.C. § 2266(5).

89. For more discussion regarding protection orders, see Tatum 2003, *supra* note 86; Hallie Bongar White et al., *Creative Civil Remedies against Non-Indian Offenders in Indian Country*, 44 TULSA L. REV. 427 (2008).

90. 18 U.S.C. § 2265(a).

91. *Id.*

92. *Id.*

93. 18 U.S.C. § 2265(d).

94. 18 U.S.C. § 2265(a).

contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe.”<sup>95</sup>

## ii. Cross Deputization

Approximately 234 tribes operate law enforcement agencies.<sup>96</sup> Tribal police who have been deputized with other agencies can enforce the laws of the other agencies’ jurisdiction, in some states.<sup>97</sup> This allows agencies to arrest non-Indians as well as the ability to pursue into the deputized jurisdiction.<sup>98</sup> This also allows for officers that are part of the community to respond, rather than those outside of the community who may not be working towards the same goals.<sup>99</sup> However, state or federal agencies may not want to deputize tribal officers without something in return.

Cross-deputization between the tribal police and the police of another jurisdiction is more efficient.<sup>100</sup> It helps stop crimes in the moment if police are alerted and allows for a larger pool of officers that could potentially respond.<sup>101</sup> Additionally, officers from both jurisdictions can enforce laws from either jurisdiction.<sup>102</sup> However, for this to be effective, tribal governments should require state police to attend trainings that teach about the culture and history of the tribe along with tribal law.<sup>103</sup> The Hoopa Valley Tribe and Humboldt county police in California have an agreement that includes these types of provisions.<sup>104</sup>

Often these agreements are with state police officers (sheriffs or highway patrol) but can include other local agencies such as county and city police departments that surround Indian country. The Cherokee Nation in Oklahoma operates a law enforcement agency called the Cherokee Nation Marshals, who are cross-deputized with 50 different law enforcement agencies, at all levels from local to federal.<sup>105</sup> They even have a specialty team that works specifically to combat domestic violence.<sup>106</sup> The multi-jurisdictional deputization allows for additional training of tribal law enforcement to meet the requirements of state and federal agencies. This includes training on preserving and collecting evidence for the other agencies if the crime falls under their jurisdiction. This is much less expensive than hiring additional tribal officers.<sup>107</sup> But the tribal government needs to consider things like insurance and sovereign immunity in

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95. 18 U.S.C. § 2265(e).

96. STEVEN W. PERRY, U.S. DEP’T JUST., TECHNICAL REPORT: TRIBAL CRIME DATA-COLLECTION ACTIVITIES 2 (2020).

97. Mills & Brown, *supra* note 12, at 12-13.

98. *Id.* at 13.

99. *Id.*

100. *Id.* at 14.

101. *Id.*

102. *Id.* at 13.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Marshal Service*, CHEROKEE NATION, <https://www.cherokee.org/all-services/marshal-service/> (last visited Mar. 31, 2021) [<https://perma.cc/2LJU-7RX5>].

107. Mills & Brown, *supra* note 12, at 14.

the tribal police officers' different roles and who pays for what.<sup>108</sup> Additionally, they must consider that cross-deputization creates issues when officers do not hold the same cultural beliefs and worldviews, which can allow decisions to be made based on stereotypes and/or racism. The tribal government may try to incorporate a clause into the agreement that allows for tribal approval of officers that are most likely to respond to Indian country, or at least a way to file complaints.

### iii. Evidence Collection

*"Current practices need to be changed so that forensic examinations can be conducted in facilities on reservations or nearby instead of requiring women to travel hundreds of miles to a very unfamiliar facility where culturally appropriate support may not be available."*

<sup>109</sup> – Amnesty International

The Government Accountability Office conducted a study on the response of Indian Health Services (IHS) and tribally operated hospitals to domestic violence and sexual assault.<sup>110</sup> They found inconsistent services offered, policies, and procedures.<sup>111</sup> Only 26 out of 45 hospitals had the ability to conduct forensic medical exams, while the other 19 referred victims to other facilities.<sup>112</sup> This is concerning, as much of the evidence is time sensitive and victims may have to travel a long way or wait until a center elsewhere opens for the day. And some victims will choose not to go: they may not have reliable transportation, or may not want to be subjected to such a personal examination by someone outside of their community after they have experienced such a trauma.

We need to provide training and funding for more Sexual Assault Nurse Examiners (SANEs) and facilities that can provide these types of examinations 24 hours a day. For locations where this is not as feasible, there should be tribal community members to provide emergency first aid to victims, collect evidence if appropriate, and provide resources and referrals. The SAFESTAR (Sexual Assault Forensic Examinations, Support, Training, Access and Resources) program through the Southwest Center for Law and Policy is an example of such training.<sup>113</sup> The community members are trained to document injuries and collect evidence.<sup>114</sup> They do not complete an extensive sexual assault exam, as they do not have the specialized equipment or training, but they do collect and document

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108. *See id.* for further discussion and examples.

109. *Maze of Injustice*, *supra* note 13, at 54.

110. U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-29, INDIAN HEALTH SERVICE: CONTINUED EFFORTS NEEDED TO STRENGTHEN RESPONSE TO SEXUAL ASSAULTS AND DOMESTIC VIOLENCE (2011) [hereinafter CONTINUED EFFORTS NEEDED].

111. *Id.*

112. *Id.*

113. *Frequently Asked Questions*, SAFESTAR <https://www.safestar.net/training/> (last visited Apr. 18, 2021) [<https://perma.cc/U87L-BNL9>].

114. *Id.*

much more than would otherwise be done so long as the victim consents.<sup>115</sup> The SAFESTARs do not push a victim into reporting or submitting evidence and support the victim's choice in a culturally appropriate manner.<sup>116</sup>

The evidentiary chain of custody must be considered when collecting evidence.<sup>117</sup> If this is done incorrectly, the evidence may not be admissible in a prosecution and the case may be dropped.<sup>118</sup> It is best to develop protocols with law enforcement agencies in the jurisdictions that have the ability to prosecute for both collection and storage. These things taken into consideration together allow for the chance to have a tribal response to the needs of evidence collection.<sup>119</sup>

### C. Tribal Level Solutions

#### i. DV Court/Peacemaking for Civil Cases

Many tribes use a restorative justice approach through peacemaker courts, talking circles, and sentencing circles.<sup>120</sup> These allow all parties affected by the issues in the case to participate and restore the relationships within the community.<sup>121</sup> This may mean that community members attend as well, such as elders, religious leaders, extended family, and others who have input on the matter.<sup>122</sup> A judge or peacemaker oversees the procedure. In the Navajo Nation, this person starts with a prayer to help restore the community and then allows everyone to tell the story as they understood it.<sup>123</sup> Often the elder or peacemaker tells a tribal story that lends to the situation being discussed.<sup>124</sup> The major difference in this type of proceeding compared to a court hearing is that the group tries to find and address the root problem instead of punishing the person, which

115. *Id.*

116. Genoveva Antone et al., *Empowering Women in Our Communities to Combat Sexual Violence Through SAFESTAR*, SW. CTR. FOR L. & POL'Y (Dec. 12, 2012), tribal-institute.org/2012/B8PP.pdf [https://perma.cc/A86F-HXEN].

117. CONTINUED EFFORTS NEEDED, *supra* note 110.

118. BONNIE CLAIRMONT, SEXUAL ASSAULT RESPONSE TEAMS: RESOURCE GUIDE FOR THE DEVELOPMENT OF A SEXUAL ASSAULT RESPONSE TEAM (SART) IN TRIBAL COMMUNITIES (2008).

119. For additional information on procedure development, see *id.*

120. Donna Coker, *Restorative Justice, Navajo Peacemaking and Domestic Violence*, 10 THEORETICAL CRIMINOLOGY 67, 69-70 (2006); RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE (2009); Eileen M. Luna-Firebaugh, *Incarcerating Ourselves: Tribal Jails And Corrections*, 83 PRISON J. 51, 62-64 (2003); Marianne O. Nielsen, *Navajo Nation Courts, Peacemaking and Restorative Justice Issues*, 31 J. LEGAL PLURALISM & UNOFFICIAL L. 105, 109-112 (1999); James W. Zion & Robert Yazzie, *Navajo Peacemaking: Original Dispute Resolution and a Life Way*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 151, 151 (Dennis Sullivan & Larry Tiff eds., 2006); see Emily Gaarder, *Lessons From a Restorative Circles Initiative for Intimate Partner Violence*, 3 RESTORATIVE JUST. 342, 344-46 (2015) (discussing restorative justice approaches in other settings of intimate partner violence).

121. AUSTIN, *supra* note 120; Zion & Yazzie, *supra* note 120.

122. Nielsen, *supra* note 120, at 107; see generally AUSTIN, *supra* note 120.

123. AUSTIN, *supra* note 120, at 23; Nielsen, *supra* note 120, at 111.

124. Coker, *supra* note 120, at 70.

would not effectively address future behavior.<sup>125</sup> This type of proceeding is designed to give the victim a voice and address the wrongs that have occurred. If the victim does not feel safe directly speaking up to the accused, there are always family members of the victim that can relay the same messages.<sup>126</sup> The group then comes up with an outcome that everyone agrees on, which can include a suggested sentence, retributive justice to compensate the victim and victim's family, community service, and often treatment for the accused and/or victim, such as a ceremony or drug and alcohol treatment.<sup>127</sup>

Peacemaking has been used in some tribes for criminal domestic violence cases.<sup>128</sup> In the context of peacemaking, the goal in domestic violence cases is to "disrupt the batterer's control of the woman by increasing her material and social resources, by undermining his social supports for abusive conduct, by establishing consequences for re-abuse and by providing meaningful opportunities for the abuser to change his conduct."<sup>129</sup> Navajo Peacemaking agreements often include steps for the batterer to change behavior, such as substance abuse treatment.<sup>130</sup> Navajo Peacemaking differs from other types of restorative justice in that the peacemaker is not impartial and uses traditional Navajo wisdom to inform the process.<sup>131</sup> If a protection order is part of the proceedings, by statute,<sup>132</sup> the peacemaker must have specialized domestic violence training.<sup>133</sup>

A study of peacemaking in the Navajo Nation was conducted with cases involving Navajo participants presenting with interpersonal violence in a criminal context.<sup>134</sup> These cases were then followed up 12 and 24 months after the case.<sup>135</sup> Participants of peacemaking were generally "very satisfied" with the perceived fairness, justice, and outcome of peacemaking, including both the victim and defendant, and this finding held true across all social and demographic groups that participated.<sup>136</sup> The peacemaking participants reported recidivism at 29%, compared to reports of participants from the family court, who reported recidivism of 64%.<sup>137</sup> Also, getting family members and the community involved decreases costs by implementing "traditional probation" through the watchful eye of the community.<sup>138</sup>

There would be some differences in using this in civil cases. A tribe would need to have a civil statute that allows for this type of proceeding for domestic

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125. *Id.*

126. *Id.*

127. *Id.*; AUSTIN, *supra* note 120, at 23.

128. Coker, *supra* note 120, at 70.

129. *Id.* at 68.

130. *Id.* at 70.

131. ERIC K. GROSS, EVALUATION/ASSESSMENT OF NAVAJO PEACEMAKING 5 (2001).

132. NAVAJO NATION CODE ANN. tit. 9, § 1652.

133. Coker, *supra* note 120, at 70.

134. GROSS, *supra* note 131, at 18.

135. *Id.* at 21.

136. *Id.* at 27, 37.

137. *Id.* at 45.

138. *Id.* at 48.

violence. The tribe would want to consider what types of cases should be eligible. A case for violation of a protection order would potentially be more dangerous for a victim, as the perpetrator has already violated a court order. Research from sentencing circles in Canada has found that victims may not be able to speak up and give their opinion for various reasons, including disagreeing with community members and not feeling safe or empowered.<sup>139</sup> Again, these sentencing circles post-conviction for a criminal charge of domestic violence, and the procedures are different from the Navajo Nation, but these are concerns to factor in. Procedures can be put in place to try and combat this as much as possible, including having the peacemaker attend specialized domestic violence training and having the victim speak first.<sup>140</sup> The question becomes: does this type of proceeding put a victim in less danger than having no recourse, as it stands now in most tribes?

Another consideration for tribes is to determine how to hold non-Indian offenders accountable. Given the traditional nature of both the proceedings and outcomes, tribes should consider whether these methods would be effective for someone who is not a part of the culture. This could be limited to those who live or work within the jurisdiction of the tribe, as those people would have closer ties to the community. For example, traditionally shame has been used to initiate and perpetuate behavior change, but for someone who is not a member of the community, shame is unlikely to effect change.<sup>141</sup>

There are many civil remedies that can be ordered through a civil proceeding like peacemaking. An offender could be ordered to pay restitution to the victim, as well as be ordered to batterer's treatment and/or substance abuse treatment if needed. Many studies in state courts have found a reduction in recidivism rate by a third to a half for those offenders that complete "batterer" treatment (e.g. batterers' intervention program) compared to those who do not receive treatment.<sup>142</sup> If the offender violates the court-ordered plan, the offender could be held in contempt of court or excluded from the tribal land altogether.<sup>143</sup> Many other creative civil remedies have been suggested as well that could likely apply in the peacemaking setting.<sup>144</sup>

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139. Rashmi Goel, *No Women at the Center: Use of the Canadian Sentencing Circle in Domestic Violence Cases*, 15 WIS. WOMEN'S L.J. 293, 324-26 (2000).

140. *See id.* at 331.

141. *Id.* at 326.

142. Huey-tsyh Chen et al., *Evaluating the Effectiveness of a Court Sponsored Abuser Treatment Program*, 4 J. FAM. VIOLENCE, 309, 320 (1989); Donald G. Dutton, *The Outcome of Court-Mandated Treatment for Wife Assault: A Quasi-Experimental Evaluation*, 1 VIOLENCE & VICTIMS, 163, 170 (1986); Christopher M. Murphy et al., *Coordinated Community Intervention for Domestic Abusers: Intervention System Involvement and Criminal Recidivism*, 13 J. FAM. VIOLENCE, 263, 273 (1998); Wayne J. Pitts et al., *The Need for a Holistic Approach to Specialized Domestic Violence Court Programming: Evaluating Offender Rehabilitation Needs and Recidivism*, 60 JUV. & FAM. CT. J., 1, 17 (2009); Bruce G. Taylor et al., *The Effects of a Group Batterer Treatment Program: A Randomized Experiment in Brooklyn*, 18 JUST. Q., 171, 193 (2001).

143. Bongar White et al., *supra* note 89, at 438, 443.

144. For a more extensive list of creative civil remedies, see *id.*

## ii. Social Services and Victim Services

Social services can be provided at the tribal level to protect Indians in a way that the justice system fails to. This is the tribe's chance to get creative and incorporate the strengths and culture of the tribes. When the justice system is unavailable, much of the burden falls to social services. "The limited resources that are available would be better invested in developing interventions and prevention programs, scientifically evaluating their efficacy for protecting Native women, and making sure all female victims of violence have safe havens in the meantime."<sup>145</sup>

a. *Shelter and Safe Houses*

One option is for tribes to provide a shelter or safe house for women to escape their abuser. These are short-term stays, generally 30 days to 6 months depending on the program.<sup>146</sup> A shelter tends to be in an established location, like a house, that women go to when they leave an abusive relationship.<sup>147</sup> In small communities, it is challenging to keep the location secret and as a result, the perpetrator of violence is likely to know the location.<sup>148</sup> This is complicated by the fact that the most dangerous time in an abusive relationship is when the woman leaves the relationship (not specific to Indian country).<sup>149</sup> If the purpose is just to give the woman (and her children) a different place to stay short-term, then this option tends to work. Police can patrol the area of the shelter more frequently as well.

Safe houses are shorter-term than shelters.<sup>150</sup> They tend to be volunteers who take a woman in for the night, and the safe house moves, thus the woman may not stay more than one night in the same place.<sup>151</sup> This method works better for a woman whose abuser is likely to come after her. This does place the volunteer's household in potential danger as well as the woman. There is a chance that people in the community will know who the volunteers are and be able to narrow down the location the victim is staying. The volunteers could communicate with the police when they have someone in their safe house for additional patrols if appropriate. If additional safety is needed, tribes may want to work with other nearby tribes for a safe house exchange, in which a victim could stay in a safe house within a different tribal jurisdiction for added secrecy

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145. RONET BACHMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 13 (2008).

146. See, e.g., *Our Services Extended Stay Program*, SAFEHOUSE DENVER, <https://safehouse-denver.org/services/extended-stay-program.html> (last visited Apr. 19, 2021) [<https://perma.cc/2UVY-RKJ9>].

147. *Id.*

148. *Shelters and Safehouses*, STOP VIOLENCE AGAINST WOMEN, <http://hrlibrary.umn.edu/svaw/domestic/link/shelters.htm> (last visited Apr. 19, 2021) [<https://perma.cc/6L7U-MY6L>].

149. *Id.*

150. *Id.*

151. *Id.*



of the location. This method of safe house incorporates more traditional tribal values of the community coming together to protect its own people.

*b. Legal Advocates*

Legal advocates are helpful for those who are considering legal routes. They can provide the victim with a realistic idea of the process, whether it be getting a protection order, or seeking to report violence that has occurred to authorities. Legal advocates can also be supportive throughout the process, should it be making the report, filling out legal documents, or attending hearings. Domestic violence legal advocates are often trained in helping a victim make a safety plan for when the offender finds out the incident is going through a legal process.

*c. Healing Ceremonies*

One of the goals of addressing domestic violence in our communities is to create safe and healthy communities. "Health rests upon a foundation of harmony between individual, family, community, nature and spirituality. Health is maintained through this harmony, which is furthered through traditional practices, ritual and story."<sup>152</sup> Domestic violence leaves women out of harmony. Victims are more likely to have symptoms of diminished mental health, such as trouble sleeping, depression, post-traumatic stress issues, a low sense of self-worth and not feeling connected to their community.<sup>153</sup> Due to lack of other types of coping mechanisms, victims may turn towards drugs and alcohol. Traditional services addressing trauma in Native communities tend to be well-received, as they have historically been the way of healing.<sup>154</sup> One such traditional practice that is utilized is the sweat lodge ceremony. The sweat lodge ceremony is considered a core ceremony in many Native cultures and has been in place for thousands of years.<sup>155</sup> The purpose of the sweat lodge ceremony is to "purify, cleanse, and heal the body, mind, emotions, and spirit."<sup>156</sup>

Researchers in Wyoming have studied the efficacy of adding sweat lodge ceremonies to treatment at a state psychiatric hospital in conjunction with a tribal community.<sup>157</sup> In the three years the study took place, referrals from tribal members to the hospital increased, and length of stay for Native patients

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152. Anton Tolman & Rommel Reedy, *Implementation of a Culture-Specific Intervention for a Native American Community*, 5 J. CLINICAL PSYCH. MED. SETTINGS 381, 384-85 (1998).

153. Bonnie Duran et al., *Intimate Partner Violence and Alcohol, Drug, and Mental Disorders among American Indian Women from Southwest Tribes in Primary Care*, 16 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RSCH., 11, 11 (2009).

154. Bonnie Duran et al., *Native Americans and the Trauma of History*, in STUDYING NATIVE AMERICA: PROBLEMS AND PROSPECTS 60, 70-72 (Russell Thornton ed., 1998).

155. J. Phillip Gossage et al., *Sweat Lodge Ceremonies for Jail-Based Treatments*, 35 J. PSYCHOACTIVE DRUGS 33, 34 (2003).

156. Jeannette Wagemakers Schiff & Kerrie Moore, *The Impact of the Sweat Lodge Ceremony on Dimensions of Well-Being*, 13 AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RSCH., 48, 49 (2006).

157. See Tolman & Reedy, *supra* note 152.

decreased.<sup>158</sup> Patients reported the ceremonies were very useful, had healing effects, and gave them a sense of connection to their community.<sup>159</sup> Additionally, it “improved health care outcomes” and increased overall satisfaction for both the patients and the tribe.<sup>160</sup> This demonstrates the sweat lodge ceremonies as helpful to the whole community and not just to the individuals actually participating in the ceremony. Other documented outcomes of sweat lodge ceremonies include eased worries and enhanced self-esteem,<sup>161</sup> resolved disharmony,<sup>162</sup> and long-term sobriety.<sup>163</sup>

There are many other types of healing ceremonies that specially address trauma specific to each tribe, and these should be utilized as appropriate. In a study conducted on the use of Native healers among Navajo patients at an Indian Health Service facility in Crownpoint, New Mexico, patients reported that distance and cost associated with the ceremonies—including supplies, travel, and gifts for the traditional practitioner—were often a barrier to the use of traditional services.<sup>164</sup> As discussed elsewhere in this paper, the court can order the offender to pay for these traditional ceremonies in civil proceedings. Some states have even awarded victim compensation to cover the costs of traditional services through their respective states’ Crime Victim Reparation Commission so long as the victim meets certain criteria.<sup>165</sup>

#### d. Individual Counseling

In a recent study, it was found that over a period of thirty days Indians experience serious psychological distress at a rate of about 2.5 times more than

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158. *Id.* at 387.

159. *Id.* at 389.

160. *Id.* at 381.

161. Stephen A. Colmant & Rod J. Merta, *Using the Sweat Lodge Ceremony as Group Therapy for Navajo Youth*, 24 J. SPECIALISTS GRP. WORK 55, 57 (1999).

162. See Tolman & Reedy, *supra* note 152, at 381.

163. Kelly L. Hazel & Gerald V. Mohatt, *Cultural and Spiritual Coping in Sobriety: Informing Substance Abuse Prevention for Alaska Native Communities*, 29 J. CMTY. PSYCH. 541, 554 (2001).

164. Catherine Kim & Yeong S. Kwok, *Navajo Use of Native Healers*, 158 ARCHIVES INTERNAL MED. 2245, 2248-49 (1998).

165. See Deborah Bulkeley, *Healing Compensation Weighed: Native Americans Might Get Funding for Using Tribal Medicine*, DESERET NEWS (Mar. 24, 2005, 12:00 AM), <https://www.deseret.com/2005/3/24/19883665/healing-compensation-weighed> [<https://perma.cc/YF5S-SMNW>]; *Utah Office for Victims of Crime: Crime Victim Reparations Program*, UTAH COMM’N ON CRIM. & JUV. JUST., [https://justice.utah.gov/wp-content/uploads/CrimeVictimBrochure\\_2011.pdf](https://justice.utah.gov/wp-content/uploads/CrimeVictimBrochure_2011.pdf) (last visited Apr. 20, 2021) [<https://perma.cc/HJ9X-LGQL>]; MINN. DEP’T PUB. SAFETY, *Financial Help for American Indian Victims of Crime*, OFF. JUST. PROGRAMS – CRIME VICTIMS REPARATIONS BD., <https://dps.mn.gov/divisions/ojp/forms-documents/Documents/Financial-Help-American-Indian-Victims.pdf#search=TRADITIONAL%20AMERICAN%20INDIAN%20SERVICES> (last visited Apr. 5, 2021) [<https://perma.cc/B295-95LG>]; *Compensation Application*, CRIME VICTIMS REPARATION COMM’N – N.M., <https://www.cvrc.state.nm.us/cvrc-application/> (last visited Apr. 5, 2021) [<https://perma.cc/H3R5-W8ZJ>]; *Traditional American Indian Services*, OKLA. CNTY., <https://www.oklahomacounty.org/495/Traditional-American-Indian-Services> (last visited Apr. 5, 2021) [<https://perma.cc/G77L-XU7G>].

any other race; these numbers are especially noteworthy because Native peoples are underserved in terms of mental health.<sup>166</sup> It is important to have culturally appropriate mental health services that maintain and respect Native values available to victims/survivors of intimate partner violence. Individual counseling should be delivered in a culturally competent way, it should be strengths-based, where the clinician seeks to understand the Native histories, communities, languages, traditions, customs, practices, norms, and the cultures which include the beliefs and values of the woman they are working with.<sup>167</sup> Western individual therapy techniques may be offered by clinicians in conjunction with traditional Native healing provided by traditional healers. Therapy may also be offered to both the victim/survivor and her child(ren).

*e. Women's Support Group and Women's Talking Circle*

Support groups are typically settings where psycho-education is provided to the victims/survivors in a confidential and safe environment. At the beginning of a support group, while seated in a circle, attendees may begin by participating in a check-in, though it is not required, and following the check-in the group facilitators provide psycho-education on domestic violence.

Women's talking circles may begin with circle guidelines; this may be followed by a prayer for the circle and the food, the facilitator introduces the discussion topic, presents a traditional story, and/or the burning of traditional medicines (e.g. sage, cedar, sweetgrass).<sup>168</sup> Participants are seated in a circle and are invited to speak; those individuals speak uninterrupted, without judgment from others. Each member, respectful of time, has an opportunity to contribute to the topic or the question posed in the non-hierarchical circle. Silences may occur and are used as important moments for reflection. Additionally, food is often present in these spaces. Food is an important part of Native culture - nourishing both the body and the mind, it ties in with many cultural values such as sharing and encourages connection and community.

*f. Education/Job Skills*

Many women stay in abusive relationships due to economic dependence on the abuser—they may not have money saved up to rent a new place or start a new

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166. Nat'l Ctr. for Health Stat., *Serious Psychological Distress in the Past 30 Days Among Adults Aged 18 and Over, by Selected Characteristics*, CTRS. FOR DISEASE CONTROL & PREVENTION (2017), <https://www.cdc.gov/nchs/data/has/2017/046.pdf> [<https://perma.cc/F527-8XUK>]; SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, BEHAVIORAL HEALTH SERVICES FOR AMERICAN INDIANS AND ALASKA NATIVES 6 (2018).

167. Teresa D. LaFromboise et al., *Counseling Intervention and American Indian Tradition: An Integrative Approach*, 18 COUNSELING PSYCH. 628 (1990).

168. Felicia Schanche Hodge et al., *American Indian Women's Talking Circle: A Cervical Cancer Screening and Prevention Project*, 78 CANCER 1592, 1593 (1996); Paulette Running Wolf & Julie A. Rickard, *Talking Circles: A Native American Approach to Experiential Learning*, 31 J. MULTICULTURAL COUNSELING & DEV. 39, 40, 42 (2003).

life.<sup>169</sup> Counterintuitively, they stay in the abusive relationship for survival. Providing job training can assist a victim to get a job and become independent. Many victims have great abilities but have not had the opportunity to define these abilities through education. Going back to school is daunting, but assistance with the application process and finding funding are all many victims need. Any temporary assistance programs, such as food boxes or help with transportation, can bolster the education and job skills training as a way to combat domestic violence. If the victims have the means, they have the ability to leave. This sends a message that she will not endure this kind of treatment anymore.

### iii. Community Level Stance Against Domestic Violence

The victim alone can only do so much to speak out about domestic violence. She needs the community behind her, supporting her, and supporting the value that women have in tribal communities. Community leaders need to speak out publicly about domestic violence as well as address it within their own families. There can be no more looking the other way. Community organizations can be powerful. If the tribe sends a clear message that this type of violence will not be tolerated, it could substantially decrease. As it stands now, violence against Indian women by non-Indian men has few consequences. Communities need to begin to implement more civil remedies. The community's stance against violence can be presented in group presentations and workshops within the community. To be effective, and because law enforcement officers and health care workers are likely to be the first point of contact after a violent incident occurs, there needs to be communication amongst the different agencies within the tribe about what services are available and how to make referrals to them.

#### a. Awareness and Prevention

Providing the community with information about violence against Indian women can be done through involvement in community events. These events include health fairs, school presentations, training events, etc. Raising awareness in culturally appropriate ways among Indigenous communities, youth, and the public about attitudes and behaviors associated with violence and the devaluation of Indigenous women can serve to aid in prevention efforts. The aims of this awareness include: starting a dialogue on definitions and types of violence and its origins, discussing the barriers (relational, legal, etc.) of violence, learning how to help and respond to a relative or friend who is experiencing violence, providing or connecting community members with skills and resources, identifying warning signs of violence, identifying what healthy versus unhealthy relationships look like, and reinforcing the traditional values held by Indians, to name a few. Awareness and prevention efforts require a comprehensive response, one that is community-based and led, culturally appropriate, and done in collaboration with the various agencies within and outside the community.

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169. Leslie M. Tutty et al., *I Built My House of Hope: Abused Women and Pathways Into Homelessness*, 19 VIOLENCE AGAINST WOMEN 1498, 1499 (2013).

*b. Community Task Force*

At the heart of a community task force is building community partnerships and collaboration at the local level. Members may include tribal leaders, law enforcement (e.g. state police, the sheriff's department, tribal police, FBI, and city police), legal aid, the prosecutor's office, mental health and health care providers, tribal and/or community victim advocates, batterer's intervention program, social service providers, community members, and others that have a vested interest in promoting the safety of and response to victims/survivors of intimate partner violence. Its members may vary depending on the make-up and needs of each community. A mission statement can be created by the task force and goals can be determined as a group. The task force should typically meet monthly to discuss challenges, problem solve, develop protocols, etc. This should be a place to build connections, discuss training needs and upcoming trainings, hold one another accountable, and offer resources.

*c. Building Cultural Identity*

Each Indian Nation has its own unique traditions, practices, beliefs, and values which make up its cultural identity. Cultural identity may serve as a protective factor for those affected by violence, and culture itself is a powerful way to bring a community together. Building cultural identity can be achieved by fostering a sense of belongingness and nurturing values through participation in cultural activities and practices. These may include tribal arts (e.g. beading, basket weaving, rug weaving, blanket weaving, sandpaintings, painting), dance, listening or playing traditional instruments and music (e.g. flutes, drums, song), and storytelling - both traditional wisdom and those of personal journeys. Promoting cultural identity is a path to healing and personal growth, which builds resilience and connectedness.

*d. Community Resource Center*

Native communities or those that serve Native communities, should consider a community resource center that would house services and resources under one roof. Various service providers would each have a small office space to house one or two employees within the center who would be available to meet with victims, hand out information about services, and/or connect these individuals with services like advocacy, temporary food and housing, employment assistance, counseling, etc. The benefits are evident when considering how difficult it can be, even overwhelming, to reach out to others when one is experiencing violence. Visiting one location to connect with services may be experienced as more achievable than traveling to several different locations which can present many more barriers (e.g time, transportation, money).

## CONCLUSION

Violence against Native women is at unacceptable levels. Tribes have been hampered in their ability to adequately deal with this issue, as tribes do not have

general criminal jurisdiction over non-Indians. Statistics demonstrate that a majority of violence against American Indians in Indian country is perpetrated by non-Indians.<sup>170</sup> This leaves a jurisdictional gap that has been ignored by the governments that do hold jurisdiction over these crimes. The federal government has high declination rates of violent crimes in Indian country, many reasons which were explored in this work. The primary reason given for declinations is lack of quality evidence. Tribes need to consider ways to combat the problems within the justice system. This includes communicating with other agencies, considering cross-deputization, and putting procedures in place for evidence collection and storage that does not violate the chain of custody. Tribes must consider civil remedies as well. They need to consider what types of social services would best protect members of their communities and publicly take a stance against domestic violence. Tribal sovereignty needs to be strengthened. Historically, Tribes effectively addressed violence against Native women. We need to allow Tribes to utilize their strengths and culture to end violence against Native women when no one else will.

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170. ROSAY, *supra* note 3, at 46.

# DEVOLVING STANDARDS OF DECENCY: HOW EIGHTH AMENDMENT JURISPRUDENCE FAILS TRANSGENDER INMATES SEEKING NECESSARY MEDICAL CARE

*George A. Acosta*<sup>†</sup>

## *Abstract*

The Supreme Court of the United States has long held that denying necessary medical care to prison inmates may constitute cruel and unusual punishment within the meaning of the Eighth Amendment. Transgender inmates suffering from gender dysphoria often do not receive essential medical care, particularly the crucial treatments of hormone therapy and gender confirmation surgery. Recent high-profile cases (and a resulting circuit split) have placed the issue of transgender healthcare in prisons within the national spotlight. Contrasting the modern plight of transgender inmates with the historical struggle of HIV-AIDS infected inmates, this Article begins by discussing how prisons and the government at-large handled the emergence of the HIV-AIDS epidemic. At the onset of the epidemic, prisons often failed to provide safe conditions and adequate medical care for HIV-AIDS infected inmates, while, conversely, stigma and prejudices were evident in various policies. However, evolving societal standards of decency—a core tenet of Eighth Amendment jurisprudence—led to the development of humane laws that protected the rights of these inmates. Viewing the modern treatment of transgender inmates through that historical lens, this Article argues that courts and lawmakers alike must reckon with the current harms afflicting transgender inmates, specifically those harms resulting from the lack of adequate healthcare, and act to remedy the injustice. Part of that reckoning must include examining how the doctrine of qualified immunity applies in the prison healthcare context of constitutional litigation, and whether it can be justified. Transgender people are discriminated against in many areas of society, but the harms resulting from discrimination are acutely pronounced in prisons. Exposing these ills—and the underlying laws and attitudes that support them—are vital considerations to this Article’s ultimate conclusions regarding transgender inmates’ access to vital healthcare: The Eighth Amendment’s mandates are unsatisfied, and qualified immunity serves as an unnecessary and injurious barrier to justice.

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## INTRODUCTION

On February 24, 2015, an inmate at the Federal Correctional Institution for men in Petersburg, Virginia named Ashley Jean Arnold hung herself in her prison cell.<sup>1</sup> Arnold, a transgender individual, was only 32 years old at the time.<sup>2</sup> In the two years she spent incarcerated before her death, Arnold repeatedly sought and was denied medical and psychological care for her gender dysphoria.<sup>3</sup> The treatment she sought aligned with standards of care for transgender people set forth by the World Professional Association for Transgender Health.<sup>4</sup> Based on prison officials’ ongoing delay and denial of her medical treatment, Arnold filed suit in July of 2013 in the Eastern District of Virginia against prison administrators and medical personnel,<sup>5</sup> alleging deliberate indifference to her

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1. Aviva Stahl, *The Uphill Battle to Make Prison Safer for Trans Women*, VICE (Apr. 23, 2015, 11:52 AM), [https://www.vice.com/en\\_ca/article/9bg5ky/the-uphill-battle-to-make-prison-safer-for-trans-women](https://www.vice.com/en_ca/article/9bg5ky/the-uphill-battle-to-make-prison-safer-for-trans-women) [<https://perma.cc/NN4J-RKBQ>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Arnold v. Wilson*, 2014 WL 7345755 (E.D. Va. Dec. 23, 2014) (defendants: Eric D. Wilson, warden of FCI Petersburg; Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons (“BOP”); Dr. Jorge Vazquez-Velazquez, BOP medical doctor; and Dr. Donald Lewis, Chief Psychiatrist).



Eighth Amendment right to be free from cruel and unusual punishment.<sup>6</sup> After the district court granted summary judgment to the prison, Arnold appealed. Tragically, while the appeal was pending, Arnold took her own life.<sup>7</sup>

Horror stories like Arnold's are not uncommon. Transgender people have struggled to access medically necessary care for many years and have suffered tremendously because of the deprivation.<sup>8</sup> In a 2015 survey conducted by the National Center for Transgender Equality, 37% of transgender respondents indicated that they were prohibited from taking hormones while incarcerated despite having used them prior to being incarcerated.<sup>9</sup> Other studies have found that close to 25% of transgender inmates reported being denied access to medical care while incarcerated.<sup>10</sup> The National Center for Transgender Equality notes that the denial of hormone treatment to transgender inmates has "serious health consequences" and "can be physically painful and damaging to a person's physical and mental health."<sup>11</sup> Denying access to adequate healthcare for transgender individuals is linked with depression, anxiety, and suicidality.<sup>12</sup> These detrimental health effects are particularly significant to this population, because of the increased risk of psychological distress and suicidality that already exists in the transgender community.<sup>13</sup> To underscore this increased risk, consider these statistics: In the 2015 U.S. Transgender Survey, close to 40% of transgender individuals conveyed experiencing severe psychological anguish in the month prior to contributing to the survey (compared with 5% of the U.S. population generally), 7% attempted suicide in the year before the survey (compared with 0.06% of the U.S. population generally), and 40% had attempted suicide in their lifetime (almost nine times the U.S. rate).<sup>14</sup>

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6. *Id.*

7. *Id.*

8. *FAQ: Answers to Common Questions About Mistreatment of TGNC Incarcerated People*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-incarcerated-people> [https://perma.cc/6LFM-HAJP] (last visited Feb. 8, 2020).

9. SANDY E. JAMES ET AL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY*, NATIONAL CENTER FOR TRANSGENDER EQUALITY 193 (2016).

10. Sari L. Reisner et al., *Racial/Ethnic Disparities in History of Incarceration, Experiences of Victimization, and Associated Health Indicators Among Transgender Women in the U.S.*, 54 *WOMEN & HEALTH*, no. 8, 2014, at 750.

11. *Id.*

12. ELI COLEMAN ET AL., *WORLD PROFESSIONAL ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, & GENDER-NONCONFORMING PEOPLE* 67 (2012), [https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7\\_English2012.pdf?t=1613669341](https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English2012.pdf?t=1613669341) [https://perma.cc/XFD6-LW5K].

13. Erin McCauley et al., *Exploring Healthcare Experiences for Incarcerated Individuals Who Identify as Transgender in a Southern Jail*, 3 *TRANSGENDER HEALTH* 34, 35 (2018).

14. *Id.*; JAMES ET AL., *supra* note 9 at 5.

While there is no present data<sup>15</sup> on the current population of transgender inmates, the Bureau of Justice Statistics reported there were approximately 3,200 transgender people in prisons and jails in 2011-2012.<sup>16</sup> This number has almost certainly increased, as the number of people in the United States who identify as transgender has substantially increased over the last several years.<sup>17</sup> Additionally, studies show that nearly one in six transgender Americans—and one in two Black transgender people—has been to prison.<sup>18</sup> Violence against transgender people tends to be worse in institutions where populations are separated by sex, such as jails and prisons.<sup>19</sup> In the United States, transgender incarcerated people are generally still assigned to prisons according to the sex assigned at birth, instead of by gender identity (i.e., one's inner sense of being male, female or something else).<sup>20</sup> These policies leave transgender people more vulnerable to harassment or attacks by staff or fellow incarcerated people; for instance, a California study found that transgender people were 13 times more likely to be sexually assaulted than non-transgender people in prison.<sup>21</sup>

As the basis of its inquiry into accountability for the contemporary widespread mistreatment and failure to care properly for transgender prisoners, this Article compares the horrific prison/jail conditions that transgender individuals presently face to the conditions faced by inmates who suffered from HIV-AIDS in the 1980s and 1990s. Inmates infected by HIV-AIDS during the emergence of the epidemic routinely experienced inadequate healthcare, degradation, and abuse.<sup>22</sup> Even as recently as 2002, Attorney Josh Lipman, with the Southern Center for Human Rights, described horrid living conditions for segregated HIV-AIDS infected prisoners at Alabama's Limestone prison:

The warehouse is literally falling apart around them. The roof has been collapsing, and the rain was leaking in. There are rats and spiders

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15. It is inexcusable that this data is neither tracked nor made publicly available. See discussion *infra* Conclusion, arguing that tracking and publicizing data on transgender inmates may help demonstrate the seriousness of this problem and, as such, spur governmental action to improve conditions for transgender inmates.

16. ALLEN J. BECK, U.S. DEP'T JUST., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES 2011-12 (2014), [https://www.bjs.gov/content/pub/pdf/svpjri1112\\_st.pdf](https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf) [<https://perma.cc/AP8Z-DA7Q>].

17. ANDREW R. FLORES ET AL., THE WILLIAMS INST., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> [<https://perma.cc/ZEV9-J3BM>] (finding that the number of people in America who identify as transgender has doubled what it was estimated to be in 2011).

18. *Transgender Incarcerated People in Crisis*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-incarcerated-people> [<https://perma.cc/6LFM-HAJP>] (last visited Nov. 29, 2019).

19. *Id.*

20. *Id.*

21. *Id.*

22. Amber M. Charles, *Indifference, Interruption, and Immunodeficiency: The Impact and Implications of Inadequate HIV/AIDS Care in U.S. Prisons*, 92 B.U.L. REV. 1979, 1993 (2012).

that bite the inmates. They do all of their cooking and living in this warehouse because they are not allowed to associate with the rest of the prison population.<sup>23</sup>

Further, leading prison healthcare expert Dr. Stephen Tabet indicated in a report on an Alabama prison AIDS ward that “a failure [of the prison] to provide proper medical care or treatment” preceded the deaths of most HIV-AIDS infected inmates.<sup>24</sup>

Today, while stigma still exists against HIV-AIDS infected people,<sup>25</sup> the commitment and efforts of activists and advocates has led to the emergence of patient-driven healthcare, access to new medications, and expanded funding for both healthcare and research—the results are nearly unprecedented when compared to the advancement of treatment for any other disease area.<sup>26</sup> Reflecting this modern shift, effective HIV therapies are almost always available in prisons—both state and federal—and available data suggest that treatment for HIV-infected prison inmates is as good as, if not better, than treatment in community-based HIV clinics.<sup>27</sup> Additionally, HIV-related mortality has declined among prisoners in parallel with the decrease seen in the general population.<sup>28</sup>

Given the eerie resemblance between the societal treatment of the transgender community in 2020 and the treatment of infected individuals during the early decades of the HIV-AIDS epidemic, it is no surprise that transgender people are not afforded any constitutional right to necessary medical treatments in prison.<sup>29</sup> This lack of fundamental protection is part of a larger societal

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23. BENJAMIN FLEURY-STEINER WITH CARLA CROWDER, *DYING INSIDE: THE HIV/AIDS WARD AT LIMESTONE 96* (Martha Minow et al. eds., 4th ed., 2011).

24. *Id.* at 19-21.

25. *Why the HIV Epidemic is not Over*, WORLD HEALTH ORG., <https://www.who.int/news-room/spotlight/why-the-hiv-epidemic-is-not-over> [<https://perma.cc/A432-4QST>] (last visited Mar. 6, 2020).

26. *Id.*

27. David Alain Wohl, *HIV and Mass Incarceration: Where Infectious Diseases and Social Justice Meet*, 77 N.C. MED. J. 359, 360 (2016).

28. *Id.*

29. See Laura R. Givens, *Why the Courts Should Consider Gender Identity Disorder a Per Se Serious Medical Need for Eighth Amendment Purposes*, 16 J. GENDER, RACE, & JUST. 579, 580 (2013) (“While some state prison systems do provide gender-confirming healthcare to transgender inmates, there is currently no national legal standard that entitles transgender prisoners to necessary gender-confirming healthcare”); Kayleigh Smith, *Free to Be Me: Incorporating Transgender Voices into the Development of Prison Policies*, 15 Hous. J. HEALTH L. & POL’Y 253, 263 (2015) (stating that the Supreme Court has yet to hear a case regarding whether gender dysphoria constitutes a serious medical need for Eighth Amendment purposes); see also LAMBDA LEGAL, *supra* note 18 (“U.S. prison officials also commonly block the access of incarcerated people to transition-related health care such as hormone therapy or sex reassignment surgery (SRS), even when it’s prescribed as medically necessary by a doctor.”).

problem of disproportionate discrimination against transgender people.<sup>30</sup> Sadly, this societal discrimination is often furthered by lawmakers; in fact, Pennsylvania and Alaska both have pending legislation that would preclude transgender people in prison from the medical care they need, namely by prohibiting state-funded gender confirmation surgeries.<sup>31</sup> The Pennsylvania bill's sponsor, Rep. Stephanie Borowicz, called such procedures "outrageous and completely unnecessary" and plans to argue that they are a misuse of taxpayer money.<sup>32</sup> Additionally, proposed legislation recently scrapped in South Dakota would have criminalized doctors treating gender dysphoria patients under the age of 16 with hormones, puberty-blocking medications, and gender confirmation surgery.<sup>33</sup> According to Dr. Alexis Chavez, the medical director for the Trevor Project, a national organization committed to preventing suicide among LGBTQ youth, the law was not based on medical science: "They're not using the research. They're not listening to any health care providers. And they're advancing something that's very dangerous to make a statement."<sup>34</sup> While the bill's defeat in South Dakota is a positive development, conservative lawmakers in other states continue to propose anti-trans bills.<sup>35</sup>

This proposed legislation comes in the wake of mounting Eighth Amendment litigation initiated by prisoners who are seeking prison-funded gender confirmation surgery or hormone therapy that have had varying results

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30. See LAMBDA LEGAL, *surpa* note 18 ("The transgender prison crisis is part of a larger pattern of violence and discrimination in U.S. society that disproportionately affects people of color, poor people and transgender and gendernonconforming (TGNC) people.").

31. Chelsea Koerbler, *State Rep. Wants to Ban Taxpayer Dollars from Being Used for Inmate's Gender Confirmation Surgery, Hormone Therapy*, FOX 43 (Oct. 8, 2019, 5:11 PM), <https://fox43.com/2019/10/08/state-rep-wants-to-ban-taxpayer-dollars-from-being-used-for-inmates-gender-confirmation-surgery-hormone-therapy/> [https://perma.cc/7WV7-Q5XV]; see also Becky Bohrer, *Bill Would Bar Alaska Gender Confirmation Surgery Coverage*, ASSOCIATED PRESS (Jan. 7, 2019), <https://apnews.com/7df1d06fbbe447a2b3fab1a85d6571b0> [https://perma.cc/2AHC-KMGX].

32. Koerbler, *surpa* note 31.

33. Peter Wade, *Proposed South Dakota Bill Would Criminalize Doctors Giving Trans Kids Gender-Affirming Treatment*, ROLLING STONE (Jan. 27, 2020, 3:45 PM), <https://www.rollingstone.com/culture/culture-news/south-dakota-trans-kids-doctor-treatment-illegal-criminal-944061/> [https://perma.cc/RUY2-2CU6] ("According to the bill, HR 1057, doctors would be prohibited from giving treatment to children under age 16 'when such procedures are done to cause the minor to feel or appear as the opposite sex.' Were the bill to become law, doctors would face misdemeanor felony charges with a maximum penalty of up to a year in prison and a maximum \$2,000 fine."); Tim Fitzsimons, *South Dakota's Trans Health Bill is Effectively Dead, Opponents Say*, NBC NEWS (Feb. 10, 2020), <https://www.nbcnews.com/feature/nbc-out/south-dakota-s-trans-health-bill-effectively-dead-opponents-say-n1134356>.

34. Julie Bosman & Mitch Smith, *Doctors Could Face Criminal Charges for Treating Transgender Teens*, N.Y. TIMES (Jan. 27, 2020), <https://www.nytimes.com/2020/01/27/us/south-dakota-transgender.html> [https://perma.cc/RY4G-HL65].

35. Nico Lang, *South Dakota Anti-Trans Bill's Defeat is Part of Larger Pattern, Advocates Say*, NBC NEWS (Feb. 12, 2020, 3:03 PM CST), <https://www.nbcnews.com/feature/nbc-out/south-dakota-anti-trans-bill-s-defeat-part-larger-pattern-n1135741> [https://perma.cc/5B9T-Q3XU].

across the circuits.<sup>36</sup> Grounded in the historical lens of the advancement of inmate and societal rights for adequate HIV-AIDS medical treatment, this Article argues that inmates suffering from gender dysphoria have a constitutional right to necessary medical treatment, just like those suffering from any other significant medical condition, and that this treatment includes gender confirmation surgery when appropriate. To this end, this Article proceeds in four parts. Part I explores the history of prison conditions for inmates suffering from HIV-AIDS in the 1980s and 1990s and how the law developed over time to promote better medical care for those inmates. This Part then discusses appropriate and modern medical treatments provided to transgender individuals suffering from gender dysphoria and introduces the history of Eighth Amendment jurisprudence with respect to inmates who bring claims after they are denied medical care.

Part II overviews the current landscape of Eighth Amendment litigation brought by transgender inmates who are denied access to gender confirmation surgery by prison medical authorities, highlighting a circuit split between the Fifth and Ninth Circuits and urging the Supreme Court to resolve the split. Next, this Part explains how the doctrine of qualified immunity militates against complete justice for transgender inmates whose Eighth Amendment rights are violated. This Part recommends that the Court eliminate qualified immunity in Eighth Amendment litigation, or alternatively, substantially narrow its application.

Taking a widespread view of the pervasive discrimination faced by transgender people in our society, Part III of this Article represents a call to action. This Part urges courts, lawmakers, and society in general to recognize the real harms of the ignorance, fear, and misconceptions surrounding gender dysphoria and the transgender communities. All stakeholders must recognize that such stigma is not and should not continue to be accepted as justification for upholding laws and policies that violate the civil rights of transgender individuals. In short, this Part calls for empathy and modern medical science to prevail over ignorance and fear mongering in the crafting of law and policy.

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36. *De'lonta v. Johnson*, 708 F.3d 520, 525 (4th Cir. 2013) (holding that inmate stated a plausible Eighth Amendment claim by alleging inadequate medical treatment to prevent self-mutilation upon withdrawal of hormone therapy for gender identity disorder); *Kolisek v. Spencer*, 774 F.3d 63, 96 (1st Cir. 2014) (en banc) (holding that prison officials who provided hormone therapy and lifestyle accommodations but denied a request for gender confirmation surgery did not violate the Eighth Amendment); *Lamb v. Norwood*, 899 F.3d 1159, 1162-63 (10th Cir. 2018) (holding that providing an inmate hormone therapy but not gender confirmation surgery did not amount to Eighth Amendment violation); *Campbell v. Kallas*, 936 F.3d 536, 549 (7th Cir. 2019) (holding that prison doctor was entitled to qualified immunity in a claim where an inmate sued him for not providing her gender confirmation surgery); *Gibson v. Collier*, 920 F.3d 212, 220 (5th Cir. 2019) (holding that inmate failed to establish that medical communities have universally accepted the necessity and efficacy of gender confirmation surgery, so Texas Dept. of Criminal Justice could not be liable for Eighth Amendment violation when they did not provide procedure to an inmate); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 803 (9th Cir. 2019) (holding that inmate established through evidence that by denying her access to gender confirmation surgery, prison doctors acted with deliberate indifference and violated her Eighth Amendment rights).

The article concludes by emphasizing the need for Supreme Court intervention to resolve the question of whether denying medically necessary gender confirmation surgeries constitutes an Eighth Amendment violation. It also addresses the need to abolish qualified immunity or enact other reforms in Eighth Amendment litigation. These necessary changes represent important steps in achieving equal justice under the law for transgender people.

I. THE DEVELOPMENT OF HUMANE LAWS PROTECTING HIV-AIDS  
INFECTED INMATES—COMPARING & CONTRASTING THE MODERN  
CRISIS FACED BY TRANSGENDER INMATES

A 1991 news article ominously titled “AIDS In Prison: The New Death Row” detailed an escalating situation in prisons across the country where the death rate for inmates with HIV-AIDS was near twice the rate of HIV-AIDS infected non-prisoners.<sup>37</sup> As of November 1990,

4,519 cases of acquired immunodeficiency syndrome (AIDS) had been reported among inmates in federal and state prisons, and 2,466 cases had been reported by 25 city/county jail systems (U.S. Department of Justice, unpublished data, 1991); these totals included both cases of AIDS reported among persons before their incarceration as well as those reported by prison systems.<sup>38</sup>

A few years later, in an urgent law review article, Professor of Law Michael L. Closen detailed how inaction by the Supreme Court in relation to HIV-AIDS helped to sustain not only a horrifying epidemic—but also a human rights crisis.<sup>39</sup> Indeed, in the 1980s, the Supreme Court’s failure to protect medical treatment as a right for people infected with HIV-AIDS led to instances of homeless shelters denying entry to people infected with HIV-AIDS, doctors refusing to see HIV infected patients, and employers screening applicants for teaching positions for the disease.<sup>40</sup> Despite these abuses, the Supreme Court refused to address HIV-AIDS head on from 1987 (when the first petition for a

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37. Heather Rhoads, *AIDS in Prison: The New Death Row*, PRISON LEGAL NEWS (Oct. 15, 1991), <https://www.prisonlegalnews.org/news/1991/oct/15/aids-in-prison-the-new-death-row/> [<https://perma.cc/SE2U-75XJ>] (“Prison AIDS wards are being called the new death row. A 1987 study by the Correctional Association of New York found prisoners with AIDS to be dying at twice the rate of non-prisoners with AIDS. ‘Many prisoners with AIDS spend their last days in prison isolated and alone, far from their families and loved ones,’ says Cathy Potler, director of the Association’s AIDS Prison Project . . . ‘The situation today for many prisoners living with HIV disease is nothing if not “cruel and unusual,”’ the National Commission on AIDS declares. ‘Too many correctional facilities subject inmates to a series of unnecessary, arbitrary indignities which fundamentally affect their basic human rights.’”).

38. *HIV Prevention in the U.S. Correctional System, 1991*, 41 MORBIDITY & MORTALITY WKLY. REP. 389, 389-91 (1992).

39. Michael L. Closen, *The Decade of Supreme Court Avoidance of AIDS: Denial of Certiorari in HIV-AIDS Cases and Its Adverse Effects on Human Rights*, 61 ALB. L. REV. 897, 899-901 (1998).

40. *Id.* at 900.

writ of certiorari in an HIV-AIDS case was filed) through 1997, resulting in the Court allowing human rights abuses to continue.<sup>41</sup> Closen astutely explained how the initial reactions to HIV-AIDS in many realms of society consisted of prejudice and mistreatment, specifically mentioning calls for quarantining individuals with AIDS and for tattooing of gay men.<sup>42</sup> The consequences of this societal treatment were horrifying: many people with HIV-AIDS committed suicide, were killed by panic-stricken people, and were even refused funeral services.<sup>43</sup>

In another example of stigmatization and inhumane treatment of HIV-AIDS infected individuals, William Barr (while serving as Attorney General for President George H.W. Bush), ordered the indefinite detainment of hundreds of HIV-positive asylum seekers at a Guantanamo Bay detention center.<sup>44</sup> The center was later deemed an “HIV prison camp” by a federal judge who found the practice to be a blatant constitutional violation.<sup>45</sup> Lucas Guttentag, founding director of the Immigrants’ Rights Project of the American Civil Liberties Union, commented that this detainment was targeted specifically at stigmatized Haitians because of their illness, and called the conditions “deplorable . . . the callous lack of sensitivity to human suffering and fundamental human rights was shocking.”<sup>46</sup>

#### *A. Legislative and Legal Responses to the HIV-AIDS Crisis in Prisons*

In 1988, the U.S. Department of Justice (DOJ) required that medications for the treatment of HIV be made available to inmates when medically indicated by prison doctors—and that any denial of FDA-approved medication to eligible prisoners would create “serious and legal ethical issues.”<sup>47</sup> The National Commission on AIDS, in 1991, recommended that a basic principle should guide prison policies on how to treat inmates with HIV-AIDS: “Society has a moral and legal obligation to provide prisoners with the means to prevent HIV infection, and to provide adequate medical care to infected prisoners at all stages of HIV disease.”<sup>48</sup> In 1995, DOJ published guidelines recommending that medical care for HIV positive inmates align with the Centers for Disease Control guidelines, along with periodic HIV-guidelines updates.<sup>49</sup> These guidelines reflect governmental acceptance that HIV-AIDS infected prisoners must receive adequate medical care, and indicate a governmental recognition that denial of such treatment may give rise to tort or constitutional claims. To that end, the

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41. *Id.*

42. *Id.* at 907.

43. *Id.* at 908.

44. Scott Bixby, *William Barr, Trump’s Attorney General Nominee, Held Immigrants in ‘HIV Prison Camp’*, DAILY BEAST (Jan. 15, 2019, 9:12 AM), <https://www.thedailybeast.com/trumps-attorney-general-nominee-held-immigrants-in-hiv-prison-camp> [<https://perma.cc/45T8-24UV>].

45. *Id.*

46. *Id.*

47. Charles, *supra* note 22, at 2014-15.

48. Rhoads, *supra* note 37.

49. Charles, *supra* note 22, at 1993.

Department of Corrections enshrined the treatment of infectious diseases within their regulations, mandating “a comprehensive approach that includes testing, appropriate treatment, prevention, education, and infection-control measures.”<sup>50</sup> In terms of general societal recognition, it was not until 1998 in *Bragdon v. Abbott* that the Supreme Court held that asymptomatic HIV infection constitutes a “disability” within the meaning of the American with Disabilities Act (ADA), thus serving to prevent discrimination against HIV-positive or AIDS-infected individuals.<sup>51</sup> The ADA’s purpose is to provide a clear and comprehensive national mandate to eliminate discrimination against individuals with disabilities.<sup>52</sup>

In sum, since the HIV-AIDS epidemic began and spread through the prison system, the government has recognized its responsibility—ethically and legally—to treat the disease and prevent the deterioration of inmates’ health. Moreover, the government recognized an obligation to protect HIV-AIDS infected individuals from discrimination in many other areas of daily life by including HIV-AIDS within the scope of the ADA. Unfortunately, but not surprisingly, those same legal and ethical obligations have not yet translated to the treatment of transgender individuals.

*B. Appropriate Medical Care for Transgender Individuals Suffering from Gender Dysphoria*

The term “transgender” refers to the broad spectrum of individuals who identify with a gender different from their assigned gender at birth.<sup>53</sup> “Gender dysphoria” is a medical/psychological diagnosis that involves a conflict between a person’s assigned (at birth) gender and the gender with which they identify.<sup>54</sup> However, not all transgender people suffer from gender dysphoria.<sup>55</sup> Moreover, some transgender people and advocates disagree with classifying gender dysphoria as a mental illness at all, arguing such a classification fosters stigma and acts as a barrier to proper healthcare.<sup>56</sup> For purposes of this article, I broadly

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50. 28 C.F.R. § 549.10 (2011).

51. *Bragdon v. Abbot*, 524 U.S. 624 (1998); *see also* *Doe v. Dolton Elementary School District*, 694 F.Supp. 440, 447 (N.D. Ill. 1988) (repudiating school district’s attempt to separate HIV-positive students and stating that “if AIDS-infected children are segregated, they will suffer the same feelings of inferiority the Supreme Court sought to eradicate in [*Brown v. Board of Education*] . . .”).

52. 42 U.S.C. § 12101(b)(1).

53. *Understanding Transgender People: The Basics*, NAT’L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), <https://transequality.org/issues/resources/understanding-transgender-people-the-basics> [<https://perma.cc/4H9U-V3KK>].

54. *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N (Nov. 2020), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/3YSB-GNQZ>].

55. *Id.*

56. Suyin Haynes, *The World Health Organization Will Stop Classifying Transgender People as Having a ‘Mental Disorder’*, TIME (May 28, 2019), <https://time.com/5596845/world-health-organization-transgender-identity/> (“When you



focus on gender dysphoria in its context as a cognizable medical diagnosis subject to Eighth Amendment constitutional claims.

The concept of a disparity between one's assigned gender and the gender with which they identify was first recognized as a psychiatric condition in 1980 in the Diagnostic and Statistical Manual of Mental Disorders III (DSM III), where it was described diagnostically as "gender identity disorders."<sup>57</sup> In the Diagnostic and Statistical Manual of Mental Disorders IV (DSM-IV), released in 1994, the section previously titled "Gender Identity Disorders" was changed to the singular term "Gender Identity Disorder" (GID) and subdivided into three categories: Gender Identity Disorder in Children, Gender Identity Disorder in Adolescence and Adults, and Gender Identity Disorder Not Otherwise Specified.<sup>58</sup> Now, in the current Diagnostic and Statistical Manual of Mental Disorders V (DSM-V), the classification of the condition has been changed to "Gender Dysphoria," which it describes as:

[A] marked incongruence between one's experienced/expressed gender and assigned gender, lasting at least 6 months, as manifested by at least two of the following: (1) A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics . . . ; (2) A strong desire to be rid of one's primary and/or secondary sex characteristics . . . ; (3) A strong desire for the primary and/or secondary sex characteristics of the other gender . . . ; (4) A strong desire to be of the other gender . . . ; (5) A strong desire to be treated as the other gender . . . ; (6) A strong conviction that one has the typical feelings and reactions of the other gender . . . .<sup>59</sup>

According to the World Professional Association for Transgender Health Standards of Care (The Standards), "treatment for gender dysphoria has become more individualized" since the organization published the first version of its clinical guidelines in 1979.<sup>60</sup> Often with the help of psychotherapy, some

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have a system that sets up someone's very existence and identity in a diagnosis as a mental health condition, that feeds an enormous amount of stigma and drives people away,' Kyle Knight, researcher in the LGBT rights program at Human Rights Watch, tells TIME. 'We have interviewed transgender people in Japan, Kazakhstan, Ukraine and Indonesia to name a few countries, and they don't even want to begin to undergo the process of legal recognition because it requires them to go see a psychiatrist who will tell them they have a so-called mental disorder; something that they don't feel corresponds with their own reality. People don't feel like their gender identity is something diagnosable or needs a diagnosis.'").

57. Anne Vitale, *Rethinking the Gender Identity Disorder Terminology in the Diagnostic and Statistical Manual of Mental Disorders IV*, TRANSHEALTH (May 28, 2005), <http://www.trans-health.com/2005/rethinking-gid-terminology-dsm/> [<https://perma.cc/AW53-8ZED>].

58. *Id.*

59. *What is Gender Dysphoria*, AM. PSYCHIATRIC ASS'N (quoting AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC & STATISTIC MANUAL OF MENTAL DISORDERS* (5th ed. 2013)), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last visited June 4, 2021).

60. COLEMAN ET AL., *supra* note 12, at 8-9.

individuals reconcile their gender identities with the gender they were assigned at birth and do not feel the need to feminize or masculinize their bodies.<sup>61</sup> Some patients may need hormones and to change their gender expressions, but not surgery, and still others may need to change gender expressions along with surgery, but do not require hormones.<sup>62</sup>

The Standards are considered the top authority on proper treatments for transgender individuals, as they articulate “the professional consensus about the psychiatric, psychological, medical and surgical management” of gender dysphoria.<sup>63</sup> Using the same definition of “medically necessary” as health insurance companies, the Standards state that surgical procedures are indeed medically necessary for certain individuals.<sup>64</sup> This opinion is based on:

[C]linical and peer reviewed evidence that gender affirming/confirming treatments and surgical procedures, properly indicated and performed as provided by the Standards of Care, have proven to be beneficial and effective in the treatment of individuals with transsexualism or gender dysphoria. Gender affirming/confirming surgery, also known as sex reassignment surgery, plays an undisputed role in contributing toward favorable outcomes.<sup>65</sup>

Not every transgender person will be a candidate for surgery, and treatment decisions should be determined on an “individualized and contextual” basis.<sup>66</sup>

It bears emphasis that The Standards explicitly hold that, with respect to gender confirmation surgery, “These reconstructive procedures are not optional in any meaningful sense, but are understood to be medically necessary for the treatment of the diagnosed condition.”<sup>67</sup> In some cases, such surgery is the only effective treatment for the condition, and for some people genital surgery is essential and life-saving.” As previously mentioned, transgender people who are denied access to proper gender dysphoria care often experience mental and physical anguish including depression, suicidality, and the compulsion to engage in self-harm and self-surgery, including attempted castration.<sup>68</sup> Thus, The Standards clarify that gender confirmation surgery is indeed a necessary medical procedure, by any definition, when properly indicated.

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61. *Id.* at 8.

62. *Id.* at 8-9.

63. WORLD PROFESSIONAL ASS’N FOR TRANSGENDER HEALTH, Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A. (Dec. 21, 2016) <https://www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH-Position-on-Medical-Necessity-12-21-2016.pdf> [<https://perma.cc/24PD-FSCM>].

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. COLEMAN ET AL., *supra* note 12, at 67.

According to The Standards, in order to receive gender confirmation surgery, a transgender individual must satisfy the following criteria: (1) persistent, well-documented gender dysphoria; (2) capacity to make a fully informed decision and to consent for treatment; (3) age of majority in the individual's given country; (4) well-controlled significant medical or mental health concerns (when present); (5) twelve continuous months of hormone therapy as appropriate to the patient's gender goals (unless hormones are not clinically indicated for the individual); and (6) twelve continuous months of living in a gender role that is congruent with the patient's gender identity.<sup>69</sup> Although some may presume that incarceration renders some of these criteria impractical, The Standards explicitly provide that incarcerated individuals can and should be able to meet all the criteria, because people should not lose access to effective medical treatment simply because of where they live.<sup>70</sup>

*C. Eighth Amendment Claims Made by Inmates—"Nothing Less Than the Dignity of Man"*

The Eighth Amendment to the United States Constitution states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>71</sup> In *Estelle v. Gamble*, the United States Supreme Court set the foundational standard for inmates' Eighth Amendment claims regarding prison medical treatment; the Court held that deliberate indifference to the serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment.<sup>72</sup> Since an inmate's sole reliance for medical treatment is placed on the authorities, if the authorities fail to treat an inmate in need, those needs will not be met.<sup>73</sup> In the worst cases, such a failure may actually produce physical "torture or a lingering death," the evils of most immediate concern to the drafters of the Amendment.<sup>74</sup> In other less dire cases, denial of medical care may result in "pain and suffering which no one suggests would serve any penological purpose."<sup>75</sup> In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs; only such indifference affronts the "evolving standards of decency in violation of the Eighth Amendment."<sup>76</sup>

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69. *Id.* at 104-06.

70. *Id.* at 67 ("The SOC (standards of care) in their entirety apply to all transsexual, transgender, and gender-nonconforming people, irrespective of their housing situation. People should not be discriminated against in their access to appropriate health care based on where they live, including institutional environments such as prisons or long-/intermediate-term health care facilities.").

71. U.S. CONST. amend. VIII.

72. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 106.

The Supreme Court in *Trop v. Dulles* explained that the basic concept underlying the Eighth Amendment, specifically as it relates to providing adequate healthcare to inmates is: “Nothing less than the dignity of man.”<sup>77</sup> The Court has since elaborated:

[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being . . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment.<sup>78</sup>

Eighth Amendment claims brought by inmates have been made in a variety of situations relating to health or hygiene; for example, in *Helling v. McKinney*,<sup>79</sup> the Supreme Court held that deliberate indifference to an inmate’s exposure to secondhand smoke supported a legitimate Eighth Amendment claim.<sup>80</sup> In *Board v. Farnham*,<sup>81</sup> the Seventh Circuit held that a detainee had a constitutional right to use toothpaste.<sup>82</sup> The Amendment’s scope must draw its meaning from the “evolving standards of decency that mark the progress of a maturing society.”<sup>83</sup> As a result, Eighth Amendment jurisprudence allows for society to evolve and sort out acceptable behavior from unacceptable behavior. In the 1980s, segregating HIV-AIDS infected prisoners from the general population, while subjecting them to intolerable living conditions, may have been seen as a viable correctional objective. However, as society and medical science progressed, the segregation practices largely dissipated.<sup>84</sup> The Court has not weighed in on the constitutionality of such practices, but given that, currently, only Alabama and South Carolina permit the segregation of HIV-AIDS infected inmates,<sup>85</sup> it stands to reason that the Court would view segregating these inmates with a high degree of scrutiny, particularly as it considers the evolving standards of decency

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77. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

78. *DeShaney v. Winnebago Cnty. Dep’t. of Soc. Serv.*, 489 U.S. 189, 199-200 (1989).

79. *Helling v. McKinney*, 509 U.S. 25 (1993).

80. *Id.* at 35.

81. *Board v. Farnham*, 394 F.3d 469 (7th Cir. 2005).

82. *Id.* at 482.

83. *Trop*, 356 U.S. at 101.

84. See Kari Larsen, *Deliberately Indifferent: Government Response to HIV in U.S. Prisons*, 24 J. CONTEMP. HEALTH L. & POL’Y 251, 268-69 (2008) (explaining that the practice of segregation is not widely accepted as a sensible strategy because it contributes to the stigmatization of HIV-positive people, among other health reasons).

85. AMERICAN CIVIL LIBERTIES UNION, SENTENCED TO STIGMA: SEGREGATION OF HIV-POSITIVE PRISONERS IN ALABAMA AND SOUTH CAROLINA 22 (2010), <https://www.hivlawandpolicy.org/sites/default/files/AL%20and%20SC%20Prisoner%20Segregation.pdf> [https://perma.cc/YM77-UN7S].

inherent in an Eighth Amendment analysis. Societal progression is also evident in the “toothpaste case,”<sup>86</sup> when it became clear to the Seventh Circuit that withholding such a basic sanitary right from an inmate indeed constitutes cruel and unusual punishment.<sup>87</sup>

The Supreme Court has yet to analyze an Eighth Amendment claim made by a transgender inmate relating to a denial of medical care. However, transgender inmates have had some success in accessing hormone therapy through litigation in lower courts,<sup>88</sup> while inmates seeking state-provided gender confirmation surgery have not been as successful.<sup>89</sup> Given the history of Eighth Amendment jurisprudence—particularly the evolving standards of decency that guide the analysis—it is past time for the Court to make a binding ruling that requires prisons to provide all necessary treatments for transgender inmates, including gender confirmation surgery.

## II. THE BURGEONING CONSTITUTIONAL QUESTION OF WHETHER A PRISON CAN VIOLATE THE EIGHTH AMENDMENT BY DENYING A TRANSGENDER INMATE GENDER CONFIRMATION SURGERY & THE ROLE OF QUALIFIED IMMUNITY

Several federal appellate courts in recent years have analyzed whether prison medical officials violated the Eighth Amendment by not providing gender confirmation surgery to an inmate suffering from gender dysphoria. Two particular cases decided in the Fifth and Ninth circuits came to conflicting conclusions on this issue and are potentially illustrative of how the Supreme

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86. *Farnham*, 394 F.3d 469, 484.

87. *Id.* at 484 “Because dental care is a basic human need and the constitutional test requires us to look at ‘the evolving standards of decency that mark the progress of a maturing society’” (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)), “Farnham was or should have been ‘on notice’ and had ‘fair warning’ that it would be unconstitutional for him to deny oral hygiene products to pretrial detainees under his watch for long periods of time.” (emphasis detracted).

88. *See Soneeya v. Spencer*, 851 F. Supp. 2d 228, 252 (D. Mass. 2012) (holding that prison policy was unconstitutional, in violation of the Eighth Amendment, where it created a blanket prohibition on certain methods of treatment for gender dysphoria, and DOC must provide treatment for inmate’s GD based on an individualized consideration of her medical needs); *Phillips v. Michigan Dep’t of Corr.*, 731 F. Supp. 792 (W.D. Mich. 1990) (holding that prison officials must reinstate hormone treatment for a transgender inmate who had received such treatment for years before her incarceration but distinguished between failure to improve her medical state and taking measures that reverse years of treatment); *Barrett v. Coplan*, 292 F. Supp. 2d 281 (D.N.H. 2003) (holding that transgender prisoner stated a valid Eighth Amendment claim when prison official denied her even an evaluation for treatment for her gender dysphoria); *Allard v. Gomez*, 9 F. App’x 793 (9th Cir. 2001) (denying treatment for gender dysphoria based on a blanket administrative policy rather than individualized medical evaluations is unconstitutional); *Gammett v. Idaho State Bd. of Corr.*, 2007 U.S. Dist. LEXIS 55564 (D. Idaho July 27, 2007) (court granted a preliminary injunction to allow an inmate to be given hormone therapy, after staff at the facility where she was housed repeatedly ignored her requests for treatment even following a suicide attempt and self-castration).

89. *See, e.g., Kolisek v. Spencer*, 774 F.3d 63, 96 (1st Cir. 2014); *Campbell v. Kallas*, 936 F.3d 536, 549 (7th Cir. 2019); *Gibson v. Collier*, 920 F.3d 212, 220 (5th Cir. 2019).

Court may conduct its analysis if and when it resolves the circuit split. Additionally, a case from the Seventh Circuit illuminates the obstacle qualified immunity presents with respect to an inmate's ability to obtain money damages when a prison doctor violates their constitutional right to necessary medical treatment.

This Part ultimately deduces two conclusions with respect to the circuit split and qualified immunity. First, the Supreme Court should adopt the Ninth Circuit's analysis with respect to a transgender inmate's constitutional right to gender confirmation surgery when the procedure is medically necessary. Second, qualified immunity should be eliminated or substantially narrowed in application in Eighth Amendment litigation, particularly those arising from the denial of medical care to inmates.

*A. The Circuit Split: Whether a Prison Doctor Can Violate the Eighth Amendment by Denying Gender Confirmation Surgery to a Transgender Inmate*

In *Kosilek v. Spencer*,<sup>90</sup> the First Circuit became the first federal appellate court to analyze whether a prison violated the Eighth Amendment by not providing a transgender inmate gender confirmation surgery. The court held that prison officials who provided hormone therapy and lifestyle accommodations to a transgender inmate but denied a request for gender confirmation surgery committed no constitutional violation.<sup>91</sup> Notably, the First Circuit did not create a categorical rule; it limited its holding to the facts of the particular case at bar because the plaintiff inmate had not sufficiently demonstrated a medical need for gender confirmation surgery.<sup>92</sup> Thus, the prison medical officials did not violate the inmate's Eighth Amendment constitutional rights by proceeding with an alternative course of treatment for the inmate's gender dysphoria.<sup>93</sup>

Five years after *Kosilek*, the Fifth Circuit addressed the same question with regard to a transgender inmate in their jurisdiction. In *Gibson v. Collier*, the Fifth Circuit created a categorical rule, determining that a prison could *never* be held liable for an Eighth Amendment violation by denying a transgender inmate gender confirmation surgery, plainly holding that: "[a] state does not inflict cruel and unusual punishment by declining to provide sex reassignment surgery to a transgender inmate."<sup>94</sup> In reaching this broad conclusion, the court focused on a supposed lack of medical consensus regarding the efficacy of gender confirmation surgery.<sup>95</sup> Discussing *Kosilek* and the potential concern of

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90. *Kosilek*, 774 F.3d 63 (en banc).

91. *Id.* at 90, 96.

92. *Id.* at 90 n.12.

93. *Id.* at 90. Importantly, the First Circuit determined that any similar claims made in the future by an inmate would be analyzed specific to that inmate's medical needs, *Id.* at 91.

94. *Gibson v. Collier*, 920 F.3d 212, 215 (5th Cir. 2019).

95. *Id.* at 223 ("Gibson relies exclusively on the WPATH Standards of Care to support his claim that failure to evaluate for sex reassignment surgery constitutes deliberate indifference to his serious medical needs. Yet he too acknowledges that WPATH's conclusions are hotly contested.").

altogether banning inmates' access to the procedure, the court concluded that individualized assessments of an inmate's medical needs are not relevant to the inquiry, justifying their rationale as follows:

No legal authority compels the state, every time a prison inmate demands sex reassignment surgery, to undertake the time and expense of assembling a record of medical experts, pointing out what we already know—that sex reassignment surgery remains one of the most hotly debated topics within the medical community today. There is no reason why—as a matter of either common sense or constitutional law—one state cannot rely on the universally shared experiences and policy determinations of other states.<sup>96</sup>

In other words, the Fifth Circuit determined that because the procedure was purportedly “hotly debated” in the medical community, prison officials retained the right to enshrine a rule categorically denying inmates access to gender confirmation surgery.

Troublingly, this line of argument abandons the commonly accepted notion that important medical care decisions should be made specific for an individual patient; certainly, no reasonable doctor operates under a “one-size-fits-all” philosophy for significant medical decisions for patients, or would rule out therapies that have proven effective solely for administrative/convenience reasons.<sup>97</sup> Even worse, the Fifth Circuit relied substantially on medical testimony from five years earlier (the medical testimony provided in the *Kosilek* record) in crafting their categorical prohibition, rather than adhering to updated medical science concerning transgender healthcare and the efficacy of gender confirmation surgery.<sup>98</sup> The dismaying neglect of the Fifth Circuit to consider updated medical science—or the individual serious medical needs of inmates in their jurisdiction—was illuminated by the discussion of a subsequent Ninth Circuit case that reached an opposite conclusion.

The Ninth Circuit in *Edmo v. Corizon, Inc.*<sup>99</sup> found that a transgender inmate named Adree Edmo had demonstrated a serious medical need for gender

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96. *Id.* at 224.

97. See, e.g., Joseph Burns, *Experts Warn Against ‘One-Size-Fits-All’ Health Care Benefits*, ASS’N OF HEALTH CARE JOURNALISTS (Apr. 28, 2014), <https://healthjournalism.org/blog/2014/04/experts-warn-against-one-size-fits-all-health-care-benefits/> [<https://perma.cc/454Z-ZLPZ>] (“Lacking the ability to tailor care to meet each individual patient’s needs means doctors must assume that all humans are identical in body chemistry, genetic makeup and health status . . . . In reality, of course, patients have an infinite array of genetic and molecular combinations. Consequently, one person might achieve better health from a particular medicine while his or her neighbor may see no health improvement, or even suffer side effects . . . .”) (citation omitted); See also *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011) (striking down a Wisconsin state law that categorically banned hormone therapy and gender confirmation surgery as treatments for transgender inmates, without any regard to individual needs).

98. *Gibson*, 920 F.3d at 221–23.

99. *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019).

confirmation surgery, and by not providing the surgery to her, the defendant prison violated the Eighth Amendment.<sup>100</sup> In reaching their groundbreaking conclusion, the Ninth Circuit opined that the WPATH Standards of Care (The Standards) are the “undisputed starting point in determining the appropriate treatment for gender dysphoric individuals,” and that Edmo had presented compelling evidence demonstrating that she needed gender confirmation surgery, in accordance with The Standards.<sup>101</sup>

By adopting The Standards as the unassailable foundation for transgender healthcare decisions, the Ninth Circuit also dismissed any “hot debate” notion within the medical field regarding the necessity and efficacy of the procedure.<sup>102</sup> Indeed, the court thoroughly critiqued the *Gibson* decision as sorely lacking substantive medical and legal support.<sup>103</sup>

With the medical foundation laid—a foundation that endorses gender confirmation surgery as appropriate *and necessary* in some circumstances—the Ninth Circuit held that Edmo had met her burden in establishing a medical need for the procedure and that the prison violated the Eighth Amendment by denying it to her.<sup>104</sup> The court also made clear that their analysis was particular to Edmo’s individual medical needs and based on the factual record of the case, contradicting the discussion in *Gibson* that castigated against individual determinations for gender confirmation surgeries.<sup>105</sup>

Broadly speaking, the Ninth Circuit’s analysis was rooted in fundamental considerations of Eighth Amendment medical care claims brought by prison inmates. Specifically, the decision illustrates the requirement of individualized determinations for inmates with serious medical conditions, and the “evolving standards of decency” principle that seeks to ensure dignified and civilized treatment—not torture and needless suffering—is provided to people within the state’s care. Such civilized treatment unquestionably requires the provision of necessary medical care for serious health conditions.

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100. *Id.* at 767 (“The record before us, as construed by the district court, establishes that Edmo has a serious medical need, that the appropriate medical treatment is GCS, and that prison authorities have not provided that treatment despite full knowledge of Edmo’s ongoing and extreme suffering and medical needs.”).

101. *Id.* at 787.

102. *Id.* at 795 (“The WPATH Standards of Care—which are endorsed by the American Medical Association, the American Medical Student Association, the American Psychiatric Association, the American Psychological Association, the American Family Practice Association, the Endocrine Society, the National Association of Social Workers, the American Academy of Plastic Surgeons, the American College of Surgeons, Health Professionals Advancing LGBTQ Equality, the HIV Medicine Association, the Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus, and Mental Health America—recognize this fact. Each expert in this case agrees. As do others in the medical community. The Fifth Circuit is the outlier.” (citation omitted)).

103. *Id.* at 795-97 (“Most fundamentally, Gibson relies on an incorrect, or at best outdated premise . . .”).

104. *Id.* at 797.

105. *Id.* at 767.



*B. SCOTUS Should Resolve the Circuit Split by Adopting the Reasoning of the Ninth Circuit*

While *Edmo* is a positive development for transgender inmates in the Ninth Circuit, it is not clear how other circuits will view the issue moving forward. Almost certainly, prisons and courts in the Fifth Circuit will continue to block inmates' access to gender confirmation surgery based on the categorical holding of *Gibson*. Again, that decision—in express terms—permits prisons to deny transgender inmates' requests for gender confirmation surgery regardless of the medical indications of their individual treatment.<sup>106</sup> As discussed, such circuit-wide prohibition is particularly unjust given that the *Gibson* court's analysis was embedded with outdated medical testimony that, astonishingly, failed to even support its own categorical rule.<sup>107</sup> Looking beyond the Fifth Circuit, optimism is still hard to come by; the Ninth Circuit remains the only federal appellate court to mandate that a prison provide a transgender inmate with gender confirmation surgery.<sup>108</sup> As a result, the Supreme Court must act with urgency.

Specifically, and simply, the Court should adopt the analysis announced in *Edmo*. Most importantly, such an analysis highlights the medical consensus regarding the efficacy and necessity of gender confirmation surgery. Moreover, the analysis dismisses the appropriateness of categorical rules banning crucial medical treatments such as gender confirmation surgery—and subjecting such blanket bans to rigorous judicial scrutiny under the Eighth Amendment.<sup>109</sup>

Certainly not every inmate who requests gender confirmation surgery (or any significant surgery) should necessarily receive it, but *Edmo* makes clear that the inquiry should always be fact-specific and rooted in a modern medical understanding of the individual's particular needs.<sup>110</sup> Until prison healthcare systems (and the federal courts litigating disputes) uniformly reflect such a requirement, Eighth Amendment jurisprudence will, most often, continue to fail transgender inmates who *need* the crucial procedure. The Supreme Court can and should remedy this injustice. However, even with a favorable ruling, other challenges remain.

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106. *Gibson v. Collier*, 920 F.3d 212, 215 (5th Cir. 2019).

107. *Edmo*, 935 F.3d at 795 (“Worse yet, the medical opinions from *Kosilek* do not support the Fifth Circuit’s categorical holding. Dr. Chester Schmidt’s and Dr. Stephen Levine’s testimony in *Kosilek*, which the Fifth Circuit relied on, do not support the proposition that GCS is never medically necessary. Dr. Schmidt and Dr. Levine testified that GCS was not necessary in the factual circumstances of that case, that is, based on the unique medical needs of the prisoner at issue.”).

108. Andy Rose & Hollie Silverman, *A Transgender Female Inmate Received her Gender Confirmation Surgery After a Three-Year Court Battle*, CNN <https://www.cnn.com/2020/07/29/us/transgender-prisoner-gender-confirmation-surgery/index.html> (last updated July 29, 2020, 3:32 AM) [<https://perma.cc/S7FB-ESQQ>].

109. *Edmo*, 935 F.3d at 796-97.

110. *Id.* at 767.

*C. The Problematic Role of Qualified Immunity in Eighth Amendment Litigation: Campbell v. Kallas as an Illustration.*

Qualified immunity, controversial in many areas of constitutional law, is particularly problematic in Eighth Amendment litigation. Even when inmates establish an Eighth Amendment violation, a qualified immunity defense can bar inmates from obtaining full relief.<sup>111</sup> Indeed, that is precisely the role of the doctrine; qualified immunity shields executive branch officials from money damages liability despite having violated the Constitution, if the government officials have not violated “clearly established law.”<sup>112</sup> The Court has held that for a right to be clearly established, its contours must be:

Sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of preexisting law the unlawfulness must be apparent.<sup>113</sup>

Relatedly, the Court has frequently cautioned that clearly established law should not be defined “at a high level of generality.”<sup>114</sup>

As applied to transgender healthcare in prisons, the Seventh Circuit recently decided part of an Eighth Amendment dispute on qualified immunity grounds. In *Campbell v. Kallas*,<sup>115</sup> the court found no existing case law demonstrating that a prison doctor refusing to provide gender confirmation surgery to a prisoner may give rise to a constitutional violation.<sup>116</sup> Thus, the prison doctor (defendant) Kallas treating inmate (plaintiff) Campbell’s gender dysphoria could not have been on notice that his refusal to provide Campbell gender confirmation surgery could amount to a constitutional violation.<sup>117</sup> As a result, the doctor was entitled to qualified immunity for recommending an alternative treatment course, and Campbell’s claim for monetary damages failed.<sup>118</sup> Fortunately, as of this writing, the outcome of Campbell’s claim for injunctive relief (the claim requesting performance of the surgery) remains pending.

It is worth noting that even if the court grants Campbell’s injunctive claim for relief, Campbell will not be made entirely whole because of the qualified immunity ruling on her damages claim; she was denied money damages regardless of whether she prevails in the injunctive claim. This is chiefly unjust because if Campbell prevails on the injunctive claim, a court will have recognized that she does *need* the procedure, and the prison failing to provide the

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111. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

112. *Id.*

113. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

114. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).

115. *Campbell v. Kallas*, 936 F.3d 536 (7th Cir. 2019).

116. *Id.* at 547-49.

117. *Id.* at 549.

118. *Id.*

procedure constitutes an Eighth Amendment violation. In other words, the injunctive claim will decide the merits of Campbell's claim, and even if a violation is found, Campbell is barred from any money damages.

Judge Wood, dissenting in *Campbell*, identified this paradox and argued that Campbell had established, if nothing else, a question of fact on whether the treatment plan endorsed by Dr. Kallas was deliberately indifferent to her serious medical needs (violating the Eighth Amendment):

The question whether a particular course of treatment for an objectively serious medical condition amounts to deliberate indifference can be answered only with evidence from the medical community. For that reason, courts cannot look to outdated factual evidence from past cases to determine whether some course of treatment is within acceptable boundaries. If the medical community uniformly decides that a recent advance is the only proper course of treatment, a defendant cannot rely on a case from before that advance occurred to say that her outdated treatment choice was reasonable.<sup>119</sup>

Judge Wood is thus implicitly advocating for qualified immunity reform in this arena of litigation because claims related to inmate medical care decisions should not be governed by a standard that looks to the past for guidance—modern medical decisions should be judged under modern medical norms.

*D. The Need to Eliminate or Modify the Qualified Immunity Standard in Prison Healthcare Eighth Amendment Claims*

Inmates' serious healthcare needs and resulting Eighth Amendment violations are better governed and litigated on the merits (and based on modern medical science/modern standards of decency), rather than by resolving the claims pursuant to prior caselaw that may or may not put an official "on notice" of potential constitutional violations.<sup>120</sup> Put another way, laws should affirmatively put prison healthcare officials on broad notice that failure to adequately treat serious medical needs constitutes deliberate indifference.<sup>121</sup> This

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119. *Id.* at 552–53 (Wood, J., dissenting).

120. Katie N. Wagner, *Doctoring an Inmate's Basic Rights: Inmate Healthcare and Fourte v. Faulker County*, 41 OKLA. CITY U. L. REV. 307, 334 (2016) ("The United States' contemporary and 'evolving standards of decency' requires an ever-improving standard of medical care for its incarcerated population."); Joel H. Thompson, *Today's Deliberate Indifference: Providing Attention Without Providing Treatment To Prisoners With Serious Medical Needs*, 45 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 635, 650, 653 (2010) ("Measuring the adequacy of a prisoner's care would seem to necessitate a review of the available evidence, whether through a summary judgment motion or trial. Given the general reluctance to second guess medical judgments, however, such claims may be dismissed at the pleading stage.").

121. See, e.g., Estalyn Marquis, "Nothing Less Than the Dignity of Man": Women Prisoners, Reproductive Health, and Unequal Access to Justice Under the Eighth Amendment, 106 CALIF. L. REV. 203, 228 (2018) (arguing that affirmative laws classifying women's reproductive healthcare as serious medical needs would put prison healthcare officials on notice, thus limiting their chances of escaping liability by virtue of qualified immunity).

is hardly a revelatory assertion; most prison medical providers realize that a deliberate indifference to treat an inmate's serious medical condition—such as HIV/AIDS—may create legal liability against them, including money damages. However, qualified immunity distorts the picture, as demonstrated by the *Campbell* decision. Indeed, the modern consensus and medical understanding of gender dysphoria treatments highlight the fundamental flaw of qualified immunity in this context: merely because prior cases do not establish today's modern norms is not an acceptable reason for prohibiting current Eighth Amendment claims to proceed.

Furthermore, qualified immunity incentivizes prison medical providers to not pursue modern treatments. Michele Deitch, an expert in correctional conditions and oversight (and former federal court monitor) at the University of Texas, echoes these arguments and in fact castigates how current Eighth Amendment standards and interpretation of qualified immunity create a “perverse incentive for agency officials to stay unaware of what’s happening in their own facilities and of what the best practices are, and to stay untrained on these topics.”<sup>122</sup> Deitch indeed calls into question qualified immunity’s purpose in prison conditions litigation.<sup>123</sup> Put succinctly: when prison healthcare officials are incentivized to stay in the dark regarding medical developments, in order to shield themselves from Eighth Amendment liability, the mandates of the amendment—which call for evolving standards of decency and basic dignity—are violated.

Prison medical officials should not be permitted to deliberately ignore developments in transgender healthcare when prescribing a course of treatment—if such neglect is found, qualified immunity should not serve as a barrier to relief for a suffering inmate. For all these reasons, the Court should consider eliminating or substantially modifying the qualified immunity standard in Eighth Amendment claims.

### III. A CALL TO ACTION: EVOLVING OUR STANDARDS OF DECENCY

Calling for society to recognize the harms sustained by transgender people by the current lack of legal protections, this Part challenges to stakeholders to examine why transgender people continue to be the target of discriminatory policies, abuse, and disproportionate violence.<sup>124</sup> The logical conclusion to this inquiry is that immediate action—political, judicial, and otherwise—must be taken to remedy the discrimination and continued harm faced by transgender people. Any alternative does not serve the interests of justice.

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122. Jack Denton, *Who’s Legally Responsible For Prison and Jail Suicides?*, PAC. STANDARD (May 14, 2019), <https://psmag.com/social-justice/whos-legally-responsible-for-prison-and-jail-suicides>.

123. *Id.*

124. See, e.g., *Violence Against the Transgender Community in 2019*, HUMAN RIGHTS CAMPAIGN (2019), <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2019>.

The modern harms against transgender individuals are rooted in a historical disdain for the transgender community, and the LGBTQ community entirely; for instance, the Americans with Disability Act (ADA)<sup>125</sup> expressly excludes transgender people from its scope.<sup>126</sup> While classifying a person's non-traditional sexual orientation and/or sexual identity as a "disability" is likely a better argument for ADA exclusion of LGBTQ people, the arguments put forth by opponents at the time the ADA was enacted instead took a more vile tone. U.S. Senator Jesse Helms stated:

If this were a bill involving people in a wheelchair or those who have been injured in the war, that is one thing. But how in the world do you get to the place that you did not even exclude transvestites. How did you get into this business of classifying people who are HIV positive, most of whom are drug addicts or homosexuals or bisexuals, as disabled?<sup>127</sup>

Helms also argued that the government should not (or even be allowed to) intervene if an employer seeks to "set up any moral standards for his business by asking [a potential employee] if he is HIV positive, even though 85 percent of those people are engaged in activities that most Americans find abhorrent."<sup>128</sup> The not so subtle implication of Senator Helms can be summed up as follows: the law should not bar discrimination against people who engage in (purportedly) immoral conduct in their personal lives, or carry themselves in a (purportedly) immoral way. While such arguments are clearly without merit—regardless of how one views the morality of another's sexual orientation or gender identity—the disdain evident in Senator Helms' comments illustrates prejudices that existed at that time; the same prejudices that continue to hinder LGBTQ progress in America.

Narrowing the discussion to only discrimination against transgender individuals, consider the following modern policy examples that trample upon transgender rights. In 2018, the Department of Housing and Urban Development removed training materials that sought to prevent discrimination against transgender individuals.<sup>129</sup> Additionally, the Trump Administration recently rescinded an Obamacare mandate that barred health care discrimination based on

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125. 42 U.S.C.A. § 12101 et seq.

126. 42 U.S.C. § 12211(b)(1) (2012) ("Disability shall not include . . . transsexualism [or] gender identity disorders not resulting from physical impairments."); see also Taylor Payne, *A Narrow Escape: Transcending the GID Exclusion in the Americans with Disabilities Act*, 83 MO. L. REV. 799 (2018) ("This exclusion - commonly referred to as the "GID Exclusion" - ensured that "transsexualism" and "gender identity disorders not resulting from physical impairments" were not considered a "disability" under the ADA.").

127. 135 CONG. REC. 19866 (1989) (statement of Sen. Helms).

128. *Id.* at 19870.

129. Jennifer Hansler, *Carson Defends Delay in LGBT Homeless Protections*, CNN (Mar. 20, 2018), <https://www.cnn.com/2018/03/20/politics/ben-carson-lgbt-homeless-rights/index.html> [<https://perma.cc/2YBM-GE3K>].

sex and gender identity (Obamacare section 1557).<sup>130</sup> President Trump's decision to ban transgender people from serving in the military is yet another modern attack against the civil rights of transgender individuals, and one that the President called a "great favor" for the military.<sup>131</sup> Despite President Trump's assertion, a recent poll found 71% of people support permitting transgender individuals to serve in the U.S. military.<sup>132</sup> Non-coincidentally, all of these policy decisions have occurred under a presidential administration that shares the same political party as Senator Helms.

To better understand the vitriol and lack of empathy in these decisions (and the overall commentary opposing transgender rights), the scholarship of law professors Jennifer Levi and Kevin Barry is highly insightful. In a 2019 law review article, Levi and Barry argue that three tropes fuel discrimination against transgender people: criminality, immorality, and disrespect.<sup>133</sup> They go on to detail the falsity of each trope: The first—that transgender people are dangerous—is based upon myths and stereotypes.<sup>134</sup> The second is that transgender people are immoral, a view often based in religious concepts of sin, or a claimed scientific basis of what constitutes "natural."<sup>135</sup> The third is that

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130. Margot Sanger-Katz & Noah Weiland, *Trump Administration Erases Transgender Civil Rights Protections in Health Care*, NY TIMES (June 15, 2020), <https://www.nytimes.com/2020/06/12/us/politics/trump-transgender-rights.html> [https://perma.cc/AF4P-Y5VS]. At the time of this writing, the COVID-19 pandemic continues to ravage the United States, and it is worth noting that the elimination of the aforementioned healthcare protections has an especially cruel impact on transgender individuals: in the early months of the pandemic, the Center for American Progress published a report indicating 29% of transgender adults stated they had been denied service by a health care provider based on their sexual orientation or gender identity; Dan Diamond, *Trump Team Moves to Scrap Protections for LGBTQ Patients*, POLITICO (Apr. 24, 2020, 10:27 PM EDT), <https://www.politico.com/news/2020/04/24/trump-team-moves-to-scrap-protections-for-lgbtq-patients-206398> [https://perma.cc/N8NA-VM64].

131. Bill Chappell, *Trump's Transgender Ban in Military Will Focus On New Enlistments*, NPR (Aug. 24, 2017), <https://www.npr.org/sections/thetwo-way/2017/08/24/545759805/trumps-transgender-ban-in-military-will-focus-on-new-enlistments> [https://perma.cc/BNR8-3KBG].

132. Justin McCarthy, *In U.S., 71% Support Transgender People Serving in Military*, GALLUP (June 20, 2019), <https://news.gallup.com/poll/258521/support-transgender-people-serving-military.aspx> [https://perma.cc/X2VV-RW9K].

133. Jennifer L. Levi & Kevin M. Barry, *Transgender Tropes & Constitutional Review*, 37 YALE L. & POL'Y REV. 589, 593 (2019).

134. See SUSAN STRYKER, *TRANSGENDER HISTORY, THE ROOTS OF TODAY'S REVOLUTION* 132-35, 227, 230 (2d ed. 2017) (discussing the "'transsexual rapist' trope [that] began to circulate in grassroots lesbian networks" in the 1970's and persists among some feminists, "ex-gay ministries, religious fundamentalists, antiabortion activists, and bigots of many stripes"); see also Mark Joseph Stern, *The NAACP Legal Defense Fund's Transgender Rights Brief is a Trenchant History Lesson*, SLATE (Mar. 3, 2017) <https://slate.com/human-interest/2017/03/naacp-ldfs-trans-rights-brief-is-a-trenchant-history-lesson.html> (discussing discriminatory laws and policies that derive from tropes about transgender people being threatening) [https://perma.cc/873L-L64Z].

135. STRYKER, *supra* note 134, at 26-27 (discussing disparagement of transgender people for defying expectation grounded in "scientific, cultural, or religious beliefs about what is natural, normal, or divinely given . . .").

transgender people are disrespectful of societal norms and seek to agitate settled expectations.<sup>136</sup> Again, no evidence supports this assertion, and no studies suggest that transgender people pose more of a “danger” than any other group.<sup>137</sup>

Significantly, many of the complaints lobbed at transgender people—that they are immoral, disrespectful, and make people uncomfortable—are some of the same rationalizations used to support racial segregation.<sup>138</sup> The segregation comparison is relevant because, as the NCAAP noted in their *amicus curae* brief for a prominent transgender rights case:

A key lesson of that painful and ignoble era is that while private-space barriers like racially segregated bathrooms may have seemed to some like minor inconveniences or insignificant sources of embarrassment, they were in fact a source of profound indignity that inflicted deep and indelible harms on individuals of both races, and society at large. This disreputable tradition of state and local governments enshrining fear or hostility toward a disfavored group of people into laws requiring their physical separation from others should encourage this Court to view with skepticism the rationales proffered by local officials here.<sup>139</sup>

Similarly, some may view anti-Trans policies—such as a prohibition on military service or legislation that bars certain medical treatments for inmates—as inconveniences that do not rise to the level of constitutional violations. Some may not even consider these policies to be unethical. However, these policies have a profoundly harmful effect on transgender people and reflect negatively on a society that has decided to rely more on tropes and ignorance than medical science and empathy when crafting policy. Operating from this historical perspective, one can see how deeply rooted prejudice can affect and sustain modern discriminatory practices.

While modern discrimination persists for transgender people and the LGBTQ community in general, the Supreme Court, politicians, and other stakeholders have the ability to make positive, just change to these circumstances. For instance, the Supreme Court recently held that discrimination based on sexual orientation, and/or transgender status is prohibited under Title VII of the Civil Rights Act of 1964.<sup>140</sup> Hopefully, this positive ruling will spur a public recognition of transgender rights and provide momentum for more

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136. Levi & Barry, *supra* note 133, at 594.

137. Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE UNIV. L. REV. 133, 161 (2010).

138. See Brief of NAACP Legal Defense and Educational Fund, Inc. & the Asian American Legal Defense and Education Fund as Amici Curiae in Support of Respondent at 7, Gloucester Cty. Sch. Bd. v. G.G., No. 16-273 U.S. (2017) (No. 16-273) (stating that “unfounded fears of sexual predation”—against transgender people and African-Americans—“have often been used to justify discrimination” and comparing “discomfort, fear, and hostility toward transgender students because of their gender identity” with justifications for racial segregation).

139. *Id.* at 3-4.

140. *Bostock v. Clayton Cty.*, Georgia, 140 S. Ct. 1731, 1737 (2020).

positive legal changes. More specific to transgender inmates, the Title VII ruling provides some hope that the Supreme Court may take up a case in the future similar to *Edmo* or *Gibson*—and make a ruling that expressly provides a constitutional right to transgender inmates for adequate medical treatment, including gender confirmation surgery when medically necessary.

Finally, tracking statistics on the number of transgender inmates may help illuminate how large a problem the treatment of transgender prisoners currently is. As previously established, transgender prisoners are more likely to be the victims of abuse and violence while incarcerated.<sup>141</sup> That these same targeted inmates often do not have access to necessary medical care is yet another degradation—one that surely is not consistent with the “broad and idealistic concepts of dignity, civilized standards, humanity, and decency”<sup>142</sup> that underlie the Eighth Amendment. Tracking statistics on the number of transgender people in prisons—and the occurrences of violence and abuse toward them—is one way to demonstrate and publicly establish the severity of this crisis, and, hopefully, to spur legal action to address it.

#### CONCLUSION

While the transgender community and allies have secured some significant legal victories over the years, recent times have seen a reversion and backlash to progress; hostilities and abuse toward transgender people indeed remain a significant problem, particularly in prisons. In the wake of these competing forces, ensuring necessary medical care for transgender inmates has developed into a particularly ripe area for the Supreme Court to address under an Eighth Amendment analysis. As demonstrated in *Edmo*, there is a viable path forward for the Court to establish modern medical norms in Eighth Amendment jurisprudence and, as a result, evolve our societal standards of decency to conform with the constitutional mandate. Moreover, for transgender advocates, the abolition or reform of qualified immunity in this context would allow for greater equity in obtaining just results.

Finally, looking back to the evolution of how HIV-AIDS infected people secured legal protections in prisons and society at-large, which was underscored by developments in medical science and societal standards of decency, is an astute lens for which to view the uphill battle faced by transgender people. We would be wise to learn from that history.

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141. *Transgender Incarcerated People in Crisis*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-incarcerated-people> (last visited Nov. 29, 2019).

142. *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).



# DANIEL V. ARMSLIST: A “BAD SAMARITAN” CASE STUDY

*Elizabeth Leonard*<sup>†</sup>

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## INTRODUCTION

Over the last year, the United States policy of broad internet immunity has come increasingly under fire from both the political right and left. Section 230

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of the Communications Decency Act<sup>1</sup> (generally called the “good Samaritan provision” or simply § 230) has provided internet websites and hosting services with blanket immunity for hosting third-party content since 1996. Often championed as the epitome of free speech legislation,<sup>2</sup> § 230 has immunized websites against claims of defamation, false advertising, fraud, and even sex trafficking.<sup>3</sup> Although politicians have vastly different reasons for wanting to curtail § 230 immunity,<sup>4</sup> one thing seems clear—the days of unfettered internet immunity are numbered. The question we now face is whether we can reintroduce liability into the cyber-world while maintaining some of the free-speech and innovation benefits that § 230 has bestowed for the last 25 years. Danielle Citron and Benjamin Wittes suggested in 2017 that we can strike an appropriate balance by applying a “bad faith” or “bad Samaritan” standard.<sup>5</sup>

The Wisconsin Supreme Court dove into the national conversation on internet liability and immunity in April of 2019 in the context of a wrongful death claim against Armslist.com, an internet marketplace for firearms.<sup>6</sup> Unsurprisingly, the Wisconsin court followed the national trend of interpreting § 230 overbroadly and provided Armslist.com full immunity because the case involved third-party content.<sup>7</sup> *Daniel v. Armslist, LLC* is the perfect example of why the current interpretation of § 230 is overly protective of internet-based businesses and leaves innocent victims with no civil recourse. Furthermore, *Daniel v. Armslist* provides an opportunity to examine how Citron and Witte’s “bad Samaritan” standard could function in the courts.

Section 230, as it currently stands, has abandoned the victims of cyber violence and harassment. Women, particularly young women, are often targets of online harassment that discourages victims from participating in online forums and leaves portions of the internet feeling like a regressive boys’ club. As our society becomes further enmeshed with the cyber-world, cyber violence creates more real-world harms. Internet companies should no longer be able to shrug off responsibility when they take an active role in facilitating harmful or illegal activity. Applying a “bad Samaritan” standard would restore a victim’s ability to

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1. 47 U.S.C. § 230.

2. Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 33-38 (2019) [hereinafter Goldman (First Amendment)].

3. See *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009); *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579 (S.D.N.Y. 2018); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016).

4. Conservatives point to perceived censorship of conservative viewpoints while liberals point to the unfettered spread of misinformation. See Bobby Allyn, *As Trump Targets Twitter’s Legal Shield, Experts Have a Warning*, NPR (May 30, 2020), <https://www.npr.org/2020/05/30/865813960/as-trump-targets-twitters-legal-shield-experts-have-a-warning> [https://perma.cc/9E2T-JBJ2].

5. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 416 (2017).

6. *Daniel v. Armslist, LLC*, 2019 WI 47, 386 Wis. 2d 449, 926 N.W.2d 710. In this case, the perpetrator of a mass shooting in Brookfield in 2012 had illegally obtained a firearm through a gun-wanted ad posted on Armslist.com. *Id.*

7. *Id.*

seek recovery while continuing to protect a company’s good faith moderating practices.

Internet liability is a broad and complex topic. Section I of this paper will give a broad overview of the tort liability framework within which *Daniel v. Armslist* is situated along with a short look at some background principles of website design. Section II will focus on the facts of *Daniel v. Armslist* and summarize the court’s analysis. Section III will first outline how the Wisconsin Supreme Court could have interpreted § 230 more narrowly. It will then set out Citron and Witte’s proposal for amending § 230 and consider how such an amendment would change the outcome of *Daniel v. Armslist*. Finally, it will examine why a broader policy change is necessary to combat the current problem of internet sex crimes.

## I. BACKGROUND

*Daniel v. Armslist* exists against a backdrop of three broad topics: publisher liability, liability protection for firearm distributors, and liability immunity for content-hosting websites under the Communications Decency Act (CDA). The CDA clearly takes center stage in the holding and analysis in *Daniel v. Armslist*, but it is important to first understand the “real world” (i.e., non-internet) liability framework that the CDA is built on. With this basis, I will then establish the history and original purpose of the CDA. Finally, I will briefly touch on some basic principles of website design and monetization.

### A. Publisher Liability in Print Media

In traditional print media, most jurisdictions draw lines between publishers, distributors, and mere conduits of information.<sup>8</sup> The potential for liability in each of these areas roughly corresponds to the amount of control exercised over the content. Publisher liability for print publishers, such as newspapers or magazines, is common in defamation law.<sup>9</sup> Under Wisconsin common law, a publisher can be held liable for negligently publishing defamatory material.<sup>10</sup> Negligence is found if the publisher either actually knew or merely should have known that the material was defamatory.<sup>11</sup> Publishers who exercise any specific control over the publication, such as writing, editing, or selecting the content are considered primary publishers. Primary publishers will likely be held liable whether or not they actually knew about defamatory material because of their close relationship to the material.<sup>12</sup> Secondary publishers, which can include printers or re-publishers, can also be held liable if the secondary publisher knows

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8. RODNEY A. SMOLLA, 1 RIGHTS AND LIABILITIES IN MEDIA CONTENT § 2:3 (2d ed. 2020).

9. *Id.*

10. RESTATEMENT (SECOND) OF TORTS: ELEMENTS STATED § 558(c) (AM. L. INST. 1977); *Maynard v. Port Publ’ns, Inc.*, 297 N.W.2d 500 (Wis. 1980) (finding that a contract printer was not a publisher and did not know of the defamatory material printed and so was not liable).

11. *Maynard*, 297 N.W.2d 500 at 505-06.

12. *Id.* (specifying that liability turned on the scope of a defendant’s involvement in the defamation, and the nature of the principal editor’s job is to be fully involved).

or has reason to know of the defamatory nature of the publication.<sup>13</sup> In contrast to primary publishers, secondary publishers are not presumed to know the content of what they publish.<sup>14</sup> The line between primary and secondary publishers can be fuzzy at times, but the general rule is that the more control a person or business has over the specific content of a publication, the less actual knowledge they need to have of the defamatory nature of the content to be held liable.<sup>15</sup>

Distributors, such as magazine stands and bookstores, follow a similar test as that applied to secondary publishers.<sup>16</sup> Distributor liability will depend on how much control the distributor generally exercises over the content they offer. If the distributor carefully reviews and selects material, they may open themselves up to more liability for allowing material that is likely defamatory.<sup>17</sup> Finally, conduits, or “common carriers,” such as transport services, are generally immune from liability for transmitting defamatory information because the conduit does not provide any gatekeeping function.<sup>18</sup>

Publisher liability outside the realm of defamation law is much less common but can open up publishers to more serious liability. *Braun v. Soldier of Fortune Magazine, Inc.*<sup>19</sup> provides a prime example of publisher liability in a wrongful death tort action. In *Soldier of Fortune* a Vietnam war veteran named Michael Savage placed an ad in *Soldier of Fortune* magazine titled “Gun for Hire” selling his services as a discrete and skilled mercenary.<sup>20</sup> He was predictably flooded with nefarious work offers.<sup>21</sup> Savage eventually took a job from Bruce Gastwirth to murder Gastwirth’s business partner, Richard Braun. Savage’s coconspirators shot and killed Braun in front of Braun’s teenage son.<sup>22</sup> Braun’s son filed a wrongful death action against *Soldier of Fortune* magazine for negligently publishing the “Gun for Hire” ad that imposed an unreasonable risk of harm to others.<sup>23</sup> The Eleventh Circuit concluded that under Georgia negligence law, a publisher has a duty to the public to “refrain from publishing advertisements that subjected the public . . . to a clearly identifiable unreasonable risk of harm from violent criminal activity.”<sup>24</sup> Thus, under state common law, publishers have long been susceptible to liability in various areas for the content they publish.

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13. RESTATEMENT (SECOND) OF TORTS: TRANSMISSION OF DEFAMATION PUBLISHED BY THIRD PERSON § 581 (AM. L. INST. 1977).

14. *See Maynard*, 297 N.W.2d 500 at 565-66; *see also* SMOLLA, *supra* note 8, § 2:3.

15. *See Maynard*, 297 N.W.2d 500 at 565-66; *see also* SMOLLA, *supra* note 8, § 2:3.

16. SMOLLA, *supra* note 8, § 2:3.

17. RODNEY A. SMOLLA, 1 LAW OF DEFAMATION § 4:92 (2d ed. 2020).

18. SMOLLA, *supra* note 8, § 2:3.

19. *Braun v. Soldier of Fortune Mag., Inc.*, 968 F.2d 1110 (11th Cir. 1992).

20. *Id.* at 1112.

21. *Id.*

22. *Id.*

23. *Id.* at 1115.

24. *Id.*

### B. Civil Liability Protection for Gun Distributors

Gun distributors in America benefit from statutory liability protections not afforded to all businesses. In 2005, Congress passed the Protection of Lawful Commerce in Arms Act (PLCAA)<sup>25</sup> which shields firearm manufacturers and dealers from both state and federal civil liability for injuries caused by third persons with non-defective products.<sup>26</sup> This instantly served to dismiss and bar various lawsuits claiming everything from negligence to wrongful death against firearms distributors or manufacturers.<sup>27</sup>

Although the PLCAA has greatly reduced the possible claims against firearms dealers, there are exceptions for claims of negligent entrustment, negligence per se, and knowing violations of the law.<sup>28</sup> The PLCAA defines negligent entrustment as supplying a firearm to someone when the seller “knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.”<sup>29</sup> Just as in publisher liability, negligent entrustment turns on whether the defendant knew, or should have known, that there was an unreasonable risk of injury. The exception for “knowing violation of the law” specifically covers any action of a seller to aid, abet, or conspire with any other person to sell a firearm to a buyer which the seller has reasonable cause to believe is prohibited from possessing a firearm under federal law.<sup>30</sup> The standard here is not actual or certain knowledge, but only “reasonable cause to believe,” which can be inferred from circumstances.<sup>31</sup> Although the PLCAA provides far more protection for firearm distributors and manufacturers from liability than other areas of commerce enjoy, it does not provide absolute immunity. Knowingly negligent behavior or knowingly enabling other’s illegal behavior will still leave firearm distributors open to civil liability. This is one example of a current law that provides a broad liability shield to an industry while still allowing truly bad actors to be held accountable.

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25. 15 U.S.C. §§ 7901–7903.

26. *Id.* § 7901.

27. Kristine Cordier Karnezis, Annotation, *Validity, Construction, and Application of Protection of Lawful Commerce in Arms Act (PLCAA)*, Pub. L. No. 109-92, 109 Stat. 2005, U.S.C.A. §§ 7901 to 7903, 17 A.L.R. Fed. 2d 167 (2007); *Delana v. CED Sales, Inc.*, 486 S.W.3d 316 (Mo. 2016) (barring a negligence claim brought by wife of fatal shooting victim against gun sellers who sold gun to mentally ill daughter after the wife begged the sellers not to sell to their daughter); *Sambrano v. Savage Arms, Inc.*, 338 P.3d 103 (N.M. Ct. App. 2014) (barring a wrongful death action against rifle manufacturer after intruder was able to open the rifle lock without the proper key and killed the victim with the unlocked rifle).

28. 15 U.S.C. § 7903(5); Karnezis, *supra* note 27.

29. 15 U.S.C. § 7903(5)(B).

30. *Id.* § 7903(5)(A)(iii)(II).

31. *Id.*

C. *The Communications Decency Act of 1996*

Set onto this liability framework is the Communications Decency Act of 1996 (CDA),<sup>32</sup> which immunizes various activities by interactive computer service providers. The story of the CDA is a familiar tale of an exception rapidly swallowing the rule. Section 230 was proposed as an exception to liabilities and penalties proposed in the CDA for distribution of pornography on the internet.<sup>33</sup> Since its inception, the CDA's power to curb pornography and indecency on the internet has weakened substantially.<sup>34</sup> In contrast, § 230's protections have grown to provide blanket liability protection for internet service providers and content hosting websites in circumstances which could not have been anticipated in 1996.

i. History and Amendments

The CDA was originally passed in 1996 and signed into law as Title V of the Telecommunications Act of 1996.<sup>35</sup> The CDA was proposed as an attempt to curb the availability of pornography and indecent material to children on the internet.<sup>36</sup> The CDA imposed sanctions on those who transmitted or displayed obscene or indecent materials to anyone under 18 years old.<sup>37</sup> Section 230 was proposed as part of a set of defenses to counterbalance the harsh penalties in the rest of the act by protecting internet service providers and users from being held liable as publishers for third-party statements or postings.<sup>38</sup> Congress used § 230 to encourage innovation and competition on the internet while placing the power of the internet in the hands of the users as much as possible.<sup>39</sup>

In 1997 the Supreme Court struck down the indecency portion of the CDA as a violation of the First Amendment,<sup>40</sup> and in 2003 Congress amended the CDA to remove the provisions that the Court struck down.<sup>41</sup> Congress's only other significant amendment to § 230 came in 2018, partially as a response to broad court interpretations of § 230 that protected internet service providers who were knowingly aiding sex trafficking.<sup>42</sup>

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32. Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 501-561, 110 Stat. 56, 133-43.

33. See Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM'NS L.J. 51, 59-60 (1996).

34. See sources cited *infra* notes 40-41 (striking down portions of the law that violated the First Amendment).

35. Telecommunications Act of 1996 §§ 501-561.

36. 47 U.S.C. § 230(b)(4); see Cannon, *supra* note 33, at 57.

37. See Cannon *supra* note 33, at 57-58.

38. See *id.* at 59-62.

39. 47 U.S.C. § 230(b)(1)-(3).

40. *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

41. 47 U.S.C. § 223 (amended 2003).

42. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 4, 132 Stat. 1253, 1254-55 (2018) (codified as amended at 47 U.S.C. § 230(e)); See Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279 (2019) [hereinafter Goldman (FOSTA)].

## ii. Purpose of § 230 of the CDA

When reviewing the purpose of § 230, it is important to remember two things: (1) § 230 was enacted in the context of the entirety of the CDA,<sup>43</sup> and (2) the internet was a very different beast in 1996 from what it is today. The CDA’s purpose was to limit access on the internet to pornography and indecent material.<sup>44</sup> Section 230 is titled “[p]rotection for private blocking and screening of offensive material,” and the statements of findings and policy set out two objectives for § 230 that are somewhat at odds with one another.<sup>45</sup> The first is to encourage the creation and use of blocking and screening technologies so that internet service providers (ISPs) and users are able to filter objectionable content.<sup>46</sup> The second is to deregulate the young internet so as to encourage expansion, innovation, and freedom of information and expression.<sup>47</sup> Section 230 attempts to achieve both of these objectives by protecting ISPs and users from both federal and state civil liability for the content posted by third parties.<sup>48</sup>

Section 230 attempted to address a flaw in common law publisher liability: if a defendant helped to print or distribute objectionable material, his liability as a “publisher” would depend on the degree of control the defendant exercised over the content distributed.<sup>49</sup> In the early days of the internet it became clear that a website would open itself up to liability as a publisher if it attempted to filter objectionable content from its site but was unsuccessful in removing all objectionable content.<sup>50</sup> In contrast, a website would enjoy liability protection if it made no effort at all to filter the content provided by third parties.<sup>51</sup> This is because a website that provides no editorial or filtering function is more like a conduit, which enjoys presumptive immunity.<sup>52</sup> This created a perverse incentive to avoid filtering objectionable material, especially because attempts to moderate a site were particularly difficult and time consuming.<sup>53</sup>

Congress recognized the need for filtering offensive material on the internet and feared that potential publisher liability would chill innovation and the free exchange of ideas.<sup>54</sup> Section 230’s solution was the “good Samaritan” provision

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43. See discussion *supra* Section I.C.i.

44. *Id.*

45. 47 U.S.C. § 230(a)-(b).

46. *Id.* § 230(b)(4).

47. *Id.* § 230(a)(3)-(4), (b)(2).

48. *Id.* § 230(c), (e).

49. See Eric Goldman, *An Overview of the United States’ Section 230 Internet Immunity* in THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY (Giancarlo Frosio ed.) (Forthcoming) [hereinafter Goldman (overview)] (explaining what Goldman terms the “moderator’s dilemma.”).

50. See, e.g., *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at \*4-5 (N.Y. Sup. Ct. May 24, 1995).

51. *Id.*

52. See SMOLLA, *supra*, note 17.

53. See Cannon *supra* note 33, at 59-61; see also Goldman (overview) *supra* note 49.

54. *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning internet medium . . . . Section 230 was enacted, in part, to maintain the robust

that provides that no interactive computer service or user can be treated as the publisher or speaker of content provided by third-parties.<sup>55</sup> The “good Samaritan” provision also provides liability immunity for “any action voluntarily taken in good faith” to remove objectionable material whether or not that material is constitutionally protected.<sup>56</sup> Section 230 allows ISPs and websites to act as publishers by filtering or moderating third-party content without fear of reprisal and without opening themselves up to lawsuits.

iii. The Court’s Broad Interpretation of § 230 and the Congressional Response: How the Exception Swallowed the Rule

It did not take long for the courts to weigh in on § 230. In 1997 the Court of Appeals for the Fourth Circuit established a broad reading of § 230 in *Zeran v. America Online*<sup>57</sup> that would shape § 230 jurisprudence to this day. The court in *Zeran* found that § 230 completely immunized AOL for “prank” postings on an AOL bulletin board.<sup>58</sup> The postings advertised obscene T-shirts regarding the Oklahoma City bombing and directed interested people to call Zeran (who had nothing to do with the posting).<sup>59</sup> As a result, Zeran received hundreds of angry, obscene, and threatening phone calls.<sup>60</sup> AOL took the original posting down but refused to print a retraction.<sup>61</sup> The posting was quickly replaced by the anonymous prankster.<sup>62</sup> The court found this was a clear case of AOL acting as a publisher of third-party content and so § 230 immunized AOL from Zeran’s suit.<sup>63</sup> The court emphasized Congress’s intent to protect freedom of speech with § 230 and concluded the free speech interest outweighed the protection of victims in these circumstances.<sup>64</sup>

As a result of this and other cases, the focus of the CDA shifted from encouraging websites to attempt to filter illegal or obscene content, to protecting websites that, by explicit policy, do not filter illegal or obscene content. Courts

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nature of internet communication and, accordingly, to keep government interference in the medium to a minimum.”).

55. 47 U.S.C. § 230(c)(1).

56. *Id.* § 230(c)(2)(A).

57. *Zeran*, 129 F.3d 327.

58. *Id.* at 329.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 328.

64. *Id.* at 330-31 (“Congress . . . found it to be the policy of the United States ‘to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.’ Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.”) (citation omitted).



regularly cited freedom of speech as among the most important policy consideration of § 230.<sup>65</sup>

The courts finally took their interpretation of § 230 too far for Congress to ignore with *Jane Doe No. 1 v. Backpage.com, LLC*, a case involving three minors who claimed they were victims of sex trafficking.<sup>66</sup> Backpage advertised sexual services, among other things.<sup>67</sup> Users and advertisers could be entirely anonymous and the rules governing the advertised content required no verification.<sup>68</sup> The victims alleged that “Backpage, with an eye to maximizing its profits, engaged in a course of conduct designed to facilitate sex traffickers’ efforts to advertise their victims on the website.”<sup>69</sup> The court began its opinion by acknowledging “[t]his is a hard case – hard not in the sense that the legal issues defy resolution, but hard in the sense that the law requires that we, like the court below, deny relief to plaintiffs whose circumstances evoke outrage.”<sup>70</sup> The court felt compelled to reach this legal conclusion because they applied broad precedents set by many courts before it.<sup>71</sup>

Congress responded with FOSTA-SESTA<sup>72</sup> which was signed into law on April 11, 2018.<sup>73</sup> The Act removed the civil liability shield for anyone who owns or operates a computer service with the intent to facilitate the prostitution of another person and either facilitates the prostitution of at least five people or acts in reckless disregard of their contribution to sex trafficking.<sup>74</sup> Essentially, the law reinstates liability for internet website publishers who know or should have known that their website facilitates illegal acts—however, the law only applies to illegal acts of sex trafficking and prostitution. This is Congress’s first real foray into tweaking § 230 to reintroduce the cyber world to the kind of liability faced in the real world by publishers of print media and classified ads.<sup>75</sup>

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65. See *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) (“[T]he immunity provided by § 230 protects against the ‘heckler’s veto’ that would chill free speech.”); see also, *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (“We believe that this distinction is consistent with the intent of Congress to preserve the free-flowing nature of internet speech and commerce . . .”).

66. *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 16 (1st Cir. 2016).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 15.

71. *Id.* at 15, 18-24, 29.

72. House bill “Allow States and Victims to Fight Online Sex Trafficking Act” and the Senate bill “Stop Enabling Sex Traffickers Act” were submitted as a joint proposal known as FOSTA-SESTA.

73. 18 U.S.C. § 2421A.

74. *Id.* § 2421A (b)-(c).

75. Goldman (FOSTA), *supra* note 42.

D. *Website Design and the User Experience*

- i. General principles of usability – you can only do what the website lets you do.

Through the design of a website, a website creator has full control over how the website can be used. Websites can give third parties a lot of freedom to post content, but the website host or creator controls the website's framework and available tools. Website hosts also retain the power to remove content. These are the very basics of web design. If the website does not have the necessary framework or tools, a third party cannot add or use those elements.<sup>76</sup> As technology advances and principles of website design are becoming more studied, website hosts and creators can exercise more control over the users. Certain tasks can be made far easier or more difficult with the inclusion of a search bar, the placement and typeface of a link, or even the simple availability of instructions.<sup>77</sup> This leaves an enormous amount of power and control in the hands of the website creator, even when the website content is largely provided by third-parties.

- ii. *Websites and Advertising*

Many web-based companies sell advertising space on their website to generate at least part of their revenue.<sup>78</sup> Advertising on the internet is generally sold in one of three ways: pay per click, pay per sales conversion, or pay for screen space.<sup>79</sup> Whichever method or methods a website uses, the key to revenue generation is website foot-traffic.<sup>80</sup> Like with any advertising, the more people who see it, the more chances that someone will respond. As such, the logical goal of any website that uses advertising to generate revenue is to draw in as much traffic as possible because it attracts advertisers.

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76. See generally STEVE KRUG, *DON'T MAKE ME THINK REVISITED: A COMMON SENSE APPROACH TO WEB AND MOBILE USABILITY* (Elisabeth Bayle ed., 3d ed. 2014); Aaron Gustafson, *The Illusion of Control in Web Design*, A LIST APART: CODE (Apr. 26, 2018), <https://alistapart.com/article/the-illusion-of-control-in-web-design/> [https://perma.cc/C4ZP-KBBT].

77. KRUG, *supra* note 76, at ch. 6.

78. See generally *U.S. Digital Advertising Industry – Statistics & Facts*, STATISTA RESEARCH DEPARTMENT (Mar. 25, 2021), <https://www.statista.com/topics/1176/online-advertising/#dossierSummary> [https://perma.cc/29Y6-SEZW].

79. Steven Snell, *Online Advertising and Its Impact on Web Design*, SMASHING MAG.: ARTICLES (Dec. 8, 2008), <https://www.smashingmagazine.com/2008/12/online-advertising-and-its-impact-on-web-design/> [https://perma.cc/F225-Z9DU].

80. See *id.*

## II. DANIEL V ARMSLIST, LLC

A. *Facts of the Case*

Zina Daniel Houghton was very aware of the danger she was facing from her unstable husband.<sup>81</sup> At the restraining order hearing on October 18th, 2012, Zina told the court, “I don’t want to die.”<sup>82</sup> The court issued a restraining order against Radcliffe Houghton and issued an injunction making it illegal under state and federal law for him to possess a firearm for four years.<sup>83</sup> Knowing that Wisconsin did not require private sellers to run background checks, and that many people in his neighborhood knew of the restraining order, Radcliffe went on Armslist.com to post a gun-wanted ad.<sup>84</sup> Radcliffe specified that he needed the gun ASAP.<sup>85</sup> Radcliffe then used the website’s search and filter tools to connect with a private seller near him, but outside his immediate neighborhood, to buy a semi-automatic handgun.<sup>86</sup> Radcliffe met the seller in a McDonalds parking lot the next day and paid more than the market rate for the gun.<sup>87</sup> The following day, October 21st, 2012, Radcliffe went to the spa where Zina worked, shot and killed Zina and two of her coworkers, wounded four other women, and then killed himself.<sup>88</sup>

Yasmeen Daniel, Zina’s twenty-year-old daughter, witnessed the incident and survived.<sup>89</sup> Yasmeen brought eleven claims against Armslist.com under Wisconsin law including negligence, negligent entrustment, wrongful death, aiding and abetting tortious conduct, and civil conspiracy for facilitating the illegal gun sale that enabled Radcliffe to take her mother’s life so efficiently.<sup>90</sup> Yasmeen’s complaint and subsequent briefs carefully framed the issues so that Armslist.com’s liability was not premised on its decision to publish Radcliffe Houghton’s gun-wanted ad but rather on their website design and management that enabled and encouraged illegal arms dealing on their site.<sup>91</sup>

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81. Lateef Mungin, *Wisconsin Spa Shooting: Wife Told Court ‘I Don’t Want to Die’*, CNN (Oct. 23, 2012, 5:10 PM) <https://www.cnn.com/2012/10/23/justice/wisconsin-shooting/index.html> [<https://perma.cc/Y6FG-EKHH>].

82. *Id.*

83. Daniel v. Armslist, LLC, 926 N.W.2d 710; see 18 U.S.C. 922(g)(8); WIS. STAT. § 941.29(1m)(f).

84. *Daniel*, 2019 WI 47, ¶ 6.

85. *Id.* ¶ 3.

86. *Id.* ¶¶ 3, 6.

87. Daniel v. Armslist, LLC, No. 15-C-1387, 2016 WL 660894, at \*2 (E.D. Wis. Feb. 17, 2016).

88. *Id.* at \*1; see also Mungin, *supra* note 81.

89. *Daniel* 2016 WL 660894, at \*1.

90. *Id.* at \*3.

91. Brief of Plaintiff-Appellant Yasmeen Daniel at 7-8, Daniel v. Armslist, LLC, 2019 WI 47, 386 Wis. 2d 449, 926 N.W.2d 710 (No. 2017AP344), 2019 WL 177222 (“Armslist did this by, inter alia, precluding the flagging of illegal sales; allowing anonymous unseen purchasers to receive guns without a background check; assuring users it will not check the legality of a sale; enabling prohibited purchasers to search for only sellers that did not check criminal backgrounds or keep records; and enabling sellers to identify themselves as either a

### B. Lower Courts

The Wisconsin Circuit Court dismissed Yasmeen Daniel's case against Armslist.com as it found the defendant immune under the CDA.<sup>92</sup> The Court determined that Daniel's claims depended on treating Armslist.com as the publisher or speaker of third-party content and was therefore barred by the CDA.<sup>93</sup>

The Wisconsin Court of Appeals disagreed.<sup>94</sup> As a matter of first impression in Wisconsin, the Court found that "the [CDA] does not protect a website operator from liability that arises from its own conduct in facilitating user activity, as is the case here."<sup>95</sup> The Court of Appeals held that Daniel's complaint did not allege that Armslist.com was liable for the content provided by another, but only for content that they themselves supplied through the design of their website and the tools offered.<sup>96</sup>

The Court of Appeals also analyzed an array of conflicting authority from other jurisdictions. They found the cases cited by Armslist.com to be generally unpersuasive as they all rely on a breadth of immunity that is not supported by the language of the statute.<sup>97</sup> Some cases provide blanket immunity to all activities involved in creating a website where third-parties can provide content.<sup>98</sup> Other cases argue that website creators are protected whenever exercising "a publisher's traditional editorial functions."<sup>99</sup> The Court of Appeals maintained that the clear language of the statute only protects a website when it is being treated as the "publisher or speaker" of third-party content. A theory of liability that holds a website responsible for its own website design is not being treated as the "publisher or speaker" of third-party content.<sup>100</sup>

### C. Wisconsin Supreme Court

The Wisconsin Supreme Court reverted to the broad interpretation of the immunity provided by § 230 and dismissed the case against Armslist.com.<sup>101</sup> The

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'private seller' or 'premium vendor.' These design elements were created by Armslist, and did not involve its publication of third party content.").

92. *Daniel v. Armslist, LLC*, 2018 WI App 32, ¶ 2, 382 Wis. 2d 241, 913 N.W.2d 211, 214, *rev'd* 2019 WI 47, 386 Wis. 2d 449, 926 N.W.2d 710.

93. *Id.*

94. *Id.*

95. *Id.* ¶¶ 3, 27.

96. *Id.* ¶ 52.

97. *Id.* ¶ 48 ("We believe that the cases cited by Armslist are effectively reading into the Act language that is not present, to the effect that the Act provides general immunity for all activities that consist of designing or operating a website that includes content from others.").

98. *Id.* ¶ 48 (discussing *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18 (1st Cir. 2016) and *Herrick v. Grinder, LLC*, 306 F. Supp. 3d 579, 589 (S.D.N.Y. 2018)).

99. *Id.* ¶ 49 (discussing *Zeran v. America Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997), *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014), *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008)).

100. *Id.* ¶¶ 45-46 (discussing *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100, 1105 (9th Cir. 2009), *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016), *J.S. v. Village Voice Media Holdings, LLC*, 184 Wash. 2d 95, 359 P.3d 714 (2015)).

101. *Daniel v. Armslist*, 2019 WI 47, ¶ 2, 386 Wis. 2d 449, 458, 926 N.W.2d 710, 714.

crux of the issue was whether all of Daniel’s claims against Armslist.com relied on treating them as the publisher or speaker of third-party content – the majority said the claims did, and therefore the case must be dismissed.<sup>102</sup>

The majority first determined that Armslist.com is not an “information content provider” under the CDA by applying the “material contribution” and “neutral tool” tests.<sup>103</sup> They allowed that a service such as Armslist.com may be liable for publishing its own content even while being immune from publishing third-party content.<sup>104</sup> The CDA defines “information content provider” as being “responsible, in whole or in part, for the creation or development” of content.<sup>105</sup> The majority cautioned against reading the word “development” either too narrowly or too broadly as a broad reading can effectively remove the immunity altogether and a narrow reading risks over-protecting providers with a blanket categorical immunity.<sup>106</sup> The majority applied the “material contribution” test to find the balance – the interactive computer service may be held liable if they materially contributed to the “alleged illegality of the conduct.”<sup>107</sup> Merely providing a place for illegal content to be displayed does not amount to a “material contribution.”<sup>108</sup> The Court used the concept of “neutral tools” to help determine if a website’s design materially contributed to the unlawfulness of content.<sup>109</sup> Tools are “neutral” if they can “be utilized for proper or improper purposes.”<sup>110</sup> If a tool is “neutral” then it does not material contribute under the test.<sup>111</sup> Furthermore, the Court relied on persuasive authority to determine that a computer service’s knowledge of illegal use of its site was irrelevant because § 230(c)(1) does not explicitly require a computer service to act in good faith in order to be granted immunity for publishing third-party content.<sup>112</sup>

The Court found that all of Armslist.com’s tools could be used for proper purposes and were therefore “neutral,” although it included very little discussion of the actual tools employed by Armslist.com.<sup>113</sup> Because of the absence of a good faith requirement in § 230(c)(1), the Court did not consider whether

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102. *Id.*

103. *Id.* ¶¶ 21-41.

104. *Id.* ¶ 21.

105. *Id.* ¶ 22.

106. *Id.* ¶¶ 22-23.

107. *Id.* ¶ 24 (quoting *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008)).

108. *Id.*

109. *Id.* ¶ 32-36.

110. *Id.* ¶¶ 32, 35 (quoting *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1197 (N.D. Cal. 2009)).

111. *Id.* ¶ 32.

112. *Id.* ¶¶ 29, 34. The absence of a good faith requirement in § 230(c)(1) is considered conspicuous in contrast to § 230(c)(2)(A) that provides immunity for “any action voluntarily taken in good faith to restrict access to or availability of” obscene material. 42 U.S.C. § 230(c)(2)(A). In other words, the portion of § 230 that immunizes a provider for their choice to moderate or remove material is conditioned on a good faith effort, but the portion of § 230 that immunizes a provider for a failure to moderate or remove material does not.

113. *See Daniel*, 2019 WI 47 ¶¶ 36-38.

Armslist.com knew its tools made it easier to illegally purchase firearms.<sup>114</sup> Under the Court's reasoning, even if Armslist.com knew for a fact that every single transaction on its website was illegal, it would remain immune from liability because the tools its website offers are "neutral" and could possibly be used for a legal purpose. Similarly, the Court explicitly rejected the argument that Armslist.com's intent to facilitate crime should affect whether they were immune under the CDA.<sup>115</sup> Finally, because of the absence of a good faith requirement in § 230(c)(1), Armslist.com was not required to implement any additional tools to discourage illegal activity.<sup>116</sup>

The Court concluded that all of Daniel's claims treat Armslist.com as the "publisher or speaker" of third-party content and therefore Armslist.com was immune. The Court warned against "artful pleading" that states claims only in terms of the service provider's own actions but the underlying basis for liability remains the unlawful third-party content.<sup>117</sup> The majority referenced various cases where sexual assault or sex trafficking resulted from the use of a website but reiterated that, despite horrible outcomes, intent had no place in the analysis.<sup>118</sup> Daniel's attempt to frame the issues as independent of Armslist.com's role as a publisher was not enough to convince the court that the issue extended to the website's design and purpose.

### III. ANALYSIS

Internet companies remain immune to the kind of liability that "real world" businesses must contend with all the time.<sup>119</sup> This immunity has allowed the internet to grow into the powerhouse that it is, but is that immunity still appropriate? It is not abnormal for the law to draw arbitrary lines - to say that one action is punishable, but a similar action is not. However, in a society where socializing, business, commerce, entertainment, and advertising are all primarily online, it becomes difficult to justify immunity for actions online that would clearly be punished in the "real world." The average person may view this difference in accountability as yet another example of how the legal system is arbitrary and unfair.

This does not necessarily mean that the cyber world must legally come in-line with the "real world" in all instances. In some cases, the increased freedom on the internet may have struck a better balance towards free speech and personal liberty than the "real world" has.<sup>120</sup> But complete publisher immunity is beginning to make the internet feel like the Wild West – like the federal legislature does not know how to properly regulate internet actors or hold them

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114. *Id.* ¶ 37.

115. *Id.* ¶ 39.

116. *Id.* ¶¶ 37-38.

117. *Id.* ¶ 43.

118. *Id.* ¶¶ 44-49.

119. See discussion *supra* Section I.C.

120. See generally Goldman (First Amendment), *supra* note 2.

accountable.<sup>121</sup> And like any Wild West society, the strong prosper while the vulnerable get overrun. Unlike in the “real world,” the vulnerable people getting hurt by online actions have no civil recourse for their legitimate grievances.

Throughout our entire legal history, people have been trying to strike the right balance between personal freedoms and reducing societal harm.<sup>122</sup> The American tort system attempts to compensate victims who are harmed because of someone else’s abuse of their freedoms.<sup>123</sup> Torts allow society to redistribute the harm victims experience to portions of society that could have prevented the harm and may have benefitted in some way from allowing the harm to happen.<sup>124</sup> This principal of redistribution is almost entirely absent on the internet. Section 230 focuses on holding only the “bad actors” – the people that write defamatory content, create misinformation, buy guns illegally, or harass and threaten women – responsible for the harm they cause.<sup>125</sup> The problem is that the bad actors are often anonymous or insolvent so the victim must shoulder the entire burden of the harm.

For the theory of liability against Armslist.com, the Wisconsin Supreme Court focused on the idea of website design as first-party content.<sup>126</sup> If Armslist’s design decisions are “content” under § 230 then they could, in theory, be held liable for their website design decisions that lead to harmful results. The difficulty with this theory of liability is that the “content” of the web design also merely facilitates bad actors. Without the addition of independent third-party

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121. See generally Danielle K. Citron, *Fix Section 230 and Hold Tech Companies to Account*, WIRED (May 6, 2021) (“But, thanks to overbroad court rulings, Section 230 ended up creating a law-free zone.”), <https://www.wired.co.uk/article/section-230-social-media>; Harrison Mantas, *Sen. Mark Warner Says He Is Embarrassed by congressional Inaction on Tech Regulation*, POYNTER (May 14, 2021) (“Warner acknowledged that social media companies have improved their content moderation since the 2016 election, but argued the U.S. government can’t rely on social media companies’ self-regulation. ‘We need to put in rules of the road . . . .’”) <https://www.poynter.org/fact-checking/2021/sen-mark-warner-embarrassed-by-congressional-inaction-on-tech-regulation/> [<https://perma.cc/D27M-UUK4>].

122. See generally BARRY A. LINDAHL, 1 MODERN TORT LAW: LIABILITY AND LITIGATION §§ 1:1 – 1:2 (2d ed. 2020).

123. See, e.g., RESTATEMENT (SECOND) OF TORTS § 558 (the tort of defamation allows victims to recover for damages if another abuses their freedom of speech by publishing false and defamatory statements about the victim); or see, e.g., RESTATEMENT (SECOND) OF TORTS § 282 (the tort of negligence in the context of an automobile accident allows an injured party to recover against a negligent driver who has abused their freedom to drive a car by driving negligently or recklessly.).

124. Take, for example, torts in the context of products liability where a manufacturer could have prevented harm through more careful testing or a costly recall of products but instead allowed the harm to occur. See, e.g., *Grimshaw v. Ford Motor Company*, 119 Cal.App. 3d 757 (1981) (Ford’s use of a cost benefit analysis to determine whether the cost of settlements would outweigh the cost to recall the defective product led to an award of punitive damages.). Or take for example the imposition of vicarious liability on employers. LINDAHL, *supra* note 122, § 7:2 (“Modern legal theory supports the doctrine [of respondeat superior] on the basis of risk allocation as well. The underlying rationale for the doctrine includes: . . . Ensuring that the victim’s losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury.”).

125. See discussion *supra* Section I.C.

126. *Daniel v. Armslist*, 2019 WI 47, ¶¶ 21–41, 386 Wis. 2d 449, 458, 926 N.W.2d 710.

content, the design is harmless. The “material contribution” and “neutral tool” test attempt to find a balance between accountability and freedom, but the “neutral tool” test is such a low bar that accountability has become a mere mirage on the internet. The Court was correct to recognize Armslist’s website design as the key to their liability, but I believe the website design is most relevant to establishing Armslist’s intent to facilitate illegal activity. Based on persuasive authority, the Court rejects the argument that § 230(c)(1) implicitly contains a “good faith” requirement in order to obtain immunity.<sup>127</sup> Although the text of § 230 is broad, it does not mandate that courts completely ignore a website host’s intent whenever they happen to host third-party content.<sup>128</sup> Furthermore, the legislative history of § 230 indicates an intention to encourage decency on the internet, not to protect those who encourage illegal behavior.<sup>129</sup>

*A. Judicial Proposal: Reintroducing Common Law Categories and the Publisher Presumption*

The Wisconsin Supreme Court could have bucked the national trend and interpreted § 230 to allow a website’s intentional facilitation of illegal activity to place them outside § 230’s liability shield.<sup>130</sup> One way to reintroduce intent into the analysis would be to recognize a distinction in § 230 between publishers, distributors, and conduits, just like there is in the common law world.<sup>131</sup> The CDA immunizes internet companies from being treated as publishers.<sup>132</sup> In the common law, publishers are presumed to know the content they are publishing and are often held liable for illegal or defamatory content whether or not a plaintiff can prove that a publisher actually knew they were publishing illegal or defamatory content.<sup>133</sup> The CDA could be read as removing the publisher presumption, rather than removing all civil liability connected to publishing. Protecting internet companies from this presumption accomplishes the original goal of the CDA, which was to allow internet companies to attempt to exercise control over offensive material without opening themselves up to additional

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127. *Id.* ¶¶ 29, 34.

128. 47 U.S.C. 230(c)(1) only protects websites from “being treated as the publisher or speaker” of third-party content.

129. See Citron & Wittes, *supra* note 5, at 409 (“Granting immunity to platforms designed in part or in whole for illegal activity would seem absurd to the CDA’s drafters.”); see also *infra* Section I.B.ii (discussion on the purpose of § 230).

130. See Citron & Wittes *supra* note 5, at 415-18 (arguing for an interpretive shift by the courts).

131. Claudia G. Catalano, Annotation, *Validity, Construction, and Application of Immunity Provisions of Communications Decent Act*, 47 U.S.C.A. § 230, 52 A.L.R. Fed. 2d § 2 (2011) (“For example, some courts have extended the immunity to “distributors” of third-party content, as a subset of “publishers” . . . notwithstanding the fact that distributors at common law are subject to an intermediate standard of responsibility, and may be held liable if they know or have reason to know of the defamatory nature of the matter they disseminate.”).

132. 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

133. See discussion *supra* Section I.A.



liability.<sup>134</sup> A website could be considered a distributor of third-party content, more akin to a magazine stand than a magazine. Traditional tort liability for distributors does not presume that the distributor knows the content it is distributing, but if there is evidence that the distributor was made aware that the content was illegal then they open themselves up to liability.<sup>135</sup> Under this theory, an ISP would remain completely immune as it would be most analogous to a conduit which ships the information without exercising any control over what the content is. A website could be considered a publisher in one sense and a distributor in others. Under this structure, the CDA could protect internet services from being held liable as a speaker or publisher of third-party content, but internet services could still be held liable for knowingly facilitating illegal activity as a distributor of third-party information.

In *Daniel v. Armslist*, Armslist.com is like a pawn shop or consignment store – they provide a venue for distribution. As such, they could be held responsible for the choices they make that facilitate known illegal activity. Their intention in how they set up their “store” or screen their customers matters to the analysis. As will be addressed further below, Armslist’s design choices show not only that they were aware that their website was used for illegal activity, but it intentionally protected those activities.<sup>136</sup> Under the proposed reading of the CDA which removes only the presumption of liability attached to publishers, Daniel’s claims showed Armslist.com had actual knowledge of illegal activity that would have opened them up to civil liability.

Unfortunately, this is not the way the courts have interpreted the CDA. Instead, most courts have interpreted the CDA to completely immunize websites for any harm caused by content created by third parties – regardless of whether or not the website was acting as a publisher or whether the website facilitated the harm through their own website tools.<sup>137</sup> *Daniel v. Armslist* provided the Wisconsin courts with a unique opportunity to limit the broad reach of § 230’s liability shield because application of § 230 to Wisconsin tort law was a matter of first impression. The Wisconsin Supreme Court chose instead to emphasize the broad nature of the immunity and base that in the “neutral tool” test.<sup>138</sup>

*B. Legislative Proposal: Liability for “Bad Samaritans” who Knowingly or Recklessly Facilitate Illegal Content*

Given the number of courts that have now weighed in, it is likely up to Congress to reintroduce an explicit “good faith” requirement to § 230’s liability shield. Citron and Witte propose two variants for an amendment to § 230. The first is a narrow amendment that would remove § 230 protection “for any website or other content host that purposefully encourages [a specific list of illegal

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134. See Cannon *supra* note 33, at 61.

135. See SMOLLA, *supra* note 8, § 2:3.

136. See discussion *infra* Section III.C.

137. See discussion *supra* Section I.C.iii.

138. Daniel v. Armslist, 2019 WI 47, ¶ 36-38, 386 Wis. 2d 449, 926 N.W.2d 710.

activities].”<sup>139</sup> The second is a broader approach that would amend § 230(c)(1) to read:

No provider or user of an interactive computer service *that takes reasonable steps to prevent or address unlawful uses of its services* shall be treated as the publisher or speaker of any information provided by another information content provider *in any action arising out of the publication of content provided by that information content provider*.<sup>140</sup>

The first variant is similar to the approach taken in the FOSTA-SESTA amendments.<sup>141</sup> It is targeted to specific and egregious harms so that non-targeted activities can still benefit from the freedom and liability protection the internet currently enjoys. However, this patchwork approach has many shortcomings. First, it can be slow to respond to new problem areas as the amendment would specifically list which illegal activities trigger the exclusion. If a specific illegal activity is not listed, the victim is out of luck until the amendment is altered. Similarly, since the amendment would list specific illegal activities, liability could be haphazard and inconsistent across similar activities. Finally, this proposed amendment would still leave many victims with no civil recourse. If the amendment called for a ban on sex trafficking and prostitution (like FOSTA-SESTA does), it still leaves victims of revenge porn and cyber stalking out of luck. If the amendment includes those crimes (as the proposed amendment example in Citron & Witte’s piece does), it still leaves Yasmeen Daniel with no recourse. This targeted amendment is a band-aid that cannot address the systemic problem with § 230’s liability shield.

The second variant is broader in its application but could provide better consistency in expectations and accountability once the dust settled. Requiring that websites take “reasonable steps” to address illegal behavior reintroduces liability for actors who intentionally or recklessly allow illegal activity on their site while still protecting websites that make a good faith effort. This approach is comprehensive and can be applied in just about any tort context. Although the change in expectations and liability would be disruptive initially, a “reasonable steps” standard should not be too high a bar for most websites to meet. It essentially creates a “bad Samaritan” exclusion for § 230(c)(1) that removes bad actors from the CDA’s protections.

### C. *Armslist.com Design Elements in Question*

If Citron and Witte’s amendment had been made and a “reasonable steps” standard were applied in *Daniel v. Armslist*, it would likely have made a significant difference. Several relevant design elements on Armslist’s website,<sup>142</sup>

139. Citron & Witte, *supra* note 5, at 419.

140. *Id.* (emphasis in original to indicate the proposed new language).

141. 47 U.S.C. § 230(e)(5) (referencing 18 U.S.C. §§ 1591, 1595, and 2421A).

142. ARMSLIST FIREARMS MARKETPLACE, <https://www.armslist.com/> [<https://perma.cc/3TYX-GWHB>] (last visited Nov. 29, 2019) (the description of these design elements is based on my own personal investigative activity and use of the site).

discussed below, show an intent to encourage illegal activity and clearly do not meet a “reasonable steps” standard. These website design choices illustrate how Armslist.com is a “bad Samaritan” that remains intentionally blind to illegal activity. These design elements make them complicit in the illegal activity on their website and would open them up to liability under the proposed “reasonable steps” standard.

i. “Power Search”

The “Power Search” function will seem rather familiar to most online shoppers. Armslist.com offers a general search bar, but also allows users to search or filter for a specific gun make and model, caliber, action (bolt, semi-automatic, single fire, etc.), and type (pistol, rifle, etc.).<sup>143</sup> There are also options to filter by location, listing type (for trade, for sale, etc.) and, most importantly, seller type.<sup>144</sup> The seller type filter allows a buyer to see only listings from licensed vendors, or only private sellers.<sup>145</sup> In addition to being able to filter on the “Power Search” page, any search run on the site includes a toggle button on the top for seller types, making it that much easier to see only private sellers.<sup>146</sup>

The “Power Search” generally allows a user to find exactly what they are looking for quickly, with only a few clicks – and there is nothing wrong with an efficient website. The potential problem with the “Power Search” lies in the seller type filter, especially in combination with the location filter. These filters allow buyers who know they would not pass a background check to only view listings that do not require background checks and may further be able to avoid any legally required waiting period.

Consider a hypothetical: an Illinois resident, who we will call Bob, is not legally allowed to possess a gun because of a domestic violence conviction and restraining order. Illinois has a law that requires a buyer to undergo a background check in order to obtain a FOID (Firearms Owner’s Identification card).<sup>147</sup> Private buyers must check a buyer’s FOID before completing a sale. Illinois also has a mandatory waiting period for private gun sales. Bob could go on Armslist.com, choose to filter to private sellers in Janesville or Racine, Wisconsin, where private sellers require no background check or mandatory waiting periods, and instantly see listings of readily obtainable firearms just across the border. Without these filters, Bob may still be able to illegally obtain a firearm, but it may take him days to manually look through listings and find a private seller in the proper location. If Armslist.com did not label sellers as either vendors or private sellers at all, Bob may not be able to differentiate on his own and may never find an appropriate seller.

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143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Private Gun Sale Laws by State*, FINDLAW, <https://consumer.findlaw.com/consumer-transactions/private-gun-sale-laws-by-state.html> [https://perma.cc/M42J-KY2G] (last visited Mar. 8, 2020).

## ii. Lack of verification or accountability

Transactions on Armslist.com can be completely anonymous.<sup>148</sup> Armslist.com does not require any kind of verification to create an account or complete a transaction.<sup>149</sup> Armslist.com could require its users to upload a background check report in order to create an account, or Armslist.com could require transactions to take place at licensed dealers who run background checks for private parties.<sup>150</sup> While these practices may be responsible and admirable, it arguably goes beyond an expected level of care considering that many states do not legally require a background check. However, it is common for websites to require, at a minimum, an email verification before creating an account. At the time this paper was written, it appears that some functions on Armslist.com require email verification, but the “requirement” is easily circumvented.<sup>151</sup> The email verification is not actually required to complete an account creation, to create and post an advertisement, or to answer a posted ad.<sup>152</sup> Requiring a verified email address can help track an internally consistent identity of a user and provides one sure line of communication with a person.<sup>153</sup> If email verification were required, a moderately savvy user could admittedly circumvent the requirement,<sup>154</sup> but on Armslist.com being anonymous and untraceable is the default. It requires no effort or expertise on the part of the user to remain anonymous.

Armslist.com does not require any true or traceable information be provided to use its site. When a buyer responds to a seller’s ad, the seller’s email address is not even visible to the buyer—the website routes the buyer’s message to the seller’s shielded email address. This means that if a user were to suspect another

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148. See *Daniel v. Armslist, LLC*, No. 15-C-1387, 2016 WL 660894, at \*2 (E.D. Wis. Feb. 17, 2016) (“Users are not required to register an account, thereby encouraging anonymity”); ARMSLIST FIREARMS MARKETPLACE, <https://www.armslist.com/> [<https://perma.cc/3TYX-GWHB>] (last visited Nov. 29, 2019) (confirmed by my own personal investigation).

149. See *Daniel v. Armslist, LLC*, No. 15-C-1387, 2016 WL 660894, at \*2 (E.D. Wis. Feb. 17, 2016) (“Users are not required to register an account, thereby encouraging anonymity”); ARMSLIST FIREARMS MARKETPLACE, <https://www.armslist.com/> [<https://perma.cc/3TYX-GWHB>] (last visited Nov. 29, 2019) (confirmed by my own personal investigation).

150. Colin Lecher & Sean Campbell, *The Craigslist of Guns: Inside Armslist, the Online ‘Gun Show that Never Ends.’* THE VERGE, (Jan. 16, 2020) <https://www.theverge.com/2020/1/16/21067793/guns-online-armslist-marketplace-craigslist-sales-buy-crime-investigation> (“Retailers like Bass Pro Shops, Brownells, or BudsGunShop.com sell their firearms through company websites, but buyers pick up the guns from licensed dealers.”) [<https://perma.cc/9Y5P-7RPL>].

151. Per tests personally run on 11/29/2019.

152. Per tests personally run on 11/29/2019.

153. See generally *What is the Point of Email Verification?* STACKEXCHANGE, <https://ux.stackexchange.com/questions/111005/what-is-the-point-of-email-verification> (last visited May 19, 2021).

154. Users can create a junk email address through a spoofed IP and likely remain untraceable. See Alison Grace Johansen, *IP Spoofing: What is it and How Does it Work?*, NORTON (Nov. 25, 2020), <https://us.norton.com/internetsecurity-malware-ip-spoofing-what-is-it-and-how-does-it-work.html> [<https://perma.cc/3HSY-U8LM>].

user of illegal activity and attempted to report the activity to the authorities (as Armslist.com purportedly suggests its users do), the user can provide the authorities with no useful identifying information beyond the self-reported general location of the user. Furthermore, the authorities could not glean any additional information from Armslist.com’s records as they don’t collect any identifying information. This makes all transactions on the site virtually untraceable. Like the “Power Search”, this design element is not unique to Armslist.com and alone would not likely be enough to incur liability, but it is a significant element to show the overall goals and purpose of Armslist.com’s design choices.

### iii. No flag for illegal behavior

Most websites that facilitate third-party advertisements and sales give users some ability to flag postings for review or removal, and Armslist.com is no different. Armslist.com allows users to flag posts as a scam, spam, unresponsive, vendor listing (miscategorized as a private seller), and even as overpriced.<sup>155</sup> Armslist.com does not have an option for users to flag a listing for review or removal for being illegal.<sup>156</sup>

Let us return to Bob, our hypothetical illegal buyer. Bob posts a “want” ad on Armslist.com which states he is looking for a semi-automatic handgun for around \$1,000. A seller, Sally, responds to the ad and they arrange a meeting. At their meeting, Sally recognizes Bob and knows he is not legally allowed to possess a firearm, so being a responsible gun owner and citizen, she refuses to sell to Bob and they both go home. Sally wishes to flag Bob’s account, or at least his “want” ad on the site, so that other unsuspecting sellers do not illegally sell to him. She cannot do this. She can flag his ad for something else, but it would simply be reviewed and reinstated as it does not qualify as a scam, or spam, or anything else that Armslist.com cares about flagging. Sally, who has actual knowledge that Bob is attempting to illegally purchase a firearm through the site, cannot even warn other users. This means that Bob can easily connect with another seller and complete the purchase.

### iv. Terms and Conditions

The terms and conditions of Armslist.com come up upon first launching the website. The user must click to agree to terms to continue to the site. The terms will also appear before performing other tasks on that site, like before posting an ad. The second item on the terms and conditions list (after verifying that the user is at least 18 years old) states the following: “I understand that ARMSLIST DOES NOT become involved in transactions between parties and does not

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155. See *Daniel v. Armslist, LLC*, No. 15-C-1387, 2016 WL 660894, at \*2 (E.D. Wis. Feb. 17, 2016) (“Users are not required to register an account, thereby encouraging anonymity”); ARMSLIST FIREARMS MARKETPLACE, <https://www.armslist.com/> [<https://perma.cc/3TYX-GWHB>] (last visited Nov. 29, 2019) (confirmed by my own personal investigation).

156. Per tests personally run on 11/29/2019.

certify, investigate, or in any way guarantee the legal capacity of any party to transact.”<sup>157</sup>

Read in the most positive light, this item simply warns the user that some other actors on the site may be acting illegally and the user should be cautious to avoid that. However, read in a more practical light, this item has two functions: one as a liability shield, not against users but against victims of users doing illegal acts; the other is as an advertisement to users intending to use the website illegally. It clearly states to bad actors that the website will not stop them and will not track them. The website, who might actually have the resources to curb illegal behavior, instead puts the onus on the users themselves to follow the law and contact the authorities if they believe a sale may be illegal (which as is established above, can be fruitless given the complete lack of information available on users).

Time and time again, Armslist.com implicitly assures users who intend to use the site for illegal transactions that they are as safe as the site can make them. Armslist.com does not collect any personal identifying information and allows entirely anonymous transactions, they advertise that the website does not get involved in the transactions and leave policing illegal activity up to the users, they do not let those users flag activity on the site as illegal (only inconvenient or overpriced), and then they make it incredibly convenient to find sellers that are not legally required to run background checks at a nearby location. Each of these features taken alone may be “neutral” per the Wisconsin Supreme Court’s extremely forgiving definition. But taken together, they clearly protect users who intend to conduct illegal transactions and would not meet a “reasonable steps” standard as articulated in Citron and Wittes’ proposed amendment.<sup>158</sup> Legal gun owners do not benefit from these tools and features. The benefit extends to users looking for an untraceable, illegal transaction.

The other party that benefits from these design features is Armslist itself through increased foot-traffic and therefore increased ad revenue. An unknown portion of Armslist.com’s revenue comes from advertisers. The landing page for Armslist.com is full of paid promotional listings for guns, ammo, and gear.<sup>159</sup> Armslist directs potential advertisers to an information page which puts front and center that it has over seven million visits per month.<sup>160</sup> Armslist’s need for foot-traffic means that it would likely be financially detrimental to discourage illegal use of their site. A vast majority of Armslist.com’s listings are by private parties.<sup>161</sup> While it is impossible to fully collect data on a site whose draw is

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157. *Armslist Terms of Use*, ARMSLIST, <https://www.armslist.com/info/terms> [<https://perma.cc/6PGB-ZCYL>] (last visited Nov. 23, 2019) (emphasis in original).

158. Citron & Wittes, *supra* note 5.

159. ARMSLIST, <https://www.armslist.com/> [<https://perma.cc/3TYX-GWHB>] (last visited Feb. 9, 2020).

160. *Advertise on Armslist*, ARMSLIST, [https://www.armslist.com/info/\[https://perma.cc/C5WF-W4KH\]advertise](https://www.armslist.com/info/[https://perma.cc/C5WF-W4KH]advertise) (last visited Feb. 2, 2020).

161. When viewing listing in Wisconsin (Feb. 9, 2020) 3,065 listings were for private parties and 1,072 were for premium vendors. When viewing the same search again (May 12, 2020) 1,808 listings were for private parties and 692 were for premium vendors.

partially based on anonymity, it has been shown that less than 10 percent of listings on Armslist.com mention background checks.<sup>162</sup> A drop in illegal use of the website could lead to a significant drop of advertising revenue, which creates a clear incentive for Armslist.com to stay “hands-off” and allow, or even encourage the illegal activity.

#### D. Public Policy and Internet Sex Crimes

One area where victims are particularly prevalent online, and their complaints go almost entirely unanswered, is in the area of sex crimes. The internet helps facilitate everything from harassment to revenge porn to sex trafficking. The problem with immunizing interactive computer services for internet sex trafficking, which is often carried out through personal advertisements on websites like Backpage.com and Craigslist.com, became so unacceptable that Congress eventually passed FOSTA-SESTA to again hold websites that facilitate sex trafficking accountable. While it is too early to say the whole effect of the new law, since FOSTA-SESTA passed, Backpage.com has been seized by the FBI as part of an enforcement action (though not predicated on FOSTA-SESTA),<sup>163</sup> and Craigslist.com has stopped hosting personal ads altogether.<sup>164</sup> There has been significant backlash against FOSTA-SESTA from the voluntary underground sex-work industry as it has limited the community’s ability to safely source and screen clients.<sup>165</sup> There has also been research that shows trafficking victims are less likely to be found when forced off-line.<sup>166</sup> Although arguments can be made that FOSTA-SESTA’s effects should be a warning of unintended consequences of reintroducing liability for third-party content online, the true cause of this problem is much bigger than an internet liability shield and lies with how sex work is criminalized and policed.

Other forms of online sex crimes, like harassment, are particularly amplified by the internet and therefore can successfully be addressed through civil liability for third-party online content. Online harassment is prevalent, especially among young women. A 2017 Pew Research survey showed 21% of women ages eighteen to twenty-nine report being sexually harassed online, and that number has likely gone up in the years since.<sup>167</sup> While the internet is often

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162. Lecher & Campbell, *supra* note 150.

163. BACKPAGE, <http://backpage.com/> [<https://perma.cc/8J2U-DNH4>] (last visited on Jan. 19, 2020); Goldman (FOSTA), *supra* note 42, at 285.

164. Samantha Cole, *Craigslist Just Nuked Its Personal Ads Section Because of a Sex-Trafficking Bill*, VICE (Mar. 24, 2018), [https://www.vice.com/en\\_us/article/wj75ab/craigslist-personal-ads-sesta-fosta](https://www.vice.com/en_us/article/wj75ab/craigslist-personal-ads-sesta-fosta) [<https://perma.cc/Q37A-M7JK>].

165. Liz Tung, *FOSTA-SESTA was Supposed to Thwart Sex Trafficking. Instead, it’s Sparked a Movement*, THE PULSE (July 10, 2020), <https://why.org/segments/fosta-sesta-was-supposed-to-thwart-sex-trafficking-instead-its-sparked-a-movement/> [<https://perma.cc/T6WM-727Z>].

166. Goldman (FOSTA), *supra* note 42, at 289-92; DANIELLE BLUNT & ARIEL WOLF, ERASED: THE IMPACT OF FOSTA-SESTA & THE REMOVAL OF BACKPAGE, 18-31 (2020).

167. Maeve Duggan, *Online Harassment 2017*, PEW RSCH. CTR. (July 11, 2017), <http://pewresearch.org/internet/2017/07/11/online-harassment-2017/> [<https://perma.cc/BK7F-M2CF>].

touted as a prime example of freedom of speech, harassing behavior often leads to silencing the voices of the vulnerable and limiting viewpoints online.<sup>168</sup>

While it is easy to dismiss online harassment as carrying little actual harm, there are many circumstances where online harassment escalates. Doxxing is the act of posting a person's real-world address or personal information without their permission.<sup>169</sup> Doxxing allows harassing behavior to cross-over from the "cyber world" to the "real world" creating truly dangerous situations. Another example of internet harassment that causes tangible real-world consequences is revenge porn – the act of posting intimate pictures or videos of an ex-lover to cause embarrassment. These pictures and videos can cause severe damage to a person's reputation, and can cause untold emotional trauma.

In each of these cases, there must be an internet platform that either explicitly allows this type of behavior or provides woefully inadequate protection for its users against such behavior. Wisconsin's approach in *Daniel v. Armslist* tells victims of crimes that were facilitated online that no matter how great their harm, no matter how much the website that facilitated the act profited, and no matter what the intent behind the website was, they cannot recover. An amendment to § 230 would put websites on notice that they must take reasonable steps to address these issues.

#### CONCLUSION

*Daniel v. Armslist* was a lost opportunity for the Wisconsin Supreme Court to go against the national trend and interpret § 230 narrowly. The case illustrates how § 230 should be amended to introduce a "bad Samaritan" exemption that requires websites to take reasonable steps to address illegal activity on their sites in order to retain immunity from civil liability. Without this adjustment, the internet will remain a libertarian feeding ground that damages the lives of many. Victims of online sex crimes are particularly vulnerable to current § 230 policy. Providing this level of blanket immunity to websites who intentionally facilitate illegal behavior will continue to encourage crimes such as revenge porn and harassment.

Within the existing § 230 framework, websites should be liable for their own website design decisions which facilitate illegal behavior. When the website host is aware its website is being used for illegal content, there should be an affirmative obligation to implement reasonable design elements that discourage that behavior. However, given the broad interpretation given to § 230 by the courts, the responsibility falls to Congress to amend § 230 to reintroduce reasonable policy limitations on internet civil immunity.

While it may be difficult to draw the line regarding how much effort a website must exert in order to discourage illegal content, Armslist.com clearly

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168. *Id.* ("Around one-quarter of Americans (27%) say they have decided not to post something online after witnessing the harassment of others, while more than one-in ten (13%) say they have stopped using an online service after witnessing other users engage in harassing behaviors.").

169. *Doxxing: What it is How you Can Avoid it*, TRIPWIRE (Dec. 26, 2018), <https://www.tripwire.com/state-of-security/security-awareness/what-is-doxxing-and-how-can-you-avoid-it/> [<https://perma.cc/C386-XSJP>].



falls on the wrong side of the line. Many websites have implemented some form of filtering or flagging to discourage illegal behavior. Armslist.com specifically designed their site to make it impossible to flag illegal buyers or sellers and practically impossible to track illegal exchanges. An amendment to § 230 is too late to protect Zina Daniel Houghton but it could protect others. It is Congress’s duty to amend § 230 to provide that protection.



# SCHOOL’S OUT FOR BLACK BOYS IN WISCONSIN: AN ANALYSIS OF WISCONSIN’S RACIST IMPLEMENTATION OF EXPULSION AND SUSPENSION LAW AND ITS INTERSECTION WITH WISCONSIN STUDENTS’ OPPORTUNITIES FOR SUCCESS

*Madeline Dawn Nelson<sup>†</sup>*

*“Each day [a student] is not receiving an education is gone forever.  
No amount of money can replace the lost opportunity. If [the student]  
has been wrongfully expelled . . . the harm is enormous.”<sup>1</sup>*

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1. Tate v. Racine Unified Sch. Dist., No. 96-C-0524, 1996 U.S. Dist. LEXIS 22723, at  
\*16 (E.D. Wis. Aug. 15, 1996).

## INTRODUCTION

“[E]ducation is perhaps the most important function of state and local governments.”<sup>2</sup> “In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms.”<sup>3</sup> The court in *Brown v. Board of Education* made these observations over fifty years ago.<sup>4</sup> Because of the Supreme Court’s decision, Black children’s constitutional right to *attend* integrated public school was finally recognized.<sup>5</sup> However, in Wisconsin, Black boys still face the question of whether their right to *remain* in public school is recognized.

This question is exemplified by a high-profile case from 2016.<sup>6</sup> Dereian Brown, a sixth grader from Cherokee Heights Middle School, in Madison, Wisconsin, faced expulsion for allegedly bringing a BB gun to school.<sup>7</sup> By the time the expulsion hearing occurred, Dereian had already served a 15-school day suspension.<sup>8</sup> Yet, the school district wanted to expel him for another two semesters.<sup>9</sup>

The case against Dereian was weak. The school district’s only evidence that Dereian brought a BB gun to school was an unsubstantiated school administrator’s claim that Dereian had confessed to doing so.<sup>10</sup> The school district conceded that no one saw Dereian in possession of the BB gun and that he never threatened anyone with it.<sup>11</sup> Furthermore, Dereian had no prior disciplinary issues at the school and received glowing praise from his teachers.<sup>12</sup> Dereian’s parents wondered why the school district was pursuing such a harsh punishment: a two semester expulsion.<sup>13</sup>

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2. *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 493, *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

3. *Id.*

4. *Id.* at 483.

5. *Id.* at 494–95.

6. Doug Erickson, *At Rare Open Hearing, Madison Middle School Student Fights to Avoid Expulsion*, Wis. St. J. (Jan. 5, 2016), [https://madison.com/wsj/news/local/education/local\\_schools/at-rare-open-hearing-madison-middle-school-student-fights-to/article\\_b8f11ac5-20fa-51c9-9eec-a335a7409550.html](https://madison.com/wsj/news/local/education/local_schools/at-rare-open-hearing-madison-middle-school-student-fights-to/article_b8f11ac5-20fa-51c9-9eec-a335a7409550.html) [<https://perma.cc/7HLF-T6MB>].

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* See also Brief in Support of Complaint at 7, *Brown v. Madison Metro. Sch. Dist., U.S. Dep’t Educ. Off. for C.R.*, <https://bloximages.chicago2.vip.townnews.com/madison.com/content/tncms/assets/v3/editorial/b/1d/b1d01be7-db3a-5804-a2e8-dbd76e8c59da/575ef3f3a6797.pdf.pdf> [<https://perma.cc/DA4R-2EZN>].

11. Erickson, *supra* note 6.

12. *Id.*

13. See *Id.*

Dereian's attorneys asserted that race was a critical factor in the school board's decision to proceed with expulsion.<sup>14</sup> In their complaint to the U.S. Department of Education Office for Civil Rights, Dereian's attorneys argued that because Dereian is Black, the District treated him differently than other students who faced expulsion for bringing a BB gun to school.<sup>15</sup> The complaint first referred to former school board member Ed Hughes' blog, in which he wrote: "I don't think students benefit much from being represented by attorneys in the expulsion process . . . rarely is there a significant factual dispute about whether the student did what he or she is charged with."<sup>16</sup> Dereian's attorneys argued that Ed Hughes' statement indicated that he approached Dereian's expulsion hearing with a presumption of guilt.<sup>17</sup> The complaint also referred to a statement made by former school board President, James Howard, to a TV reporter: "It was important to send a message . . . We cannot decide this case by case."<sup>18</sup> Dereian's attorneys argued that this statement demonstrated the school district's failure to consider Dereian's individual circumstances—a consideration required by Wisconsin's expulsion statutes.<sup>19</sup> Finally, the complaint identified other cases from the Madison Metropolitan School District in which students were found to have brought BB guns to school and were not expelled.<sup>20</sup> From this, it is not difficult to infer that Dereian's race played a more important role in determining whether to expel him than his actual behavior.

Cases like Dereian's occur all too often in Wisconsin's school districts. School administrators or teachers involved in incidents leading to suspension or expulsion weigh Black male students' behavior more negatively than white male students' behavior.<sup>21</sup> If a case reaches an expulsion hearing, the implicit biases of the school board or hearing officer lead them to overestimate the likelihood that the Black male student did in fact engage in the punishable conduct.<sup>22</sup> Furthermore, laws regulating the expulsion process lack adequate protections for students, creating an ease with which school boards and hearing officers expel students.<sup>23</sup> Together, these factors result in a disparate number of Black male students facing suspension and expulsion in Wisconsin's school districts. The disparate use of expulsion and suspension for Black male students has a disastrous effect on students' opportunities for success in the future.

This comment examines and proposes ways to decrease the racist disciplinary practices in Wisconsin's public schools. These proposals include (1)

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14. Brief in Support of Complaint, *supra* note 10, at 16.

15. *Id.* at 43.

16. *Id.* at 12.

17. *Id.* at 24-25.

18. *Id.* at 24.

19. *Id.*

20. *Id.* at 43 ("Similarly, over the last several years . . . the District recommended for expulsion 28 students based on BB gun allegations, only four were actually expelled. The District treated Dereian, a Black male student, differently than other similarly situated students . . .").

21. *See infra* Part II, Section A.

22. *See infra* Part II, Section A.

23. *See infra* Part III.

requiring schools to implement and utilize non-disciplinary alternatives for suspend-able behavior, (2) mandating that free legal counsel be made available to all students facing an expulsion, (3) adopting a specific standard of proof to be used in expulsion hearings, (4) applying more stringent rules of evidence, and (5) creating more oversight over school board expulsion decisions.

In support of these proposals, Part I of this comment provides a background of expulsion and suspension law in Wisconsin's K-12 public schools. Part II addresses the racist implementation of Wisconsin's disciplinary practices and its effect on Black male students. Part III makes recommendations to decrease racist and excessive discipline in Wisconsin's public schools. Part IV explains how decreasing racist and excessive discipline will positively affect all students. Finally, the Conclusion asserts that without implementing any of the stated suggestions, Black male students' opportunities for success will continue to be harmed by Wisconsin's racist disciplinary system.

#### I. BACKGROUND OF STUDENT DISCIPLINE LAW IN WISCONSIN'S K-12 PUBLIC SCHOOLS

Children in the United States have a constitutional right to public education protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>24</sup> This means that a student's property interest in public education cannot be arbitrarily denied or otherwise taken away through disciplinary suspension or expulsion without a fair hearing of some kind.<sup>25</sup> The Due Process Clause requires, at a minimum, that when a student is threatened with suspension not exceeding ten days the student receive notice of the charges against him, an explanation of the facts against him, and an opportunity to plead his case.<sup>26</sup> These "rudimentary precautions" are supposed to protect against "unfair or mistaken findings of misconduct and arbitrary exclusion from school."<sup>27</sup> The Due Process Clause does not require formal hearings for students facing short suspensions because of the assumptions that the cost imposed would be too great and that the effectiveness of suspension as part of the teaching process would decline.<sup>28</sup> However, if a student is facing expulsion, the Supreme Court determined that protection of a student's fundamental right to public education may require a more formal hearing.<sup>29</sup> As such, different due process requirements exist for different disciplinary practices.

Through the Fourteenth Amendment, federal law imposes the above due process requirements on the States and the boards of education who oversee the

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24. *Goss v. Lopez*, 419 U.S. 565, 573–75 (1975).

25. *Id.* at 574.

26. *Id.* at 581.

27. *Id.*

28. *Id.* at 583.

29. *Id.* at 584. The court does not address what a more formal hearing would entail. *See id.*

disciplinary process.<sup>30</sup> In Wisconsin, the due process requirements and the functioning of the disciplinary process are recognized in statutes, court cases, Department of Public Instruction (DPI) decisions, and local school board policies.<sup>31</sup>

*A. Suspension Law in Wisconsin*

Wisconsin statutes authorize student suspension for a variety of reasons. A student can be suspended for:

- (1) noncompliance with school rules;
- (2) “[k]nowingly conveying any threat or false information concerning an attempt or alleged attempt being made or to be made to destroy any school property by means of explosives”;
- (3) engaging in conduct that “endangers the property, health or safety of others”;
- (4) or engaging in “conduct while not at school or while not under the supervision of a school authority that endangers the property, health or safety of others at school or under the supervision of a school authority or endangers the property, health or safety of any employee or school board member of the school district in which the pupil is enrolled.”<sup>32</sup>

Students can be suspended by their school district administrator, or by a principal or teacher designated by the school district administrator, for up to five school days, or for a period of not more than fifteen consecutive days if the student is also facing expulsion.<sup>33</sup>

Students have limited due process rights during the suspension process. For example, a student has no right to a formal hearing for a suspension.<sup>34</sup> Rather, the student is advised of the reason for the proposed suspension and the school administrator, principal, or teacher must determine whether the student is guilty of the alleged conduct and whether the student’s suspension is “reasonably justified.”<sup>35</sup> Students and their parents or guardians can request a conference with

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30. *Id.* at 574 (“The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.[internal citation omitted] The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student’s legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.”) (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)); *See* WIS. STAT. § 118.01(1) (2019-20) (“Public education is a fundamental responsibility of the state.”).

31. Jennifer A. Kratochvil, *In Wisconsin Expulsions, We Don’t Have to Leave Children Behind*, 91 MARQ. L. REV. 1213, 1215 (2008).

32. WIS. STAT. § 120.13(1)(b)2 (2019-20).

33. *Id.*

34. *Goss*, 419 U.S. at 583.

35. § 120.13(1)(b)3. Note that “reasonably justified” is not defined. *Id.*

the school district administrator or a neutral designee in order to determine whether the student was suspended unjustly or unfairly, whether the suspension was inappropriate, or whether the student suffered undue consequences or penalties as a result of the suspension.<sup>36</sup> If, at the conference, a student can demonstrate any one of these circumstances, reference to the suspension on the student's school record must be expunged.<sup>37</sup>

### *B. Expulsion Law in Wisconsin*

Wisconsin statutes also authorize student expulsion for a variety of reasons. Expulsion is statutorily authorized if the school board finds the student guilty of:

- (1) repeated refusal or neglect to obey school rules;
- (2) conveyance of any threat or false information concerning an attempt to destroy school property with explosives;
- (3) engagement in conduct at school or under the supervision of school authority that endangers the "property, health or safety of others"; or
- (4) engagement in conduct not at school, nor under the supervision of school authority that endangers the "property, health or safety" of others at school, school employees, or school board members for the district in which the student is enrolled.<sup>38</sup>

The reasons for expulsion are quite similar to the reasons listed for suspension. However, there are subtle differences. For example, a student can be suspended for one instance of noncompliance with school rules, but if they repeatedly engage in noncompliance they can be expelled.<sup>39</sup> Students can also be expelled for actions outside of the aforementioned behaviors. If the student is sixteen years old the school board has statutory authority to pursue expulsion if the student "repeatedly . . . disrupted the ability of school authorities to maintain order or an educational atmosphere at school or at an activity supervised by a school authority."<sup>40</sup> After finding a student guilty of one of these actions, a school board must be "satisfied that the interest of the school demands the pupil's expulsion" in order to proceed with the expulsion process.<sup>41</sup>

If a school board decides to proceed with the expulsion process, an expulsion hearing must be held.<sup>42</sup> Once a school board initiates the expulsion hearing,<sup>43</sup> notice is provided to the student as required by the decision in *Goss v. Lopez*.<sup>44</sup> Wis. Stat. § 120.13(1)(c)(4) requires a school board to provide a student

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36. § 120.13(1)(b)4.

37. *Id.*

38. § 120.13(1)(c)1.

39. *Id.*

40. § 120.13(1)(c)2.

41. *Id.*

42. § 120.13(1)(c)3.

43. § 120.13(1)(c)2m.

44. *Goss v. Lopez*, 419 U.S. 565, 584 (1975).



facing expulsion (or the student's parent/guardian) with not less than five days written notice of the hearing. Notice under the statute must include: the specific grounds for expulsion and the particulars of the student's alleged behavior; the location and time of the hearing; the fact that the hearing may result in the student's expulsion; that, upon the student's request the hearing shall be closed; that both the student and the student's parent or guardian may have counsel; that the student has the right to appeal the school board's decision to the state superintendent; and that the student has the right to appeal the state superintendent's decision within thirty days to the circuit court in which the school is located.<sup>45</sup>

While a school board has statutory authority to carry out the expulsion hearing itself, school boards also have the authority to appoint an independent hearing officer or hearing panel to carry out the expulsion process as described above.<sup>46</sup> Wisconsin statutes require that an appointed hearing officer be knowledgeable of state and federal special education laws, rules, and regulations, and federal and state court precedent.<sup>47</sup> Hearing officers must also understand how to "conduct hearings and render and write decisions in accordance with appropriate standard legal practice."<sup>48</sup> These requirements indicate that the ideal hearing officer has a legal education. However, the statutory language opens the door for hearing officers who are not law school graduates and therefore lack an understanding of due process, the rules for admitting certain types of evidence, and even the burden of proof in expulsion cases. This results in uninformed, unqualified persons having authority in the expulsion decision. If a hearing officer recommends that the school board expel the student, the school board can "approve, reverse, or modify" the hearing officer's decision.<sup>49</sup> On the other hand, if the hearing officer recommends that the school board not order expulsion, the school board must abide by the hearing officer's decision, or appeal to the state superintendent.<sup>50</sup>

If the expulsion decision is appealed by the school board or by the student, the state superintendent will review the decision.<sup>51</sup> However, the state superintendent's review of the expulsion decision is limited to whether procedural mandates within Wisconsin statutes were followed; the state superintendent cannot review the merits of the claim.<sup>52</sup> Consequently, Wisconsin has a lack of oversight regarding whether a school board's decision to expel a student should be overturned for lack of sufficient evidence or for bias.

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45. § 120.13(1)(c)4 (listing all the notice requirements).

46. § 120.13(1)(e)1.

47. WIS. STAT. § 115.80(2) (2019-20).

48. *Id.*

49. § 120.13(1)(e)3.

50. *Madison Metro. Sch. Dist. v. Burmaster*, 2006 WI App 17, ¶2, 288 Wis. 2d 771, 709 N.W.2d 73.

51. § 120.13(1)(c)3.

52. *Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657, 321 N.W.2d 334, 339 (Ct. App. 1982); *Madison Metro. Sch. Dist. v. Dep't of Pub. Instruction*, 199 Wis. 2d 1, 14, 543 N.W.2d 843 (Ct. App. 1995) (affirming the determination in *Racine Unified Sch. Dist.* that the superintendent can only review expulsion decisions for procedural violations).

If, after all appeals are exhausted, the decision to expel is upheld, students have few options. First, a student may seek to enroll in another school district. However, no school board is required to enroll a student that is expelled from another school district.<sup>53</sup> It can also be very difficult for a student's family to afford to send their child to a different school district either because of the cost of moving or transportation. Second, the student can seek "early reinstatement," or the ability to return to the school district prior to the end of their expulsion.<sup>54</sup> However, the student must meet certain conditions before reinstatement can occur.<sup>55</sup> These conditions vary from student to student and can be anything the school board deems necessary for allowing early reinstatement as long as the conditions relate to the reasons for the expulsion.<sup>56</sup> Finally, a student's expulsion period can last until they are twenty-one years old.<sup>57</sup> At this point, the state is no longer constitutionally obligated to provide a free public education.<sup>58</sup> Given the minimal options available to expelled students, students facing expulsion risk a complete denial of their constitutionally protected right to education.<sup>59</sup>

## II. WISCONSIN'S DISCIPLINARY SYSTEM IS RACIST TOWARD BLACK MALE STUDENTS

Under *Remer v. Burlington Area School District*, "[t]here is a 'strong presumption' that administrative decision makers are impartial."<sup>60</sup> However, Wisconsin disciplinary data indicates that this faith in administrative impartiality is misplaced. Administrative decision makers are, in fact, extremely biased.

Black students are much more likely to be expelled than their white peers. In the 2018–19 school year 858,833 students were enrolled in Wisconsin Public Schools.<sup>61</sup> Of those students, 77,839 were Black and 595,020 were white.<sup>62</sup> According to these numbers, white students made up 69.3% of the student population and Black students made up 9.06%.<sup>63</sup> During that same school year, Wisconsin public schools expelled 715 students;<sup>64</sup> 294 (41%) of the expelled students were Black and 267 (37%) were white.<sup>65</sup> Thus, one in about every 2,229

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53. § 120.13(1)(f).

54. § 120.13(1)(h)2.

55. § 120.13(1)(h)3.

56. § 120.13(1)(h)2.

57. Alison Julien & Patricia Engel, *School Expulsions: Not All Are Equal*, 74 WIS. LAW., Oct. 2001, at 10, 54.

58. WIS. CONST. art. X, § 3 ("[S]uch schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years . . .").

59. See Julien & Engel, *supra* note 57, at 51.

60. *Remer v. Burlington Area Sch. Dist.*, 149 F. Supp. 2d 665, 674 (E.D. Wis. 2001).

61. *WISEdash Data Files by Topic*, WIS. DEP'T PUB. INSTRUCTION, [https://dpi.wi.gov/wisedash/download-files?type?field\\_wisedash\\_upload\\_type\\_value=Discipline](https://dpi.wi.gov/wisedash/download-files?type?field_wisedash_upload_type_value=Discipline) (last visited March 10, 2020) (citing data from the file "discipline\_actions\_certified\_2018-19.zip") [<https://perma.cc/H25M-XY4E>].

62. *Id.*

63. See *id.*

64. *Id.*

65. *Id.*

white students was expelled,<sup>66</sup> while nearly one in every 265 Black students was expelled.<sup>67</sup> Even though Black students made up a significantly smaller portion of the enrolled student population, they were still *eight times* more likely to be expelled than white students.<sup>68</sup>

The rate of out-of-school suspension for Black students is even worse than the rate of expulsion. In the 2018–19 school year, 73,067 public school students in Wisconsin received out-of-school suspensions.<sup>69</sup> Of the 73,067 students who received out-of-school suspension, 32,209 (44%) were Black and 24,359 (33%) were white.<sup>70</sup> Thus, one in every twenty-four white students was suspended,<sup>71</sup> while one in every two Black students was suspended.<sup>72</sup> Again, even though Black students made up a significantly smaller portion of the enrolled student population, they were *ten times* more likely to receive out-of-school suspension than white students.<sup>73</sup>

The issue is not only racial, but also gendered. The United States Department of Education Office of Civil Rights (DEOCR) analyzed national data from the 2011–12 school year and reported that Black boys were suspended three times more than white boys.<sup>74</sup> The data also indicated that twenty percent of Black boys received out-of-school suspensions, which is a rate higher than any of their peers.<sup>75</sup> A similar trend for expulsion was exhibited in the data: male students were far more likely to receive expulsion than female students, and Black students were expelled and suspended at a rate three times greater than their white peers.<sup>76</sup> This trend is also evident in Wisconsin's more recent 2018–19 school year data. During Wisconsin's 2018–19 school year, 31% of students receiving out-of-school suspension were female and the other 69% were male.<sup>77</sup>

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66. *See id.* (total number of white students enrolled (595,020) divided by the total number of expelled white students (267)).

67. *See id.* (total number of Black students enrolled (77,839) divided by the total number of expelled Black students (294)).

68. *See id.* (total number of Black students expelled (294) divided by the total number of Black students enrolled (77,839). Divide that number by the total number of white students expelled (267) divided by the total number of white students enrolled (595,020)).

69. *Id.*

70. *Id.*

71. *See id.* (total number of white students enrolled (595,020) divided by the total number of white students suspended (24,359)).

72. *See id.* (total number of Black students enrolled (77,839) divided by the total number of Black students suspended (32,209)).

73. *See id.* (total number of Black students suspended (32,209) divided by the total number of Black students enrolled (77,839). Divide that number by the total number of white students suspended (24,359) divided by the total number of white students enrolled (595,020)).

74. Cassandra R. Davis, "Why Are the Black Kids Being Suspended?" *An Examination of a School District's Efforts to Reform a Faulty Suspension Policy Through Community Conversations*, 27 SCH. CMTY J. 159, 161 (2017).

75. C.R. DATA COLLECTION, U.S. DEP'T OF EDUC. OFF. FOR C. R., ISSUE BRIEF NO. 1, DATA SNAPSHOT: SCHOOL DISCIPLINE 3 (2014), <https://ocrdata.ed.gov/assets/downloads/CRDC-School-Discipline-Snapshot.pdf> [<https://perma.cc/W5CT-7XP3>].

76. *Id.* at 3, 5.

77. *See* WIS. DEP'T OF PUB. INSTRUCTION, *supra* note 61.

Additionally, female students represented only 36% of the expelled student population, while male students represented 64%.<sup>78</sup> Therefore, the disparate disciplinary practices in Wisconsin are not only racial, but also gendered.

The DEOCR's report also included a state-by-state analysis, which emphasized Wisconsin's discipline gap.<sup>79</sup> This information was published in 2014,<sup>80</sup> making it readily available to school administrators, policymakers, and government entities. But, as the data from Wisconsin's 2018–19 school year shows, the problem is only getting worse.

*A. The Data Reflects the Result of Educators' and Administrators' Implicit Racial Biases*

Studies show that there are no discernable differences between Black students' and white students' behaviors in school.<sup>81</sup> Rather, the disparities come from the way that adults respond to their behaviors.<sup>82</sup> When a Black student and a white student engage in the same behavior, adults in the school building are more likely to respond negatively to the Black student.<sup>83</sup>

A 2016 Yale study demonstrates this bias well.<sup>84</sup> During the study, researchers told 135 educators the following:

Now you are ready to view a series of video clips lasting 6 minutes. We are interested in learning about how teachers detect challenging behavior in the classroom. Sometimes this involves seeing behavior before it becomes problematic. The video segments you are about to view are of preschoolers engaging in various activities. Some clips may or may not contain challenging behaviors. Your job is to press the enter key on the external keypad every time you see a behavior that could become a potential challenge.<sup>85</sup>

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78. *See id.*

79. *See* C.R. DATA COLLECTION, *supra* note 75, at 11–15. According to the data, Wisconsin reported higher gaps than the nation between the suspension rates of Black male students and white male students. *Id.* at 12–13. In Wisconsin's 2011–12 school year 32% of the students receiving out-of-school suspension were Black boys. *Id.* at 13. The national number was 20%. *Id.* at 12.

80. *Id.* at 1.

81. Moriah Balingit, *Racial Disparities in School Discipline Are Growing*, *Federal Data Show*, WASH. POST (Apr. 24, 2018, 10:41 PM), [https://www.washingtonpost.com/local/education/racial-disparities-in-school-discipline-are-growing-federal-data-shows/2018/04/24/67b5d2b8-47e4-11e8-827e-190efaf1f1ee\\_story.html](https://www.washingtonpost.com/local/education/racial-disparities-in-school-discipline-are-growing-federal-data-shows/2018/04/24/67b5d2b8-47e4-11e8-827e-190efaf1f1ee_story.html) [https://perma.cc/PYV7-DRMR].

82. *Id.*

83. *See id.*

84. WALTER S. GILLIAM ET AL., YALE UNIV. CHILD STUDY CTR., DO EARLY EDUCATORS' IMPLICIT BIASES REGARDING SEX AND RACE RELATE TO BEHAVIOR EXPECTATIONS AND RECOMMENDATIONS OF PRESCHOOL EXPULSIONS AND SUSPENSIONS? 11 (2016), [https://medicine.yale.edu/childstudy/zigler/publications/Preschool%20Implicit%20Bias%20Policy%20Brief\\_final\\_9\\_26\\_276766\\_5379\\_v1.pdf](https://medicine.yale.edu/childstudy/zigler/publications/Preschool%20Implicit%20Bias%20Policy%20Brief_final_9_26_276766_5379_v1.pdf) [https://perma.cc/HU56-ZEWY].

85. *Id.* at 6 (emphasis omitted).

The video segments showed a Black student of each sex and a white student of each sex in a classroom setting.<sup>86</sup> After watching the videos, the educators were asked to identify which student required the most attention because of challenging behavior.<sup>87</sup> No challenging behavior existed in any of the videos, yet forty-two percent of the educators identified the Black boy.<sup>88</sup> The researchers concluded that the educators' responses to the students' behavior were the result of implicit biases.<sup>89</sup>

This reaction toward Black boys is not just true of educators; it is representative of people in general. A study conducted by the American Psychological Association published in 2014 found that people generally view Black boys as young as ten years old as older and less innocent.<sup>90</sup> One author of the study stated that:

Children in most societies are considered to be in a distinct group with characteristics such as innocence and the need for protection. Our research found that [B]lack boys can be seen as responsible for their actions at an age when white boys still benefit from the assumption that children are essentially innocent.<sup>91</sup>

This research is helpful in determining why, in Wisconsin, dramatically different rates of suspension and expulsion exist between Black male students and their peers. It indicates that the high rates of disciplinary action taken against Black male students in comparison to white male students is not a result of different behaviors between the different races. Rather, the disparate treatment results from Wisconsin educators' and administrators' implicit biases against Black boys.

*B. These Racist Disciplinary Practices Have a Devastating Effect on Wisconsin Students' Opportunities for Academic Achievement and Future Success*

High rates of discipline have a devastating effect on students' opportunities for academic achievement and future success. Prior suspension is more likely to cause a child to drop out of high school than any other factor including low socioeconomic status, not living with both biological parents, frequent transferring of schools, and engagement in sexual activity before the age of fifteen.<sup>92</sup> It follows that because expulsion is more extreme than suspension,

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86. *Id.*

87. *Id.*

88. *Id.* at 6–7.

89. *See id.* at 11.

90. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 529 (2014).

91. Press Release, *Black Boys Viewed as Older, Less Innocent than Whites, Research Finds*, AM. PSYCH. ASS'N (2014), <https://www.apa.org/news/press/releases/2014/03/black-boys-older> [https://perma.cc/LZ3K-4SHZ].

92. Suhyun Suh, Jingyo Suh & Irene Houston, *Predictors of Categorical At-Risk High School Dropouts*, 85 J. COUNSELING & DEV. 196 (2007).

students expelled from school are even less likely to graduate from high school than those who were suspended.<sup>93</sup>

The consequences of not finishing high school are severe. Those who do not finish high school are much more likely than high-school graduates to be and remain unemployed and to earn less money when they do gain employment.<sup>94</sup> High school dropouts are also much more likely to require public assistance.<sup>95</sup> Furthermore, those who do not finish high school are 3.5 times more likely to be arrested as adults.<sup>96</sup> In fact, approximately eighty-two percent of the adult prison population in the United States dropped out of high school.<sup>97</sup>

The effect of Wisconsin's racist expulsion and suspension practices is exhibited in its prison population. In 2018, Black males comprised nearly forty-one percent of Wisconsin's prison population,<sup>98</sup> but an estimated less than seven percent of Wisconsin's general population.<sup>99</sup> Additionally, only twenty-two percent of the adult prison population completed above a high school education or GED,<sup>100</sup> meaning that most prisoners never finished high school. Many attribute these statistics, in part, to Wisconsin's school-to-prison pipeline, which can be caused by racist disciplinary practices.<sup>101</sup> For example, an independent nonprofit group based in Milwaukee, Wisconsin, called Leaders Igniting Transformation (LIT)<sup>102</sup> is focused on ending Wisconsin's school-to-prison

93. Sarah Biehl, *School Expulsion: A Life Sentence?*, AM. BAR ASS'N. (Mar. 15, 2011), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2011/school-expulsion-a-life-sentence/> [<https://perma.cc/UAH7-NPAZ>].

94. *Id.* (citing Coalition for Juvenile Justice, *Abandoned in the Back Row: New Lessons in Education and Delinquency Prevention* (2001), [https://www.juvjustice.org/sites/default/files/resource-files/resource\\_122\\_0.pdf](https://www.juvjustice.org/sites/default/files/resource-files/resource_122_0.pdf) [<https://perma.cc/5T4M-MFXR>]).

95. *Id.* (citing National Center for Education Statistics, *Dropout Rates in the United States: 2000*, [https://nces.ed.gov/pubs2002/droppub\\_2001/intro.asp](https://nces.ed.gov/pubs2002/droppub_2001/intro.asp) [[perma.cc/Z5QJ-4A49](https://perma.cc/Z5QJ-4A49)]).

96. *Id.*

97. *Id.* (citing Coalition for Juvenile Justice, *supra* note 94).

98. OFF. OF THE SEC'Y RSCH. & POL'Y UNIT, STATE OF WIS. DEP'T OF CORR., *Inmate Profile 2018* (Nov. 2019), <https://doc.wi.gov/DataResearch/DataAndReports/InmateProfile.pdf> [<https://perma.cc/4AFX-3QVC>].

99. U.S. Census Bureau, *QuickFacts Wisconsin*, <https://www.census.gov/quickfacts/fact/table/WI/PST045218> (last visited Mar. 4, 2020) [<https://perma.cc/DPE8-SSXA>].

100. OFF. OF THE SEC'Y RSCH. AND POL'Y UNIT, STATE OF WIS. DEP'T OF CORR., *supra* note 98.

101. *See, e.g.*, Phoebe Petrovic, *Student Activists Call On Lawmakers, MPS To Break School-To-Prison Pipeline*, WIS. PUB. RADIO (Apr. 30, 2019, 2:30 PM), <https://www.wpr.org/student-activists-call-lawmakers-mps-break-school-prison-pipeline> [<https://perma.cc/22HP-V259>]. *See generally* ACLU, *School-To-Prison Pipeline* (2020), <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline> ("The ACLU is committed to challenging the 'school-to-prison pipeline,' a disturbing national trend wherein children are funneled out of public schools and into the juvenile and criminal justice systems") [<https://perma.cc/E5NZ-BNX3>].

102. LEADERS IGNITING TRANSFORMATION, <https://www.litwi.org/> (last visited Mar. 13, 2021) [<https://perma.cc/6EWL-37EY>].

pipeline.<sup>103</sup> In one of the group's efforts, they addressed Wisconsin lawmakers and called for an end to "suspensions, expulsions, arrests and citations for misdemeanor offenses, and truancy citations and prosecutions, all which disproportionately affect youth of color."<sup>104</sup> One member of LIT asked Governor Tony Evers to: "[i]nvest in our future, not in our prison sentence."<sup>105</sup>

The effect of Wisconsin's racist disciplinary practices is also exhibited in the lingering achievement gap. The National Assessment of Educational Progress tests are administered to fourth and eighth grade students every two years, testing proficiency in both mathematics and reading.<sup>106</sup> The results are reported as scores and as percentages of students reaching the basic, proficient, and advanced achievement levels.<sup>107</sup> In recent years, Wisconsin has consistently had the widest racial achievement gap between Black students and white students when it comes to performance on these tests.<sup>108</sup> An achievement gap occurs when one group of students outperforms another group and the difference in average scores for the two groups is statistically significant.<sup>109</sup> The 2019 test indicated that the gap between white and Black students in Wisconsin who received proficient or advanced scores ranged from a thirty-one point gap in fourth grade reading to a thirty-nine point gap in fourth-grade math.<sup>110</sup> This means that Black students on average received reading scores that were thirty-one points less than white students and math scores that were thirty-nine points less than white students.

Findings from a recent Stanford study suggest that the achievement gap is closely related to the discipline gap.<sup>111</sup> The study analyzed national data and found that an increase in the discipline gap between Black and white students in the United States predicts an increase in the achievement gap and vice versa.<sup>112</sup>

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103. Petrovic, *supra* note 101.

104. *Id.*

105. *Id.*

106. Logan Wroge, *Wisconsin Has Widest Racial Achievement Gap on Nation's Report Card*, WIS. ST. J. (Oct. 31, 2019), [https://madison.com/wsj/news/local/govt-and-politics/wisconsin-has-widest-racial-achievement-gap-on-nation-s-report/article\\_9264f5fc-779c-53f1-aa47-ca3ac77ac219.html](https://madison.com/wsj/news/local/govt-and-politics/wisconsin-has-widest-racial-achievement-gap-on-nation-s-report/article_9264f5fc-779c-53f1-aa47-ca3ac77ac219.html) [<https://perma.cc/BV3W-DMKG>].

107. NATIONAL CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., AN OVERVIEW OF NAEP (2018), [https://nces.ed.gov/nationsreportcard/subject/about/pdf/NAEP\\_Overview\\_Brochure\\_2018.pdf](https://nces.ed.gov/nationsreportcard/subject/about/pdf/NAEP_Overview_Brochure_2018.pdf) [<https://perma.cc/MMM9-58QQ>].

108. Wroge, *supra* note 106.

109. National Center for Education Statistics, NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS, *Achievement Gaps*, <https://nces.ed.gov/nationsreportcard/studies/gaps/> [<https://perma.cc/5W8J-K58F>].

110. Wroge, *supra* note 106.

111. Francis Pearman et al., *Are Achievement Gaps Related to Discipline Gaps? Evidence from National Data*, AM. EDUC. RES. ASS'N OPEN, Oct.–Dec. 2019, at 1. *See also* Ann Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RES. 59, 59 (2010) ("The use of school exclusion as a discipline practice may contribute to the well-documented racial gaps in academic achievement. This suggests that there is a pressing need for scholarly attention to the racial discipline gap if efforts addressing the achievement gap are to have greater likelihood of success.").

112. Pearman, *supra* note 111, at 5.

The research also indicated that as one gap narrows so does the other.<sup>113</sup> More specifically, the researchers found that a ten percent increase in a school district's Black-white discipline gap predicts an achievement gap seventeen percent larger than the average.<sup>114</sup> According to Francis Pearman, one of the researchers, "[t]his suggests that the mechanisms connecting the achievement gap to the discipline gap, such as teacher biases and feeling isolated at school, may be most salient for black students."<sup>115</sup> This direct relationship between the discipline gap and the achievement gap thus indicates that as Wisconsin's discipline gap grows larger, the achievement gap will as well.

The Stanford study has important implications for Wisconsin's school administrators and their disciplinary practices. Francis Pearman advises school administrators that:

If your district has higher suspension rates for students of color than it does for white students, it's likely that it is also failing to meet the academic needs of its students of color as well as it does its white students . . . [and] if your district is struggling to meet the academic needs of students of color, then it will likely have a racial discipline problem.<sup>116</sup>

Since efforts made to decrease one gap will likely have the consequence of decreasing the other, school districts are advised to adopt strategies aimed at decreasing both.<sup>117</sup> Suggested strategies include ethnic studies programs, culturally relevant teaching, and non-punitive disciplinary practices.<sup>118</sup> Wisconsin State Superintendent Carolyn Stanford Taylor has referred to Wisconsin's achievement gap as a crisis and has stated that closing the gap is "imperative for our state."<sup>119</sup> If she and other Wisconsin school administrators, educators, policymakers, and government officials are serious about decreasing the achievement gap, they must also address ways to decrease the discipline gap.

113. *Id.*

114. Carrie Spector, *Racial Disparities in School Discipline are Linked to the Achievement Gap Between Black and White Students Nationwide, According to Stanford-led Study*, STANFORD GRADUATE SCH. OF EDUC. (Oct. 16, 2019), <https://ed.stanford.edu/news/racial-disparities-school-discipline-are-linked-achievement-gap-between-Black-and-white> [<https://perma.cc/H8LF-ZEE2>].

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* Other researchers advise methods such as "(a) increasing the awareness of teachers and administrators of the potential for bias when issuing referrals for discipline, (b) utilizing a range of consequences in response to behavior problems, (c) treating exclusion as a last resort rather than the first or only option, (d) making a concerted effort to understand the roots of behavior problems, and (e) finding ways to reconnect students to the educational mission of schools during disciplinary events." Gregory, *supra* note 111, at 65.

119. Wroge, *supra* note 106.



### III. BY REFORMING ITS EXPULSION AND SUSPENSION LAW, WISCONSIN COULD INCREASE WISCONSIN STUDENTS' OPPORTUNITIES FOR SUCCESS

Juvenile criminal law provides an informative context and lens through which to analyze expulsion and suspension law. Courts recently began to develop juvenile criminal law in response to current social science data. In a landmark case, *Graham v. Florida*, the Court relied on social science data to formulate its holding that juvenile life sentences without the possibility of parole for non-homicide crimes are unconstitutional.<sup>120</sup> The social science data indicated that children are different from adults in that the parts of the brain responsible for behavior control are underdeveloped during adolescence.<sup>121</sup> Relying on this information the Court determined that “[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults.”<sup>122</sup> In other words, a juvenile’s criminal conduct is likely the result of an underdeveloped brain rather than a career criminal demeanor. Likewise, a juvenile’s school disciplinary conduct is the result of an underdeveloped brain, rather than a predilection for misbehavior. However, schools continue to treat children’s misbehavior with incredibly harsh consequences—consequences with the potential to severely limit their opportunities for success. Given the evolution of juvenile criminal law in response to social science data, it seems appropriate that other areas of the law affecting juveniles, such as expulsion and suspension, also respond.<sup>123</sup>

#### A. *Methods to Reduce Racist and Excessive Suspension Practices*

While most disciplinary practices are justified under a theory of protecting “well-behaved” students, the reality is that most suspensions are the result of non-endangering behaviors. During the 2018-19 school year, there were 73,139 disciplinary incidents in Wisconsin.<sup>124</sup> Sixty-one percent of these disciplinary actions were for “other violations of school rules.”<sup>125</sup> That means that most disciplinary actions were *not* the result of assault, drugs and alcohol, endangering

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120. *Graham v. Florida*, 560 U.S. 48 at 67–70, 81 (2010).

121. *Id.* at 67–70.

122. *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

123. Biehl, *supra* note 93 (“The *Graham* holding and the social science-based data that motivated it create an interesting context from which to analyze the school discipline crisis that grips the United States. If life sentences without the possibility of parole for juveniles in non-homicide cases are clearly unconstitutional, and if what we now know and understand about the way children’s brains develop justifies holding children not accountable in the same way as adults, then how can our legal and educational systems continue to justify the relative ease with which school administrators expel children from school? The stakes and the legal analyses are different, but the consequences to children and to the nation as a whole are perhaps no less serious.”).

124. *WISEdash Data Files by Topic*, WIS. DEP’T OF PUB. INSTRUCTION (Mar. 10, 2020), [https://dpi.wi.gov/wisedash/download-files/type?field\\_wisedash\\_upload\\_type\\_value=Discipline](https://dpi.wi.gov/wisedash/download-files/type?field_wisedash_upload_type_value=Discipline) (choose “discipline\_incidents\_certified\_2018-19.zip”) [<https://perma.cc/B2TA-W2UT>].

125. *Id.*

behavior, or weapons related behavior.<sup>126</sup> Rather, most disciplinary actions were the result of offenses that could have been effectively managed through interventions such as peer mediation and counseling.<sup>127</sup>

The legislature should amend current suspension law to require schools to approach suspend-able behavior with non-disciplinary interventions first. These non-disciplinary interventions could include restorative justice, a “First Offenders” program, or a “second chance” program.<sup>128</sup> Each of these interventions was implemented by different school districts throughout Wisconsin and each has seen relatively successful results.<sup>129</sup> However, it is also important to promote the success and retention of these alternatives to suspension. As such, policymakers should provide Wisconsin’s school districts with funding to sustain these alternative approaches, and incentives, such as competitive grant opportunities, to pursue them.<sup>130</sup>

### *B. Methods to Reduce Racist and Excessive Expulsion Practices*

Sarah Biehl, author of the American Bar Association article “School Expulsion: A Life Sentence?”, illustrates four factors that contribute to disparate expulsions: (1) a student’s lack of representation, (2) a student’s limited access

126. *See Id.*

127. *See Id.* *See also* Brea L. Perry, *The Overuse of Suspension in American Public Schools Threatens the Success of All Students*, LONDON SCHOOL OF ECONOMICS U.S. CENTRE BLOG (Jan. 5, 2015), <https://blogs.lse.ac.uk/usappblog/2015/01/05/the-overuse-of-suspension-in-american-public-schools-threatens-the-success-of-all-students/> (“In short, suspension is rarely used for the purposes of keeping schools safer – an outcome that might arguably justify the negative outcomes experienced by suspended youth. Rather, suspension is used liberally as a punitive response to offenses that can be effectively managed through peer mediation, counseling, and other interventions.”) [<https://perma.cc/M2Z4-TTFA>].

128. WIS. DEP’T OF PUB. EDUC., ALTERNATIVES TO EXPULSION: CASE STUDIES OF WISCONSIN SCHOOL DISTRICTS (2009), <https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/expulsionalts.pdf> [<https://perma.cc/PM7X-MSWL>].

129. *Id.* “The Janesville School District provides a ‘second chance’ program for students whereby the Independent Hearing Officer holds an expulsion in abeyance, allowing the student to return to school under conditions of continuance. These students have certain conditions that they need to meet, such as an alcohol or other drug assessment.” *Id.* at 4. “The Beloit School District is successfully implementing a First Offenders Program for students who violate the district’s alcohol, tobacco, and other drug (ATOD) policies . . . First offenders of the ATOD policies participate in the district’s Prime for Life education program, along with other support opportunities such as assessment and counseling.” *Id.* at 1. “The Oshkosh Area School District received four years of grant funding from DPI to begin implementing a restorative justice program. Students who commit a variety of offenses along with the victims, their families, and community representatives are able to be directly involved in addressing the wrongdoing . . . Some of the strategies used to implement restorative justice include mediation, classroom community circles, and circle conferences, which are used to bring together the various parties involved so that discussion can lead to conflict resolution.” *Id.* at 5.

130. DANIEL LOSEN ET AL., ARE WE CLOSING THE DISCIPLINE GAP? 33–34 (2015), [https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap\\_FINAL221.pdf](https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf) [<https://perma.cc/V5XN-HYKE>].

to the evidence against them, (3) the lack of evidentiary rules to help make a student's case, (4) and the extreme lack of oversight over the decision to expel.<sup>131</sup> Fixing these problems could reduce the ease with which Wisconsin school administrators expel Black male students, thereby reducing some disciplinary disparities. Students would then spend more time in class, increasing their opportunity for performing well in school and on the National Assessment of Educational Progress tests. In doing so, Black male students in Wisconsin would have a greater opportunity for future success.

i. Provide Legal Representation to Students Facing Expulsion

By law, all students in Wisconsin have a right to legal counsel during expulsion proceedings.<sup>132</sup> However, it is the student's responsibility to obtain counsel. The school district is not required to provide counsel to the student. The school district's only requirement is to provide notice, including notice of the student's right to an attorney, five days in advance of the expulsion hearing.<sup>133</sup> As a result, only students whose families can afford an attorney or can obtain a pro bono attorney in a short amount of time exercise their right to counsel.<sup>134</sup> Other students will be forced to navigate the expulsion process alone.<sup>135</sup> Students facing expulsion are disproportionately from urban and minority families who statistically are unlikely to be able to afford representation.<sup>136</sup> Therefore, while students technically have a right to legal counsel, many students must go without.

Contrary to former Madison school board member Ed Hughes' belief,<sup>137</sup> a student's lack of representation in expulsion proceedings is extremely detrimental to their case. National anecdotal evidence shows that legal representation in school expulsion cases greatly increases the likelihood that an individual will avoid expulsion.<sup>138</sup> In Wisconsin, the Student Expulsion Prevention Program (StEPP) provides pro bono legal services to students facing expulsion in Madison, Milwaukee, and Racine.<sup>139</sup> Without this program, many more students facing expulsion in Wisconsin would lack representation, and as indicated by the national anecdotal data, would suffer from a disadvantage throughout the expulsion process.

Wisconsin should reform the current right to legal counsel statute to mandate that school boards work with students facing expulsion to provide such students with representation. This could be by virtue of the school providing the student with a list of attorneys that offer pro bono services, or by working with

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131. Biehl, *supra* note 93.

132. WIS. STAT. § 120.13(1)(c)3.

133. § 120.13(1)(c)4.

134. Kratochvil, *supra* note 31, at 1224.

135. *Id.*

136. *Id.* at 1222.

137. Brief in Support of Complaint, *supra* note 10.

138. Biehl, *supra* note 93.

139. Caitlin Sievers, *Student Expulsion Prevention Project coming to Racine*, THE JOURNAL TIMES (Aug. 19, 2019), [https://journaltimes.com/news/local/student-expulsion-prevention-project-coming-to-racine/article\\_d83419b6-ba70-5f8c-978c-c81ed469fbf1.html](https://journaltimes.com/news/local/student-expulsion-prevention-project-coming-to-racine/article_d83419b6-ba70-5f8c-978c-c81ed469fbf1.html) [https://perma.cc/VB79-ERT5].

StEPP.<sup>140</sup> Going one step further, this could be accomplished by mandating that the school provide counsel for all students facing expulsion, something that critics of the expulsion process advocate for.<sup>141</sup> Requiring a school district to provide counsel for students facing expulsion would beneficially shift the burden of finding counsel from students who do not have the necessary funds or ability to seek legal counsel themselves to the school board which has ample resources, knowledge, and the ability to work with pro bono organizations such as StEPP. Whatever the resolution is, it is important to remember that “the expense associated with providing counsel to a student facing expulsion is small compared to the lifelong effects the expulsion will have on the student . . . .”<sup>142</sup>

## ii. Require Transparency with Evidence Against Students

Students in Wisconsin have limited access to the evidence against them in expulsion proceedings. Typical exhibits in an expulsion case include the notice of expulsion hearing, the suspension letter, copies of the school rules that the student allegedly violated, evidence that the student had notice of the rules, copies of written statements from witnesses, physical evidence such as photographs or video footage, and the student’s academic, attendance, and behavior records.<sup>143</sup> It is extremely important for the student to have access to these documents in order to prepare a case. However, “[t]here is no obligation for the district to provide the student or his or her parent(s)/guardian(s) with copies of the exhibits prior to the expulsion hearing . . . .”<sup>144</sup> The school board should be required to turn over any and all evidence relating to the alleged misbehavior, similar to a juvenile criminal case. Without access to those documents the student will be unprepared during the expulsion hearing and consequently face a greater chance of expulsion. The Wisconsin Legislature should mandate that a school district provide a student’s parent(s)/guardian(s) or attorney(s) with a copy of all evidence prior to the expulsion hearing.

## iii. Apply Evidentiary Rules and Require Beyond a Reasonable Doubt Finding

Additionally, students in Wisconsin have virtually no recourse from the rules of evidence. In *Racine Unified School District v. Thompson*, the court determined that the rules of evidence do not strictly apply in expulsion proceedings.<sup>145</sup> For example, hearsay statements offered by a school district

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140. Biehl, *supra* note 93 (“[L]awyers can help ensure that low-income children and families facing school expulsion have legal representation by taking such cases for little or no cost and/or by supporting legal aid programs and other nonprofits that provide such representation for free.”).

141. See Kratochvil, *supra* note 31, 1225–26.

142. *Id.*

143. Doug Witte, *Expulsion Overview and Pointers for Administrators*, ASS’N OF WIS. SCH. ADM’RS, <https://awsa.memberclicks.net/update-article—expulsion-overview-and-pointers-for-administrators> (last visited Mar. 6, 2020) [<https://perma.cc/4TTN-QR57>].

144. *Id.*

145. *Racine Unified Sch. Dist. v. Thompson* 321 N.W.2d 334, 337–38 (Wis. Ct. App. 1982).

employee are admissible in expulsion proceedings.<sup>146</sup> The court's reason for allowing hearsay into evidence was that a "lay board cannot be expected to observe the niceties of the hearsay rule" and that there is "no reason why school staff would fabricate or misrepresent statements of [the] sort" used to determine whether to expel a student.<sup>147</sup>

However, in cases such as *Dereian*'s, hearsay statements are a real issue. The school's case against *Dereian* was based on one school administrator's claim that *Dereian* confessed to having a BB gun at school. There were no corroborating witnesses and the gun was never seen nor found. Unfortunately for *Dereian*, because hearsay statements made by a school administrator are afforded high validity, the school board found that the evidence supported expulsion. Given the evidence that implicit biases, rather than factual evidence are what instruct many expulsion decisions, the Wisconsin Legislature and courts hearing these arguments should reevaluate the necessity of applicable evidentiary rules in expulsion proceedings.

Furthermore, the burden of proof for expulsion cases is unclear. Courts have not definitively stated which burden of proof applies in expulsion cases, but most cases rely on standards much lower than beyond a reasonable doubt.<sup>148</sup> In Wisconsin, the standard typically used is preponderance of the evidence.<sup>149</sup> This is a much lower burden of proof than that applied in juvenile criminal proceedings, which require proof beyond a reasonable doubt.<sup>150</sup> The reason for this high standard is that persons in these proceedings face a huge deprivation of liberty. However, like persons in juvenile criminal proceedings, children in expulsion proceedings also face a huge deprivation of liberty.<sup>151</sup> Therefore, school boards attempting to expel a student and substantially impact their opportunity for future success should be held to the highest standard of evidence—beyond a reasonable doubt.

#### iv. Implement More Oversight Over Expulsion Decisions

There is an extreme lack of oversight regarding a school board's decision to expel. The first element of the expulsion process that contributes to this lack of oversight is the false independence of hearing officers that preside over expulsion hearings. School boards are authorized to appoint independent hearing officers to preside over expulsion hearings. However, these bodies are far from independent. The school board is the sole entity involved in the appointment of

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146. *Id.*

147. *Id.*

148. *See, e.g.,* *Butler v. Oak Creek-Franklin Sch. Dist.*, 172 F. Supp. 2d 1102, 1119 (E.D. Wis. 2001) ("I observe here only that no lower a standard of proof than 'preponderance of the evidence' could be acceptable. Under this standard, the relevant facts must be determined to be more likely than not").

149. Abby Busler et al., *Student Expulsions – What Proof Do You Need?*, ASS'N OF WIS. SCH. ADM'RS, <https://awsa.memberclicks.net/update-article—student-expulsions—what-proof-do-you-need-> [https://perma.cc/2YH7-REDF]; *See also* Brief in Support of Complaint, *supra* note 10, at 33.

150. *In re Winship*, 397 U.S. 358, 368 (1970).

151. *See* Suh et al., *supra* note 92; Biehl, *supra* note 93.

hearing officers. This creates a conflict of interest in the hearing officer whose job is to determine whether the student engaged in conduct that constitutes grounds for expulsion<sup>152</sup> and then make their recommendation to the school board. The hearing officer knows that the school board is seeking expulsion in an expulsion hearing. As such, appointment by the school board likely motivates a hearing officer to recommend expulsion so that they will be appointed by the school board again in the future. Therefore, the ‘independent hearing officer’ is not independent and creates minimal oversight over the school board’s decision to expel.

The Wisconsin Legislature should implement a system that ensures the actual independence of hearing officers. For example, the legislature could model the hearing officer appointment system after that of the legal referee appointment system for attorney discipline. Referees are appointed by the Supreme Court of Wisconsin, and as such, “function under the supervision of the Supreme Court.”<sup>153</sup> When a referee is needed to oversee an attorney disciplinary hearing, “[t]he clerk or deputy clerk of the Supreme Court [sic] select[s] an available referee from the panel provided in SCR 21.08, based on the location of the respondent’s principal office.”<sup>154</sup> By taking the appointment power away from the school board and giving it to the Wisconsin Supreme Court, the risk of undue influence over the hearing officer’s decision diminishes. Supreme Court appointed legal referees are also trained attorneys.<sup>155</sup> Therefore, an incidental effect in creating a hearing officer appointment system that models the legal referee appointment system would be that the appointed hearing officers are trained attorneys who understand due process, rules of evidence, and the burden of proof standard. Overall, this model of appointment would not only increase the independence of the hearing officers, but also increase their legal competency.

Furthermore, the legislature should remove the right of school board members to oversee expulsion hearings themselves. School board members pursue the expulsion of students and, as such, are inherently biased actors in expulsion hearings. Appointment of an independent hearing officer to oversee each expulsion would reduce the risk of bias affecting the expulsion determination.

The second element that contributes to the lack of oversight over a school board’s decision to expel is the inability of the state superintendent and courts to review substantive decisions made during the expulsion hearing. As explained above, the state superintendent can review expulsion decisions for violations of

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152. WIS. STAT. § 120.13(1)(e)2a–b.

153. WIS. SUP. CT. R. 21.08(1)–(2).

154. WIS. SUP. CT. R. 22.13(3).

155. WIS. SUP. CT. R. 21.08(1) (“The referee panel consists of no more than 15 lawyers and reserve judges appointed by the supreme court. Referees shall be members of the State Bar of Wisconsin in good standing.”). WIS. SUP. CT. R. 21.08(5) (“Each referee shall participate in mandatory referee training developed by the office of judicial education . . .”).

procedure but cannot review the merits of the actual claim.<sup>156</sup> Therefore, “the appeal is valuable only insofar as it provides an opportunity to examine whether the school district provided adequate notice and a proper hearing.”<sup>157</sup> The appeal does not provide an opportunity for the superintendent to review whether or not the evidence supported a finding that the student committed the act leading to expulsion, nor whether expulsion was the proper response to the student’s behavior.<sup>158</sup> Furthermore, on appeal to the circuit court, courts generally defer to a school board’s judgment on whether to expel and the length of the expulsion.<sup>159</sup> A circuit court’s review is thus, limited to questions of law.<sup>160</sup> Therefore, school boards’ decisions regarding whether to expel and the length of expulsion are virtually non-contestable.

The State Superintendent and courts should have the authority to review more than just whether proper procedure was followed. In addition to examining the adequacy of expulsion procedures, reviewing bodies should be allowed to review whether the facts adequately supported a finding of guilt, whether expulsion was the best course of action, and whether the length of the expulsion was appropriate. This would accomplish two things: (1) create an extra level of protection against implicit biases affecting a school board’s decision to expel, and (2) help prevent students’ right to a free public education from being taken away arbitrarily.

#### IV. REFORM WILL ALSO BENEFIT “WELL-BEHAVED” STUDENTS

High rates of expulsion and suspension negatively affect “well-behaved” students as well as students that are disciplined. A 2014 study published by the American Sociological Association concluded that “students who attend schools with high rates of out-of-school suspension exhibit lower achievement, even if they are not personally suspended.”<sup>161</sup> The researchers studied a sample of over 16,000 students in Kentucky urban public middle and high schools.<sup>162</sup> From the sample they collected over 38,000 observations over three years (or six semesters).<sup>163</sup> The data indicated that when an individual school’s rate of suspension rose above the school district’s average, “well-behaved” students’

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156. *Racine Unified Sch. Dist. v. Thompson*, 321 N.W.2d 334, 339 (Ct. App. 1982); *Madison Metro. Sch. Dist. v. Dep’t of Pub. Instruction*, 543 N.W.2d 843 (1994) (affirming the determination in *Racine Unified School District* that the superintendent can only review expulsion decisions for procedural violations).

157. Kratochvil, *supra* note 31, at 1221.

158. *Id.*

159. Witte, *supra* note 143.

160. *See id.*; *see also Racine Unified School District*, 321 N.W.2d at 338 (“Questions of law are always reviewable by the court. Where the material facts are not in dispute and the only question is one of law, the court may substitute its judgment for that of the agency.”).

161. Brea L. Perry & Edward W. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 AM. SOCIO. REV. 1067, 1068 (2014).

162. *Id.* at 1072.

163. *Id.*

grades suffered.<sup>164</sup> Under this condition, the researchers found that the higher the number of suspensions during a semester, the lower the non-suspended students' scores were on end-of-semester reading and math assessments.<sup>165</sup> This inverse relationship occurred even when controlling for factors such as levels of violence and disruption in schools, school funding, and student-to-teacher ratios.<sup>166</sup> Furthermore, the study only considered out-of-school suspensions, leaving out the rates of expulsion.<sup>167</sup> As such, the researchers may have *underestimated* the effects of school administered student discipline.<sup>168</sup>

The researchers theorized that the decrease in academic performance in “well-behaved” students enrolled in schools with high rates of suspension might be the result of high levels of anxiety and disconnectedness.<sup>169</sup> Ethnographic studies support this theory, finding that “an overly punitive school environment can subvert genuine institutional authority and create student apathy, anxiety, and disconnection.”<sup>170</sup> Edward Morris, one of the researchers involved in the Kentucky study, commented that “[w]hen you are in a very punitive environment, you’re getting the message that the school is focusing on crime control and behavior control . . . Schools should really be about relationships.”<sup>171</sup> Therefore, when schools use excessive discipline in an effort to create a less disruptive environment for their “well-behaved” students, they unintentionally undermine the positive and nurturing atmosphere necessary for student growth and achievement.

Applying the results of this study to Wisconsin data, one can infer that the high rates of suspension and expulsion in Wisconsin’s school districts negatively affect not only the disciplined students, but also the “well-behaved” students. In the Madison Metropolitan School District (MMSD), the 2017-18 rate of out-of-school suspensions was 9.5%.<sup>172</sup> As found in the Kentucky study, “well-behaved” students are negatively affected when their school’s rate of suspension is higher than the district’s average. Dereian’s school, Cherokee Heights Middle School, unequivocally meets that standard. The rate of suspension for all students at Cherokee Heights Middle School is forty-four percent,<sup>173</sup> almost *five times*

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164. *Id.* at 1082–83; see also Perry, *supra* note 127 (“Exclusionary discipline only becomes harmful when schools are above average in their use of suspensions.”).

165. Perry & Morris, *supra* note 161, at 1081.

166. *Id.* at 1076–1082; see also Jane Meredith Adams, *Study: Suspensions Harm ‘Well-behaved’ Kids*, EDSOURCE (Jan. 8, 2015), <https://edsource.org/2015/study-suspensions-harm-well-behaved-kids/72501> (“The findings were ‘robust,’ Morris said, even when the results were controlled for the level of violence and disruption at schools, school funding and student-teacher ratios.”) [<https://perma.cc/2E37-E42D>].

167. Perry & Morris, *supra* note 161, at 1084.

168. *Id.*

169. *Id.* at 1083–84.

170. Perry, *supra* note 127 (referencing Edward W. Morris, “Tuck in that Shirt!” *Race, Class, Gender, and Discipline in an Urban School*, 48 SOCIO. PERSPS. 25 (2005)).

171. Adams, *supra* note 166.

172. Total number of suspended students in the Madison Metropolitan School District divided by the total number of enrolled students in the Madison Metropolitan School District.

173. Total number of suspended students in Cherokee Heights Middle School divided by the total number of enrolled students in the Cherokee Heights Middle School.



MMSD's average.<sup>174</sup> A similar pattern exists for many other public schools in Wisconsin.<sup>175</sup>

Not only does the Kentucky study emphasize the negative effects that high rates of suspension in schools can create, but it also invalidates part of the Supreme Court's reasoning in *Goss v. Lopez* for keeping suspension an informal process.<sup>176</sup> The Court in *Goss v. Lopez* determined that "further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process."<sup>177</sup> According to the Kentucky study, the effectiveness of suspension as a common disciplinary school tactic is drastically overstated. Higher than average rates of suspension cause "an overarching sense of anxiety that radiates throughout punitive schools" and consequently decreases even non-disciplined students' chances of academic success.<sup>178</sup> The effect that suspension has is not beneficial. It is detrimental for "well-behaved" students and disciplined students alike.

#### CONCLUSION

Children in Wisconsin have a constitutional right to free public education. Despite this constitutional guarantee, Wisconsin school administrators use suspension and expulsion excessively to discipline students and remove them from school. The students most affected by these excessive disciplinary practices are Black boys. Evidence suggests that Black boys are most affected because of administrator bias and the ease of the disciplinary process. Unfortunately, these disciplinary procedures have long-lasting negative effects on students' lives. Not only do they decrease all students' opportunities for academic achievement, but they drastically increase the likelihood that an expelled or suspended child will grow up to live in poverty and be incarcerated. The Wisconsin Legislature should reform student discipline law in K-12 public schools by (1) requiring schools to approach suspend-able behavior with non-disciplinary interventions first; (2) guaranteeing students' right to counsel; (3) protecting students' right to the evidence against them; (4) protecting students' access to the rules of evidence; and (5) adding additional oversight over the decision to expel. Such reform will not only protect Wisconsin students' constitutional right to a free public education but will also remove some of the racist barriers to students' success.

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174. The rate of suspension in Cherokee Heights Middle School (44) divided by the rate of suspension for Madison Metropolitan School District (9.5).

175. The following data is from the 2018-19 school year. East High School in the Madison Metropolitan School District had a suspension rate more than 2 times that of the district's average: 25%. Milwaukee School District had a 30% average rate of suspension. The rate of suspension for South Division High in the Milwaukee School District was 84%. The rate of suspension for Vincent High in the Milwaukee School District was 114%. Racine School District had a 33.7% average rate of suspension. The rate of suspension for Mitchell School in Racine School District was 103%. The rate of suspension for Knapp Elementary in the Racine School District was 60%.

176. See *Goss v. Lopez*, 419 U.S. 565, 583 (1975).

177. *Id.*

178. Perry, *supra* note 127.

Government entities have known about the student discipline crisis for nearly a decade. Yet, the crisis continues to grow more dire, with Wisconsin being one of the states with the worst numbers. The Wisconsin Legislature can make a difference in the lives of *all* students by enacting and enforcing changes to the student disciplinary system in public schools. Without drastic change, students', especially Black boys', opportunities for success will continue to be harmed by Wisconsin's racist disciplinary system.

# **COMMERCE, NOT SPEECH: DISMANTLING THE EIGHTH CIRCUIT’S FREE SPEECH ANALYSIS IN TELESCOPE MEDIA GROUP V. LUCERO**

*Alexander Schmidt<sup>†</sup>*

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## INTRODUCTION

In 1990, Minnesota Governor Rudy Perpich realized there was a serious problem brewing in his state.<sup>1</sup> He appointed a task force to investigate this problem, and it heard forty hours of public and private testimony on the issue.<sup>2</sup> The task force soon issued a report confirming the governor’s fears: It found wide-spread discrimination and substantial societal hostility toward

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<sup>†</sup> Juris Doctor Graduate, 2021, University of Wisconsin Law School. Thank you to Greta Martens for supporting me through this whole process. Also, thank you to Ryan Jayne for your help and for inspiring me to write on this topic.

1. *See Telescope Media Grp. v. Lucero*, 936 F.3d 740, 764 (8th Cir. 2019) (Kelly, J., concurring in part and dissenting in part).

2. *Id.*

homosexuality in Minnesota, especially in the state's rural areas.<sup>3</sup> There was significant evidence that homosexual individuals risked losing their jobs and housing because of their sexual orientation.<sup>4</sup> Businesses could refuse to serve these customers, telling them “we don’t want your kind here,” and the state had no power to prevent it.<sup>5</sup> Throughout the hearings and testimony, the task force kept hearing an “underlying theme”: Minnesota must change its laws to eliminate this legally permissible discrimination.<sup>6</sup> In 1993, the Minnesota legislature heeded the task force’s suggestions and amended the Minnesota Human Rights Act (MHRA) to include sexual orientation as a protected class alongside race, color, creed, religion, disability, national origin, marital status, and sex.<sup>7</sup> Under the new law, most places of public accommodation<sup>8</sup> could neither “intentionally refuse” customers nor deny the “full and equal enjoyment” of their goods and services to customers “because of . . . sexual orientation.”<sup>9</sup>

Minnesota’s move reflects a national trend toward greater legal protections for homosexual persons.<sup>10</sup> In 2003, the Supreme Court overturned decades of precedent, holding that anti-sodomy laws were unconstitutional.<sup>11</sup> That same year, Massachusetts became the first state to legalize same-sex marriage.<sup>12</sup> A decade later, the Court overturned a federal law that prohibited federal recognition of same-sex marriages,<sup>13</sup> and soon held that the government could not deny same-sex persons the right to marry.<sup>14</sup> By 2019, nearly half of all states and over 100 local jurisdictions had laws prohibiting sexual orientation discrimination at places of public accommodation.<sup>15</sup>

Not surprisingly, however, many people disagree with these new laws, and one area of serious legal conflict is in the context of wedding vendors. As famously illustrated in the 2018 *Masterpiece Cakeshop* decision, some

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3. *Id.*

4. *Id.*

5. *Id.* at 765 (“[S]everal people testified that they had been denied motel or hotel rooms when the inn-keepers discovered they were gay, remarking, ‘We don’t want your kind here.’”).

6. *Id.* at 764–65.

7. *See id.* at 765. MINN. STAT. § 363A.11(1)(a)(1) (2020); *see also* MINN. STAT. § 363A.17(3) (2020).

8. “Place of public accommodation” is defined as: “a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.” MINN. STAT. § 363A.03, subd. 34 (2020).

9. § 363A.17(3), § 363A.11, subd. 1(a)(1).

10. *Telescope Media Grp.*, 936 F.3d at 765–66 (Kelly, J., concurring in part and dissenting in part).

11. *Lawrence v. Texas*, 539 U.S. 558 (2003).

12. *A Timeline of the Legalization of Same-Sex Marriage in the U.S.*, GEO. L. LIBR. (Jan. 27, 2021), <https://guides.ll.georgetown.edu/c.php?g=592919&p=4182201> [<https://perma.cc/2KXG-TBPD>]; *see also* *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

13. *United States v. Windsor*, 570 U.S. 744 (2013).

14. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

15. *Telescope Media Grp.*, 936 F.3d at 765–66 (Kelly, J., concurring in part and dissenting in part).

businesses that provide wedding services like cake design, flower arrangements, or photography do not wish to serve same-sex weddings.<sup>16</sup> In Minnesota, this conflict came to a head in *Telescope Media Group v. Lucero*, a federal case where a wedding videography company challenged the MHRA as violating free speech and free exercise of religion.<sup>17</sup> The Eighth Circuit agreed with the business, holding that the MHRA, as applied, unconstitutionally compelled speech and infringed on the business's religious liberty.<sup>18</sup>

In this note, I challenge the Eighth Circuit's holding that the MHRA infringes on the business owners' free speech. The MHRA neither compels the videographers to speak nor operates based on the content of the business's wedding videos. Instead, the MHRA is a content-neutral and generally applicable law that neutrally regulates the commercial conduct of providing goods and services to the public. Part I sets out the facts and procedural history of *Telescope Media Group v. Lucero* and summarizes the current state of this issue across all courts. Part II describes the Eighth Circuit's flawed reasoning of whether producing wedding videos qualifies as "speech" and argues that this reasoning undermines the rest of the court's free speech arguments. Part III summarizes the court's free speech analyses—compelled speech and content-based regulation of speech—and challenges each in turn. This part also highlights the important policy reasons for declining challenges to public accommodations laws. The Conclusion shows that the wedding videographers' free speech challenge should have failed because the MHRA regulates commerce, not speech.

## I. BACKGROUND

### A. Background Cases

*Telescope Media Group* is a recent decision in a line of cases regarding the intersection of First Amendment rights and public accommodation antidiscrimination laws in the context of wedding service providers.<sup>19</sup> For instance, in 2013, the New Mexico Supreme Court held that a commercial

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16. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1724 (2018). To be clear, the wedding vendors in cases such as *Masterpiece Cakeshop* are specifically arguing that they refuse to serve same-sex weddings but will 'gladly' serve same-sex individuals. See, e.g., *id.* at 1735 (Gorsuch, J., concurring). Although this 'wedding vs. individual' distinction is significant and is addressed later in this note, *infra* Section II.A., the distinction is not this note's primary criticism of cases agreeing with wedding vendors free speech claims.

17. *Telescope Media Grp.*, 936 F.3d at 748-49. The wedding videography company principally argued (1) that the MHRA compelled them to speak the government's pro-same-sex-wedding message and (2) that the MHRA targeted their speech because of the content of the videos. *Id.* at 752. For a more detailed discussion of the company's free speech claims (i.e. compelled speech and content-based restriction of speech), see *infra* Section III.B.

18. *Telescope Media Grp.*, 936 F.3d at 758.

19. See generally Pamela Griffin, *Exclusion and Access in Public Accommodations: First Amendment Limitations upon State Law*, 16 PAC. L.J. 1047 (1985); Lauren J. Rosenblum, *Equal Access or Free Speech: The Constitutionality of Public Accommodations Laws*, 72 N.Y.U. L. REV. 1243 (1997) (discussing the intersection of the First Amendment and antidiscrimination laws).

wedding photography business violated New Mexico's antidiscrimination law when it refused to photograph a same-sex commitment ceremony.<sup>20</sup> In its decision, the court held that applying the law to the photography business did not violate the First Amendment because the law regulated only the *conduct* of providing services to the public, not the business owner's *speech*.<sup>21</sup> Similarly, in 2016, the New York Appellate Division held that a wedding venue unlawfully discriminated when it refused to host a same-sex wedding.<sup>22</sup> The court reasoned that the New York antidiscrimination law did not compel the venue owners to "espouse or promote same-sex marriages."<sup>23</sup>

In 2018, the United States Supreme Court appeared as though it would resolve this issue in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, a case involving a baker who refused to create a wedding cake for a same-sex marriage.<sup>24</sup> However, the Supreme Court vacated the lower court's decision on narrow grounds, holding that the Colorado Civil Rights Commission did not maintain religious neutrality when deciding the case.<sup>25</sup> The Supreme Court did not squarely address the reconciliation of antidiscrimination laws and First Amendment liberties.<sup>26</sup> In light of its decision in *Masterpiece*, the Supreme Court vacated state court decisions from Washington and Oregon,<sup>27</sup> both of which upheld antidiscrimination laws against wedding vendor challenges. In June 2019, the Washington Supreme Court reaffirmed its earlier decision, holding that a wedding florist discriminated based on sexual orientation by refusing to provide custom floral arrangements for a same-sex wedding.<sup>28</sup> It held that Washington's antidiscrimination law did not unconstitutionally compel the vendor's speech.<sup>29</sup> The court also held that the lower court remained religiously neutral under *Masterpiece Cakeshop*.<sup>30</sup>

Two other cases were decided in 2019. In May, the United States District Court for the District of Colorado considered a wedding website designer's challenge to the Communication Clause of Colorado's antidiscrimination law.<sup>31</sup> The court held that prohibiting the website designer from stating an intent to discriminate against same-sex customers violated neither the free speech nor free exercise rights of the designer.<sup>32</sup> In September, just a few weeks after the Eighth Circuit's decision in *Telescope Media Group*, the Arizona Supreme Court decided a case regarding a custom wedding invitation business that refused to

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20. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013).

21. *Id.*

22. *Gifford v. McCarthy*, 23 N.Y.S.3d 422, 432 (N.Y. App. Div. 2016).

23. *Id.*

24. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1720 (2018).

25. *Id.* at 1724.

26. *Id.* at 1723–24.

27. *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018); *Klein v. Oregon Bureau of Labor & Indus.*, 139 S. Ct. 2713 (2019).

28. *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1224 (Wash. 2019).

29. *Id.* at 1224–25.

30. *Id.* at 1216.

31. *303 Creative LLC v. Elenis*, 385 F. Supp. 3d 1147, 1147–52 (D. Colo. 2019).

32. *Id.* at 1157–64.

create invitations for same-sex weddings.<sup>33</sup> The court followed the Eighth Circuit, holding that the wedding invitations were protected speech and that the antidiscrimination law both unconstitutionally compelled speech and substantially burdened the free exercise of religion.<sup>34</sup> Most recently, in August 2020, the United States District Court for the Western District of Kentucky followed the Eighth Circuit and Arizona, holding that Louisville's public accommodations law violated a wedding photographer's First Amendment speech rights.<sup>35</sup>

*B. Facts of Telescope Media Group*

In August 2019, the Eighth Circuit Court of Appeals decided *Telescope Media Group v. Lucero*.<sup>36</sup> In this case, Carl and Angel Larsen ("the Larsens") own Telescope Media Group, a wedding videography company.<sup>37</sup> The Larsens operate this business in Minnesota as a "public accommodation" and offer video services to the general public.<sup>38</sup> They produce a variety of videos, including commercials, short films, live-action events, and most recently, wedding videos.<sup>39</sup> As Christians, the Larsens "believe that God has called them to use their talents and their company to . . . honor God."<sup>40</sup> They also believe that marriage is a sacrament between "one man and one woman" and decline any requests to work on projects that promote any other conception of marriage, such as same-sex marriage.<sup>41</sup> Concerned that they might be barred from operating their business in this fashion, the Larsens brought a pre-enforcement challenge to the MHRA, Minnesota's anti-discrimination law.<sup>42</sup>

Since 1885, the MHRA has outlawed certain discriminatory practices in public accommodations.<sup>43</sup> In relevant part, owners of public accommodations in Minnesota may not deny any person the "full and equal enjoyment" of the public accommodation because of sexual orientation,<sup>44</sup> nor may any service provider "intentionally refuse to do business" with a person because of sexual

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33. *Brush & Nib Studio, LC v. City of Phx.*, 448 P.3d 890, 897–98 (Ariz. 2019) (decided on September 16, 2019); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 764 (8th Cir. 2019) (decided on August 23, 2019).

34. *Brush & Nib Studio*, 448 P.3d at 922.

35. *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't*, 479 F. Supp. 3d 543 (W.D. Ky. 2020).

36. *Telescope Media Grp.*, 936 F.3d at 747.

37. *Id.*

38. *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090, 1099 (D. Minn. 2017), *aff'd in part, rev'd in part and remanded sub nom.* *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019) (The Larsens admitted that Telescope Media Group operates as a public accommodation.). In general, a "public accommodation" is a business whose goods, services, or facilities, privileges are made available to the public. MINN. STAT. § 363A.03, subd. 34 (2020).

39. *Telescope Media Grp.*, 936 F.3d at 747–48.

40. *Id.* at 748.

41. *Id.*

42. *Lindsey*, 271 F. Supp. 3d at 1100.

43. *Id.* at 1097–98.

44. MINN. STAT. § 363A.11, subd. 1(a)(1) (2020).

orientation.<sup>45</sup> The Larsens sued the Commissioner of the Minnesota Department of Human Rights and the Minnesota Attorney General in their official capacity seeking injunctive and declaratory relief excepting them from the MHRA's ban on sexual orientation discrimination.<sup>46</sup>

Before the United States District Court for the District of Minnesota, the Larsens argued that the MHRA infringed on their First Amendment rights to free speech, expressive association, and free exercise of religion, created an unconstitutional condition on entry into the wedding video market, and violated their Fourteenth Amendment rights to equal protection and to substantive and procedural due process.<sup>47</sup> The District Court granted the government's motion to dismiss for failure to state a claim and the Larsens appealed.<sup>48</sup>

On appeal, the Eighth Circuit Court of Appeals reversed the District Court's holding and instead held that the MHRA violated the Larsens' First Amendment rights to free speech.<sup>49</sup> First, the court decided that the Larsens' wedding videos qualify as protected speech—even if created for-profit—because the videos are subject to the Larsens' editorial control and judgment.<sup>50</sup> Second, it held that the MHRA interferes with the Larsens' First Amendment right in two ways: (1) It compels speech because it requires the Larsens to speak a message they find objectionable,<sup>51</sup> and (2) it regulates the Larsens' speech based on the anti-same-sex marriage content of their videos.<sup>52</sup> Third, the court held that the MHRA fails strict scrutiny, which requires that the MHRA be narrowly tailored to serve a compelling state interest.<sup>53</sup> The court conceded that Minnesota has a compelling interest in ensuring that all people in Minnesota are entitled to full and equal enjoyment of public accommodations and services, but nevertheless held that the MHRA must “yield to the Constitution” to avoid compelling speech and restricting speech based on its content.<sup>54</sup> The court also held that the Larsens may develop their free exercise of religion claim on remand, but that the law neither violated their ‘associational freedom’ and Equal Protection claims, nor was unconstitutionally vague.<sup>55</sup>

## II. WEDDING VIDEOS AS PROTECTED SPEECH

### A. Eighth Circuit's Analysis

The foundation of the Eighth Circuit's free speech analysis was its threshold finding that the Larsens' wedding videos are a form of speech protected by the

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45. MINN. STAT. § 363A.17(3) (2020).

46. *Lindsey*, 271 F. Supp. 3d at 1090, 1100.

47. *Id.* at 1100.

48. *Telescope Media Grp. v. Lucero*, 936 F.3d 746-747 (8th Cir. 2019).

49. *Id.* at 747.

50. *Id.* at 750-51. For further discussion of the court's reasoning, *see infra* Section II.A.

51. *Id.* at 752.

52. *Id.* For further discussion of the court's reasoning for compelled speech and content-based restriction of speech, *see infra* Section III.A.

53. *Id.* at 754.

54. *Id.* at 754-55.

55. *Id.* at 758-62.



First Amendment.<sup>56</sup> The court compared the Larsens' wedding videos with feature films and motion pictures, both of which have previously been protected by the Supreme Court as protected speech.<sup>57</sup> Like motion pictures, the wedding videos here are subject to the Larsens' "editorial control and judgment" and "affect public attitudes and behavior," so they qualify as speech.<sup>58</sup> The Eighth Circuit further rejected the argument that any speech, including the wedding videos, could lose protection because the speaker was engaging in for-profit conduct.<sup>59</sup> For illustration, the court pointed to Supreme Court cases where commercial entities and corporations were entitled to First Amendment protection.<sup>60</sup> Finally, the Eighth Circuit rejected the state's argument that the law regulates conduct, not speech.<sup>61</sup> Although creating and composing wedding videos certainly involves some "conduct" like positioning cameras and setting up microphones, the court held that the state may not regulate speech simply by regulating the underlying conduct of that speech.<sup>62</sup> Doing so would impermissibly subject "wide swaths of protected speech ... to regulation by the government."<sup>63</sup>

*B. The Eighth Circuit's reasoning is flawed because the MHRA regulates the Larsens' denial of service to same-sex individuals, not the Larsens' speech*

The major flaw with the Eighth Circuit's opinion is that the court rests its entire argument on the faulty premise that the Larsens' commercial activity qualifies as speech.<sup>64</sup> To the contrary, Minnesota and the MHRA seek to regulate the *sale* of the videos through the Larsens' public accommodation, not the content of the videos.<sup>65</sup> Even if creating wedding videos in isolation is protected speech, Minnesota seeks to regulate the Larsens' operation of a business that provides the service of creating such wedding videos for the public.<sup>66</sup>

As an initial matter, the court is correct that creating wedding videos may qualify as protected speech. It is well understood that "free speech" is not

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56. *Id.* at 750.

57. *Id.* at 751.

58. *Id.*

59. *Id.*

60. *Id.* at 751–52.

61. *Id.* at 752.

62. *Id.*

63. *Id.*

64. *See id.* at 750 ("The Larsens' videos are a form of speech that is entitled to First Amendment protection.").

65. For the purposes of this case, the MHRA regulates two forms of conduct: "[T]o deny any person the full and equal enjoyment . . .," MINN. STAT. § 363A.11, subd. 1(a)(1) (2020), and "to intentionally refuse to do business with, to refuse to contract with, or to discriminate . . .," MINN. STAT. § 363A.17(3) (2020). Both of these forms of conduct are described in the context of "selling" or "providing" goods and services to the public, not regulating speech. § 363A.11, subd. 1(a)(1); § 363A.17(3).

66. Conduct may still be protected speech if it is sufficiently expressive. *See Spence v. Washington*, 418 U.S. 405 (1974). This is further discussed in Section III.B.ii.

restricted to literal speech.<sup>67</sup> In fact, the Supreme Court has acknowledged that activity which is “sufficiently imbued with elements of communication” may well “fall within the scope” of the First Amendment.<sup>68</sup> Thus, as the Eighth Circuit correctly noted, it follows that making wedding videos is a protected activity under the First Amendment.<sup>69</sup>

But the Eighth Circuit overlooks an important aspect of the activity at issue here. The Larsens are not just *making* wedding videos, they are also *selling* them to the public through their videography business.<sup>70</sup> In fact, the way the Eighth Circuit frames the Larsens’ activity barely even mentions that the Larsens are creating the videos as a part of a business.<sup>71</sup> Instead of dissecting Minnesota’s claim that the MHRA regulates the sale of the videos rather than the videos themselves, the court simply dismisses the argument on the grounds that one’s motive or for-profit status does not strip one’s speech of its constitutional protection.<sup>72</sup> This proposition is not disputed; speech carried in a “form that is ‘sold’ for profit” may be entitled to First Amendment protection.<sup>73</sup> But the Eighth Circuit’s reasoning on this point completely misses the purpose of the MHRA.<sup>74</sup> What matters is not that the Larsens are selling or profiting off of their wedding videos, but rather that the Larsens are doing so by operating a business that provides services to the public. Because the law is concerned only with businesses’ discrimination in the *sale of goods and services to the public*, it should make no difference what form the good or service takes.

The Eighth Circuit also argues that the MHRA does not regulate conduct in this case because the MHRA only targets the conduct involved in producing speech.<sup>75</sup> But like the court’s flawed “for-profit” analysis, the MHRA’s targeted conduct is not the action of making wedding videos—i.e. positioning cameras and setting up microphones—but is rather the provision of videography services to the public.<sup>76</sup> If the court had properly characterized the MHRA as regulating the operation of a business selling goods and services to the public, the court would no longer need to be concerned that the government could regulate one’s

67. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

68. *Spence*, 418 U.S. at 409.

69. *Telescope Media Grp.*, 936 F.3d at 750–51 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952)).

70. *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090, 1099 (D. Minn. 2017), *aff’d in part, rev’d in part and remanded sub nom. Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019).

71. *See Telescope Media Grp.*, 936 F.3d at 747–49.

72. *Id.* at 751 (“It also does not make any difference that the Larsens are expressing their views through a for-profit enterprise.”).

73. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

74. *See* part III.C., *infra*, discussing the purposes of public accommodation laws.

75. *See Telescope Media Grp.*, 936 F.3d at 752.

76. “[A]ntidiscrimination laws apply to the operation of a business, specifically the decision to deny goods or services on the basis of a protected characteristic, and not to the content of the allegedly artistic product or service.” Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right’s Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1, 43 (2016).

speech simply by reducing the speech to its physical actions. Under the MHRA, Minnesota does not regulate the Larsens' physical conduct of producing speech, but rather the Larsens' commercial conduct of providing wedding video services as a public accommodation.

The Eighth Circuit's mischaracterization also hides any discussion of whether the Larsens' refusal is discrimination "because of . . . sexual orientation,"<sup>77</sup> an issue that has divided scholars and courts alike.<sup>78</sup> On one hand, a business owner might choose to refuse service to a customer because the customer's requested message is offensive or objectionable.<sup>79</sup> On the other hand, the business owner might refuse service because of a customer's religion, sexual orientation, or protected characteristic.<sup>80</sup> Generally, the former choice is an acceptable business practice, while the latter is unlawfully discriminatory.<sup>81</sup> Here, the Larsens argue that they fall in the first camp: they provide their videography services to everyone, including same-sex customers, but refuse to create a product carrying a positive message about same-sex marriage.<sup>82</sup> This is the argument the court latches onto in its opinion.

However, the issue before the court is not whether Minnesota could compel the Larsens to create wedding videos carrying a message they find objectionable, but rather whether Minnesota can compel the Larsens to provide their videography services to customers of a particular class.<sup>83</sup> By refusing to provide

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77. MINN. STAT. § 363A.11, subd. 1(a)(1) (2020).

78. Compare Ryan T. Anderson, *Disagreement Is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage*, 16 GEO. J.L. & PUB. POL'Y 123, 129 (2018) (arguing that businesses do not discriminate on the basis of sexual orientation when they refuse to provide goods or services for same-sex weddings) with *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1220–21 (Wash. 2019) (rejecting the distinction between discrimination on the basis of "sexual orientation" and discrimination against those who marry members of the same sex).

79. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1733 (2018) (Kagan, J., concurring) (suggesting that a baker who refuses to inscribe a cake with a message that he "would not have made for any customer" does not engage in unlawful discrimination based on a protected characteristic).

80. See *id.* at 1750 (Ginsburg, J., dissenting).

81. *Id.* at 1723 ("If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference."); See also *id.* at 1733 (Kagan, J., concurring) ("Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple.").

82. *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090, 1099 (D. Minn. 2017), *aff'd in part, rev'd in part and remanded sub nom. Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019) ("The Larsens allege that they will 'gladly work with all people' regardless of sexual orientation or religious belief, but they decline requests for their creative services unless 'they can use their story-telling talents and editorial control to convey only messages they are comfortable conveying given their religious beliefs.'").

83. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 771 (8th Cir. 2019) (Kelly, J., dissenting).

their videography services for same-sex weddings, the Larsens are effectively denying service to a certain class of customers *because of* their sexual orientation. This denial of service is unlawful discrimination because “some protected characteristics are so intertwined with particular conduct that discrimination against the conduct becomes discrimination against the protected class.”<sup>84</sup> Indeed, the Supreme Court has “declined to distinguish between status and conduct” in the context of “exclud[ing] individuals because of sexual orientation.”<sup>85</sup> For example, in *Lawrence v. Texas*, the Supreme Court held that a state could not criminalize homosexual conduct because that would essentially discriminate against homosexuals as a class.<sup>86</sup> In another context, the Court has argued that “a tax on wearing yarmulkes is a tax on Jews.”<sup>87</sup> This reasoning extends to same-sex weddings because such relationships and marriages are a “fundamental” expression of a person’s sexual orientation.<sup>88</sup> What good would the MHRA be if it only protected a person from sexual orientation discrimination to the extent he or she does not express it through a relationship or marriage?<sup>89</sup> Excluding same-sex customers because of their “conduct” of having same-sex weddings goes beyond simply declining to host an objectionable message, and amounts to unlawful discrimination on the basis of the customer’s same-sex status.

Ultimately, the MHRA regulates commerce, not speech. It discriminates on neither content nor viewpoint and applies equally to both ‘traditional’ public accommodations—like hotels and restaurants—and ‘expressive’ public accommodations—like the Larsens’ wedding video company. Because the Eighth Circuit laid the foundation for its analysis on a mischaracterization of the MHRA, the court obscures an important distinction between conduct and sexual orientation status. As I explain next, this mischaracterization also fatally undermines the courts subsequent analysis of the Larsens’ compelled speech and content-based regulation of speech claims.

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84. *Id.* at 770 (Kelly, J., dissenting).

85. Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 689 (2010).

86. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination.” (emphasis added)); *id.* at 583 (O’Connor, J., concurring in judgment) (“While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.”).

87. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993).

88. *Obergefell v. Hodges*, 576 U.S. 644, 665-66 (2015); *see also* Abner S. Greene, *Barnette and Masterpiece Cakeshop: Some Unanswered Questions*, 13 FIU L. REV. 667, 687 (2019) (“[D]enying a cake for a same-sex wedding celebration that one would bake for an opposite-sex wedding celebration is treating a gay or lesbian couple differently from how one would treat a straight couple.”).

89. This would essentially be saying that one is technically protected from discrimination based on one’s sexual orientation *status*, but that the protection does not cover any *conduct* sought as a fundamental component of that status.

## III. COMPELLED SPEECH AND CONTENT-BASED DISCRIMINATION

## A. Eighth Circuit's Analysis

Once the Eighth Circuit established that the Larsens' wedding videos were speech rather than conduct, the court first held that Minnesota's application of the MHRA violated "the 'cardinal constitutional command' against compelled speech."<sup>90</sup> Free speech includes both a right to speak and a right to refrain from speaking.<sup>91</sup> When the government coerces a person into betraying his or her convictions and promoting ideas he or she finds objectionable, it is violating that person's right to refrain from speaking.<sup>92</sup>

Here, the court held that Minnesota attempted to compel the Larsens to betray their sincere beliefs by requiring them to convey the same "positive" message in their videos about same-sex marriage as they do for opposite-sex marriage.<sup>93</sup> The court argued that a law impermissibly compels speech when it "has the effect of foisting a third party's message on a speaker."<sup>94</sup> In support, the court referenced *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, in which the Supreme Court held that a state could not use its public accommodation law to force a private parade to include a group of gay, lesbian, and bisexual individuals.<sup>95</sup> The Eighth Circuit's takeaway from *Hurley* was that "compelling the inclusion of others [in the parade] impermissibly declared the sponsors' speech itself to be a public accommodation in a way that altered the expressive content of their parade."<sup>96</sup> The Eighth Circuit also referenced *Miami Herald Publishing Co. v. Tornillo*, in which the Supreme Court invalidated a state law requiring newspapers that published attacks on the "personal character or official record" of political candidates to also publish the candidates' response, free of cost.<sup>97</sup> The lesson to be learned from *Tornillo*, the Eighth Circuit argued, is that "the First Amendment is relevant whenever the government compels speech, regardless of who writes the script."<sup>98</sup>

Second, the court held that the MHRA operates as a content-based regulation of the Larsens' speech.<sup>99</sup> According to the court, a law is content-based when it mandates "speech that a speaker would not otherwise make" or

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90. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019) (quoting *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018)).

91. *Id.* at 752. (quoting *Janus*, 138 S. Ct. at 2463).

92. *Id.* at 753 (quoting *Janus*, 138 S. Ct. at 2464).

93. *Id.*

94. *Id.*

95. *Id.* (citing *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 572–73 (1995)).

96. *Id.* (alterations and internal quotation marks omitted) (quoting *Hurley*, 515 U.S. at 572–73).

97. *Id.* at 753 (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244, 258 (1974)).

98. *Id.*

99. *Id.*

“exacts a penalty on the basis of the content of” speech.<sup>100</sup> The court argued that the MHRA does both of these by using the Larsens’ choice to produce videos with certain content (opposite-sex weddings) as a “trigger” for compelling them to produce videos with other content (same-sex weddings).<sup>101</sup> As highlighted in *Tornillo*, the problem with content-based regulations is that they exact a penalty and dampen the free exchange of ideas.<sup>102</sup> Just as the penalty in *Tornillo* would drive the newspaper to cease publication, the penalty here would force the Larsens to avoid the wedding video business entirely.<sup>103</sup>

Finding that the MHRA compelled the Larsens’ speech and operated as a content-based regulation of speech, the court concluded that the MHRA could not pass a test of strict scrutiny.<sup>104</sup> Under strict scrutiny, Minnesota must prove that the application of the MHRA to the Larsens is “narrowly tailored to serve a compelling state interest.”<sup>105</sup> The court acknowledged that there is “no doubt” that Minnesota has a compelling interest in ensuring that all people are “entitled to full and equal enjoyment of public accommodations and services.”<sup>106</sup> However, “as compelling as the interest in preventing discriminatory conduct may be, speech is treated differently under the First Amendment.”<sup>107</sup> The government “may not declare another’s speech itself to be a public accommodation or grant protected individuals . . . the right to participate in another’s speech.”<sup>108</sup> For example, in *Hurley*, the Supreme Court held that a “peculiar” application of a public accommodation law requiring speakers to alter the expressive content of their parade was unconstitutional.<sup>109</sup> The government simply has no compelling interest in regulating speech solely because it is discriminatory or offensive—no matter how hurtful the speech may be—because antidiscrimination laws can only regulate conduct, not expression.<sup>110</sup> For example, if the court accepted Minnesota’s argument, a state could theoretically require an atheist musician to perform at an evangelical church service.<sup>111</sup>

The court also rejected Minnesota’s argument that it should adopt a lower level of scrutiny.<sup>112</sup> Intermediate scrutiny may apply when “speech” and “non-speech” are combined in the same conduct and the state attempts to regulate the nonspeech.<sup>113</sup> Minnesota argued that intermediate scrutiny should apply because the Larsens’ conduct included both speech (making wedding videos) and

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100. *Id.* (quoting *Riley v. Nat’l Fed’n of the Blind of N.C. Inc.*, 487 U.S. 781, 795 (1988)).

101. *Id.*

102. *Id.* at 754 (citing *Tornillo*, 418 U.S. at 256-57).

103. *Id.* (citing *Tornillo*, 418 U.S. at 257).

104. *Id.* at 752, 754-55.

105. *Id.* at 754.

106. *Id.*

107. *Id.* at 755.

108. *Id.* at 755 (internal quotations omitted) (quoting *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 572-73 (1995)).

109. *Id.* (quoting *Hurley*, 515 U.S. at 572-73).

110. *Id.*

111. *Id.* at 756.

112. *Id.* at 756-57.

113. *Id.* at 756 (internal quotations omitted).

nonspeech (selling the videos to the public).<sup>114</sup> However, the court held that the Larsens' conduct is not like other "commercial conduct" that the government may regulate as "nonspeech" (like serving food or hiring employees) because making wedding videos is pure speech.<sup>115</sup> The court also held that lower scrutiny does not apply simply because the Larsens can disapprove of same-sex marriage in other ways, for instance by providing a disclaimer.<sup>116</sup> Although the Supreme Court has suggested in some cases that the opportunity to provide a disclaimer may be relevant, the facts and main issues of those cases were about providing a forum for speech; the shopping mall and the law school were still free to express their views.<sup>117</sup> In contrast, the court found that the facts of this case are more similar to *Hurley* because the government requires the Larsens, like the parade organizers, to alter their own message rather than simply provide a forum for others' messages.<sup>118</sup>

*B. The compelled speech and content-based restriction of speech analyses mischaracterize the regulated conduct*

Just like its 'speech or conduct' analysis, the Eighth Circuit's compelled speech and content-based discrimination analyses are flawed because they rest on the premise that the MHRA regulates speech, not conduct. This mischaracterization undermines its compelled speech analysis because the MHRA does not compel *speech*, but rather compels all public accommodations to provide the same services to same-sex customers as it would to opposite-sex customers. Similarly, the MHRA is content-neutral because it targets not the content of the speech, but the conduct of providing services.

*i. The Eighth Circuit's compelled speech analysis is flawed because the MHRA only compels businesses to provide equal service*

The Eighth Circuit incorrectly held that the MHRA compels businesses to speak against their will. First, the court placed this case in the improper context of the Supreme Court's compelled speech doctrine. For example, the court often relied on *Hurley*, a case involving an association of private individuals that organized a St. Patrick's Day parade in Boston.<sup>119</sup> The organizers refused to give the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) a place in the parade and GLIB sued the organizers under Massachusetts' public accommodations law.<sup>120</sup> The state trial court held that the parade qualified as a "public accommodation" and that including GLIB would not violate the

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114. *Id.*

115. *Id.* at 757.

116. *Id.*

117. *Id.* at 757-58.

118. *Id.*

119. *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 560 (1995).

120. *Id.* at 561.

organizers' First Amendment rights because the parade itself was not sufficiently expressive.<sup>121</sup> The Massachusetts Supreme Court affirmed the trial court.<sup>122</sup>

In an unanimous decision, the United States Supreme Court reversed.<sup>123</sup> The Court first held that a parade is a form of protected expression.<sup>124</sup> The Court then recognized that laws like Massachusetts' public accommodations law have a "venerable history" and reflect how the scope of the common law principle of "public employment" has broadened to prohibit discrimination on the basis of "race, color, religious creed, national origin, sex, sexual orientation, . . . deafness, blindness or any physical or mental disability or ancestry."<sup>125</sup> Such laws are "well within the State's usual power to enact" and "they do not, as a general matter, violate the First or Fourteenth Amendments," especially when they do not facially target speech or discriminate on the basis of content.<sup>126</sup>

The Supreme Court held, however, that the "peculiar" application of the law to the parade organizers violated the First Amendment.<sup>127</sup> Because the application of the law essentially required the private organizers to "alter the expressive content of their parade," it had the impermissible effect of "declaring the sponsors' speech itself to be the public accommodation."<sup>128</sup> Doing so undermined the fundamental protection of the First Amendment that a "speaker has the autonomy to choose the content of his own message."<sup>129</sup> The government cannot control a private speaker's choice not to propound a certain view.<sup>130</sup> Further, even if the government's "enlightened" purpose is really to "produce a society free of the corresponding biases," the government still may not "interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one."<sup>131</sup> Ultimately, when the public accommodations law is applied to expressive activity, its only purpose is to alter the content of the speaker's message, which, without any further legitimate purpose, is prohibited by the First Amendment.<sup>132</sup>

In the present case, the Eighth Circuit failed to recognize the key differences between *Hurley* and the application of the MHRA to the Larsens' business. Unlike a state requiring a *public accommodation* to serve members of protected classes—as was the case here—the Court in *Hurley* held that a state could not apply its public accommodations law to require a speaker to alter his *private* speech.<sup>133</sup> The Court noted that the parade's "inherent expressiveness" distinguished it from entities traditionally subject to public accommodations

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121. *Id.* at 561–63.

122. *Id.* at 563–64.

123. *Id.* at 566.

124. *Id.* at 568–70.

125. *Id.* at 571–72.

126. *Id.* at 572.

127. *Id.* at 572–73.

128. *Id.*

129. *Id.* at 573.

130. *Id.* at 575.

131. *Id.* at 578–79.

132. *Id.* at 578.

133. *Id.* at 572–73.



laws—those that provide “publicly available goods, privileges, and services.”<sup>134</sup> Indeed, the Court said the parade is not a public accommodation at all: The state could not apply its public accommodations law in a “peculiar” way to declare the speech itself to be the public accommodation.<sup>135</sup> In the present case, however, the Larsens are not private speakers, but rather owners of a public accommodation.<sup>136</sup> Also, the fact that the services they provide are expressive does not mean that the law is being applied in a peculiar way: The law applies to any and all public accommodations. As such, Minnesota did not “foist” its preferred message on a private speaker; it regulated the provision of services to the public.<sup>137</sup> In fact, *Hurley* supports the purpose of the MHRA. Whereas the Supreme Court rejected Massachusetts’ purpose of applying its law to modify the expressive content of private speakers’ messages, the Court signaled approval for the purpose of applying the law to ensure that customers will not be turned away solely because of their sexual orientation.<sup>138</sup> Thus, because the Larsens’ business is in fact a public accommodation, the Eighth Circuit’s reliance on *Hurley*’s reasoning is misplaced.

The Eighth Circuit also misinterpreted this case’s place in the Supreme Court’s compelled speech doctrine. Although the Court’s compelled speech jurisprudence is somewhat unclear, many scholars and courts divide the cases into two doctrinal strands: (1) those involving the right to not speak the government’s message and (2) those involving the right to not host or accommodate another speaker’s message.<sup>139</sup> The first strand of cases stems from

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134. *Id.* at 568-72 (citing *State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203, 1226 (Wash. 2019)).

135. *Id.* at 572-73.

136. *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090, 1099 (D. Minn. 2017) (“The parties do not dispute that because TMG offers videography services to the general public, it is a “place of public accommodation.”), *aff’d in part, rev’d in part and remanded sub nom.* *Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019).

137. *Contra Telescope Media Grp. v. Lucero*, 936 F.3d 740, 753 (8th Cir. 2019) (“The Supreme Court has recognized that the government still compels speech when it passes a law that has the effect of foisting a third party’s message on a speaker.”).

138. The purpose of the MHRA is similar to that of the Massachusetts law: “[T]o ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor’s exercise of personal preference.” *Hurley*, 515 U.S. at 578.

139. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 63 (N.M. 2013) (citing *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 63 (2006)). *See also* Velte, *supra* note 76, at 36; Steven H. Shiffrin, *What is Wrong with Compelled Speech?*, 29 J.L. & POL. 499, 504 (2014). *But see* Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1077 (2015) (questioning courts’ reliance on this dichotomy in the antidiscrimination context, but ultimately agreeing that those laws do not compelled speech). One scholar has suggested a different approach. Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 358 (2018). Volokh divides the compelled speech doctrine into two different strands: 1. Compulsions of speech that restrict the speaker’s other speech (like requiring a newspaper to publish something, thus restricting the newspaper’s intended message), and 2. Pure compulsions of speech that simply intrude on one’s autonomy. *Supra*. Volokh treats the antidiscrimination issue here as one of “compelled personal creation of speech,” which is

the Supreme Court's landmark decision in *West Virginia State Board of Education v. Barnette*, in which the Court held that the government could not compel students to recite the Pledge of Allegiance or salute the American flag.<sup>140</sup> Similarly, in *Wooley v. Maynard*, the Court held that New Hampshire could not force its residents to accept the state motto—"Live Free or Die"—on vehicle license plates.<sup>141</sup> Recently, in *NIFLA v. Becerra*, the Court held that a law requiring certain pregnancy counseling centers to notify patrons of "free or low-cost access to . . . abortion" impermissibly compelled the centers to adopt the government's message.<sup>142</sup>

All these cases involve the government choosing a specific message and requiring speakers to endorse that message,<sup>143</sup> but this is certainly not the function of public accommodations laws like the MHRA. First, the MHRA is content-neutral.<sup>144</sup> It does not expressly single out a particular message that speakers must endorse. Instead, the MHRA only requires that public accommodations provide equal service to members of protected classes.<sup>145</sup> Second, the goal of the MHRA is not to require speakers to carry the government's message, but rather "to ensure that sexual orientation cannot be used to deny some Minnesotans the basic rights to a place to live, employment and other public accommodations which should be enjoyed by all citizens" and to recognize that "the right to public accommodations, public services and freedom from personal harm, should be guaranteed to all."<sup>146</sup> The MHRA does not compel speakers to carry the state's message, but rather compels public accommodations to provide services equally to all customers.

The second line of cases involves those where the government requires a speaker to "host or accommodate *another* speaker's message."<sup>147</sup> In its decision, the Eighth Circuit relies on two of these cases—*Hurley* and *Tornillo*<sup>148</sup>—and distinguishes two others—*Pruneyard* and *FAIR*.<sup>149</sup> Another case in this line is *Pacific Gas & Electric Co. v. Public Utilities Commission of California*.<sup>150</sup> There, a plurality of the Court held that California could not require a public utility to include messages from a third party in its customers' billing

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constitutionally tantamount to the impermissible "compelled utterance or display of speech." *Supra*, at 383.

140. *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

141. *Wooley v. Maynard*, 430 U.S. 705, 713 (1977).

142. *NIFLA v. Becerra*, 138 S. Ct. 2361, 2369-78 (2018). "This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression." *Id.* at 2379 (Kennedy, J., concurring).

143. Velte, *supra* note 76, at 37.

144. See discussion *infra* Section III.B.ii.

145. See *supra* text accompanying note 65.

146. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 765 (8th Cir. 2019) (Kelly, J., dissenting) (quoting Letter from Hubert H. Humphrey III, Att'y Gen., to Hon. Alan Spear, Chair, Senate Judiciary Comm. (Mar. 1, 1993)).

147. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc. (FAIR)*, 547 U.S. 47, 63 (2006) (emphasis added).

148. *Telescope Media Grp. v. Lucero*, 936 F.3d at 753; see *supra* Section III.A.

149. *Telescope Media Grp. v. Lucero*, 936 F.3d at 758; see *supra* Section III.A.

150. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986).

envelopes.<sup>151</sup> The plurality reasoned that the law required a speaker to accommodate the message of another speaker and impermissibly restricted Pacific Gas & Electric's speech "to certain topics or views."<sup>152</sup> By contrast, in *Turner Broadcasting System, Inc. v. FCC*, the Court upheld a "must-carry" rule that required cable systems to carry certain channels that they would prefer not to carry.<sup>153</sup> Together, this second line of cases stands "for the principle that the government may not hijack a private speaker's method of communicating with its audience by mandating dissemination of a third person's message."<sup>154</sup>

In the present case, the MHRA does not require public accommodations to speak another individual's message. First, the application of the MHRA is distinguishable from the application of the antidiscrimination law in *Hurley* because the Larsens' business is undoubtedly a public accommodation, whereas the parade was not.<sup>155</sup> Second, public accommodations laws like the MHRA have quite a different purpose than the content-based laws in *Tornillo*, *Pacific Gas*, and *NIFLA*. The MHRA is not concerned with any message a public accommodation may be speaking and has no purpose of promoting a particular message via another person's speech. Indeed, the MHRA does not "on [its] face or by intent, suppress speech or target the production of speech. Almost all of [its] applications raise essentially no First Amendment issues."<sup>156</sup> The Supreme Court has even analyzed the MHRA specifically and held that it does not "aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria."<sup>157</sup>

Instead, the MHRA only concerns the conduct of providing goods and services to the public. The law requires a wedding videography business to produce same-sex wedding videos only if it makes its services available to the public. This purpose and effect clearly do not concern the content of the message produced by the business's activity. If, for instance, the Larsens produced no wedding videos at all, the government could not compel them to start producing wedding videos, same-sex or opposite-sex. Here, however, the Larsens explicitly intend to produce wedding videos.<sup>158</sup> Similarly, if the Larsens operated as independent artists telling their own story and did not offer their services to the public, the government also could not compel them to create objectionable wedding videos. But the Larsens are not operating like "'Steven Spielberg, edit[ing] the film[s] to express messages' consistent with their personal and

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151. *Id.* at 4–7.

152. *Id.* at 11.

153. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997).

154. Velte, *supra* note 76, at 40.

155. *See supra* Section III.B.i.

156. Bhagwat, *supra* note 139, at 1077.

157. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (holding unanimously that Minnesota may require a male-only organization to admit women and that this requirement does not violate the First Amendment).

158. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 748 (8th Cir. 2019).

religious views.”<sup>159</sup> Steven Spielberg is not a public accommodation and is “free to use his talents as he pleases without regard for laws like the MHRA.”<sup>160</sup> The Larsens’ business, however, is undeniably a public accommodation.<sup>161</sup> Thus, it is subject to regulation under the content-neutral MHRA, a law which neither compels the adoption of the government’s message nor the message of another individual.

Further, Minnesota’s application of the MHRA to the Larsens is analogous to how the government permissibly compelled speakers to provide a forum for messages in other cases.<sup>162</sup> For instance in *Rumsfeld v. FAIR*, the Court held that a content-neutral federal law could require law schools to allow the military to recruit on campus on the same basis as non-military recruiters.<sup>163</sup> The Court reasoned that the law “regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.”<sup>164</sup> In effect, the law “did not force the law schools to endorse military recruiting. It forced them to give non-discriminatory access and left them free to condemn discrimination by the military.”<sup>165</sup> In the present case, the core purposes and application of the MHRA are more like that of the *FAIR* law than the *Barnette* or *Wooley* laws. Like the *FAIR* law, the MHRA is content-neutral and does not single out any particular message that the government wishes to compel. The MHRA only affects what public accommodations must do: provide their goods and services to customers without discrimination. Therefore, when compared to laws compelling speakers to provide a forum for other messages, the MHRA still does not violate the rights protected by the First Amendment.

ii. The court’s content-based discrimination analysis is flawed because the MHRA neutrally regulates commerce

Much like its compelled speech analysis, the Eighth Circuit’s holding that the MHRA is a content-based regulation of speech is built upon the incorrect foundation that the MHRA regulates speech, not conduct. Further destabilizing this analysis is the Eighth Circuit’s distortion of the test for separating content-neutral laws from content-based ones. By recognizing that the MHRA regulates only the conduct of serving the public and by employing the proper test for content-based discrimination, the court’s entire argument comes crashing down.

The Eighth Circuit defined content-based laws as those that mandate “speech that a speaker would not otherwise make” or “exact[] a penalty on the basis of the content of” speech.<sup>166</sup> This description of the test for content-based discrimination is far from accurate. Instead, as the Supreme Court recently

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159. *Id.* at 775 (Kelly, J., dissenting) (quoting Oral Argument at 0:00-1:05).

160. *Id.*

161. *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090, 1099 (D. Minn. 2017).

162. *See Shiffrin, supra* note 139, at 508.

163. *Rumsfeld v. FAIR*, 547 U.S. 47, 67 (2006).

164. *Id.* at 60.

165. *Shiffrin, supra* note 139, at 508.

166. *Telescope Media Grp. v. Lucero*, 936 F.3d at 753 (quoting *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

detailed, a law is content-based if it (1) facially draws distinctions based on the message a speaker conveys, (2) cannot be justified without reference to the content of the regulated speech, or (3) was adopted by the government because of disagreement with the message the speech conveys.<sup>167</sup> Courts analyze content-based regulations of speech using strict scrutiny, which requires such laws to be narrowly tailored to serve compelling state interests.<sup>168</sup> On the other hand, laws that do not discriminate based on the content of one's speech are generally content-neutral.<sup>169</sup> These laws are less suspect, but may still receive intermediate scrutiny if they regulate the time, place, or manner of speech, or when they incidentally affect speech or inherently expressive conduct.<sup>170</sup>

In the present case, the MHRA is clearly content-neutral. It does not draw distinctions based on the message a speaker conveys, but rather neutrally prohibits all places of public accommodation from discriminating based on protected characteristics. Nor must it be justified with reference to the content of regulated speech; it is justified on the common law basis of providing equal service at places of public accommodation.<sup>171</sup> Indeed, the United States Supreme Court has explicitly held that the purpose of the MHRA is “unrelated to the suppression of expression” and “does not distinguish between prohibited and permitted activity on the basis of viewpoint.”<sup>172</sup> Even as applied to the Larsens, the law is still content-neutral. The Eighth Circuit argued that the MHRA was not content-based because it treats “the Larsens’ choice to talk about one topic—opposite-sex marriages—as a trigger for compelling them to talk about a topic they would rather avoid—same-sex marriages.”<sup>173</sup> This argument suggests that the MHRA only operates against the Larsens because of the anti-homosexual content of their wedding videos. But the MHRA does not operate because of the content of public accommodations’ expressive activities. Rather, the application of the MHRA to the Larsens is based only on the act of discrimination or denial of *service* to a customer because of sexual orientation.<sup>174</sup> Because the MHRA is

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167. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015).

168. *Id.*

169. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (“We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”).

170. *Id.* at 298; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

171. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 578 (1995).

172. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

173. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 753 (8th Cir. 2019).

174. Public accommodations laws “require[] that [businesses] do not discriminate, which is a regulation of conduct, not speech.” Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 281 (2015). Further, the Eighth Circuit dismisses the ‘conduct-speech’ distinction early in its opinion by framing the regulated conduct as that involved in producing the videos: “positioning a camera, setting up microphones, and clicking and dragging files on a computer screen.” *Telescope Media Grp. v. Lucero*, 936 F.3d at 752. However, the regulated conduct is not that which a speaker undertakes when speaking or expressing a message, but rather that which is involved in selling services to the public. *supra* Section II.B.

content-neutral and not content-based, it is not subject to the exacting strict scrutiny analysis.

Even though the MHRA is content-neutral and not subject to strict scrutiny, it may still be subject to intermediate scrutiny if it indirectly affects “expressive conduct.”<sup>175</sup> *United States v. O’Brien* is the seminal case on this topic.<sup>176</sup> There, the Supreme Court held that content-neutral regulations may still receive a form of intermediate scrutiny: “[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”<sup>177</sup> In that case, the court held that even if burning a draft card expressed some sort of message, the compelling government purpose against destroying draft cards justified any infringement on the speaker’s First Amendment rights.<sup>178</sup>

In the present case, the regulated conduct—providing videography services to the public—does not qualify as either “speech” or “expressive conduct.” Because there is no speech or expressive conduct to “incidentally affect,” the MHRA is not subject to intermediate scrutiny. On this point, the Eighth Circuit argued that the Larsens’ activity should qualify as pure speech.<sup>179</sup> Concededly, when contrasted with other wedding vendor cases—like the cakes in *Masterpiece Cakeshop* or the floral arrangements in *Arlene’s Flowers*—the Larsens’ videos certainly exhibit more speech-like characteristics.<sup>180</sup> But making wedding videos is only part of the regulated activity; the Larsens also sell their videography services to the public. Several courts and academics have suggested that providing such creative services to the public should not qualify as pure speech, or at least should not be treated as such. For instance, the court in *Arlene’s Flowers* held that “the regulated activity at issue in this case—[the] sale of wedding floral arrangements—is not ‘speech’ in a literal sense . . . .”<sup>181</sup> Similarly, one scholar has argued that wedding photography in the public accommodations context is not “pure speech” because the law compels conduct (the provision of services), not speech.<sup>182</sup> Another scholar argued that even though public accommodations laws “may affect the content of speech in some applications,” that “does not change the fact that they are, at heart, regulations of

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175. See *United States v. O’Brien*, 391 U.S. 367 (1968).

176. *Id.*

177. *Id.* at 376.

178. *Id.* at 382.

179. *Telescope Media Grp. v. Lucero*, 936 F.3d at 750 (“The Larsens’ videos are a form of speech that is entitled to First Amendment protection.”).

180. See, e.g., *State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203, 1225 (Wash. 2019) (“[T]he line between speech and conduct in this context is not always clear.”). See also *Kaplan v. California*, 413 U.S. 115, 119–20 (1973) (“[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection . . . .”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (holding that motion pictures may be considered speech with First Amendment protections).

181. *Arlene’s Flowers*, 441 P.3d at 512 (emphasis added).

182. Corbin, *supra* note 174, at 281.

conduct.”<sup>183</sup> Thus, under the *O’Brien* test, the MHRA does not incidentally affect pure speech.

Further, the MHRA does not incidentally affect “expressive conduct” because the conduct of providing videography services to the public is not expressive. In *Spence v. Washington*, the Supreme Court fashioned a two-part test for determining if conduct is sufficiently ‘expressive’ to be considered ‘speech’: 1) If the speaker intended to express a certain message and 2) If the audience understood that message.<sup>184</sup> The first prong is not disputed in this case, as the Larsens intend to produce videos that “promote their view of marriage as a ‘sacrificial covenant between one man and one woman.’”<sup>185</sup> However, the second prong, which hinges on how the audience understands that message, is less clear. For this prong, the *Spence* Court emphasized the “context” and “surrounding circumstances” of the activity.<sup>186</sup> Recently, the Supreme Court has characterized this inquiry as whether the conduct is “inherently expressive.”<sup>187</sup>

In the present context, an audience would not understand that a business producing a customer-requested wedding video conveys the message that the business endorses the portrayed marriage. The Washington Supreme Court has addressed this issue in the context of wedding flower providers: “The decision to either provide or refuse to provide flowers for a wedding does not inherently express a message about that wedding.”<sup>188</sup> That court held that providing wedding services is analogous to the circumstances of *FAIR*, a case where the Supreme Court held that a law school providing (or refusing to provide) a forum for military recruiters was not ‘inherently expressive’ and not protected by the First Amendment.<sup>189</sup>

Similarly, here, a person would likely not understand a wedding videography business’s decision to accept or decline a customer’s request as expressing a message about that wedding. In this context, customers and the general public “can and will appreciate that compliance with an antidiscrimination law is not a reflection of [an entity’s] beliefs . . . .”<sup>190</sup> Indeed, “creative decisions do not automatically read as approval, especially when the

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183. Bhagwat, *supra* note 139, at 1077.

184. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (per curiam); *see also* *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (describing test as “whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it” (alteration in original)).

185. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 748 (8th Cir. 2019).

186. *Spence*, 418 U.S. at 410–11. One scholar suggests reframing this prong as “the social meaning of the contested act” or “the expressive dimension of conduct . . . in the relevant community.” Corbin, *supra* note 174, at 254.

187. *Rumsfeld v. FAIR*, 547 U.S. 47, 64 (2006).

188. *State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203, 1226 (Wash. 2019).

189. *Id.* at 1225–26 (citing *FAIR*, 547 U.S. 47).

190. Velte, *supra* note 76, at 40. “It strains credulity to argue that the commercial work of a baker, photographer, or crafting store either makes or is perceived to make a collective point. Observers are extremely unlikely to believe that the proprietors of commercial enterprises personally share in every message that might be conveyed on items produced by customers (e.g., on a cake).” *Id.* at 43.

public accommodations context neutralizes any potential endorsement.”<sup>191</sup> Producing videos that portray a client’s wedding in a positive light reflects how the video subjects feel, rather than any messages about the proper definition of marriage.<sup>192</sup> Even if the Larsens express their clients’ messages in their photographs, they do so “only because [they are] hired to do so.”<sup>193</sup> And the Larsens can always post a disclaimer on their website saying that the content of the wedding videos does not reflect their views or beliefs.<sup>194</sup> Thus, because regulating a public accommodation’s provision of creative services does not incidentally affect the business’s speech or expressive conduct, the MHRA is not subject to the *O’Brien* intermediate scrutiny test and does not violate the First Amendment.

But even if providing such services to the public were considered “speech” or “expressive conduct,” the MHRA would still survive intermediate scrutiny. In this case, the Eighth Circuit rejected Minnesota’s argument favoring intermediate scrutiny because 1) the MHRA is not content-neutral and 2) the regulated ‘commercial conduct’ of producing videos is actually speech.<sup>195</sup> Assuming for the sake of argument that the MHRA incidentally affects the Larsen’s speech—but is still content-neutral—the law would survive the *O’Brien* intermediate scrutiny test.<sup>196</sup> The Eighth Circuit acknowledged that Minnesota’s interest in preventing discrimination is “compelling” (and thus “sufficiently important” as well).<sup>197</sup> This sentiment is echoed throughout Supreme Court jurisprudence, including in the recent *Masterpiece Cakeshop* case and in *Hurley*.<sup>198</sup> Therefore, in this scenario, because the Larsen’s conduct would include “speech” (making the wedding videos) and “nonspeech” (selling the videos as a public accommodation), the MHRA would be valid because

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191. Corbin, *supra* note 174, at 275.

192. *Id.* at 275-77.

193. Elane Photography, LLC v. Willock, 309 P.3d 53, 66 (N.M. 2013).

194. *See, e.g., id.* at 70 (“Elane Photography and its owners likewise retain their First Amendment rights to express their religious and political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws.”).

195. Telescope Media Grp. v. Lucero, 936 F.3d 740, 756–57 (8th Cir. 2019).

196. Again, that test is: “[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

197. *Telescope Media Grp. v. Lucero*, 936 F.3d at 754 (“This interest has a substantial constitutional pedigree and, generally speaking, we have no doubt that it is compelling.”).

198. *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1727 (2018) (“[I]t is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”); *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995) (“Provisions like these are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.”).



Minnesota's interest in regulating the 'nonspeech' element is "sufficiently important," if not compelling.<sup>199</sup>

*C. Creating an exemption for certain businesses undermines the important underlying policy of public accommodations laws*

Aside from the caselaw and complex First Amendment analysis, there are compelling policy reasons to uphold the MHRA as applied to the Larsens. As a general matter, public accommodations laws have a "venerable history" and hold an important place in our society.<sup>200</sup> The concept for these laws originated at common law, where those who "made profession of a public employment," such as innkeepers or smiths, were prohibited from refusing to serve a customer without good reason.<sup>201</sup> After the Civil War, many states codified this rule into public accommodations statutes.<sup>202</sup> Minnesota enacted its own law in 1885,<sup>203</sup> and today that law protects from discrimination on the basis of "race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex."<sup>204</sup>

Public accommodations laws serve many significant purposes beyond guaranteeing access to goods and services. One commonly referenced purpose is ensuring societal equality. In *Hurley*, the Supreme Court endorsed this view, stating that "the object of the law is to ensure by statute . . . what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference."<sup>205</sup> The Washington Supreme Court agreed, and added that such laws are about "eradicating barriers to the equal treatment of all citizens in the commercial marketplace."<sup>206</sup> A similar purpose is in protecting individuals from the dignitary harm of discrimination. For instance, in *Daniel v. Paul*, the Supreme Court stated that the purpose of Title II of the Civil Rights Act of 1964 was "to [re]move the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public . . . ."<sup>207</sup> Justice Kennedy's opinion in *Masterpiece Cakeshop* also suggests that these laws are designed to protect certain groups from harmful "community-wide stigma."<sup>208</sup> Other justifications for these laws include the

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199. *O'Brien*, 391 U.S. at 376.

200. *Hurley*, 515 U.S. at 571.

201. *Id.*

202. *Telescope Media Grp. v. Lucero*, 936 F.3d at 763 (Kelly, J., dissenting).

203. *See* U.S. Jaycees v. McClure, 305 N.W.2d 764, 767 n.1 (Minn. 1981).

204. MINN. STAT. § 363A.11 subdiv. 1(a)(1) (2020).

205. *Hurley*, 515 U.S. at 578.

206. *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1235 (Wash. 2019).

207. *Daniel v. Paul*, 395 U.S. 298, 307–08 (1969).

208. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018).

economic harm of discrimination by public accommodations,<sup>209</sup> creating norms,<sup>210</sup> and fundamental principles of property law.<sup>211</sup>

The reasons for protecting against sexual orientation discrimination largely mirror the reasons that public accommodations laws originally protected against racial discrimination. Discrimination based on one's sexual orientation creates similar dignitary harm and feelings of inferiority to those that accompany racial discrimination.<sup>212</sup> As one scholar put it, "[t]he promise of equality" would not be "real or robust" if public accommodations were allowed to deny service to LGBT customers.<sup>213</sup> When Minnesota amended the MHRA to protect against sexual orientation discrimination, it found that LGBT persons faced "considerable discrimination" and that there existed a "substantial societal hostility" toward homosexuality.<sup>214</sup> Regarding this amendment, Hubert Humphrey (then Minnesota's Attorney General) commended the move as recognizing that "the right to public accommodations, public services and freedom from personal harm, should be guaranteed to all."<sup>215</sup>

Because public accommodations laws hold such an important place in our society, it is imperative that courts not allow these laws to be undermined by religious objectors or businesses engaged in "expressive activity." The effort to obtain religious exemptions from these antidiscrimination laws has been persistent since the Civil Rights Act of 1964,<sup>216</sup> but courts have generally been unsympathetic.<sup>217</sup> Famously, in *Bob Jones University v. United States*, the Supreme Court rejected a university's claim that prohibiting racial discrimination would violate the university's religious free exercise rights.<sup>218</sup> The

209. See *Katzenbach v. McClung*, 379 U.S. 294, 299–300 (1964) (finding that racial discrimination at restaurants which receive a substantial portion of food from out of state imposes commercial burdens of national magnitude upon interstate commerce).

210. Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J. L. & GENDER 177, 191 (2015). Antidiscrimination laws have "not ended discrimination or voluntary segregation. It has not worked miracles. But it has established a norm, a standard that creates a baseline of expectations." *Id.*

211. See Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929, 950 (2015). "Public accommodations law is not a nice extra that we can be happy the Congress passed in 1964. Nor does it limit the rights of property owners. It defines what property rights are compatible with the truths that we hold self-evident and our commitment to freedom, equality, and democracy." *Id.*

212. Melling, *supra* note 210, at 189–90.

213. *Id.* at 190.

214. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 764–65 (8th Cir. 2019) (Kelly, J., dissenting).

215. *Id.* at 765.

216. Melling, *supra* note 210, at 182 ("There was also resistance rooted in religion to laws barring discrimination in public accommodations and education"); See generally Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014).

217. See, e.g., *Newman v. Piggie Park Enter., Inc.*, 377 F.2d 433, 438 (4th Cir. 1967) (Winter, J., concurring) (rejecting the argument that the Civil Rights Act of 1964 was invalid because it "contravenes the will of God" and constitutes an interference with the "free exercise of the Defendant's religion."), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

218. *Bob Jones Univ. v. United States*, 461 U.S. 574, 580–82 (1983).

Court held that “the interests asserted by petitioners cannot be accommodated with [the] compelling governmental interest” in “eradicating racial discrimination in education.”<sup>219</sup>

This same reasoning should be extended to those seeking exemption from public accommodations laws on the basis of free speech. Creating a carve-out from generally applicable public accommodations laws for businesses providing expressive goods and services would undermine the important objectives of these laws. By shifting the focus to “the content of the allegedly artistic product or service,” these free speech challenges suppress the laws’ true purpose of regulating the operation of a business—namely, the decision to deny goods or services on the basis of a protected characteristic.<sup>220</sup> Just because a business may engage in speech or produce speech for others does not grant it a “general First Amendment immunity from the application of neutral laws” that are unrelated to expression.<sup>221</sup> If businesses could be exempted because of the incidental effect on speech, courts would essentially be sanctioning the dignitary harms and social inequality that public accommodations laws were designed to prevent.

The implications of this carve-out are substantial. In *Masterpiece Cakeshop*, Justice Kennedy recognized the threat that these free speech challenges posed to antidiscrimination laws: If courts exempted certain businesses from the laws, it would result in “a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.”<sup>222</sup> Even more troubling is that this carve-out logically extends beyond refusing to serve same-sex weddings—all you have to do is replace “same-sex” with “interracial.” For example, a wedding videographer not wanting to promote interracial marriage could challenge a public accommodations law on free speech grounds. Just like the Larsens, this vendor would claim that they would happily serve the opposite-race couple for all their non-marriage video needs, but that they simply could not endorse the interracial marriage. And following the Eighth Circuit’s reasoning, this would not be racial discrimination. In fact, prohibiting the vendor from discriminating would violate the vendor’s First Amendment rights to express its racial beliefs.<sup>223</sup> The ruling in *Telescope Media Group* creates a “two-tiered

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219. *Id.* at 604.

220. Velte, *supra* note 76, at 43.

221. Bagenstos, *supra* note 216, at 1236.

222. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1727 (2018).

223. The only conceivable difference in this hypothetical and the present case is the different social contexts of same-sex and interracial marriage discrimination. The argument goes like this: Vendors like the Larsens serve all customers—black and white, gay and straight—but turn down certain orders because of the nature of the occasion being celebrated and the message they’d be forced to communicate. By contrast, vendors who decline to serve interracial weddings also decline to serve African Americans at all. See Ryan T. Anderson, *Disagreement Is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage*, 16 GEO. J.L. & PUB. POL’Y 123, 130 (2018). But this argument is a massive oversimplification. All it takes is for some wedding vendors to refuse to serve interracial weddings like the Larsens refused to serve same-sex weddings. Once the illusory ‘social context’ distinction is removed, all sorts of other public accommodations laws are put at risk.

system” carving out an enormous hole from public accommodations laws.<sup>224</sup> Under this system, a “dime-store lunch counter would be required to serve interracial couples but an upscale bistro could turn them away”—all because the bistro does not want to ‘express’ approval for interracial marriage.<sup>225</sup>

Following this extension of the Eighth Circuit’s reasoning, another troubling aspect arises: How does one separate “expressive” businesses from “non-expressive” ones? All commercial entities engage in some form of expression, such as choice of advertising, of what to sell, and who to hire.<sup>226</sup> Conceivably, any business’s provision of a good or service to someone on an equal basis with others could be characterized as expressive.<sup>227</sup> Following the reasoning in *Telescope Media Group*, the government would be unable to require public accommodations to serve customers of protected classes equally because doing so—like serving same-sex weddings—would express unwanted approval of the customer’s lifestyle in violation of the First Amendment. Because of the difficult distinction between expressive and non-expressive businesses, “courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws.”<sup>228</sup> Allowing courts to make that decision would be allowing the courts to twist the First Amendment to give expressive businesses a free pass under public accommodations laws.

#### CONCLUSION

“The one great achievement of the last century is that we took out of American lexicon six words: ‘We don’t serve your kind here.’”<sup>229</sup> Or at least that is how we thought it would be. Cases like *Telescope Media Group* show that some courts are willing to allow businesses to escape the reach of generally applicable public accommodations laws because of the owners’ personal beliefs. In this case, the Eighth Circuit held that the MHRA was not content-neutral and compelled the Larsens’ speech. This conclusion rests on the premise that the

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224. *State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203, 1228 (Wash. 2019).

225. *Id.*

226. Bagenstos, *supra* note 216, at 1231.

227. Bagenstos, *supra* note 216, at 1235. “The provision of the good or service expresses the message, at the least, that the customer is entitled to be treated like any other customer.” *Id.* One possible solution was proposed by Justice O’Connor in a concurrence to *Roberts v. U.S. Jaycees*, 468 U.S. 609, 631 (1984). She advocated for a ‘commercial- expressive’ distinction to determine the breadth of public accommodations laws, where expressive, social organizations (like the NAACP or the Boy Scouts) would be given more leeway to choose their members and message, while purely commercial organizations would be bound by the laws. *Id.* This solution is tempting because it recognizes the commercial aspects of public accommodations laws, but it ultimately fails to separate commercial entities engaged in expression from purely commercial entities. “Once we expand the ‘expressive’ zone to include for-profit businesses that sell their goods or services to the public, it becomes clear that the expressive-commercial distinction cannot be counted on to cabin Dale’s constitutional exemption from public accommodations laws.” Bagenstos, *supra* note 216, at 1236.

228. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 71 (N.M. 2013).

229. ‘*This Week*’ Transcript: John Kerry, ABC NEWS (Feb. 28, 2014, 12:41 PM), <https://abcnews.go.com/ThisWeek/week-transcript-john-kerry/story?id=22720806> [<https://perma.cc/6RH7-SSDZ>].

MHRA regulates the content of the Larsens' videos. But the MHRA does not operate based on what the Larsens say. Rather, it regulates only the conduct of providing services as a business that holds its services out to the public. Once the focus of the argument is properly shifted from speech to commerce, the foundation for the Eighth Circuit's holding falls away.

Wedding vendors—as well as all businesses that “speak” or produce speech for others—should be treated no differently than any other sort of business operating as a public accommodation. Allowing exemptions for “expressive” businesses undermines the substantial and legitimate purposes of antidiscrimination laws, reintroduces the dignitary and economic harms against which these laws were designed to protect, and opens the door for more discrimination in more contexts.

The Larsens' refusal to serve same-sex customers, no matter how religiously inspired, is an affront to the legal rights of same-sex persons to be free from discrimination in the commercial marketplace.<sup>230</sup> “In a constitutional form of government, personal, religious, and moral beliefs, when acted upon to the detriment of someone else's rights, have constitutional limits.”<sup>231</sup> Business owners must channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different.<sup>232</sup> This is the sense of respect we owe others, and it, in short, “is the price of citizenship.”<sup>233</sup>

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230. *Id.*

231. *Elane Photography*, 309 P.3d 53, at 78 (Bosson, J., concurring).

232. *See id.*

233. *Id.* at 80.





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