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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 statutes and cases to study the practical effects of the law on individuals, marginalized communities, and society at large. This 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 for society.

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WISCONSIN JOURNAL OF LAW, GENDER & SOCIETY

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COERCIVE CONTROL, PARENTAL ALIENATION & INSTITUTIONAL GASLIGHTING: HYPER-VIGILANT MOTHERS, UNREGULATED WIVES AND COURT IMPOSED "FEMINIZED IRRATIONALITY"[1]

Frances Chapman

1. Paige L. Sweet, The Sociology of Gaslighting 84 Am. Socio. Rev. 851, 852 (2019) [hereinafter Sweet].

ABSTRACT

Although there have been attempts to understand and curtail coercive control and to understand parental alienation, many parents are still being gaslit by a system designed to protect them. There have been considerable changes in Canada to the federal *Divorce Act* and the definition of family violence, but the "friendly parent" and "maximum contact" principles remain, despite lip service given towards the best interests of the child. This paper attempts to examine if enough is being done to understand the intersection of coercive control and parental alienation, and the "feminized irrationality" which deems protective mothers hysterical and not worthy of credibility.

The intersection of coercive control and parental alienation has had such divergent research because of an antiquated conclusion that women use false allegations of abuse to secure custody of their children. Even though this has been roundly dismissed, many courts still grapple with whether there is deceit amidst domestic violence accusations. Mental health support systems, children's aid associations, and the police are being used as weapons of oppression for many women. The result is that courts dealing with the custody of children have great difficulty awarding decision-making authority to someone who is unregulated and deemed pathologically (and somehow inappropriately) concerned for her children. These organizations may be, perhaps unwittingly, using their power to debilitate further women who are simply trying to protect their children.

The case study of *IS v. TC* is informative about how these principles were weaponized against an Indigenous mother who was characterized, without evidence, as lacking credibility and suffering from various mental disorders. Ultimately, the court ordered reunification with the father, who had alleged parental alienation, and the child was prevented from contacting his mother for a significant period. The paper finishes with an exploration of what might be done to help this problem, emphasizing the mediation model and further screening for domestic violence. Perhaps if all lawyers are screening for the signs of intimate partner violence, they can be part of the solution rather than perpetuating harmful stereotypes of mothers which abound in the family law system in Canada.

I. INTRODUCTION

Coercive control ("CC") in intimate relationships has captured the focus of many cross-disciplinary researchers. Survivors and researchers continually demonstrate that CC is particularly insidious and damaging. Lewis Okun noted that "ignorance of the severity and sophistication of woman-battering obscures for many observers the similarities between the treatment of hostages, brainwashed prisoners, people interned in concentration camps, and battered women."[2] However, entering into a conjugal relationship is deemed wholly voluntary; this is not the case for the other controlled subjects.[3] Okun argues that,

2. LEWIS OKUN, WOMAN ABUSE: FACTS REPLACING MYTHS 88 (1986).
3. *Id.*

unlike Lenore Walker's cycle of violence, "the coercive control interpretation makes no acknowledgment whatsoever of the importance of predisposing factors existing in the battered woman before marriage/cohabitation . . . no predisposition to succumb to coercive control is necessary or even relevant . . . [and] avoids conclusions that blame the victim or portray her as inviting abuse."[4] This new model should remove a victim's blame and "choice" from the equation, but there is much stigma to overcome to do this.

Similarly, parental alienation ("PA") is increasingly being used under the guise of "'high-conflict disputes,' 'parental manipulation,' 'attachment intolerance,' or 'parent-child relational problems.'"[5] These are all pseudonyms for PA and, as will be discussed, often obscure the victimization of women. A commonality between CC, PA, and gaslighting is that the victim is seen as victim*less* because of their "consent" in the relationship (wife, mother, etc.). However, women are reaching out to the police, Children's Aid Societies ("CAS"), and courts for help to remove themselves from these relationships to which they "consented." Yet, these institutions are not only accepting the gaslighting of women's intimate partners (most often men), but they are actively participating. The police, mental health supports, and the CAS are used as weapons of oppression against many women. Instead of receiving assistance, many women experience institutional gaslighting and are told that *they* are, in fact, the problem, and custody of their children is put in jeopardy.

The concept of "mutual participation" in Domestic Violence ("DV") originates from Robin Stern's work on gaslighting.[6] Stern argues that this concept is empowering because "it means that the gaslightee holds the keys to her own prison. Once she understands what is happening, she can find within herself the courage and clarity to refuse the gaslighter's crazy-making distortions and hold fast to her own reality."[7] Conversely, I argue that being "blamed" for one's own gaslighting is very dangerous. Choice and participation are used against mothers who engage the system. Once their responsibility is established, women are "paradoxically described as [having] weak emotionality and as

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4. *Id.* at 88–89

5. Reem Alsalem (Special Rapporteur), *Custody, Violence Against Women and Violence Against Children: Report of the Special Rapporteur on Violence Against Women and Girls, Its Causes and Consequences*, Hum. Rts. Council, Fifty-Third Session, June 19-July 14, 2023, ¶ 46, A/HRC/53/36 (Apr. 13, 2023). Please note that the terms "custody" and "access" will be referenced throughout this paper as these terms were used in the past, but updated terms of "parenting time" and "decision-making responsibility" are now preferred.

6. Robin Stern, THE GASLIGHT EFFECT: HOW TO SPOT AND SURVIVE THE HIDDEN MANIPULATION OTHERS USE TO CONTROL YOUR LIFE (Harmony Books, First Trade Paperback Ed. 2018) (2007). Sweet, *supra* note 1, at 854 (identifying that when abusers make their victims feel "crazy" the women are "especially vulnerable to institutional abuse and less likely to rely on institutional supports."). I will focus on domestic violence in the context of women who are battered by a male partner although I acknowledge this is not the only type of battering.

7. *Id.* at xxi.

dangerously unregulated."[8] The result is that courts dealing with the custody of children have great difficulty awarding custody to a parent who is unregulated and deemed pathologically and inappropriately concerned for her children.[9] These organizations may be unwittingly using their power to further debilitate women who are simply trying to protect their children, but the result is the same.

The intersection of CC and PA has had such divergent research because of the antiquated conclusion that women use false allegations of abuse to secure custody of their children. Even though this has been roundly dismissed, many courts still grapple with whether there is deceit amidst accusations.[10] Feminist researchers have shown that the abuse suffered by children and the victim parent, usually the mother, has been discredited, dismissed, or greatly minimized by the courts, and the safety of mothers and children is sacrificed in dangerous parenting arrangements. Parental alienation in high-conflict matters should be reserved for these rare and specific cases where experts can validate what is, in fact, occurring. However, many women find themselves in the terrible position of choosing their safety or risking the safety of their children, and ultimately custody, when PA is alleged by their abuser. Many women are advised not to raise DV during their custody hearing for fear of the counterargument of PA, which results in the statistically significant possibility that they will be the ones who lose custody.

First, this paper will briefly examine the nature and development of our knowledge of coercive control and examine the debate as Canada grapples with whether to criminalize this type of intimate partner violence ("IPV"). Secondly, I will examine the effects of intimate partner violence on children and highlight family law legislation in Canada that was brought in to redefine family violence in the *Divorce Act* related to custody and access. I will examine the "best interests of the child," "friendly parent," and "maximum contact" principles and how they inform our examination of parental alienation.[11] Fourth, I will briefly examine the history of parental alienation, including the role of Dr. Richard Gardner, his definition of "Parental Alienation Syndrome" ("PAS"), and subsequent criticisms of his work regarding gender. I will then consider PA and gaslighting as I examine the case example of *IS v. TC,* in which the court discusses cultural considerations, mental health, allegations of abuse, evidence, parental alienation, and institutional gaslighting.[12] Building on the work of Canadian scholars, I suggest that we should follow the lead of the mediation system in Canada when it comes to screening for power imbalances and coercive control, and I ask judges to re-evaluate their role in this process.

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8. Stephanie A. Shields, *Passionate Men, Emotional Women: Psychology Constructs Gender Difference in the Late 19th Century*, 10 HIST. PSYCH. 92, 106 (2007).

9. *See* Sweet, *supra* note 1, at 855.

10. *See* Michele Burman & Oona Brooks-Hay, *Aligning Policy and Law? The Creation of a Domestic Abuse Offence Incorporating Coercive Control*, 18 CRIMINOLOGY & CRIM. JUST. 67, 76 (2018).

11. Divorce Act, R.S.C. 1985, c D-3.4 (2d Supp.) § 16(6) (Can.) [hereinafter Divorce Act, Revised Version].

12. IS v. TC*,* 2020 ONSC 3966 (Can.) [IS v. TC, June 29, 2020].

The paper will close by building on the work of Deborah Epstein and Lisa Goodman, who allege that many abused women are subject to institutional gaslighting.[13] The system appears to be in place to assist women (via CAS, the police, or the court system) but instead gaslights women who seek help. This is particularly true for women with various cultural and racial intersectionalities who are treated even more poorly by the system. Women's "fear and lack of credibility" are used against them in institutional settings as they become a tool for gaslighting.[14] These institutions are transformed from a source of help to a source of harm when they are used to mobilize fear and deny credibility to women who are deemed "crazy."[15] As Deanne Sowter has noted, there is a "long history of women's experiences with violence being erased by Canadian courts, including by recasting the problem as the survivor's mental instability."[16] Criminal and family law judges must be educated on parental alienation, domestic violence, and mental health interventions to discontinue the harmful trend of utilizing PA accusations to discredit reports of intimate partner violence. Women are mislabelled as "hysterical," "crazy," and "alienators," and the court dismisses those at the intersection of race, disability, and other inequalities at the cost of their children.[17]

II. GASLIGHTING AND COERCIVE CONTROL

Gaslighting has become a widespread term in the last several years.[18] For the purpose of this paper, gaslighting is a social and/or psychological phenomenon rooted in "inequalities, especially gender and sexuality, and executed in power-laden intimate relationships."[19] Women are made to feel "crazy" or "hysterical," particularly in matters that involve their children, and many feel caged in a process they trusted to help them at the most vulnerable periods of their lives. When this intersection between gender and power is achieved in interpersonal relationships, it is not only "effective, but

13. Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 UNIV. PA. L. REV. 399, 447 (2019).

14. Sweet*, supra* note 1, at 865. Sweet notes that she focuses on "police/courts, and mental health systems because these were the institutions women most frequently identified as exacerbating gaslighting." *Id.*

15. *Id.*

16. Deanne Sowter, Violence Erased: The Supreme Court of Canada on the Family Lawyer's Role, SLAW, Mar. 8, 2023, https://www.slaw.ca (search "violence erased") [https://perma.cc/4DQ7-H73Z] [hereinafter Sowter, *Erased*].

17. *See* Sweet, *supra* note 1, at 861. Sweet also notes that creating a stigmatized sexual identity can also be used to show a woman is unstable. *Id.* Although it is beyond the scope of this paper, see Sowter, *Erased*, *supra* note 16, where she discusses the history of the term "hysteria" and its intersectional links to gender, race, sexual orientation, and class.

18. *See* Sam Cabral, Gaslighting: Merriam-Webster Picks its Word of the Year, BBC NEWS, Nov. 20, 2022, https://www.bbc.com/news/world-us-canada-63798242 [https://perma.cc/E286-JML3].

19. Sweet*, supra* note 1, at 852.

devastating[,]" especially so when the gaslighting has the power of the state."[20] This mobilization of gender stereotypes and institutional structures is empowered because "women do not typically have the cultural, economic, and political capital necessary to gaslight men," therefore these institutions are engaging in "feminized irrationality."[21] Women who are at conflict with their spouses or the system must not be believed but instead blamed.

One of the most comprehensive definitions of Coercive Controlling Violence ("CCV") comes from an organization called "The Redwood," which assists women and children who are fleeing abuse and defines CCV as:

> [T]he most dangerous and lethal category of IPV. [Causers-of harm or CoHs] use a mixture of some, or all, of the tactics on the Duluth Wheel of Power and Control. Most domestic homicides are perpetrated by coercive-controlling CoHs. "In heterosexual relationships, Coercive Controlling Violence is perpetrated primarily by men." For CC CoHs, control is the goal. It is overwhelmingly perpetrated by men, and misogynistic attitudes prevalent among these CoHs. In the event of separation, there is a likelihood of an escalation of violence. There is a lethality risk to survivors, children, pets, and others; and potential suicide risk if control cannot be re-established by the causer-of-harm.[22]

It cannot be denied that the psychological, emotional, and even fiscal impacts of DV are astronomical. In 2009, Ting Zhang et al. estimated the economic cost of DV, finding the "impact borne by the justice system, the impact borne by primary victims, and the impact borne by third parties and others, the total economic impact of spousal violence in Canada . . . [was] estimated at $7.4 billion, amounting to $220 per Canadian."[23] The costs of physical and sexual impacts must also be considered. Researchers have found that "systematic reviews of longitudinal data find that women who have been physically and/or sexually abused by their partner at some point in their life are twice as likely to have an abortion, twice as likely to suffer from depression, and in some regions are 1.5 times more likely to acquire HIV compared with women who have not experienced IPV."[24] Further, a 2018 study found an increased rate of "depression,

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20. *Id.*

21. *Id.*

22. THE REDWOOD, THE REDWOOD…FOR WOMEN AND CHILDREN FLEEING ABUSE: FURTHER SUBMISSIONS TO THE HOUSE OF COMMONS' STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS RE. BILL C-247 (2021). The power and control wheel was developed by the Duluth Abuse Intervention Program to provide a visual description of abuse tactics. For more information, *see also* Pamela C. Cross et al., *What You Don't Know Can Hurt You: The Importance of Family Violence Screening Tools for Family Law Practitioners*, 12 (Luke's Place, 2018) [hereinafter Cross, *Hurt You*].

23. TING ZHANG ET AL., AN ESTIMATION OF THE ECONOMIC IMPACT OF SPOUSAL VIOLENCE IN CANADA, 2009, https://publications.gc.ca/site/eng/441839/publication.html [https://perma.cc/A9AD-5MVD].

24. Loraine J Bacchus et al., *Recent Intimate Partner Violence Against Women and Health: A Systematic Review and Meta-Analysis of Cohort Studies*, BMJ OPEN, July 2018 at 1, 1.

postpartum depression, alcohol use, hard drug use, marijuana use and [sexually transmitted infections]" in women who had been abused.[25] The societal costs on all fronts are very real.

Although there are many disagreements on the typology of abuse and its impacts on parenting, research done both by medical doctors and neurobiologists (and later by social scientists) found that coercion and control result in negative parenting.[26] It is borne out in the research that "the degree to which parental conflict and or violence are severe or repetitive and produce excessive stress of the child" is significant, more so than the *type* of abuse.[27] The research also seems to verify that child resilience depends on having a relationship of "strength and stability" with "at least one non-abusive parent."[28] It is also essential to recognize that many times, physical abuse is not the most damaging. Evan Stark has noted that "depending on whether we look at emergency medical data, police data, or general population surveys, no significant injury occurs in an estimated 98% of all domestic violence incidents."[29] But, significant injury does occur, just not in the way we traditionally conceptualize harm.

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25. *Id.* at 15, 1 (noting that "IPV is the second most common risk factor for disability-adjusted life years globally in women aged 20-24 years.").

26. LINDA C. NEILSON, RESPONDING TO DOMESTIC VIOLENCE IN FAMILY LAW, CIVIL PROTECTION & CHILD PROTECTION CASES (Can. Legal Info. Inst., 2017) (updated 2020) (eBook).

27. *Id.*

28. *Id.*

29. Evan Stark, Nicholson v Williams *Revisited: When Good People do Bad Things*, 82 DENV. U.L. REV. 691, 702 (2005). However, Stark has rightly noted that many theorists were alarmed to see that the research that they had collected to advocate for women and children were "being used against the very people that we had hoped it would help." *Id.* at 703. By no means to I wish to suggest that women should be blamed for failure to protect their children when they themselves are victims. This is an ongoing debate in Canada as there are calls to codify CC in our *Criminal Code*. As of 2020, the House of Commons Standing Committee on Justice and Human Rights is studying coercive control and the addition of section in the *Canadian Criminal Code* (Bill C-247, which is a failed private member's bill.) *See* Robert Nonomura et al., *Family Violence & Family Law Brief: Coercive Control and Family Law*, 3 LONDON, ONT.: CTR. FOR RSCH. & EDUC. ON VIOLENCE AGAINST WOMEN & CHILD., May 2021, at 9. [hereinafter Nonomura, *Family Law*]. The proposed section was as follows: "264.01 (1) Everyone commits an offence who repeatedly or continuously engages in controlling or coercive conduct towards a person with whom they are connected that they know or ought to know could, in all the circumstances, reasonably be expected to have a significant impact on that person and that has such an impact on that person," as cited C-247, *An Act to Amend the Criminal Code (Controlling or Coercive Conduct)*, 2nd Sess, 43rd Parl, 2020. However, there have already been calls to amend Bill C-247 to include "all former spouses, common law, or dating partners regardless of living arrangements" and not simply those who live in the same household. *See* CARMEN GILL & MARY ASPINALL, UNDERSTANDING COERCIVE CONTROL IN THE CONTEXT OF INTIMATE PARTNER VIOLENCE IN CANADA: HOW TO ADDRESS THE ISSUE THROUGH THE CRIMINAL JUSTICE SYSTEM?, 9 (Off. of the Fed. Ombudsman for Victims of Crime, Dep't of Just. Can.) (2020). It is also worth noting that some provincial and territorial governments have developed their own laws regarding coercive control. Alberta, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador and Saskatchewan and the three territories have "specific legislations on family violence, domestic

Some wish us to believe that domestic violence happens exclusively to a certain type of woman.[30] While those who are Indigenous or disabled, poor or young may be overrepresented, DV is of equal opportunity without regard to occupation or demographics. The truth is that, at the hands of an experienced abuser, "even [the] most secure and strong-minded woman can be reduced to someone utterly unrecognisable, even to herself."[31] Beyond traditional physical marks that can be left on someone, CC involves something much less visible to the outside world. It was once believed that women who experienced battering "suffered from some sort of major psychopathology," however, this view is no longer tenable.[32] Add in the reality that Indigenous women who seek the assistance of the police are far more likely to be detained, arrested, and charged than non-Indigenous women, and there exists a very dangerous recipe that encourages the victimization of marginalized women.[33]

A. The Effects of Intimate Partner Violence and PA on Children

For some time, it was assumed that a parent's history of violence with a spouse was not necessarily relevant to child custody determinations. "Maximum contact" with both parents was assumed to be best for the child, but decades of research have concluded that this is so "unless [such] contact exposes children to high levels of stress, for example, as a result of parental conflict."[34] The scientific community now realizes that toxic levels of stress can be induced by witnessing abuse, causing emotional and developmental harm to children.[35]

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violence, and intimate partner violence." As discussed, Ontario also has family law legislation that defines family violence with regard to coercive control principles. *Id.* at 11.

30. For the purposes of this paper, women abused by men will be the focus (because the majority of violence happens by a man against a woman) even though there is evidence that those in same sex relationships suffer coercive control and abuse. *See* JESS HILL, SEE WHAT YOU MADE ME DO: POWER, CONTROL AND DOMESTIC ABUSE 9 (Schwartz Books Pty. Ltd. 2019); *See also*, Nonomura, *Family Law*, *supra* note 29, at 6 (noting that this may be a counteraction to the "many advances that women have made in the public and political sphere").

31. HILL, *supra* note 30, at 6.

32. PETER G. JAFFE, NANCY K.D. LEMON & SAMANTHA E. POISSON, CHILD CUSTODY & DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 54 (Sage Publ'ns 2003) [hereinafter JAFFE, LEMON, & POISSON].

33. *See* Haley Hrymak & Kim Hawkins, *Why Can't Everyone Just Get Along? How BC's Family Law System Puts Survivors in Danger*, RISE WOMEN'S LEGAL CENTER, Jan. 2021 at 1, 40 https://womenslegalcentre.ca/wp-content/uploads/2021/01/Why-Cant-Everyone-Just-Get-Along-Rise-Womens-Legal-January2021.pdf [https://perma.cc/7VTU-DTHH] ("It should come as no surprise that Indigenous women who report violence to law enforcement are more likely to be arrested, detained and charged than non-Indigenous women.").

34. LINDA C. NEILSON, PARENTAL ALIENATION EMPIRICAL ANALYSIS: CHILD BEST INTERESTS OR PARENTAL RIGHTS? 6 (2018) (emphasis omitted) https://www.fredacentre.com/wp-content/uploads/Parental-Alienation-Linda-Neilson.pdf [https://perma.cc/PD98-XPJ2] [hereinafter NEILSON, EMPIRICAL ANALYSIS].

35. *Id.* at 6. Researchers have also identified certain resilience factors including social and community support and attachments with non-abusive others as a counterpoint to these DV factors within the home. *See id.*

Research has shown an overlap between IPV, CC, and child abuse.[36] There are also a significant number of cases where children are weaponized and used as pawns in coercion and control.[37] Scientifically, severe parental conflict and DV can cause "long-term emotional and developmental harm to children."[38] This has been shown repeatedly through qualitative and quantitative studies and across disciplines, including psychiatry, medicine, early childhood development, and the social sciences.[39]

Stark notes that DV is "the context for as much as 45% of child abuse."[40] There are real risks to children because "perpetrators of coercive control also enlist children in their coercion or control of their mother, make them direct objects of control, and use children to extend and solidify coercive control, to sabotage parenting, and to spy on or otherwise intimidate their mother both during the marriage and after separation."[41] It is the perpetrators of DV who more often engage in PA behaviors,[42] and frequently, the abuser is the gatekeeper of the children, utilizing "power and control, oppression, fear and isolation."[43] Destructively, using PA against the victim's spouse doubles the abuse she experiences and removes children from her care.

When it comes to PA, we know that "children are resilient, and they are not easily brainwashed into rejecting another parent, at least not without active abuse, coercion and terrorizing."[44] Some have classified PA as a form of psychological maltreatment of children, but others have said that the alienation must be associated with "specific maltreating behaviors."[45] Adrienne Barnett has

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36. Evan Stark & Marianne Hester, *Coercive Control: Update and Review*, 25 VIOLENCE AGAINST WOMEN 81, 96 (2019) [hereinafter Stark & Hester].

37. *See, e.g.*, ROBERT NONOMURA ET AL., FAMILY VIOLENCE & FAMILY LAW BRIEF: COERCIVE CONTROL & FAMILY LAW 8 (2021), https://fvfl-vfdf.ca/briefs/Briefs%20PDF/Family_Violence_Family_Law_Brief-3.pdf [https://perma.cc/JEG3-U6H2].

38. NEILSON, EMPIRICAL ANALYSIS, *supra* note 34, at 6.

39. *Id.* at 32.

40. Evan Stark, *Rethinking Custody Evaluation in Cases Involving Domestic Violence*, 6 J. CHILD CUSTODY 287, 289 (2009) [hereinafter Stark, *Rethinking*].

41. *Id.* at 295.

42. *E.g.*, Joan S. Meier, *Getting Real About Abuse and Alienation: A Critique of Drozd and Olesen's Decision Tree*, 7 J. CHILD CUSTODY 227–28 (2010) [hereinafter Meier, *Getting Real*]; Leslie M. Drozd & Nancy W. Olesen, *Abuse and Alienation are Each Real: A Response to a Critique by Joan Meier*, 7 J. CHILD CUSTODY 253, 259 [hereinafter Drozd & Olesen, *Real*].

43. Drozd & Olesen, *Real*, *supra* note 42 at 255–56.

44. JOAN S. MEIER, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN, PARENTAL ALIENATION SYNDROME AND PARENTAL ALIENATION: A RESEARCH REVIEW 15 (2013) https://vawnet.org/sites/default/files/materials/files/2016-09/AR_PASUpdate.pdf [https://perma.cc/EBZ5-TKUZ] [hereinafter MEIER, PARENTAL ALIENATION].

45. Madelyn Simring Milchman, *How Far has Parental Alienation Research Progressed Toward Achieving Scientific Validity?*, 16 J. CHILD CUSTODY 115, 124 (2019) [hereinafter Milchman, *Parental Alienation Research*]. Measures of parental alienation are still being developed; the Rowland Parental Alienation Scale is promising. *See* Gena A. Rowlands, *Parental Alienation: A Measurement Tool*, 60 J. DIVORCE & REMARRIAGE 316

noted that when it comes to DV and children, the outcomes are "poorest when post-separation contact forms the site for continuing violence," and other studies have demonstrated the dangers associated with contact during access in DV relationships.[46] When it is assumed that contact with both parents is the preferred paradigm, the invisibility of DV is reinforced in a situation where DV is a valid reason for denying equal and unsupervised contact.[47] Post-separation parenting research shows that "negative perpetrator parenting—such as demeaning domination, monitoring and surveillance, isolation, excessive physical

(2019). Another recently developed tool is the "Parental Acceptance-Rejection Questionnaire (PARQ)" intended to aid in differentiating alienation from estrangement and to describe concepts of "splitting" or a "lack of ambivalence" toward the rejected parent. William Bernet et al., *Measuring the Difference Between Parental Alienation and Parental Estrangement: The PARQ-Gap*, 6 J. FORENSIC SCI. 1225, 1226, 1228 [hereinafter Bernet et al.]. Bernet et al. note that the PARQ is a "60-item questionnaire that children complete regarding their perceptions of their mother's and fathers' accepting-rejecting behaviors." *Id.* at 1228. The PARQ-gap score "distinguishe[s] severely alienated children from neglected and other children with 99% accuracy" but this is only "one part of a comprehensive psychiatric or psychological assessment of the family." *Id.* at 1232. In another study, Bernet et al. have shown very different PARQ scores for those children who are abused and neglected, and those who are alienated. *See* William Bernet et al., *An Objective Measure of Splitting in Parental Alienation: The Parental Acceptance-Rejection Questionnaire*, 63 J. FORENSIC SCIS. 776, 780 (2018). Even in the cases where it is questionable whether a child is alienated, they should be subject to a "comprehensive psychiatric and/or psychological assessment of the family, including multiple interviews, meetings with collateral informants, review of records, and teamwork with other professionals," and the PARQ test should be "one component of a comprehensive evaluation." *Id.* at 782. Some believe that these types of tools will be able to "differentiate between children's alienated behavior and behavior that is interpreted as alienation but is really abuse-related." Milchman, *Parental Alienation Research*, *supra* at 128. Milchman also notes that from an American perspective, "it is not necessary to claim either scientific validity or diagnostic institutionalization in order to provide reliable testimony about PA in court. Expert testimony is admissible when it helps the court and is based on scientific or specialized knowledge." *Id.* at 133 (emphasis omitted). The sad fact is that coercive control and domestic violence can be difficult to detect, especially when many victims use the tools of "minimization, denial or scapegoating…stigmatizing abuse victims with pseudo-psychiatric labels, and reframing their protective strategies as resistant, uncooperative or obstructive." Stark, *Rethinking*, *supra* note 40, at 315. It is even harder to detect in perpetrators: even our best tools are "no match for the self-interested concealment that characterizes perpetrators of domestic violence or coercive control." *Id.* at 316. Attempts are being made, but the fact remains that "no empirically valid and reliable assessment tools are yet available to accurately distinguish whether a child actively rejecting a parent is alienated, is justifiably rejecting the parent, whether it is a combination of factors representing both alienation and justified rejection, whether it is a reaction to chronic co-parental conflict, trauma, or high levels of anxiety. That is, unlike the ability to accurately diagnose medical conditions and its related clinical stage based on a multitude of tests and images, there is no clear way for a mental health professional to definitively assess the relationship dynamic as purely representing a case of 'alienation,' 'justified rejection,' or 'hybrid,' or to measure its intensity (i.e. mild, moderate, severe) with objective certainty." Shely Polak, Tom Altobelli & Linda Popielarczyk, *Responding to Severe Parent-Child Rejection Cases Without a Parentectomy: A Blended Sequential Intervention Model and the Role of the Courts*, 58 FAM. CT. REV. 507, 511 (2020).

46. Adrienne Barnett, *'Like Gold Dust These Days': Domestic Violence Fact-Finding Hearings in Child Contact Cases* 23 FEMINIST LEGAL STUD. 47 (2015) [hereinafter Barnett, *Gold Dust*].

47. *Id.* at 51.

discipline, and coercive control"—often escalates following separation as the abused parent is no longer able to protect the child when the abuser has unsupervised access to the child.[48] The effects of allowing an abusive parent to have custody are alarming. Ignoring CC and accepting PA as a defense that enables an abusive parent to have custody can have alarming repercussions and, in the worst outcomes, be fatal. U.S. Divorce Child Murder Data shows that, since 2008, nearly 1000 children have been murdered by a separating or divorcing parent.[49]

PA also has long-term detrimental effects on children as a form of child abuse. Research has found that alienating children can result in "the child internalizing a sense of worthlessness and conditional value."[50] Further, studies have confirmed the impaired psychological functioning of alienated children, including not only anxiety but also "panic attacks, depression, emotion dysregulation, attention problems, post-traumatic stress disorder, disassociation, eating disorders, suicide ideation and self-harm," both in the period of alienation and into adulthood.[51] This presents later in life as "low self-esteem, depression, substance abuse, trust issues, alienation from their own children, divorce and lack of identity and sense of belonging."[52] We are failing mothers and children. Samantha Jeffries has concluded that:

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48. Memorandum from 352 Concerned Family Law Academics, Family Violence Experts, Family Violence Research Institutes, Child Development and Child Abuse Experts, Children's Rights Networks and Associations and 764 concerned individuals to the World Health Organization RE: Inclusion of "Parental Alienation" as a "Caregiver-Child Relationship Problem" Code QE52.0 in the International Classification of Diseases 11th Revision (ICD-11) (July 10, 2019), http://www.learningtoendabuse.ca/docs/WHO-September-24-2019.pdf [https://perma.cc/4BAW-LXMN].

49. *U.S. Divorce Child Murder Data*, CTR. FOR JUD. EXCELLENCE, https://centerforjudicialexcellence.org/cje-projects-initiatives/child-murder-data (last visited Dec. 1, 2023 8:40 PM) [https://perma.cc/P6MT-DPEL]. *See also* Nina Jaffe-Geffner, *Gender Bias in Cross-Allegation Domestic Violence-Parental Alienation Custody Cases: Can States Legislate the Fix?* 42 COLUM. J. GENDER & L. 58, 60 (2021) [hereinafter Jaffe-Geffner]. There have also been several very high-profile Canadian cases of children who were murdered by their parent. *See, e.g.,* Jessica Mundie, 'Keira's Law' passes Senate, signalling a change to the way courts approach domestic violence, CBC (April 25, 2023), https://www.cbc.ca/news/politics/keira-kagan-domestic-violence-coercive-control-1.6815711 [https://perma.cc/T5XE-HA7H].

50. Caitlin Bentley & Mandy Matthewson, *The Not-Forgotten Child: Alienated Adult Children's Experience of Parental Alienation* 48 AM. J. FAM. THERAPY 509, 510 (2020) [hereinafter Bentley & Matthewson].

51. *Id*. at 516; *see also* Peter G. Jaffe, Dan Ashbourne & Alf Mamo, *Early Identification and Prevention of Parent-Child Alienation: A Framework for Balancing Risks and Benefits of Intervention* 48 FAM. CT. REV. 136, 138 (2010).

52. Bentley & Matthewson*, supra* note 50, at 510, 516. The authors go on to find in their 2020 study that these children described a childhood which was "unpredictable, intrusive, rejecting, self-referential, role-reversing, or otherwise frightening and neglectful, all of which can result in insecure attachments and subsequent multiple negative outcomes in later life." *Id.* at 523.

> Despite what is now known about coercively controlling violence, the negative impacts on children of living with it, the questionable parenting capacities of abusers, and legislative change suggesting that the best interests of the child are dependent on protecting them from this type of abuse, research from Australia, Ireland, the United Kingdom and United States, suggests that the family law system is likely failing children and adult victims of domestic violence. Judicial determination of children's best interests appear weighted more toward the parental rights of abusers than the safety of children. The inconsequentiality of domestic violence to judicial determinations of children's best interests appears to stem from normative assumptions around gender and a poor understanding of coercive control.[53]

The bottom line is that a child witnessing DV is a child who is being abused. This recognition of a lack of help for women and children led to significant legislative changes in Canada, not in criminal law as may be anticipated, but in family law. It is crucial that evaluators determine if the child's resistance to seeing the other parent is because of PA "or because of a 'child's fears due to abuse or witnessing abuse of a parent.'"[54] This is where the concept of PA becomes even more intertwined with CC.

III. CHANGES IN CANADIAN LEGISLATION TO RECOGNIZE COERCIVE CONTROL AND BEST INTERESTS OF THE CHILD STANDARD – AMENDMENTS TO THE *DIVORCE ACT* IN CANADA

Family law has had the most significant legislative changes regarding DV. Traditionally, and perhaps still today, IPV was not deemed a major factor in custody determinations.[55] A study by Elizabeth Sheehy and Susan Boyd found that in 40% of the cases they studied, IPV was deemed "irrelevant" to the best interests of the child, and in 23% of the cases IPV was "neutralized" and found

53. Samantha Jeffries, *In the Best Interests of the Abuser: Coercive Control, Child Custody Proceedings and the "Expert" Assessments That Guide Judicial Determinations* 5 LAWS art. no. 14 at 13 (2016) https://doi.org/10.3390/laws5010014 [https://perma.cc/5FRN-39GA].

54. Peter G. Jaffe, Claire V. Crooks & Nicholas Bala, *A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes* 6 J. CHILD CUSTODY 176 (2009) [hereinafter Jaffe, Crooks & Bala]. The terms "witnessing" and "exposure" are misleading when children are used as tools to control a parent. *See* Stark & Hester*, supra* note 36, at 98.

55. Elizabeth Sheehy & Susan B. Boyd, *Penalizing Women's Fear: Intimate Partner Violence & Parental Alienation in Canadian Child Custody Cases*, J. SOC. WELFARE & FAMILY L. 80, 81 (2020) [hereinafter Sheehy & Boyd].

to be a "one-off" incident.[56] There are numerous incidents of the courts finding IPV irrelevant to parenting, even as recently as 2017.[57]

Many have been critical of family law legislation as not recognizing the gendered nature of IPV and its impacts on women and children.[58] However, it is worth noting that the Senate Committee for the revisions of the Divorce Act received evidence that protective parents (often mothers) attempt to protect their children from the abusive parent, but the system often fails to identify the child abuse occurring.[59] Yet, when lawyers, mediators/arbitrators, and judges fail to investigate safety and instead punish parents (primarily mothers) when a child refuses time with the abusive parent, there is a lack of accountability.[60] These very important changes were brought in on March 1, 2021, and fell into several main categories: (1) best interests of the child; (2) definition of family violence; (3) "friendly parents;" and (4) maximum parenting time.

A. Best Interests of the Child

The best interests of the child have always been the cornerstone of the Divorce Act.[61] Now revised, the former section simply said that the court should consider decisions regarding the division of "parenting time consistent with best interests of [the] child."[62] The revised section is titled the same but states,"[i]n allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests

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56. *Id.* at 84, 86. Canada has an interesting structure to our family legislation. *See* Divorce Act, Revised Version, R.S.C. 1985, c D-3.4 (2d Supp.) § 16(6) (Can.). The Federal Divorce Act governs all cases where the parents are divorcing. Each province or territory also has legislation that governs parents who have cohabited (or parented) without the benefit of marriage. *Fact Sheet – Divorce*, DEPARTMENT OF JUSTICE CANADA https://www.justice.gc.ca/eng/fl-df/fact4-fiches4.html [https://perma.cc/Y9R6-23PS] (Nov. 21, 2023).

57. Sheehy & Boyd, *supra* note 55, at 87.

58. *See* Linda C. Neilson & Susan B. Boyd, *Interpreting the New Divorce Act, Rules of Statutory Interpretation & Senate Observations* (Mar. 8, 2020) (guidance document provided for public information purposes) http://dev.fredacentre.com/wp-content/uploads/2020/03/Dr.-Linda-Neilson-and-Professor-Susan-Boyd-Interpreting-the-New-Divorce-Act-March-8-2020-Rules-of-Statutory-Interpretation-and-Senate-Observations.pdf [https://perma.cc/6DCM-4CG8] [hereinafter Neilson & Boyd].

59. *Id.* at 7–8.

60. *Id*. However, commentators were overall positive of the changes saying, *Neilson & Boyd, supra* note 51 at 14-15 note that there is a debt is owed to the "Canadian Senate, and particularly to the Standing Senate Committee on Legal and Constitutional Affairs, for listening carefully and knowledgeably to the concerns of experts and for taking additional steps to offer 'a sober second thought' in connection with the implementation and interpretation of forthcoming changes to *Divorce Act*. Although concerns about the gender imbalance remain, the Senate's Observations, along with Supreme Court of Canada rulings on statutory interpretation, should go a long way toward ensuring that the new provisions will be interpreted in accordance with Parliamentary intentions and the social realities of Canadian family life, especially in family violence cases." *Id.* at 14–15.

61. Divorce Act, R.S.C. 1985, c 3 (2nd Supp.) § 16(6) (2019) (amended 2021) (Can.) [hereinafter Divorce Act, Prior Version].

62. *Id.*

of the child."[63] Further, a new principle was put in place: the "primary consideration" should be the "child's physical, emotional, and psychological safety, security, and well-being."[64] The government explained in its policy documents that these considerations are weighed above all else (something already recognized on a provincial basis in Alberta and British Columbia) to resolve conflicts and prioritize safety.[65] This could be helpful if used in a principled way by the court.

B. Definition of "Family Violence"

The definition of family violence in the Divorce Act was also a significant change in the new legislation.[66] The provision now provides that:

> [F]amily violence means any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behavio[]r or that causes that other family member to fear for their own safety or for that of another person—and in the case of a child, the direct or indirect exposure to such conduct—and includes
>
> (a) physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person;
> (b) sexual abuse;
> (c) threats to kill or cause bodily harm to any person;
> (d) harassment, including stalking;
> (e) the failure to provide the necessaries of life;
> (f) psychological abuse;
> (g) financial abuse;
> (h) threats to kill or harm an animal or damage property; and
> (i) the killing or harming of an animal or the damaging of property[.][67]

The Government of Canada finally recognized that DV is in and of itself child abuse. The explanation for this change was that an act does not have to be criminal (and thus held to a standard of beyond a reasonable doubt) to be

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63. Divorce Act, Revised Version, R.S.C. 1985, c D-3.4 (2d Supp.) § 16(6) (Can.).

64. *Id.* at § 16(2).

65. *The Divorce Act Changes Explained, Primary Consideration (Section 16(2), Divorce Act)*, DEP'T JUST.CAN. https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/div15.html [https://perma.cc/2UJM-6N3G] (last modified Mar. 7, 2022).

66. *See The Divorce Act Changes Explained, Family Violence (Section 16(3)(j), Divorce Act)*, DEP'T JUST.CAN., https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/div60.html [https://perma.cc/7YYG-TYPF] (last modified Mar. 7, 2022); *see also* Neilson & Boyd, *supra* note 58, at 4–7.

67. Divorce Act, Revised Version, R.S.C. 1985, c D-3.4 (2d Supp.) § 2(1) (Can.). This is not a definition that is found in many Provinces like Ontario for example. *See* Family Law Act, R.S.O. 1990, c. F.3 (Can.).

considered family violence.[68] The government noted that a "child's direct exposure to family violence (for example, a child seeing or hearing the violence) or indirect exposure (for example, a child seeing that a parent is fearful or injured) is recognized as family violence and child abuse" and for the first time concluded that family violence includes "a pattern of coercive and controlling behavio[]r."[69] It also recognized a non-exhaustive list of types of violence, including "[p]sychological abuse, such as a pattern of ridiculing, yelling at and criticizing a family member. To be considered family violence, the abuse must be threatening, constitute a pattern of coercive and controlling behavio[]r, or cause a family member to fear for their safety or for the safety of another person."[70] This broad definition could benefit victims by recognizing expanded notions of controlling behavior and family members.

The Divorce Act does not simply list family violence as a factor for the best interests of the child analysis. It also instructs that the court may consider the impact of any family violence on subfactors such as "the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child" and the "appropriateness of making an order" requiring potential perpetrators and victims of family violence to "cooperate on issues affecting the child."[71] The revised Act further provides courts with a non-exhaustive list of factors to take into account when considering the impact of family violence:

(a) the nature, seriousness and frequency of the family violence and when it occurred;
(b) whether there is a pattern of coercive and controlling behavio[]r in relation to a family member;
(c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
(d) the physical, emotional and psychological harm or risk of harm to the child;
(e) any compromise to the safety of the child or other family member;
(f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
(g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child;
(h) and any other relevant factor.[72]

68. *The Divorce Act Changes Explained, Family Violence (Section 2(1), Divorce Act)*, DEP'T OF JUST. CAN. https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/div15.html (last modified Mar. 7, 2022) [https://perma.cc/QUZ2-76KB].

69. *Id.*

70. *Id.* Family violence can also include such things such as "harassment and stalking;" "financial abuse;" and "threats to kill or harm an animal or to damage property." For a full list and more coercive and controlling behavior see *id.*

71. *Divorce Act,* Revised Version*,* R.S.C. 1985, c D-3.4 (2d Supp.) § 16(3)(j) (Can.).

72. *Id.* § 16(4).

Requiring courts to consider family violence, its impact on the child, and how it may affect the parties' willingness to cooperate shows recognition from the government that there is a dangerous period after separation where damage to the children may be possible and that this harm to children may be long lasting. In its justification for this revision, the government noted that "[e]vidence indicates that family violence has wide-ranging effects on victims and families, including long-term impacts on the behavio[]r, development and physical, psychological and emotional health of the child."[73] This is one of the first recognitions in Canada of family violence and stresses the importance of parenting arrangement decisions that acknowledge the existence of family violence and consider the needs of the child. The Divorce Act recognizes the varied forms family violence can take and instructs the court to assess relevant details that include: whether a parent may use their relationship with the child to exert control over the other parent; whether the child is fearful of the parent; and whether the history or presence of family violence affects their ability to be an appropriate role model.[74] Where spousal violence is present, the court must consider whether a cooperative parenting arrangement is appropriate. It may not be appropriate to co-parent because of trauma or fear, and these types of parenting arrangements may simply be opportunities for more violence.[75]

Although past conduct is surely relevant to any assessment the court makes of how family violence should impact parenting arrangements, the Divorce Act limits the review of past conduct only to instances where it is "relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order."[76] This new legislation seems to say all the right things, but one must question if the court is giving life to these essential concepts.

C. "Friendly Parent"

One factor that remains unchanged in the revised Act is that the court must consider all factors, including "each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse."[77] This provision is highly problematic to the domestic violence survivor who may be subject to coercive control. Indeed, it could be argued that it creates a reverse onus on the "friendly parent" to cater to the needs of the abusive spouse. Before revision, the Divorce Act's language on the duty to support a child's relationship with the other parent read:

> In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with

73. *The Divorce Act Changes Explained, Family Violence (Section 16(3)(j), Divorce Act),* DEP'T JUST. CAN. https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/div60.html (last modified Mar. 7, 2022) [https://perma.cc/7YYG-TYPF].

74. *Id.*

75. *Id.*

76. Divorce Act, Revised Version R.S.C. 1985, c D-3.4 (2d Supp.) § 16(5) (Can.).

77. *Id.* § 16(3)(c). Some have noted that this creates a reverse onus on the "friendly parent" to cater to the needs of the abusive spouse.

> each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.[78]

Despite the recognition that there may be cases where this factor is inappropriate to consider, such as in family violence cases, it remains that the "courts must consider the impact of the violence on all of the best interests of the child factors . . . including on the willingness of a spouse to support the child's relationship with the other spouse. In every case, the court must give primary consideration to the child's safety, security and well-being."[79] The "friendly parent" factor remains in the legislation.

Many U.S. states have similar provisions, and research has shown time and again that the survivors of DV fare worse in custody matters because they may be seen as "uncooperative." As a result, sole custody may be given to the abuser with the understanding that they seem better able to forge a relationship with the other parent.[80] However, courts regularly overlook how much DV can halt communication and the reality that "forcing the survivor to negotiate with her abuser can be not only frightening but ultimately futile."[81] It is undoubted that

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78. Divorce Act, Prior Version R.S.C. 1985, c 3 (2nd Supp.) § 16(10) (2019) (amended 2021) (Can.); *see also id.* § 17(9) (using substantially similar language in guidance for making changes to a previously established custody order).

79. *The Divorce Act Changes Explained, Supporting the Child's Relationship with the Other Spouse (Section 16(3(c), Divorce Act)*, DEP'T OF JUST. CAN. https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/div53.html (last modified Mar. 7, 2022) [https://perma.cc/W4EZ-R6L7].

80. JAFFE, LEMON & POISSON, *supra* note 32, 10.

81. Daniel G. Saunders & Katherine H. Oglesby, *No way to turn: Traps encountered by many battered women with negative child custody experiences*, 13 J. CHILD CUSTODY 154, 164 (2016) (citations omitted). *See also* Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts; Treatment of Cases Involving Abuse and Alienation*, 35 MINN. J.L. & INEQUALITY 311, 315 (2017) [hereinafter Meier & Dickson] (noting that the "friendly parent" principle seems to override abuse claims) (citation omitted). *See also* Brief for the Plaintiff-Appellant as Amici Curiae, at 11, Anonymous v. Anonymous (2019) [hereinafter Meier, Amici Curiae] (positing that evaluators "are often driven by their own biases and predispositions rather than objective pacts. Indeed…there is frequently a tone of blame and denigration of the preferred parent in such opinions."). *See also* Joyanna Silberg & Stephanie Dallam, *Abusers Gaining Custody in Family Courts: A Case Series of Over Turned Decisions*, 16 J. CHILD CUSTODY 140, 142–45 (2019) [hereinafter Silberg & Dallam] (finding that many evaluators who are informing the court have no training in coercive control and/or domestic violence) (citation omitted). There are also criticisms of this research. *See* Jennifer J. Harman & Demosthenes Lorandos, *Allegations of Family Violence in Court: How Parental Alienation Affects Judicial Outcomes,* 27 PSYCH., PUB. POL'Y, & L. 184 (2021) [hereinafter Harman & Lorandos] who identify "at least 30 conceptual and methodological problems with the design and analyses of the study and make the results and the conclusions drawn dubious at best." Meier's conclusions could be presented as a "woozle," which are "faulty, partial, or misinterpreted research claims that can be used to mislead professions and others working with families." *Id.* at 185. Others side with Meier, and think her research is "closer to the mark." *See* John E.B. Meyers & Jean Mercer, *Parental Alienation in Family Court: Attacking Expert Testimony* 10 BARRY L. CHILD & FAM. L.J. 80 (2022) [hereinafter Meyers & Mercer].

the "survivors of [] abuse may suffer from anxiety, depression, low self-esteem, inability to trust future partners, and sexual dysfunction."[82] Even with all of these issues occurring, the legal system sees itself fit to impose on these survivors a responsibility to be a "friendly parent," to mediate with their abuser and to get on for the sake of the children. Life stressors such as "poverty, racism, classism, disabilities, language barriers, undocumented status, and lack of access to needed services" only compound how ridiculous this request can be.[83]

This friendly parent concept is very much alive and well in the Canadian court system. In the 2021 case of *LB v. PE*[84] in the Ontario Court of Justice, the court continuously stated how important it is to maintain a relationship with the other parent even where family violence has been alleged.[85] Despite findings that the facts supported the wife's allegations of family violence and coercive and controlling behavior of the husband,[86] the court questioned whether the mother facilitated the child's relationship with her father [87] and noted that the mother "worked very hard" to facilitate her son's relationship with his father.[88] The undertone of this case is that if the mother is willing to swallow her fear, then the court will reward her. In this case, despite the findings of family violence, the court increased parenting time with the father.[89] There is an unspoken suggestion in many of these cases that women need to prioritize their support of the other parent above "their need for safety."[90]

Friendly parent provisions can be dangerous if they are interpreted to mean that even parents with a relationship fractured by abuse simply "need to get along

82. JAFFE, LEMON & POISSON, *supra* note 32, at 10.

83. *Id.* Many victims have expressed that "living in poverty was seen as preferable to living with ongoing harassment and threats of violence that might result from court proceedings over financial issues." *See* Jaffe, Crooks & Bala, *supra* note 54, at 173. We must also recognize the "[p]ersistent racial, colonial, class, gender, and sexual inequality within Canadian society (as well as inequalities relating to disability, citizenship, and age)" and acknowledge that economic control can look much different in southern Ontario than it does in remote, rural and northern locations. Nonomura, *Family Law*, *supra* note 29, at 11–12 (citation omitted). *See also* J. Tabibi, P. Jaffe & L. Baker, *Misuse of Parental Alienation in Family Court Proceedings involving Allegations of Intimate Partner Violence – Part 1: Understanding the Issue*, 33 LEARNING NETWORK 1, 1 http://www.vawlearningnetwork.ca/our-work/issuebased_newsletters/issue-33/index.html [https://perma.cc/M3H7-N6CK] [hereinafter Tabibi, Jaffe & Baker] (observing that there is still "a lack of intersectional analysis on the misuse of PA in cases involving parents of different identities, such as BIPOC identities, [gender] identities, and individuals with disabilities."). For a commentary on DV and rural, remote, and northern communities, see Pertice Moffit et al., *Intimate Partner Violence and COVID-19 in Rural, Remote, and Northern Canada: Relationship, Vulnerability and Risk*, J. FAM. VIOLENCE 1 (2020).

84. LB v. PE, (2021) O.R. 3d 114 (Can. Ont.). Note that this decision was decided at exactly the same time that the legislative changes were being made.

85. *Id.* ¶ 49.

86. *Id.* ¶ 79.

87. *Id.* ¶ 93.

88. *Id.*

89. *Id.* ¶ 122. In this case, the child was 6 years old.

90. *Saunders & Olgesby, supra* note 81, at 164. The friendly parent principles are still being discussed by the courts. *See* AP v. JG, [2023] O.J. No. 966, para. 68 (Can. O.N.S.C).

for the sake of the children."[91] That would suggest that both parents are equal participants in conflict and "disregards the potential danger of unsupervised encounters between a child and an ex-partner."[92] In cases where family violence is an issue, putting too much importance on cooperative parenting "suggests that the protective parent is harming the child by not agreeing to the violent partner having unsupervised access to the children."[93] This is troubling in situations where a manipulative parent may succeed in obtaining custody.[94] It has been noted that abusive men are skillful at misrepresenting themselves and that judges may underestimate the possibility of future violence and be "swayed by the passionate pleas and promises by fathers to change their behaviors. Batterers, by their very nature, excel at misrepresenting themselves in this environment."[95] The drafters of our new legislation saw it fit to saddle women with this ongoing burden, which will continue to be used by abusers. In addition to reinforcing an expectation that parents support the child's relationship with the other parent, the best interests of the child factors also include "the ability and willingness of each person in respect of whom the order would apply . . . to communicate and cooperate, in particular with one another, on matters affecting the child."[96]

D. Maximum Contact or "Parenting Time Factor"[97]

The previous legislation stated that the child "should have as much contact with each spouse as is consistent with the best interests of the child."[98] The new section provides that "[i]n allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child."[99] The best interests of the child have always been of concern when determining parenting schedules, which reflects the primary interest principle of the child's safety, security, and well-being.[100] But when family violence is involved, the classic presumption that maximum contact is in the best interests of the child is at odds with itself. Perhaps

91. Tabibi, Jaffe & Baker, *supra* note 83, at 4.

92. *Id.*

93. *Id.*

94. *See* Lenore E.A. Walker, Kristi L. Brantey & Justin A. Rigsbee, *A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court*, 1 J. CHILD CUSTODY 47, 52 (2004). The authors note that "[u]nfortunately, in our experience, the result of many custody evaluations is usually what the evaluator determines is in the best interests of the parent(s) even when MHPs and courts believe that they are being guided by the child's best interests."

95. JAFFE, LEMON & POISSON, *supra* note 32, at 9.

96. Divorce Act, R.S.C. 1985, c.3 (2d Supp.) at 16(3)(i).

97. This term has undergone a change. *See* Barendregt v. Grebliunas, [2022] S.C.R. 22 ¶¶ 131–35 (Can.).

98. Divorce Act, Prior Version, R.S.C. 1985, c. 3 (2d Supp.) at 16(10); Gordon v. Goertz, [1996] S.C.R. (Can.) set out best interests of child in 1996.

99. Divorce Act, R.S.C. 1985, c. 3 (2d Supp.) at 16(6).

100. *Id.* at 16(2).

the court should delve deeper into the safety of the child in the context of maximum contact.

Men's rights groups have been seeking shared parenting rights to have "gender symmetry" since the 1970s, "claiming to uphold children's rights to have a relationship with 'both parents.'"[101] When women's groups have responded with concerns about shared parenting rights for those who have experienced IPV, they have been "perceived as selfishly trying to exclude fathers from children's lives."[102] Even the term "shared parenting" was urged by men's groups and during hearings on the Divorce Act. Many scholars and DV organizations "argued that adopting such a plan would deny the reality of many domestic violence victims fighting for their children's safety."[103] It has been recognized for some time in the social science and legal literature that in high-conflict families, "frequent contact [with both parents after separation] may be stressful for children."[104] Furthermore, while there are continued calls for equal parenting "entitlement," too often, the primary care parent is forced to shoulder the blame alone when equal parenting efforts do not work.[105] This parent is frequently the mother.[106] Some have questioned if the "new" legislation may perpetuate the "old" practice. Maximum contact is at least one factor on the minds of Canadian judges simply couched in terms of best interests and safety.

IV. COERCIVE CONTROL AND PARENTAL ALIENATION

Parental alienation is the epitome of a social science concept that has become a fixture in the language of the courtroom and family law system around the world.[107] From its inception, lawyers, social scientists, psychologists, psychiatrists, and a host of other medical and social science practitioners saw something of interest in this "disorder." Dr. Richard Gardner coined the term Parental Alienation Syndrome ("PAS") as:

> [A] childhood disorder that arises almost exclusively in the context of child-custody disputes. Its primary manifestation is the child's campaign of denigration against a parent, a campaign that has no justification. It results from the combination of a programming

101. Sheehy & Boyd, *supra* note 55, at 88.

102. *Id.*

103. JAFFE, LEMON, & POISSON, *supra* note 32, at 11.

104. Nicholas Bala, Suzanne Hunt & Carolyn McCarney, *Parental Alienation: Canadian Court Cases 1989-2008*, 48 FAM. CT. REV. 164, 164 (2010) [hereinafter Bala, Hunt & McCarney].

105. NEILSON, EMPIRICAL ANALYSIS, *supra* note 34, at 19.

106. Women often report feeling bullied in this role. *See* HILL, *supra* note 30, at 276.

107. Zoe Rathus, *A History of the Use of the Concept of Parental Alienation in the Australian Family Law System: Contradictions, Collisions and their Consequences*, 42 J. SOC. WELFARE & FAM. L. 1, 3–6 (2020).

> (brainwashing) parent's indoctrinations and the child's own contributions to the vilification of the target parent.[108]

Gardner goes on to say that PAS diagnoses are only warranted when the alienated parent has not done anything to bring on "vilification" by the children.[109]

Gardner was particular in his view of PAS. He used it to describe children of a "broken marriage" who become estranged from the alienated parent, seemingly without justification, because the alienating parent negatively interferes with the child's relationship with the other parent and weakens the emotional bond between them.[110] The alienated parent was good and loving before the child was programmed and was not involved in abuse or neglect of the child. These acts of interference included "not only conscious but subconscious and unconscious factors within the parent that contribute to the child's alienation," which eventually work within the child "independent of the parental contributions" and contribute to the "syndrome" being formed within the child.[111] Though the term PAS has fallen into disfavor, PA, as it is used in family court, spawned from this "diagnosis."[112]

Shortly after Gardner coined the phrase, men's rights groups embraced the theory behind PA and focused on mothers who engaged in alienation.[113] In contrast, feminists disliked the concept because it seemed to trivialize IPV. Psychologists were also skeptical because there was little reliable research on

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108. Richard A. Gardner, *Parental Alienation Syndrome vs. Parental Alienation: Which Diagnosis Should Evaluators Use in Child-Custody Disputes?*, 30 AM. J. FAM. THERAPY 93, 95 (2002) [hereinafter Gardner, "*PAS*"].

109. *Id.* at 96.

110. Richard A. Gardner, *Recent Trends in Divorce and Custody Litigation* 29 Acad. F. 1, 3, (1985) http://fact.on.ca/Info/pas/gardnr85.pdf [https://perma.cc/NQF6-FGHP] [hereinafter Gardner, *Recent Trends in Divorce*].

111. *Id* at 1–6. Gardner identifies eight main symptoms that often appear in children with PAS:

1. A campaign of denigration against the rejected parent;
2. Weak, absurd, or frivolous rationalizations for the rejection;
3. Lack of ambivalence between the parents – one is all bad and one is all good;
4. The child claims that these are their own views and not the alienating parent;
5. Reflexive support of the alienating parent in the parental conflict;
6. Absence of guilt over cruelty to and/or exploitation of the alienated parent;
7. The presence of borrowed scenarios from the alienating parent;
8. Spread of the animosity to the friends and/or extended family of the alienated parent.

There have been legitimate cases of parental alienation. PAS is not limited to occurring at any one specific time during a divorce. In fact, it can occur at any point prior to the divorce, immediately after the divorce is finalized, or several years after it has been finalized. The longer the alienation occurs in PAS, the more alienated the child becomes from the alienated parent and consequently the more severed the bond between the alienated parent and the child becomes.

112. Holly Smith, *Parental Alienation Syndrome: Fact or Fiction? The Problem with Its Use in Child Custody Cases*, 11 U. MASS. L. REV. 64, 89 (2016).

113. Madelyn Simring Milchman, *Misogynistic Cultural Argument in Parental Alienation Versus Child Sexual Abuse Cases*, 14 J. CHILD CUSTODY 211, 217 (2017) [hereinafter Milchman, *Misogynistic*].

alienation. The "diagnosis" failed to meet the "scientific criteria to be labeled as a diagnosable 'syndrome,'"[114] and the courts struggled with the reality that there were no easy fixes for this alienation. "The theory seemed overly simplistic and was frequently misapplied in court."[115] Despite all this, some have observed a continued "infatuation with th[e] concept."[116]

Parental alienation has been applied (post-Gardner) to a child who "expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection, and/or fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent."[117] It is better described as "a term used to describe some events during and after divorce" rather than as a psychological diagnosis.[118] Unfortunately, there is no neat psychological test that proves whether there is alienation in a family.[119] This means that, in the courtroom, judges are tasked with making findings of alienation without a bright-line rule. And when judges use legal reasoning based on mistaken conceptions of PA, there can be serious harm to families.[120] Alienating behaviors are broad and wide-ranging and may include:

> [D]enigration of the rejected parent, (general badmouthing), limiting contact with the rejected parent, withdrawing love if the child seems positive about the rejected parent, saying that the rejected parent does not love the child, forcing the child to choose between parents, confiding in the child about the marriage, limiting mention of the rejected parent, forcing the child to limit contact, limiting contact with the rejected parent's family, belittling the rejected parent in front of the child, and inducing conflict between the child and the rejected parent.[121]

Even the modern conception of PA involves vague behaviors that could fall anywhere on a spectrum from being very harmful to the child to simply being an innocent parenting misstep. There is also no established solution to PA, and

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114. John-Paul Boyd, *Alienated Children in Family Law Disputes in British Columbia*, CAN. RSCH. INST. L. & FAM. 1, 3 (2015) https://prism.ucalgary.ca/bitstream/handle/1880/107404/Parental%20Alienation%20-%20July%202015.pdf?sequence=1&isAllowed=y [https://perma.cc/PCU7-3C2V].

115. *Id.*

116. Suzanne Zaccour, *Does Domestic Violence Disappear from Parental Alienation Cases? Five Lessons from Quebec for Judges, Scholars, and Policymakers*, 33 CAN. J. FAM. L. 301, 301 (2020) [hereinafter Zaccour*, Disappear*].

117. Joan Kelly & Janet Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 249, 251 (July 2001).

118. Jean Mercer, *Critiquing Assumptions about Parental Alienation: Part 1, The Analogy with Family Violence*, 19 J. FAM. TRAUMA, CHILD CUSTODY & CHILD DEV. 81, 83 (2022) [hereinafter Mercer*, Critiquing*].

119. John E.B. Myers & Jean Mercer, *Parental Alienation in Family Court: Attacking Expert Testimony*, 10 CHILD & FAM. L.J. 68, 95 (2022).

120. Mercer*, Critiquing*, *supra* note 118, at 83.

121. *Id.* at 85, as adopted from A. Baker & D. Darnall, *Behavior and Strategies Employed in Parental Alienation: A Survey of Parental Experiences*, 45 J. DIVORCE & REMARRIAGE 97 (2006).

judicial orders could miss that the actual problem stems from violence or a reason other than PA.

Judges have an active role to play in protecting the rights of women and children in the justice system.[122] If a parent is taking genuine protective measures to keep themselves and their children safe, alienation should not be used to discredit them. All-or-nothing thinking has plagued research on this topic.

> When allegations of abuse are raised during custody disputes, this distinction between estrangement and parental alienation becomes important. If there is a substantiated history of DV or child abuse over the course of the relationship, the accuser's and child's behaviors are explicable; if the accusation is manufactured as a strategy to gain the upper hand in a custody dispute, then the accusation is a parental alienating behavior.[123]

If there is abuse, then PA must be scrutinized to make sure that this is not a continuation of abuse. However, once the Canadian court system finds PA, it can be complicated to challenge.[124] The reality is that although PAS has been wholly discounted, the concept is still being used by Canadian family law courts. It is extraordinary that the research on the role of violence against women and children and the severe health impacts documented over decades "have a negligible impact in many of these cases" and that "IPV tends to be 'siphoned off' from the family law system."[125] We must find a place where PA can be investigated in a principled way, but IPV cannot be discounted.

A. Where There is IPV, There is No PA

It is misleading to label a child as parentally alienated based solely on their rejection of a parent; the presence of this one factor is neither "a necessary nor a sufficient condition" for finding parental alienation.[126] A multitude of factors could contribute to a child resisting contact.[127] Without standard criteria or clear guidance, the result of the continued use of PA as a factor in family court

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122. A full discussion of this topic is outside of the scope of this paper, but for further information see Donna Martinson & Margaret Jackson, *Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases*, 30 CAN. J. FAM. L. 11, 38 (2017) [hereinafter Martinson & Jackson, *Equality Guardians*]. Martinson & Jackson have also noted that the devaluation of family law in Canadian law schools has also negatively impacted the rights of women and children as big firms in global practices stress other business-based classes rather than a focus on family law.

123. Jennifer J. Harman, William Bernet & Joseph Harman, *Parental Alienation: The Blossoming of a Field of Study*, CURRENT DIRECTIONS IN PSYCH. SCI., Feb. 2019, at 1, 2 (2019) [hereinafter Harman, Bernet & Harman].

124. *See* Frances E. Chapman, *At the Intersection of Discrediting, Degradation & Denigration: Coercive Control, Parental Alienation, and "Institutional Gaslighting*," 44 WOMEN'S RTS. L. REP. 52 (2022) [hereinafter Chapman].

125. Sheehy & Boyd*, supra* note 55, at 80 (alteration in original) (citation omitted).

126. *Id.* at 281.

127. *Id.* at 282.

decisions is that the "overwhelming majority of families have to make do with the possibility of misinformed clinical judgment and naïve assumptions about PA, child abuse, IPV and the intersection of those with PA within the context of crowded court dockets and inadequately trained mental health professionals."[128] Courts and legal service providers have little time and ability to make these assessments properly.

Theorists have posited that Gardner was wrong, as "children reject parents for many reasons, with alienating behavior on the parents' part being but one of many and certainly abuse being another. The point is that Garner's all-or-nothing thinking (alienation or abuse) is not what we see in the real world of child custody cases and these cases call for a multivariate approach."[129] Abuse and alienation do not have to be mutually exclusive concepts.[130] Gardner himself acknowledged, right before his death in 2003, that PAS was being used in courts by "abusing parents [as] a weapon . . . against their accusers."[131] He also lamented that he was "somehow being blamed for [the misuse,]" which he compared to "blaming Henry Ford for automobile accidents."[132] In Gardner's view, any instance of abusing parents weaponizing PAS against the victims of their abuse was a misapplication of his work by mental health and legal professionals. He maintained that "when bona fide abuse/neglect exists, the PAS diagnosis is not applicable."[133] However, what "bona fide abuse" is, and what Gardner identified as abuse, may be difficult to determine with accuracy.

In the "murky practice of child custody litigation, there is considerable dispute as to what constitutes evidence for such exclusion" in a strained parent/child relationship. However, we seem to be seeing cases where the 'misuse' of alienation 'turns the tables' on those making allegations of IPV and results in the victims being mislabelled as 'emotional abusers, that is alienators,' themselves.[134] At best, this dynamic establishes abuse and alienation as equals, that is, both as forms of abuse. At worst, it fuels a focus on purported alienation over and above any actual abuse.[135] Research has revealed that when DV is alleged, judges are more likely to weigh heavily alienating behavior when ruling

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128. *Id.*

129. Drozd & Olesen*, Real*, *supra* note 42, at 259.

130. Barbara Jo Fidler & Nicholas Bala, *Concepts, Controversies and Conundrums of "Alienation:" Lessons Learned in a Decade and Reflections on Challenges Ahead*, 58 FAM. CT. REV. 576, 584 (2020) [hereinafter Fidler & Bala].

131. Richard A. Gardner, *Misinformation Versus Facts About the Contributions of Richard A. Gardner, MD*, (2002) 30 AM. J. FAM. THERAPY 395, 402 [hereinafter Gardner*, Misinformation*].

132. *Id.* at 402–03.

133. *Id.* at 404. Gardner goes as far as to say that he has "never been involved in a case in which I have been directly responsible for anyone's suicide or anyone's homicide." This statement is more chilling recognizing that this is only months before his own suicide. *Id.* at 405.

134. Janet R. Johnston, Marjorie G. Walters & Nancy W. Olesen, *Is it Alienating Parenting, Role Reversal or Child Abuse? A Study of Children's Rejection of a Parent in Child Custody Disputes*, 5 J. EMOTIONAL ABUSE 191, 193 (2005) [hereinafter Johnston, Walters & Olesen].

135. Meier*, Getting Real*, *supra* note 42, at 227.

on custody and parenting time, while "IPV is rarely condemned or related to children's best interests in the same way that alienation is."[136] "U.S. data actually demonstrates that PA allegations by men have the effect of discrediting women's allegations of IPV and child abuse."[137]

There is empirical support for what has been suggested by academics for years. Fathers who alleged PA were "2.3 times as likely as an alleging mother to receive a favorable decision," and even when the father's alienation allegation was rejected, they received a favorable decision 37% of the time.[138] A pilot empirical study on whether custody cases involving allegations of PA had gendered outcomes found "preliminary empirical support" showing that family courts are biased against women who report abuse and confirmed that "family courts are hostile venues for mothers alleging abuse and that mothers are at significant risk of losing custody."[139] This bias also exists for women and children who allege child sexual abuse. It enables the impossible situation where a protective parent may risk losing custody of their children to the abuser if they raise sexual abuse and are labeled alienators but may also risk their children having regular unsupervised contact with the abuser if they remain silent.[140]

Many judges assume that if there is "real" DV, there will be accompanying criminal cases or a plethora of evidence to document this violence. The reality is that evidence may not be available, and many women raise abuse for the first time upon a custody hearing. Judges have to challenge their assumptions about proof in these matters; it is essential to "remain open not only to those with whom we disagree, but to the possibility that one's own beliefs may be fallible; the evidence for one's beliefs may be flawed and there may be bias in our evaluation of the evidence."[141] The bottom line is that a significant number of abused women may get less favorable custody arrangements if they identify DV during custody matters.[142]

Barbara Jo Fidler and Nicholas Bala note that multiple realities can exist wherein mothers and/or fathers can be abusive, and both can potentially be alienated; consequently, there "are abused children and there are alienated children. All of these realities can and do exist. It is our view that it is not necessary or ethical to discount one reality to recognize or advocate for the other." [143] It is not right to favor one injustice above another just because there are false reports and there are abused children who are alienated. There are children who have been identified as abused and have been exposed to alienating

136. Sheehy & Boyd, *supra* note 55, at 88.
137. *Id.*
138. Meier & Dickson, *supra* note 81, at 324–25.
139. *Id.* at 332.
140. *Id.*
141. Fidler & Bala, *supra* note 130, at 584.
142. Meier & Dickson, *supra* note 81, at 332.
143. Fidler & Bala, *supra* note 130, at 591.

parental behaviors.[144] As a whole, PA has many dire consequences that negatively affect the child well into adulthood.[145] Allegations of DV already receive insufficient attention in hearings, and the harm to children is also "misunderstood and underestimated by judges" who "prioritize" and give access to abusive fathers, including those who have perpetrated sexual and physical violence.[146] It is becoming difficult to deny that PA is being used in a highly gendered way against women. Courts frequently minimize DV, which "stigmatizes and pathologizes women and children" by reframing the mother as an abuser and shifting the focus onto the "supposedly lying or deluded mother or child."[147] Alienated children can be abused children. Some children are vulnerable to alienation because of a poor relationship with one parent. There is no one-size-fits-all solution, but the polarization of the concepts is unhelpful.[148]

Perhaps it is time to stop looking at this phenomenon as black and white. Raising the issue of PA cannot simply wipe out years of violence. All families have "complex and complicated lives," and those who find themselves before family courts have their "lives, emotions and circumstances . . . reduced to stark binaries of good and bad, deserving and undeserving, excluding many other ways of explaining parents' and children's views and behavio[]r."[149] The danger is that when parents are labeled as the alienator or as the abuser, all of their actions are judged according to that label.[150] Of course, there are those who falsify accusations, but alleging PA "will not help the children involved, or the fathers who have to deal with resistant, angry, and distressed children."[151] This result serves no one.

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144. *Id. See also* Richard A. Warshak, *When Evaluators Get It Wrong: False Positive IDs and Parental Alienation*, 26 PSYCH. PUB. POL'Y & L. 54 (2020) [hereinafter Warshak*, False Positives*] who notes that false positives of alienation can be very damaging and are very under-researched. It is a truism that evaluators and "judges sometimes reach wrong conclusions about whether a child is alienated from a parent about the genesis of a child's rejection of a parent." Richard A. Warshak, *Risks and Realities of Working with Alienated Children*, 58 FAM. CT. REV. 432, 433 (2020) [hereinafter Warshak*, Risks*].

145. Caitlin Bentley & Mandy Matthewson, *The Not-Forgotten Child: Alienated Adult Children's Experience of Parental Alienation*, 45 AM. J. FAM. THERAPY 509 (2020).

146. Alsalem*, supra* note 5, at 4.

147. *Id.* at 5, 11.

148. Milchman*, Parental Alienation Research*, *supra* note 45, at 123. The criticisms of PA and PAS are almost too numerous to mention. *See* NEILSON, EMPIRICAL ANALYSIS, *supra* note 34, at 4–5. Neilson breaks down the broad and wide-ranging criticisms into general categories: 1) research and methodology issues; 2) gender bias; 3) undeserved focus on parents' rights rather than the child's; 4) lack of focus on child risk and safety; 5) lack of focus on the best interest of the child; 6) lack of voice from the children; and 7) inappropriate parental blame for the normal behavior of children. *But see* Harman & Lorandos, *supra* note 81, at 185 (noting substantial criticism of some studies showing that women are being oppressed by parental alienation in the courts).

149. Adrienne Barnett*, A genealogy of hostility: parental alienation in England and Wales*, 42 J. SOC. WELFARE & FAM. L. 18, 26 (2020) [hereinafter Barnett, *Genealogy*].

150. *Id.*

151. *Id.*

Again, this binary perspective feeds into myths using "pseudo-concepts" while ignoring violence and leading to re-victimization.[152] A one-size-fits-all approach represents all that is wrong with the family law system and sets up the good/bad dichotomy of the "unimpeachable father" and the evil mother/perpetrator of PAS.[153] Neither myth is necessarily true, but the parent accused of PA comes to see the system with hostility because of the punitive consequences of such a finding.[154] Allegations of DV should not be construed by courts as "evidence" of PA by the other parent. It is no wonder that mothers are distrustful of the system and unwilling to disclose the violence against them and their children, even though doing so may keep them safe.

Madelyn Simring Milchman advocates that the nuclear option of reversing custody is only appropriate if there is evidence of an unfounded allegation, no "affirmative" evidence of PA, and no justifiable reasons for obstructing a parent/child relationship.[155] It is possible that a deliberately false CSA allegation could be employed as an alienation strategy. However, "unfounded allegations cannot and should not be assumed to be false."[156] PA continues to be misused in family court proceedings involving DV in Canadian courtrooms.[157] The fault lies in many factors, including "lack of training and education for court professionals on child development and impacts of abuse on women and children, assumptions that separation and/or divorce end abuse, misperceptions that can lead to gender-biased credibility discounting in IPV cases, and ideological preferences and support for 'friendly parenting' and shared parenting arrangements."[158] The perpetuation of these myths and stereotypes is concerning. What is also disturbing is the frequency by which many judges in Canada today are employing the most severe option of transferring custody to the alienated parent to the exclusion of a possibly protective parent.

V. CASE STUDY: *IS V. TC*[159]

A. Background and Culture

A case study exemplifying the issues of coercive control, parental alienation, and Divorce Act principles (as discussed) is instructive. In the case of

152. *Alsalem, supra* note 5, at 2.

153. Barnett*, Genealogy*, *supra* note 149, at 26.

154. *Id.*

155. *See* Madelyn Simring Milchman, *Misogyny in New York Custody Decisions with Parental Alienation and Child Sexual Abuse Allegations* 14 J. CHILD CUSTODY 234, 239 (2017) [hereinafter Milchman, *Misogyny*].

156. *Id.* (citations omitted). Milchman notes that an "absence of evidence should not be interpreted to mean that an allegation is either more likely to be true or more likely to be untrue. It is simply unknown at the time." *Id.* at 241.

157. Zaccour, *Disappear*, *supra* note 116, at 301.

158. Tabibi, Jaffe & Baker*, supra* note 83, at 8.

159. IS v. TC, June 29, 2020*, supra* note 12. The author received documents from the court file including the Affidavit of IS, Apr. 14, 2020 (including all exhibits); Notice of Motion

IS v. TC, multiple case conferences, parental coordination meetings, and arbitrations had occurred since 2020. As with previous examples used by this author,[160] this case involved a very contentious custody issue.[161] The father (IS) initially sought primary residential care of his then nine-year-old son (JS) or, alternatively, an equally shared residential schedule between the parents, while the mother (TC) sought continued custody, with access to the father, according to the son's wishes or as recommended by a counselor.[162] It is relevant that the mother in this case is of mixed European and Indigenous descent[163] and is highly educated and accomplished—having previously worked as a professor and a lawyer.[164] The father is non-Indigenous and is employed as an IT consultant and later started his own business.[165] The pandemic was an overwhelming complicating factor throughout the proceedings, as much of this case took place while the courts were closed; most of the work was done over the telephone. The father was alleged to be "argumentative and authoritarian" with his son, and his parenting style was said to be inappropriate for their child.[166] The father eventually alleged active parental alienation by the mother.[167]

At the outset of the first motion, Justice Mackinnon noted that the materials in the motion were "extensive" as there were "many factual disputes," but that "not all w[ould] be referred to" as the proceeding was a motion for temporary

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of IS, Apr. 14, 2020; Affidavit of JP, Apr. 21, 2020; Answer of TC, May 8, 2020; Affidavit of TC, May 19, 2020 (including exhibits); Affidavit of IS, May 26, 2020 (including all exhibits); Factum of IS, May 28, 2020; Factum of TC, June 2, 2020; Amended Notice of Motion of IS, dated June 4, 2020; Affidavit of TC, Aug. 5, 2020; Affidavit of KPS, July 28, 2020; Affidavit of SEG, July 29, 2020; Affidavit of Dr. DLF-R, Aug. 4, 2020; Affidavit of BT, Aug. 4, 2020; Letter from Dr. AV (psychiatrist) & HW (social worker), Aug. 4, 2020. A copy of each of these documents are on file with the author on the consent of one party to the matter. The author also reviewed the reported judgments including IS v. TC, 2020 ONSC 3966; Endorsement in IS v. TC, Aug. 18, 2020 [IS v. TC, Aug. 18, 2020]; IS v. TC, 2020 ONSC 5411 [IS v. TC, Sept. 10, 2020]; IS v. TC, 2020 ONSC 6789 [IS v. TC, Nov. 4, 2020]; and IS v. TC, 2021 ONSC 644 [IS v. TC, Jan. 26, 2021]. Note that there are issues throughout this litigation that were not considered in this case study as they were beyond the scope of this paper.

160. Chapman, *supra* note 124.

161. Note that though this case was largely decided before the changes in legislation, it demonstrates how these principles are still at the forefront. However, this does not matter if one of the parties is simply not believed at the most basic level.

162. IS v. TC, June 29, 2020 ¶ 1.

163. *See* Affidavit of TC, May 19, 2020 ¶ 12. TC also has various health concerns that do not impact parenting but are important to provide context, including a bone disorder, PTSD, and fibromyalgia. *See* Answer of TC, May 8, 2020 ¶ 49. TC no longer identifies as "she" in part related to the gender discrimination and gender stereotypes associated with the pronoun "she." TC identifies as non-binary (they/them) because of the gendered harms they have suffered and the significant trauma which has impacted their emotional, physical, and psychological health. Direct quotes may contain the original "she" pronouns in reference to TC. I have maintained the term "mother" with no intended disrespect. Otherwise, they/them pronouns will be used in reference to TC.

164. IS v. TC, June 29, 2020 ¶ 168.

165. Affidavit of IS, Apr. 14, 2020 ¶ 40.

166. IS v. TC, June 29, 2020 ¶ 4.

167. *Id.* ¶ 4.

relief and not a trial.[168] However, findings of "credibility and reliability, evidence from independent sources, and documents, [were] very important to the conclusions reached."[169] The child was "unquestionably" attached to his mother,[170] and the court noted that the child expressed some "signs of low mood including expressing a wish to be dead or go back to Sky World."[171]

The judge seemed to misunderstand "Sky World" at the very outset of this case. It is unclear whether the court ever asked for an explanation of this Indigenous teaching from the mother (or others). It seems as if the court continued the erroneous assumptions about the suicidal ideations of the child in this context when, in fact, he was expressing his beliefs in a Kanienkehaka creation story that speaks to how people select their parents.[172] TC had taught JS about Sky World when he was very young, and JS had also learned about the story when the two attended Indigenous ceremonies.[173] TC shared this teaching with JS to help him understand that his father's spirit came from Sky World, meaning that his father must have "good in him" and his spirit and that it is "only when [people] descend to earth and are impacted by their environment that this purity can become tarnished or hidden."[174] The child remained adamant that he did not choose his father in Sky World.[175] The mother established that the child's First Nations culture is a "massive part of his identity."[176] JS has support from the Elders in his community but vocalized that his father does not respect his culture.[177]

After the court commended the father for taking control of his mental health and seeking help,[178] a great deal of the decision centered around two nights when TC was emotionally exhausted and sought help from a friend to take JS for a few days. Without access to their support system during the pandemic, TC called a crisis line. TC maintained that they were "not suicidal" and did not intend to hurt themselves.[179] TC wished to do a ceremony for the anniversary of their father's death.[180] TC told the crisis worker they were grieving and "felt like Sky World was all around [them]."[181] The worker misinterpreted this as a threat of suicide. TC attempted to clarify the worker's misjudgment but quickly realized the

168. *Id.* ¶¶ 7–8.
169. *Id.* ¶ 8.
170. *Id.* ¶ 11.
171. *Id.* ¶ 13.
172. Answer of TC, May 8, 2020 ¶ 25. *See also* Factum of TC, June 2, 2020 ¶ 7. The child may have unrelated suicidal thoughts at various times, but the use of Sky World in this determination shows that it may not be fully understood by the court.
173. Affidavit of TC, May 19, 2020 ¶ 12.
174. Answer of TC, May 8, 2020 ¶ 25; Affidavit of TC, May 19, 2020 ¶ 12.
175. Answer of TC, May 8, 2020, ¶ 25.
176. Affidavit of TC, May 19, 2020 ¶ 34.
177. *Id.*
178. This will be discussed further below.
179. Affidavit of TC, May 19, 2020 ¶ 62.
180. Affidavit of TC, Aug. 5, 2020 ¶ 44.
181. Affidavit of TC, May 19, 2020 ¶ 62.

counselor "did not have the cultural understanding" and was too upset to explain.[182] The counselor repeatedly tried to get their name and address, which TC did not want to share, and after concluding that TC wished to die by suicide, the counselor called the police.[183] This Indigenous mother innocently spoke of wanting to connect with "Sky World" to "sleep and dream with [their] Dad," which the worker mistook to be Heaven and deemed suicidal ideation.[184] This cultural ignorance and bias led to an eventual report to CAS and an avalanche of consequences for TC. The health line was asked to investigate, and while an individual worker apologized to TC, they never received a formal apology from the organization.[185] TC stated that "[their] comments about not wanting to share [their] address and name should have been interpreted as counter-indicative of suicidal intention and the police should not have been called."[186] Despite this, TC was taken to a hospital by police.

TC was quickly released from the hospital as they found TC did not have suicidal ideation.[187] The next day, TC called their son's godfather, JP, who had agreed to care for JS for a few days. JP had a telephone discussion with TC where he also misunderstood their explanation. JP decided that TC was suicidal and called the police.[188] After confiding in JP, TC did not expect any institutional ramifications. Instead, the police went to their house, and when TC did not immediately respond to the door because TC was taking a bath, the police "kicked in [the] door."[189] They found TC with prescribed medication in their hands, and TC was forcibly taken to a hospital in handcuffs.[190] TC describes this encounter as "degrading and humiliating," and CAS was informed TC was "suicidal" *before* TC was assessed by a psychiatrist or seen by a medical professional.[191]

Understandably, TC was agitated when they were informed that the hospital staff had contacted CAS and TC became "frustrated and angry."[192] This was the second time in two days that TC was misunderstood and wrongly accused of

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182. *Id.*

183. IS v. TC, June 29, 2020 ¶ 49.

184. *Id.* ¶ 50. TC notes their discussion with the hotline counsellor in Factum of TC, June 2, 2020 ¶ 25.

185. Affidavit of TC, May 19, 2020 ¶ 62.

186. *Id.*

187. IS v. TC, June 29, 2020 ¶ 52.

188. Affidavit of TC, May 19, 2020 ¶ 65–66. JP had family history of attempts of suicide and had a particular sensitivity to the issue.

189. Factum of TC, June 2, 2020 ¶ 28.

190. *Id.* There was a standard police question posed to TC about whether there were firearms in the home. The only firearms in the home were several registered hunting rifles and antique guns that TC had inherited from their father upon his death. These firearms were inoperable, there was no ammunition, and only IS had the key to the reinforced steel gun safe that was bolted to the wall. *See* Affidavit of TC, May 19, 2020 ¶ 68. By the time this is mentioned in the May 26, 2020 Affidavit of IS ¶ 6, he states that the "police broke down the door and seized guns from the apartment."

191. Affidavit of TC, Aug. 5, 2020 ¶ 45. TC also notes that she had heard someone in the hall say that she was "First Nations" so they should call CAS.

192. IS v. TC, June 29, 2020 ¶ 57.

being a risk to themselves and their son, so TC admitted to becoming "angry at the staff."[193] TC was discharged the next morning as the attending physician was not concerned with their mental health.[194] The father characterized these two nights as TC threatening "to commit suicide *two nights in a row*" and as instances where TC was "extremely belligerent and made threats to staff members at the [named] hospital, resulting in them having to call security."[195] There was no evidence of attempted suicide nor evidence of belligerence.

The actions of a distraught mother (who openly talked about intergenerational trauma), fearing that they were going to lose their son and upset with hospital staff, were characterized by IS as "the same abuse that [he] experienced at the hands of the mother throughout the marriage [and] the same abuse that JS [was] being exposed to when he [did] not comply with the mother's demands."[196] The hospital and CAS records led IS to conclude that his son was being "emotionally abused, alienated from [him] and manipulated by the mother."[197] The conclusion from being frustrated to manipulating their son is an unwarranted leap. IS alleged that TC was "emotionally abusing JS in this way for some time, making him feel like he has to hate me and be fearful of me."[198] This conclusion was based on information from JP, who listened to one side of a telephone conversation between the child and his mother from outside a door.[199]

The clash of culture and bias are pivotal throughout this case. When TC indicated in an email that they had to prepare the child to go back to his father, they noted that this was "exactly like [what] First Nations parents were forced to do with their children who were sent to day schools during the residential era."[200] IS characterizes this statement as using "lies and exaggeration to try and bully others into having them do what [they] wan[t]. The mother is absolutely not credible."[201] Again, instead of understanding the complicated situation TC had been in, the court gave lip service to their culture and lived experiences but minimized their trauma.[202] Justice Mackinnon stated that she appreciated that TC's contact with CAS would be distressing, "but more so to the mother on account of [their] culture and the historical involvement of both authorities with [A]boriginal people. As well there is a note in the CAS file that TC has trust issues with the CAS as a result of [their] own childhood experiences."[203] Instead

193. Affidavit of TC, May 19, 2020 ¶ 69.
194. *Id.*
195. Affidavit of IS, May 26, 2020 ¶ 12. Emphasis in the original.
196. *Id.* ¶ 23.
197. *Id.* ¶ 25.
198. *Id.* ¶ 37.
199. *Id.* ¶ 31.
200. *Id.* ¶ 57.
201. Affidavit of IS, May 26, 2020 ¶ 58.
202. IS v. TC, June 29, 2020 ¶ 60.
203. *Id.*

of layering this understanding of the apprehension of Indigenous children from their parents with TC's actions, TC was vilified by the judge for their conduct.[204]

What is apparent within the first twenty paragraphs of the lengthy June 29, 2020, endorsement is that the judge had already determined that the father was seeking help while the mother was uncooperative and the source of the child's anxiety. TC identified this in their affidavit, saying, "the decision on June 29, 2020 portrays me as an aggressive, unreasonable, manipulative, mentally ill woman, who lacks credibility and truthfulness."[205] The next part of the decision tried to paint a very damning picture of the mother's mental health.

B. Mental Health "Diagnoses"

Instead of attempting to understand TC's trauma, the court went on to say that TC had a "tendency to overstate or exaggerate events that have happened and to worry excessively about what may happen in the future."[206] Despite a great deal of discussion of the mother's "suicidal ideations," there was scant medical documentation to this point. TC denied they were suicidal during the relevant periods. In fact, TC's May 8, 2020 Answer notes that the *father* was suicidal on or about June 2019.[207] TC assisted the father in calling a suicide hotline and scheduling an urgent appointment with his psychiatrist, at which time the father agreed to pursue residential treatment.[208] The father wholly denied this episode and ever threatening suicide, but for some reason (likely TC's detailed hospital records), the father is believed and the mother is not.[209] He concluded that "all of the traits the mother describes and accuses me of—gaslighting, belittlement and lack of empathy, putting me down and manipulation are how TC treated me throughout the entirety of our relationship (and continues to do so)."[210]

Given TC's history, the court's judgment does not reflect a trauma-informed perspective, which could look to the mother's history as a dictate for TC's distress.[211] The judge mentioned that TC was afraid that the removal of their son would be part of the millennial scoop (which is very understandable given their education and profession).[212] Instead of using a trauma-informed lens, the court labeled TC with diagnoses including the most damning (and false) diagnosis of Borderline Personality Disorder (BPD) in the June 2020 decision.[213]

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204. Affidavit of TC, May 19, 2020 ¶ 70. According to TC, the social worker eventually said that she had misunderstood what was communicated, and that her report on April 6 was incorrect and should be ignored.

205. Affidavit of TC, Aug. 5, 2020 ¶ 14.

206. IS v. TC, June 29, 2020 ¶ 67.

207. Answer of TC, May 8, 2020 ¶ 17.

208. *Id.*

209. Affidavit of IS, May 26, 2020 ¶ 160. It is important to note that IS was given TC's entire medical file, which detailed all sorts of information about TC. This is at best a questionable practice and further research is needed.

210. *Id.* ¶ 163.

211. Instead, TC is called "hypervigilant." IS v. TC, June 29, 2020 ¶¶ 66, 134.

212. *Id.* ¶ 67.

213. It is also worth noting that the diagnosis of PTSD was identified as originating from a past relationship.

IS noted in his affidavit that TC was "diagnosed with Borderline Personality Disorder in 2003, which has gone largely untreated."[214] Although TC emphatically stated that they were *not* diagnosed with BPD, and that was erroneously added to the hospital file, the court did not believe TC about their diagnosis. The word of a male-identifying spouse was taken over TC's own.

The documents needed to prove this misdiagnosis were unavailable during the pandemic as documents were largely not digitized, and it was very difficult to get medical documentation for an urgent motion when doctor's offices were closed.[215] Therefore, "proof" beyond the word of an individual was not available for a period of time. TC denied this diagnosis but admitted to struggling at various times.[216] The judge commented on how TC had several opportunities to correct this information and concluded that the mother's denial of a BPD "diagnosis" was "pertinent to the mother's level of insight, to [their] parenting ability and to [their] credibility."[217] This was despite any evidence of BPD. This conclusion by the judge is out-of-touch with a trauma-informed perspective and lead to very damning conclusions for TC. TC's documents stated that the hospital was investigating how this information was wrongly included.[218]

The court concluded that the father had made several "misstatements" but that he was "wrong or misinformed [,] not lying."[219] Further, the court found his beliefs were borne out by "other sources" and that he was not "unreliable or lacking in credibility."[220] Yet, IS submitted only one affidavit from a personal reference (his partner) and no expert or medical documents. Despite this, the court found that IS acknowledged his responsibility, "including in ways not favo[]rable to himself," and was generally a "reliable and credible witness."[221] In contrast, TC provided medical documents confirming the medications they take, and explained again that they had never been diagnosed with a personality disorder.[222] TC also noted attendance at parenting and trauma courses.[223] TC additionally mentioned individual counseling, therapeutic and health exercises with community Elders, and a high-conflict parenting class that was eventually canceled due to the pandemic.[224] Instead of commending TC, the court seemed

214. Affidavit of IS, Apr. 14, 2020 ¶ 36.

215. Affidavit of TC, May 19, 2020 ¶¶ 57–58.

216. *Id.*

217. IS v. TC, June 29, 2020, ¶ 77. TC notes how this "diagnosis" got into TC's medical files. She was recovering from a miscarriage when she was referred to Dr. RA in September 2009. TC asked IS about an assessment that she did in 1999 and "he thought the report said I had Borderline Personality Disorder (BPD)." This is how this diagnosis started in TC's file. She has since found the 1999 assessment and there is "no mention at all of a BPD diagnosis." *See* Affidavit of TC, Aug. 5, 2020 ¶ 28.

218. Affidavit of TC, May 19, 2020 ¶ 63.

219. IS v. TC, June 29, 2020 ¶ 126.

220. *Id.* ¶ 127. This is of interest given there was only one affidavit in support of the father.

221. IS v. TC, June 29, 2020 ¶¶ 127–28.

222. Affidavit of TC, May 19, 2020 ¶ 58.

223. *Id.*¶¶ 57–59.

224. *Id.* ¶ 59.

to adopt the false reasoning of the father regarding the night of police intervention, where he characterized TC as a dangerous person who "amassed many pills" and had "firearms in the basement."[225]

For the next hearing, TC secured a psychological assessment by Dr. AV & Ms. HW, who confirmed that although PTSD and ADHD can overlap with some of the symptoms of BPD, in TC's case, "[they] have not found [TC] to meet diagnostic criteria for BPD."[226] In fact, they concluded that TC's "symptom presentation is in alignment with what we would anticipate in an individual who has been the victim of abuse and/or IPV, and this can of course have a significant impact on an individual's mental health status and symptom presentation."[227] This professional assessment pinpointing IPV as a cause of TC's symptoms seemed to have little impact on the court in August 2020.[228]

In the August 18, 2020 decision, the court referenced the letter from Dr. AV & Ms. HW. It simply stated that these professionals do not "feel she satisfies the criteria for that [BPD] diagnosis at this time."[229] Completely contrary to the June judgment, the court found that TC "was not suicidal in March and clarifie[d] that BPD is not a present diagnosis[,]" noting that " it [was] positive to read that her recent symptoms [were] likely situational in her current stressful situation and that she is insightful to her psychological condition."[230] The court further acknowledged that a doctor's report described TC as "insightful of [their] psychological conditions" and as a "reliable historian[,] proactive in seeking help for [themselves]."[231] This was in stark contrast to the court's previous findings but seemed to do little to mitigate the damage already done, given that the child had already been removed and continued to be outside of TC's 50/50 care until May 2021.[232]

Even with this new information, the court again chastised TC, stating that it "would be very positive were the respondent also able to demonstrate that [their] antipathy towards the applicant can be managed or mitigated, and that [they] can develop insight into the harm to JS from messaging [their] negative views of his father to him."[233] The court went on to say that it "is not possible to tell from [TC's] list of personal supports whether these two issues, both key to progressing the parenting issues in the case, are as yet being addressed. I hope [TC] will provide professional feedback on these issues in the next review."[234] Even when TC sought out medical information to substantiate claims about their health, they were still vilified for their "negative views" of the father, with the insinuation that TC was not a friendly parent. If the medical review was correct,

225. Affidavit of IS, May 26, 2020 ¶¶ 6, 18 (He states that the "police broke down the door and seized guns from the apartment.").

226. Letter from Dr. AV (Psychiatrist) and HW (Social Worker), Aug 4, 2020.

227. *Id.*

228. IS v. TC ¶¶ 40–41.

229. *Id.* ¶ 38.

230. *Id.* ¶ 40.

231. *Id.* ¶ 39.

232. IS v. TC, November 4, 2020 ¶ 41.

233. *Id.*

234. *Id.*

TC's mental health issues were (at least in part) the result of IPV and family violence. One could extrapolate that this means abuse allegedly perpetrated by an ex-spouse. Still, the court was dissatisfied with TC's ability to fit the mold of this friendly parent, which, despite legislative changes, is still very much a part of Canada's current legislation.

Although the court acknowledged that the father may have sought mental health counseling, this was reflected in a positive way in the court judgments.[235] The father's mental health struggles were described in the past tense as if all issues were resolved. For example, "the father arranged to see a psychiatrist for help with anger, anxiety and depression, and connected receiving the help to improving his relationship with his son."[236] In fact, TC alleged that it was IS that threatened suicide "if [TC] left him."[237]

On the contrary, it was the father who had not availed himself of mental health support. The court noted that IS attended a family anxiety and parenting program under medical recommendation but was asked to leave because of poor attendance.[238] Although the father downplayed the child's anxiety, the mother brought it to the court's attention that JS was late for school 83 times in 2017-2018 and 63 times in 2018-2019. When TC was home in the morning, JS was only late 10 times in 2019-2020.[239] The court then concluded, based on a hospital intake report that "prior to separation the parents had communication problems, there was conflict between the father and J., J. was anxious and both parents needed more skills to help reduce his anxiety. J.'s anxieties were associated with his mother" yet the father was "open with his personal issues" and "acknowledged his responsibility"[240] related to the son. The court concluded that "the father has insight into his personal issues and has sought professional help for them."[241] All in past tense; all treated as resolved issues. The conclusions related to TC were not substantiated.

The mother was penalized for submitting too much material at the August 2020 hearing; it was deemed "more than a procedural error . . . directed towards presenting the father in a negative light."[242] The court contemplated that the mother introduced more material to paint the father in a negative light because of the alleged abuse. The court did not ask whether the father's submissions aimed to paint the mother negatively. Many statements in IS's material make unsubstantiated allegations against the mother, including engaging in PA.

After this very thorough and public reporting of TC's psychiatric history, the court noted that IS "ha[d] not yet obtained and produced a copy of his psychiatrist's file, or a report from his psychiatrist covering his involvement with

235. IS v. TC, June 29, 2020 ¶ 18.

236. *Id* ¶ 123.

237. Affidavit of TC, May 19, 2020 ¶¶ 73–74.

238. IS v. TC, June 29, 2020 ¶ 19. *See also* Affidavit of TC, May 19, 2020 ¶ 40; Affidavit of IS, May 26, 2020 ¶ 134.

239. Affidavit of TC, May 19, 2020 ¶ 16.

240. IS v. TC, June 29, 2020 ¶ 20.

241. *Id.* ¶ 124.

242. IS v. TC, Aug. 18, 2020 ¶ 44.

the applicant, any diagnoses made, and treatment provided, and to the extent of the psychiatrist's knowledge, the applicant's past psychiatric history, as was ordered on June 29."[243] Justice Mackinnon directed that if IS did not present this documentation within the next two weeks, "he shall at that time obtain a letter from his psychiatrist advising the court when the file or report will be delivered."[244] There was no admonition by the court that this material had yet to be supplied by the father, and the court simply recommended that the father "engage in continuous individual therapy to assist him with anxiety and depressiveness."[245] This mental health finding seems to have had no impact on the father's parenting in the eyes of the court. Why this is concluded is unclear.

In contrast, TC was characterized as "not credible" in asserting that they were not diagnosed with BPD.[246] TC was also accused of having "minimized the level of [their] distress" on the days when they were taken to the hospital.[247] The court concluded, without evidence, that TC tended to "dramatize or overstate events." This followed the court's pattern in declaring TC a bad mother.

C. Abuse Allegations Against the Father

The court gave little weight to the mother's five original supporting affidavits (including several from medical professionals and a letter from their psychiatric team), which noted, among other things, that JS is afraid of his father and that he is "scared to be alone with him."[248] And yet, the father's statements about "the last time they went skiing and how much fun he had" were given significant weight in the dichotomy that the mother is mentally ill, but the father is good enough.[249] Further, the child's statement to teachers that he would like to "go home to be with his mother" was painted as somehow bad parenting by the mother.[250] Allegations of abuse against the father in the June 29, 2020 decision were dealt with in the judgment in three short paragraphs. Although TC alleges coercive control and that the father "manipulated" TC and their son "psychologically and emotionally" using "control and guilt" designed to gaslight and belittle them, the court gave this almost no weight and found that "the allegations have not established abuse on a balance of probabilities."[251] The court repeated that the allegations were unsubstantiated by later "testimony" that the father was not abusive to his son or to TC.[252] Again, the father submitted only one supporting affidavit from an intimate partner and no supporting affidavits from medical or legal professionals. The mother submitted at least five

243. *Id.* ¶ 58. There is no evidence that this report has been submitted at the time of the writing of this article.

244. *Id.*

245. IS v. TC, Jan. 26, 2021 ¶ 26.

246. IS v. TC, June 29, 2020 ¶ 129.

247. IS v. TC, June 29, 2020 ¶ 133.

248. *See* Affidavit of Dr. DLF-R, Aug. 4, 2020, ¶ 7.

249. IS v. TC, June 29, 2020 ¶¶ 96–97.

250. *Id.* ¶ 100.

251. *Id.* ¶¶ 120–22

252. *Id.* ¶ 154.

supporting affidavits from professionals and witnesses, though only three were admitted.

The court also minimized IS's use of physical discipline. Even though IS admitted to one incident in which he "grabbed" the son allegedly to prevent injury, the court found that he did "slightly twist his arm" but not to "dislocate it as the mother allege[d]."[253] The young son responded by getting a knife and approaching the father, at which time the mother intervened. The father then carried the son out of the house and eventually used some force to dress him.[254] Again, this was minimized by the court even though the mother reported that the child "broke down" for hours and said "he wanted to die and to kill his dad."[255] CAS received a third-party complaint soon after concerning abuse by the father, but they "did not verify the allegation" and the court found that it was "ill advised" to get the son dressed in that way using the "physical approach," but that it did not amount to abuse.[256]

The court found unpersuasive TC's concerns that the child was unsafe with his father because of IS's threatening and controlling behavior, and lack of insight into his responsibility for the child's anxiety. Shockingly, the court concluded that although the child told CAS that he wanted to die and he wanted his father to die, he did not "include himself as the instrumentality of either death."[257] Despite the father's actions in precipitating this incident, the court concluded that the child did carry a kitchen knife but did not attack his father.[258] The court similarly dismissed the child's reports that the father said "mean things" about his mother but warned the father that he must be "vigilant to ensure he does not speak in a negative, critical or derogatory way to [the child] about his mother."[259] The father again received a light warning, while the mother was painted as mentally ill and undeserving of leeway. Inexplicably, the court concluded that this incident, and others like it, were somehow related to the fact that the "mother exerts significant influence over J." And Justice Mackinnon concluded that "the attachment has unhealthy aspects to it.[260] Although the mother described the father's materials as "full of blame, vitriol and disgust,"[261] these descriptions appeared to fall on deaf ears, continuing the pattern of blaming the mother and excusing the father.

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253. *Id.* ¶ 23. This is an adoption of the characterization of the incident by IS in Affidavit of IS, May 26, 2020 ¶ 106, where IS noted that he grabbed the child "because he was in danger of hurting himself" and thought it would not "cause any significant physical harm." *See* Affidavit of TC, May 19, 2020 ¶ 21 where the mother says that she had to intervene to ensure [JS's] arm did not get dislocated."

254. IS v. TC*,* June 29, 2020, ¶ 23.

255. *Id.*

256. *Id.* ¶ 24.

257. *Id.* ¶ 143.

258. *Id.*

259. *Id.* ¶ 147. IS characterizes this "unhealthy attachment to the mother" as "parentification." *See also* Affidavit of IS, May 26, 2020 ¶ 67.

260. *Id.* ¶¶ 143–44.

261. *Id.* ¶ 151.

An affidavit was submitted by BT, another mother at the child's school, on August 4, 2020. BT described another incident where she saw IS "grab" the child by his upper arm and "lift him right out of the swimming pool."[262] While she reported a separate incident to CAS, she was dismissed because the child was not taken to the hospital.[263] Further evidence showed that a CAS report stated IS said that he had no choice but to be "aggressive in his discipline towards JS" and described JS as a "monster."[264] BT stated that the CAS worker agreed and said "I think JS was acting like a little monster too" and the case was closed without talking to TC or JS.[265] The agent of the state weaponized the child against the mother; JS was made to look as if he deserved physical punishment and somehow TC was to blame.

D. Evidence

Another important note is that the court acknowledged the materials in this case were all established on a written record.[266] Credibility and reliability are central to these decisions, but the reality is that the parties were never seen by this judge, and their voices were never heard.[267] Based on her questionable conclusions from the intake report, Justice Mackinnon said that if the child stayed with his mother, he would "continue to be an anxious child with some important unhealthy aspects in his attachment to his mother."[268] The court also found that the risk of the child harming his father was "not likely to occur" and so it was in the child's best interest to live with his father.[269] The mother was to have no contact with the child before the end of his first week with his father, when they were permitted a phone call that was to last no longer than five minutes and during which the mother was to "reassure [the child] that she [was] well and that he [had] no reason to worry about her."[270] Additional ten-minute phone calls were permitted on the tenth and thirteenth days of the child being in his father's care, and by the third week, the mother could visit the child at a community location for two hours.[271] The mother was not to talk to the child about the court case.[272] Oddly, the judge ended her judgment with the statement that the child "needs both of his parents," especially his mother, because his "Indigenous heritage is so important to his sense of self and personal identity."[273] This is paradoxical, given the ordered lack of contact with his mother, and was followed

262. Affidavit of BT, Aug. 4, 2020 ¶ 8.
263. *Id.*
264. *Id.*
265. *Id.*
266. IS v. TC, June 29, 2020, ¶ 152.
267. Note that this all occurred during the COVID-19 pandemic.
268. IS v. TC, June 29, 2020, ¶ 159.
269. *Id.* ¶ 160. It is interesting to note that the Parenting Order includes a statement that the father should "safety proof" his home and remove sharp knives or other objects that could harm the child.
270. *Id.* ¶ 161.
271. *Id.*
272. *Id.*
273. *Id.* ¶ 162.

up with the judge's "hope" that the father would avoid "physicality in his parenting."[274] "Hope" seems a problematic term considering the severity of the matters concerned and the supremacy of safety, not to mention the best interests of the child.

A review of this order was scheduled to occur on August 12, 2020, but Justice Mackinnon ordered that all material be by affidavit and that "affidavit material shall be restricted to events occurring after June 4 and exhibits arising from the production order made below, or documents from service providers as to matters arising after the release of this Endorsement."[275] The matter was heard and a judgment was entered on August 18, 2020.[276] Per the last endorsement, only three affidavits were permitted per party, but the mother entered five affidavits (one of which the judge should have been provided with in the previous matter). Those from Dr. DLF-R and JP were deemed "not admissible."[277] The inadmissible affidavit from Dr. DLF-R (the child's pediatrician since he was three) stated that the child "feels safe and protected in the custody of his mother" who was the primary parent to attend his medical treatments.[278] The doctor also confirmed the allegations of the mother that the child disclosed abuse during a phone conversation.[279] She said that he was scared to be alone with his father and that his father "twisted his arm, yell[ed] at him and is emotionally hurtful, making him feel bad about himself."[280] Dr. DLF-R reported this conversation to CAS.[281] The pediatrician also noted that she was "surprised to hear that the Court had placed JS in the full-time care of his father temporarily and [had] limited his mother's access with JS since she has always appeared to be his primary emotional support person."[282] This affidavit was not entered.

It is also worth noting that the mother had attached copies of two letters from Dr. DLF-R on March 11, 2020 and April 17, 2020 that the pediatrician had written. One was addressed to the father's counsel, urging that custody be left with TC because he is "a very emotionally sensitive and anxious boy."[283] IS characterized the material from Dr. DLF-R as dictated by TC because it "sounds exactly like what TC would have requested JS's pediatrician to write, as all of these things have been demands TC has expressed prior to April 17th."[284] This statement not only implied that TC would influence her son's pediatrician, but

274. IS v. TC, June 29, 2020 ¶ 163.

275. *Id.* ¶ 161.

276. *Id.*

277. *Id.* ¶ 3.

278. Affidavit of Dr. DLF-R, Aug. 4, 2020 ¶¶ 5, 11.

279. Note that most appointments were by telephone at this time because of the COVID-19 pandemic.

280. Affidavit of Dr. DLF-R, Aug. 4, 2020 ¶ 7. *See also* Affidavit of TC, May 19, 2020 ¶ 21 (The mother states that the father alleged that the child twisted his own arm.).

281. Affidavit of Dr. DLF-R, Aug. 4, 2020 ¶ 7.

282. *Id.* ¶ 15.

283. Letter from Dr. DLF-R to counsel of IS, Ms. Jodi Fleishman (Victor Vallence Blais), Apr. 17, 2020 (on file with author). *See* Affidavit of TC, May 19, 2020 ¶ 37 regarding the unprompted letter.

284. Affidavit of IS, May 26, 2020 ¶ 131.

maligned the doctor by suggesting she would sign a letter that did not reflect the genuine opinion of the lead physician for pediatrics at the local hospital. There was no comment by the court.

The second affidavit deemed inadmissible was rejected because it was dated before June 4, 2020; it was from the child's godfather and a friend of the family, JP.[285] TC noted that this affidavit was supposed to be filed before the previous matter, but for some reason it was not read by the judge.[286] It was JP's opinion that the child should be given to the mother with access to the father because he had witnessed the father's "abuse towards JS" which "caused him psychological and emotional harm."[287] He added that the child has expressed to him that he "feels unsafe and afraid of [the father] and that [the father] is mean to him."[288] Contrary to what was found at the first hearing, JP stated that he "[did] not believe that the Mother is or ever has been a threat to JS nor [did he] believe she [was] now suicidal."[289] This was the same witness who previously conveyed conversations he heard through a door, but now his sworn affidavit was held inadmissible. These affidavits were deemed "removed or not entered into the continuing record."[290] The affidavit of therapist KPS was also ruled inadmissible, apart from one paragraph that stated when therapy sessions started and ended.[291]

IS's statement was allowed, however. He wrote that "the mother is allowing the inappropriate behavio[]r and treatment to continue without any consequences for JS or being made to apologize to me. I understand that this is a key indicator of parental alienation."[292] The father is not an expert and was not in a position to conclude what is, or is not, a key indicator of PA. The father also pointed to the hospital and CAS records and said that the "mother can frame the matter as a misinterpretation or a cultural difference [;] however [,] the hospital records and CAS records speak for themselves."[293] These documents weighed heavily for the father, while the mother's material was denied or discounted.

E. Parental alienation

The word "alienation" or the term "parental alienation" did not appear in the first affidavit of the father from April 14, 2020.[294] The only time that the word was used was in reference to TC, who noted that their son had been alienated from his father since he was a toddler.[295] By the next Affidavit of IS in May of 2020, the term or phrase appeared 11 times and "manipulation" appeared 10

285. Affidavit of JP, April 21, 2020.

286. Affidavit of TC, August 5, 2020 ¶ 4. All documents were electronic as the court was struggling to adapt to the pandemic.

287. Affidavit of JP, Apr. 21, 2020 ¶¶ 4, 6.

288. *Id.* ¶ 6.

289. *Id.* ¶ 7. *See* Affidavit of TC, May 19, 2020 ¶ 62 (JP admits to TC that his past trauma influenced his initial conclusion that TC was suicidal and his resulting call to police.).

290. IS v. TC, Aug. 18, 2020 ¶ 6.

291. Affidavit of KPS, July 28, 2020.

292. Affidavit of IS, May 26, 2020 ¶ 151.

293. *Id.* ¶ 158. It is notable that the CAS records do not seem to speak for themselves.

294. Affidavit of IS, Apr. 14, 2020.

295. *Id.* ¶ 32.

times. Subsequently, the factum of IS dated May 28, 2020 used the word "alienation" or its derivatives 52 times. The mother is accused of being verbally abusive and controlling and "did everything during the marriage to undermine my self-esteem, including using sarcasm, yelling at me, threatening, insults and humiliation."[296] TC noted that these accusations were devastating because TC had never been accused of being abusive in any way before some "odd emails in the fall of 2019."[297] TC also did not get to reply to the fresh allegations of "parental alienation."

The second affidavit of IS also said that the mother had been "alienating JS from me since the separation and that the alienation [had] intensified greatly since JS returned to live with the mother full-time on April 13, 2020."[298] The factum of IS notes that the child was "being severely alienated from his father by a mother with a history of mental health issues. The evidence indicates that JS's emotional and psychological well-being is being compromised by the mother. The evidence is overwhelming. The father respectfully requests immediate intervention from this court on an urgent basis."[299] IS went on to say that the mother had "engaged in a campaign of alienation."[300] The solution, according to the father, was for the child to be placed in "[his] care or in an equal schedule" and for the court to make a "finding of parental alienation" at this "interim stage."[301] These fresh allegations were not commented on or excluded, as the mother's materials were.

Even when there was outside evidence of the absence of PA on the part of TC (for example, the Affidavit of SEG dated July 29, 2020), this was ignored. This childcare worker indicated that when the child did not want to go with his father and stated that he had called the police on his father, TC only said, "I'm sorry you feel that way. You need to know that I love you."[302] The court did not comment on this purposeful attempt *not* to alienate the child. One of the most compelling affidavits when it comes to the alleged "parental alienation" of the mother came from BT.[303] BT spent time with the family and noted that she had never seen TC "speak to JS about IS in a negative way during their relationship or after their separation, no matter how upset she was with IS."[304] In fact, she swore that "[she] saw TC on many occasions tell JS that his father loved him."[305] She said TC had "changed plans, missed important appointments, and turned down work opportunities in order to make sure JS was available to meet up with

296. *Id.* ¶ 31.

297. Affidavit of TC, Aug. 5, 2020 ¶ 40.

298. Affidavit of IS, May 26, 2020 ¶ 5.

299. Factum of IS, May 28, 2020 ¶ 1.

300. *Id.* ¶ 14.

301. *Id.* ¶¶ 18, 73.

302. Affidavit of SEG, July 29, 2020 ¶ 38, which was deemed admissible.

303. Affidavit of BT, Aug. 4, 2020. BT is another mom with children who are in the same school system as JS, who witnessed the pool incident between IS and JS.

304. *Id.* ¶ 35.

305. *Id.*

his father when IS was available, sometimes in a matter of minutes."[306] Again, these are not the actions of one actively engaging in PA.

One word was also central to the first decision. The mother had used the word "kidnap" when referring to the father's access and TC's right to exercise supports if the access was not carried out appropriately.[307] Later, when JS's father attempted to take him from JP's home—which ultimately necessitated police involvement—the mother used the word "kidnapping" because all parties, including the police, were using the term.[308] The court was very unforgiving of the use of this term and stated that the father's actions "did not amount to an attempt to kidnap [him]."[309] When the child also used the word "kidnap," the court concluded that there were indicia that the "mother [was] communicating to [him] about adult issues" even though multiple parties were using the term.[310] The court concluded that the son's use of the word was "well out of proportion to actual events" and evidence of alienation.[311] The court said that the son reflected what "his mother had said to him, by way of blaming his father for current events and thereby involving JS in adult conflict."[312] Word choice seemed to put in motion a finding that was critical of the mother and led to TC's separation from the child. Again, word choice does not necessarily equal PA, and it seems that the system (which should be trauma-informed) put the child in a position where he felt he needed to defend his mother.

F. Costs

In September 2020, the father sought costs for the June 29 motion, the urgency determination, and the two case conferences before the motion.[313] Unbelievably, the same justice who eventually found that the mother had been correct in their mental health diagnosis and would refer to the mother as insightful (which was fully confirmed by doctors), found that the father was "clearly the successful party" on these matters and ordered $19,500 in costs on a partial indemnity basis.[314] Although the mother proved an inability to work beginning in May 2019, the court found that TC had some income and was "not impecunious."[315]

Using TC's training as a sword, the court found that the mother was "well educated and should be well positioned to obtain employment given her qualifications and work history" and if TC was unsuccessful, they may apply to the Ontario Disability Support Plan and Legal Aid Ontario.[316] Justice Mackinnon

306. *Id.* ¶ 36.
307. IS v. TC, June 29, 2020 ¶ 21.
308. *Id.* ¶¶ 85–86.
309. *Id.* ¶ 86.
310. *Id.* ¶ 145.
311. *Id.* ¶ 155.
312. *Id.* ¶ 115.
313. IS v. TC, Sept. 10, 2020.
314. *Id.* ¶¶ 1–3.
315. *Id.* ¶ 12.
316. *Id.* ¶ 14.

concluded that neither party made a formal settlement offer, but the court found that the father made attempts to settle by "correspondence," that the mother was "intransigent," and that TC's conduct was "unreasonable" as TC failed to make timely disclosures and had involved the child in the "conflict between parents."[317] Although the mother asked that the court take into consideration TC's proven mental health issues in assessing delay, the court found that this would "not make the behavio[]r any less unreasonable."[318] This is gaslighting and a failure to apply a trauma-informed perspective at its worst. There seems to be little attention given to the child's safety, let alone the child's best interests.

G. Institutional Gaslighting

I have written in the past about the "institutional gaslighting" that occurs in our system as victims come forward and share their lived experiences of CC and IPV.[319] When they do, their children are removed from their care, and evidentiary and procedural rules are set aside. This happened to TC. We tell women to call crisis lines when they need help but have seen the tragic consequences when they do. TC called a crisis line during the COVID-19 pandemic when their usual supports were not readily available.[320] TC did not give their name or address because they wanted to stay anonymous. TC was pressured to provide information, and when they refused, the worker called the police. The police broke down their door, resulting in the eventual involvement of CAS, even though the child was not present at that time. We are gaslighting individuals by punishing them when they ask for help—taking away their children and disregarding legislation and the best interests of the child.

The system is failing so many. A human being who asks for assistance and discusses their culture is characterized as crazy, hypervigilant, hysterical, and suicidal. The system accused TC of having mental disorders that they had never been diagnosed with and used this to show they were a bad mom. TC, upset at the assertion of an untrue diagnosis of BPD, was characterized as being unhinged and untrustworthy at each turn. I challenge anyone who finds themselves in that situation to remain wholly compliant and untraumatized.

The arguably manipulative husband may have called a similar hotline in the past, and no one questioned his ability to be a parent. Alienation was not initially mentioned in IS's court materials. However, as it became apparent that the term could be used against the mother, casting doubt on the credibility of TC's statements (and those of the child, allegedly influenced by coaching), it was swiftly added to the court file. Nothing in the record from the father was ever deemed inadmissible. The treatment of TC when she was apprehended for being

317. *Id.* ¶ 24.

318. *Id.* ¶ 25. These parenting issues were not significantly changed by the endorsement of *IS v. TC,* Nov. 4, 2020.

319. *See* Frances Chapman, *At the Intersection of Discrediting, Degradation & Denigration: Coercive Control, Parental Alienation, and Institutional Gaslighting*, 44 WOMEN'S RTS. L. REP. 52 (2023).

320. Affidavit of TC, May 19, 2020 ¶ 25.

"suicidal" is nothing less than shameful. Instead of helping someone who reached out to the system, the system acted in the same way as it had with the apprehension of Indigenous children. The system ignored culture and the pleas of a human being who was suffering from IPV and denied them fundamental human rights. The court ignored the requests for adjournment and delayed disclosure to a mother who was having difficulty functioning, let alone acting as their own lawyer at times, in this very complex family law matter when the child was removed. However, the court did not comment on IS's delays in disclosure or his undisclosed psychological reports.

It is worth noting that TC's legal training was held against them. TC explains in painfully honest terms that "people perceive me as being 'intelligent' and 'capable' and in this instance, I just could not meet all the expectations being placed on me, which was traumatizing since the issue of the court case was the most important topic in the world to me: the wellbeing of my child. This entire experience has made me feel like a failure in all possible ways."[321] A trauma or violence-informed decision from a decolonial lens indicates that the mother was right from the outset; the documents show that TC was labeled as an "aggressive, unreasonable, manipulative, mentally ill woman, who lacks credibility and truthfulness."[322] Couple this with the fact that the judge allowed breaches of the rules of evidence, limited the evidence presented, and denied hearing from or seeing the parties involved, and it is easy to conclude that the system is broken. It is thus understandable that TC considered appealing the ruling, but even the ability to appeal was unobtainable.

TC explained that they wanted to appeal the June 29, 2020 decision but could not find a lawyer to take on their case (nor did they have the emotional, economic, or psychological ability).[323] Thinking of their child, TC said that "it would have taken needed financial and emotional resources away from my son, both for myself and his father and it . . . would not have provided any immediate, or even short-term, benefits for JS."[324] Appealing any judgment has so many built-in methods of dissuasion evident to TC as a lawyer. Combined with the struggles inherent in living through the pandemic and the lack of capacity to continue fighting, this option was not practically available to this mother.

Even throughout this affair, TC maintained that their son "deserves a healthy and good relationship with both of his parents, and [they] will commit to doing whatever is needed to ensure he has this opportunity."[325] These do not sound like the words of someone bent on keeping their son from his father. Further litigation will likely proceed shortly in this case.

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321. Affidavit of TC, Aug. 5, 2020 ¶¶ 50–51.

322. *Id.* ¶ 14. Even when the mother is trying to state that she wants there to be a safe relationship between JS and his father, TC is criticized for the way she expresses this. Even though she says that "I am happy to hear that they are getting along better than they were" she is criticized for saying that "I would not be surprised that JS has quickly figured out how to manage the situation, since he is a very bright child for his age." *See* Affidavit of TC, Aug. 5, 2020 ¶¶ 73–74.

323. Affidavit of TC, Aug. 5, 2020 ¶ 127.

324. *Id.*¶ 127.

325. *Id.* ¶ 149.

VI. WHAT CAN BE DONE TO ASSURE MORE WOMEN ARE NOT EXPERIENCING INSTITUTIONAL GASLIGHTING?

Preventing these injustices seems like a monumental task. Theorists call for "access to specially trained child custody evaluators with expertise in domestic violence, supervised access centers, and treatment resources for individual family members (including perpetrators, victims, and children)."[326] Education and training must be available for judges, lawyers, and court workers to assist the court in recognizing CC and IPV; this would also equip these stakeholders with a functional knowledge of the services available to help individual families.[327] Family lawyers need specialized training, and they also need to be knowledgeable about criminal law matters like DV. Education on the needs of those who have experienced DV is vital.[328] Both judges and lawyers need "current knowledge of social context, including the lived reality of women . . . together with up-to-date knowledge about equality principles applicable to family law," and it should be a serious and ongoing part of judicial education.[329]

Even where there is access to evaluators, research has found that these experts frequently "(1) fail to document and understand the nature and risk of coercively controlling violence; (2) question the credibility of mothers by presenting them as having made false or inflated allegations of abuse; (3) label victims 'unfriendly' or 'alienating' parents; [and] (4) de-contextualise trauma symptoms in victims from domestic violence."[330] These professionals need training on how to work along with lawyers, not see them as a bothersome impediment to their work.

Family lawyer Whitney Smith wrote a piece to serve as a warning. She argues that lawyers play a part in the safety of their clients.[331] Domestic violence cases are multi-faceted, including when or if a client decides to disclose that they have been subjected to family violence. There are also "secondary issues such as trauma, cultural factors[,] and mental-health . . . that compound the complexity of these matters."[332] "While lawyers are not expected to be social workers or mental-health professionals, these cases require particular sensitivity and training to ensure cases are appropriately screened at the outset to determine the appropriate course of action and to ensure that the necessary safeguards are in place."[333] Many lawyers fail to ask the appropriate questions, and the evidence shows that there are lawyers who fail to talk about DV because they would rather not know. Smith notes that lawyers often miss details and rely on clients to share

326. Jaffe, Crooks & Bala*, supra* note 54, at 184.

327. *Id.* at 170, 184. The authors use the image of a freeway and an off-ramp for those high-conflict cases who need specialized intervention. *Figure 2* (illustration), *supra* at 180.

328. Martinson & Jackson, *Equality Guardians*, *supra* note 122, at 41, 43.

329. *Id.*

330. Jeffries*, supra* note 53, at 9.

331. Whitney Smith, *Changes Needed for Mandatory Domestic Violence Screening by Family Lawyers*, CAN. LAW. (20 May 2019).

332. *Id.*

333. *Id.*

that they have experienced violence in preliminary interviews, and "allow [their] personal biases (whether consciously or unconsciously) to assess risk and fail to establish the trust and confidence necessary for . . . clients to feel safe in confiding in us. Even where domestic violence is identified, [they] may miss the often-subtle warning signs that there is an imminent threat to our client's safety or fail to address the matter strategically and in a way that minimizes the risk of harm."[334] The risk of harm in "typical" family law matters is already great.

If, in Canada, we are required to undergo DV screening as part of our qualification to be mediators or arbitrators (and to screen for power imbalances in the system), why are we not doing this for all legal professionals in the justice system? Do we need to do more when this involves the realm of litigation? Screening tools are now available to all lawyers, but we know that some family law lawyers are still not using those tools.[335] Practitioner Katherine Batycky, a family lawyer from Burlington, Ontario, argues that all lawyers need to know how to screen for DV so that it can be identified and assistance can be provided.[336] She notes that it is imperative to identify abuse so that lawyers can take "steps to address the abuse and protect the fairness of the process. That way, [they] will be in a better position to know if there are any immediate safety concerns and [to] discuss and plan a process with the client including, if necessary, making any referrals for services to assist the client." [337] Whatever tool is used, it should be used in a trauma-informed way, and lawyers should be able to put concrete steps in place.

The Divorce Act requires lawyers to attempt to resolve family disputes through the mediation/arbitration process unless clearly inappropriate.[338] Similarly, with PA and DV, lawyers cannot know the appropriate path to take if they do not know the true history of the relationship. In other child welfare

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334. *Id.*

335. A wonderful tool was released in 2021 called "HELP Toolkit: Identifying and Responding to Family Violence for Family Law Legal Advisers." DEP'T JUST., CAN., HELP TOOLKIT: IDENTIFYING AND RESPONDING TO FAMILY VIOLENCE FOR FAMILY LAW LEGAL ADVISERS (2021), www.justice.gc.ca/eng/fl-df/help-aide/docs/help-toolkit.pdf [https://perma.cc/SM6X-EBMK]. This is a very thorough resource guiding lawyers through all kinds of scenarios. My fear is that at 119 pages, many lawyers may not review this tool.

336. Katherine Batycky, *Family Violence: What the Amendments in Bill C-78 Teach Us*, CAN. BAR ASS'N (Apr. 21, 2020) (internal citations omitted), https://www.cba.org/Sections/Family-Law/Articles/2020/Family-violence [https://perma.cc/NY8T-DHK6].

337. *Id.* Batycky notes that the "'MASIC-4'"…is a detailed screening tool that will assist in assessing whether any domestic violence does exist within the family. It is one tool that exists and does provide an in-depth story of the client's life that will help in understanding the needs of the specific client." *Id.*

338. Deanne Sowter, *If It Wasn't Required Before, It Is Now: All Family Lawyers Must Screen for Family Violence* SLAW, Nov. 2nd, 2021, https://www.slaw.ca/2021/11/02/if-it-wasnt-required-before-it-is-now-all-family-lawyers-must-screen-for-family-violence [https://perma.cc/622V-HUF9] [hereinafter Sowter*, Required*]. The *Divorce Act,* Revised Version dictates under § 7.8(2)(a) that lawyers must encourage with the attempt to resolve through the family dispute resolution process. This provision is "to encourage the person to attempt to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so."

sectors, research has shown that in "one study of the efficacy of FV screening . . . practitioners saw a 300% increase in the number of abused women identified during the intake process with the introduction of FV screening questions."[339] It is worth noting that many may be reluctant to disclose unless they are asked directly about family violence.[340] Lawyers need to be responsible for "unmasking violence."[341]

Zaccour goes even further, suggesting that lawyers should consider DV at the outset of all cases.[342] If there is a presumption that DV could be involved, she says safety concerns "should always be at the forefront, whether or not it is alleged. Courts facing cases of alleged parental alienation should know that even if there is no trace of it in the file, domestic violence can still be present. They cannot rule out domestic violence simply because the mother has not mentioned it or because it is not otherwise apparent."[343] Zaccour argues that when courts look to the "alienating behaviors" alleged by one party, they should first ask whether the offending behavior could be explained by DV and whether it is consistent with a mother's "attempt to protect herself and her child. Even when domestic violence cannot be confirmed despite active screening, legal professionals might still want to pause to consider what their practices and the rules they apply would mean if the mother and child were victims of undisclosed violence."[344] For the current system to function properly, DV needs to be alleged, identified, and resolved; this is not the current reality and "the legal community cannot assume that domestic violence will simply sort itself out. A conscious effort must be made to develop legal rules that are sensitive to that (potentially

339. Cross, *Hurt You*, *supra* note 22, at 26.

340. *Id.*

341. Deanne Sowter, *Lawyering in a Family Justice System That Masks Violence* SLAW, Mar. 4th, 2022, http://www.slaw.ca/2022/03/04/lawyering-in-a-family-justice-system-that-masks-violence [perma.cc/VG8T-PZNJ] Sowter asks pivotal questions lawyers should consider including:

- Should a lawyer who represents a client accused of family violence be prohibited from counterclaiming or implying parental alienation?
- Should lawyers be prohibited from making arguments based on myths and stereotypes about family violence?
- Prohibit lawyers from suggesting the violence has been exaggerated?
- Prohibit lawyers from suggesting that violence during the relationship is not relevant to parenting?
- Prohibit lawyers from suggesting claims of family violence indicate the survivor is not reasonable?
- Should lawyers be required to consider and respond to the survivor's safety concerns in managing their client's file?
- Should lawyers be required to connect their clients to community supports who have expertise in family violence?

This, of course, assumes that one can afford to retain a family law lawyer.

342. Zaccour, *Disappear*, *supra* note 116 at 354–55.

343. *Id.*

344. *Id.* at 355.

hidden) context."[345] Lawyers must be proactive, ask uncomfortable questions, and insist on procedural and trauma-informed fairness.

VII. WHAT CAN BE DONE TO ASSURE A PRINCIPLED APPROACH TO PARENTAL ALIENATION IN THE COURTS?

> [F]or some, an accusation of alienation is a weapon of choice for violent fathers who want to blame the mother and direct the court's attention away from their violence. For others, parental alienation is a useful concept in itself, and domestic violence is merely a special case—a reason not to apply, or perhaps to apply differently, the parental alienation framework.[346]

Can there be a middle ground between the extremes that have plagued the discussion of PA for decades? The ability for PA to legitimately affect a child is based largely on the premise that the more time the child spends with the alienating parent, the more a child can be alienated. As such, it is proposed that the child be removed from the care of the alienating parent as soon as possible to limit the opportunity for the alienating parent to succeed. This may be an option, but its current application is not working. Many theorists have discussed frustration with this process. Nick Child and Philip Marcus note that there is "widespread dismay at the slow ineffectual way family law systems often mishandle PA."[347] We need to be sensitive to the needs of those being screened. If we impose this on family lawyers without training, we run the risk of alienating those who we are aiming to assist.[348]

Bill C-233 received Royal Assent in April 2023, changing the section of the Judges Act that dictates that the Canadian Judicial Council may "establish seminars for the continuing education of judges, including seminars on matters related to sexual assault law, intimate partner violence, coercive control in intimate partner and family relationships and social context, which includes systemic racism and systemic discrimination" and that a report must be submitted

345. *Id.*

346. *Id.* at 321.

347. Nick Child & Philip Marcus, *The PASG Prevention Project: A Preliminary Report*, PASG (2020).

348. A program in Georgia was found to be ineffective because the women being screened were fearful of losing benefits if they disclosed abuse. *See* Soonok An & Ga-Young Choi, *Is TANF Truly Accessible and Helpful? Victim's Experiences with Domestic Violence Screening Under the Family Violence Option* 34 J. WOMEN & SOC. WORK 461, 465 (2019) (noting that women who received a financial aid package "might be forced to give up their government assistance or the safety of their children and themselves in order to comply" with the requirements of the program); *see also id.* at 465, 468 (noting that others did not take the assistance because the process was "(i) impersonal and (ii) insensitive to the needs of domestic violence victims regarding benefit access…[and] applicants perceived the process as highly authoritarian, uncomfortable, and/or rushed").

on the seminars.[349] It is still to be seen whether this will help the problem of judicial education and knowledge about IPV.[350]

As Barbara Jo Fidler and Nicholas Bala have commented, the legal system must stop making matters worse by being "arsonists rather than firefighters."[351] Specialized training and courts are needed. Fidler and Bala note that:

> [W]hile some jurisdictions are moving in the direction of specialized family courts and ensuring that judges in these courts have appropriate knowledge, temperament and skill to deal with family cases involving high conflict, in many courts judges lack adequate training and background to effectively address [parent-child contact problem] cases. This risks causing harm to children, and in some cases endangering the safety and lives of children and parents.[352]

This deep understanding of the issues around IPV includes providing loophole-free specific orders to prevent unnecessary litigation. Additional time and resources must be provided in cases where PA complicates matters. A reversal of custody must be an absolute last resort. Others have suggested that continuous case management with the same judge may be a possible solution and valuable where PA is a factor: as Fidler and Bala note, "one specialist family law judge for one family—is especially valuable for cases where alienation is alleged. Judicial continuity allows the judge to gain an appreciation of the complex nature of the case and to set clear expectations for the parents (and in some cases the children)."[353] "One judge" also assumes that the judge is also the *right* judge for that family. Although it may seem cliché, education and prevention of the "fire"[354] might be the best option that we have with judges who are privy to the issues. We also need judges to take responsibility for when they are wrong. It is troublesome to see a judge accuse a mother of not being insightful about their own mental illness when it is proven that they did not suffer from that mental illness. There should be judicial insight into how damaging it may be for victims to leave the system feeling further victimized by gaslighting perpetrated by the institutions they thought would protect them.

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349. *See* Judges Act, R.S.C. 1985, c J-1, s 60(2)(b).

350. Pamela Cross, *The Challenge of Judicial Education*, LUKE'S PLACE, (May 2, 2023) https://lukesplace.ca/the-challenge-of-judicial-education [perma.cc/5FRG-DK6F] (quoting Jennifer Kagan, whose 4-year-old daughter, Keira, was killed by an ex-spouse, "Keira's Law is an important step towards protecting women and children in situations of intimate partner violence. It's about time that the courts treated IPV with the seriousness that it deserves. Keira was failed by the court system. Had the judge on her case had education and training on domestic violence, it would have made a considerable difference for Keira. We hope that this piece of legislation will save the lives of other children.").

351. Fidler & Bala*, Parent-Child Contact Problems*, *supra* note 130, at 590.

352. *Id.* at 589.

353. Barbara Jo Fidler & Nicholas Bala, *Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums*, 48 FAM. CT. REV. 10, 28 (2010).

354. Fidler & Bala*, supra* note 130, at 590.

VIII. IS A MEDIATION MODEL THE ANSWER?

There is no Canadian universal standard for screening for DV by family law lawyers.[355] A woman may choose not to disclose abuse to her lawyer because of fear of reprisal from ex-partners, shame, denial, not recognizing how important it may be to her family matter, or the fact that she may "still care about her partner or be afraid that disclosing abuse will lead to the involvement of child protection authorities."[356] This is particularly true for racialized and marginalized women. While screening for family violence is more automatic in mediation,[357] there have been calls to make all provincial and territorial law societies adopt universal screening and for family law practitioners to have training on how to administer and follow up with clients.[358]

Screening is but one piece of the puzzle. Lawyers need guidance on what to do when they do find that DV is involved and instructions on how to continue to screen throughout the life of the matter.[359] Because a lawyer is engaged on only one side of a file, we have less insight than mediators, for example, who might know more about the complete file. One must not conclude that family violence is too complicated or messy and continue not to screen at all. As Sowter has noted, "[i]magine the courage it takes for a survivor to seek counsel and try to leave an abusive relationship, only to have that lawyer fail to listen to their story, citing the failures of the family justice system as the reason."[360] Similarly, survivors should not be painted with myths and stereotypes that lead to unsafe outcomes. Sowter notes that there are three primary things a lawyer should do with this information: "try to create a safe process, a safe outcome, and [] try to stop the cycle of abuse."[361] I agree that the lawyers are just as much a product of our very broken system, but "they could make an enormous difference to a single client if they chose to do so."[362]

I do not think that PA should be wholly scrubbed from the family law system, but I do agree that we need to accurately define the term, assume DV until it can be screened out of a file, and "prioritize domestic violence concerns and to treat situations of intimate partner violence as paradigmatic rather than

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355. *See* Cross, *Hurt You*, *supra* note 22, at 5.

356. *Id.* at 13. Whether a client is in an abusive situation can be very important in the client's case. *Id.* at 16 (explaining that "[i]nformation collected using a screening tool can assist a FLP in many ways. S/he can identify safety concerns and refer the client to appropriate resources for safety planning. The lawyer can consider what abuse-specific legal options to present to the client and can implement a trauma-informed approach to working with the client. Knowing about abuse may affect what process the lawyer considers; in particular, whether it is mediation, other forms of dispute resolution, or litigation that is more appropriate.").

357. *Becoming an Accredited Family Mediator*, ONT. ASS'N OF FAM. MEDIATION, https://www.oafm.on.ca/family-mediation/becoming-an-accredited-family-mediator [https://perma.cc/5SNT-YKWW] (2021). The Ontario Association of Family Mediation requires a course in screening for domestic violence.

358. Cross*, Hurt You, supra* note 22, at 67.

359. Sowter*, Required*, *supra* note 338.

360. *Id.*

361. *Id.*

362. *Id.*

exceptional cases."[363] Zaccour is correct, saying that we "cannot think about parental alienation without considering domestic violence, and this applies even within theories in which a finding of domestic violence excludes a finding of parental alienation."[364] We need to find this label quickly and perhaps "triage" these cases for assessment by DV experts who may be able to help before years of protracted litigation and resulting litigation abuse.[365]

There are divergent opinions from legal and mental health practitioners on the role of mediation in cases that involve DV.[366] Some literature suggests that making mediation mandatory is harmful to women and becomes a "barrier to women's access to the courts."[367] Mediation should be a process that is voluntary and is a "matter of choice, informed by effective legal representation and an understanding of the disadvantages and advantages in their particular circumstances."[368] Some provincial acts, like the Family Law Act in British Columbia, require dispute resolution professionals to assess for DV.[369] The key is that this must be an ongoing process of discussion about family violence. This should not be a one-time checklist that everyone moves on from once completed. That disclosure must come from a relationship "of trust and a willingness to keep asking questions throughout the course of the file."[370] In one particular study, only 59.3% of participants said that they were asked about family violence, and 44% were advised by their lawyer not to bring up family violence in the court process.[371] It is possible that a more robust screening procedure will find more incidents of DV by both men and women and could backfire like PA backfired against women. Perhaps a federal screening mandate is required to curtail DV, but this also runs the risk of making women not seek help.[372] There is always the

363. Zaccour, *Disappear*, *supra* note 116, at 356.

364. *Id.* at 357.

365. *Id.* at 320.

366. Martinson & Jackson, *Equality Guardians*, *supra* note 122, at 39.

367. *Id.*

368. *Id.*

369. Zara Suleman, Haley Hrymak & Kim Hawkins*, Are We Ready to Change? A Lawyer's Guide to Keeping Women and Children Safe in BC's Family Law System* RISE WOMEN'S LEGAL CENTRE, 16, (2021) [hereinafter Suleman, Hrymak & Hawkins].

370. *Id.* The authors go on to note that clients may not immediately disclose at the initial stages of the file, "because a client's level of risk and safety may change over the course of the file. A full assessment of family violence and the client's safety will only be possible if a client has the security and ability to share their lived experiences and have the assurance that they will be 'seen' by their lawyers." Even with provincial legislation in BC, many survivors say that their lawyer did not ask about their safety and many women chose not to disclose to their lawyer. *Id. See also* NEILSON, EMPIRICAL ANALYSIS, *supra* note 34, at 22 (noting that you cannot "diagnose" PA with a generic checklist.).

371. Suleman, Hrymak & Hawkins*, supra* note 369, at 17. Participants in the study indicated that lawyers told them not to disclose DV in court because, "judges don't like it;" "it wasn't important, [] my ex would use it to get custody of my son, [] it wasn't severe;" and "it could be used against me."

372. *Id. See also Tools, guidance, and promising practices to help you prevent and respond to family violence*, GOV'T OF CAN. (Sept. 10, 2020), https://www.canada.ca/en/public-

possibility that women will go underground because they fear their children's removal if they allege DV, and PA is the response.

Mediation is not wholly inappropriate in DV cases. An Italian study found that many women conceal DV but that it is involved in (perhaps) the majority of mediation cases.[373] Studies in the US have shown that DV exists in more than "two third [sic] of family mediation cases imposed by a judge. Other studies reveal that 40-80% of family mediation cases involve domestic violence."[374] However, mediation can be dangerous in DV cases. The "shared responsibility model" that underlies mediation may blame victims for the violence imposed on them.[375] There are many reasons not to use mediation where there is DV. Mariachiar Feresin et al. note that mediation requires equality of the parties; it violates a woman's human rights, forcing "women to be present in a room and to negotiate with their perpetrators . . . Indeed, psychological abuse is likely to occur during the mediation sessions. In the same vein, the patterns of power and control may continue during mediation, causing survivors to be less able to negotiate for safe and satisfactory custody arrangements and financial settlements."[376] These victims could be greatly disadvantaged in the mediation, but even more damaging is that "concealment of past violence and the perpetration of violence during mediation cause[s] survivors to be less able to negotiate for safe and satisfactory custody arrangements."[377] Hiding the reality is not assisting victims in keeping their children safe. Having lawyers who can deal with that reality is fundamental to the victim's success.

The way that we train lawyers may also be a problem. Researchers have identified that:

> [L]awyers are not trained to listen or to create safe spaces for listening. Lawyers are trained to spot issues and to disregard evidence that is not 'relevant' to the issues they expect to resolve. If lawyers do not have a fulsome understanding of family violence, they may not look beyond their own limitations of knowledge and training.[378]

We should be training lawyers to listen. We should be training lawyers to go beyond spotting the issues. As educators, we are responsible for ensuring that lawyers are exposed to these issues, CC behavior, and trauma-informed practice. Jennifer Koshan testified before the Standing Committee on Justice and Human Rights that the passing of legislation is not the end goal, but rather a statute

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health/services/health-promotion/stop-family-violence/tools-guidance-promising-practices-help-you-prevent-respond-family-violence.html [https://perma.cc/A8WJ-BFTS] (providing some resources for lawyers; it has not been updated since Sept 10, 2020 at the time of writing). The government has provided resources to assist lawyers in helping their clients, but many women may be afraid to seek help from a lawyer and do not wish to disclose DV.

373. Mariachiara Feresin et al., *Family Mediation in Child Custody Cases and the Concealment of Domestic Violence*, 33 J. WOMEN & SOC. WORK 509, 513–16 (2018).

374. *Id.* at 512.

375. *Id.*

376. *Id.* (citations omitted).

377. *Id.* at 519.

378. Suleman, Hrymak & Hawkins, *supra* note 369 at 17.

accompanied by "specific police and Crown policies, along with training not just for police and Crowns but for judges and lawyers more broadly."[379] She advocates for education because, as argued in this paper, if lawyers do not screen, "and if their client has been subject to CC, that can completely affect the way the family law matter unfolds. [She] think[s] there needs to be—even starting in law schools—education around coercive control."[380]

Our knowledge of IPV and PA continues evolving, so lawyers must evolve as well. Many have argued that we cannot talk about training without having accountability. We need a national action plan for survivors and by stakeholders. This raises tough questions around a system that needs to "'unlearn' and dismantle their own structures and environments, and raises further questions around whether the justice and legal systems are the most appropriate systems to lead the advancement of the coercive control model."[381] A multi-discipline program in Winnipeg, Manitoba is showing some promise after a one-year pilot program.[382] Three workers from Manitoba Justice Victim Services of the Winnipeg Police Service "collaboratively determine the most appropriate outreach for families who call police for domestic incidents in non-criminal cases."[383] This program makes sure that callers get a "meaningful response" within a few hours, and that they can contact the police and Victim Services at the same time.[384]

We must use screening to make the right decisions for abused women and children. Linda Neilson notes that if judges are without "specialized knowledge" on DV, there will be "mistaken assumptions about parenting and child safety [leading to]…erroneous conclusions."[385] Judges may indeed need expert assistance so that they can determine normal reactions to DV.[386] Another suggestion is to have a CC and abuse commissioner in Canada to "provide public leadership [to legislators] on abuse issues and play a key role in overseeing and

379. *Evidence Number 018: Hearing Before the Standing Comm. on Just. & Hum. Rts.*, 43rd Parliament 3 (2021) (statement of Jennifer Koshan, Professor, Faculty of Law, University of Calgary) [hereinafter *Testimony on Coercive Control,* 2021].

380. *Id.* at 9. I began teaching a course called "Family Violence" at Lakehead University in the Winter of 2023 (and am set to teach it again in Fall of 2023). This course approaches family violence in a multi-perspective manner (torts, family law, criminal law, contracts, etc.), and teaches students what they need to know to identify the signs of violence in the clients they see every day, without the typical siloed approach to law. I firmly believe that this may save lives.

381. Lianne Lee, Lana Wells, Shawna M. Gray & Elena Esina, *Building a Case for Using "Coercive Control" in Alberta: Discussion Paper*, SHIFT: THE PROJECT TO END DOMESTIC VIOLENCE (Univ. of Calgary, Calgary, Alta) Sept. 2020, at 23.

382. *See* Terry Davidson, *Winnipeg Intervention Program Court De-Escalate Intimate Partner Violence: Expert* LAW360 CAN. (June 15, 2023, 12:02 PM) https://www.law360.com/ca/articles/1762454 [https://perma.cc/B5U3-YLTU].

383. *Id.*

384. *Id.*

385. Linda C. Neilson, *At Cliff's Edge: Judicial Dispute Resolution in Domestic Violence Cases* 52 Family Court Review 529, 542 (2014) [hereinafter Neilson, *Cliff's Edge*].

386. *Id.* at 553 n. 47.

monitoring the provision of abuse responses with a focus on coercive control."[387] We must widely recognize that CC is not a discrete incident but systematic control and patterns of behavior over time. Judges who are uneducated about this perpetuate a "judicial failure to protect."[388]

Finally, Joyanna Silberg and Stephanie Dallam have suggested eliminating the concept of the friendly parent when there is DV.[389] "All evidence admitted in custody and parenting adjudications should be subject to evidentiary admissibility standards and courts must reject pseudoscientific concepts that pathologize parents seeking to protect children such as Parental Alienation Syndrome, and other simplistic theories of parental alienation that rely on this unvalidated construct."[390] It is only with the recognition that many of these concepts, like the friendly parent and the use of maximum contact, are harmful to victims and their children.

IX. CONCLUSION

At the very least, we should have an educated look at the family situation before we remove children from loving parents. Some suggest that a neutral party be appointed in high-conflict divorce cases who would do a comprehensive evaluation for family violence and PA, including interviews with all primary parties.[391] We must implement some sort of mandatory screening to make the right decisions for abused women and children. Neilson notes that judges and mediators are not mental health practitioners, but they can ask the right questions and reveal meaningful patterns to elucidate cases of CC that might impact the process.[392]

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387. *Testimony on Coercive Control*, *supra* note 379, at 3, (statement of Andrea Silverstone, Executive Director, Sagesse Domestic Violence Prevention Soc'y).

388. Christine Harrison, *Implacably Hostile or Appropriately Protective? Women Managing Child Contact in the Context of Domestic Violence* 14 VIOLENCE AGAINST WOMEN 381, 386 (2008).

389. Silberg & Dallam, *supra* note 81, at 164.

390. *Id.*

391. Pearl Berman & Ethan Weisinger, *Parental Alienation vs Coercive Control: Controversial Issues and Current Research* 19 J. FAM. TRAUMA, CHILD CUSTODY & CHILD DEV. 214, 222 (2022).

392. Neilson, *Cliff's Edge*, *supra* note 385, at 540.

> Does the screening process reveal a pattern of demeaning or coercive abuse and violence, or an incident of severe violence or intimidation? Alternatively, does the screening process indicate isolated, minor violence (such as uncharacteristic pushing and shoving with no physical or emotional injury) that is not repeated and that is not connected to intimidation, coercion and control of either party? Does the screening process reveal equality in decision-making, or does it indicate coercion or an imbalance in power between the parties? If both parties engaged in isolated, minor and non-repeated violence on a reasonably equal footing; if there is no physical or emotional injury; if there is no associated coercive emotional abuse on the part of either party; if neither party fears or is intimidated by the other; if the history of the relationship indicates a pattern of equal participation in conflict resolution without intimidation, domination, manipulation, denigration, coercion or control by the other; if there is evidence of a pattern of independent

Without the specialized knowledge of judges and lawyers, there will be inaccurate assumptions made about the safety of children and inaccurate (and unjust) findings of PA. If judges do not have training, they may find cases inappropriate for judicial dispute resolution, whereas "judges with higher levels of specialization and expertise may decide to engage in JDR in more complex domestic violence cases . . . while helping to guide the parties and the process toward an equitable, safe resolution."[393]

There are no easy answers to these issues. Drozd and Olesen comment that "[m]ultivariate problems call for multivariate solutions," and the basis of a child refusing contact needs to be examined for the family to heal.[394] If abuse is present, safety considerations must be paramount and should be explored first.[395] Judges, lawyers, and court workers need to be trained in trauma, CC, the effects of those on witnesses and testimony, and the ways a survivor may react.[396] However, education may not be the answer to all our problems.

Epstein and Goodman have cautioned for decades that "[t]raining must be accompanied by a genuine commitment to absorbing new and sometimes complex understandings about the world."[397] They go on to note how long this might take to change because of the "cultural assumption that women tend to be improperly motivated by an outsized concern for financial, material, or child custodial gain—and the related assumption that women simply lack full capacity as truthtellers—are longstanding and deeply held."[398] Lawyers need to listen.[399] Perhaps this is something that we can teach our students to help them in all aspects of their careers. It would make a huge difference if victims were listened to and not subjected to gaslighting by the system. Particularly where a client may have intersectional vulnerabilities, we need to be more understanding and not fall into stereotypical tropes like those of the "bad mother."

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action and decision-making, it may be reasonable to suppose, in the absence of recent abuse or violence or indicators of continuing fear or psychological harm, that each party will be able to present his or her own views and interests in a carefully constructed settlement process although caution is still advisable. *Id.*

393. *Id.*

394. Drozd & Olesen, *Real*, *supra* note 42, at 263.

395. *Id.*

396. *Cross*, Hurt You *supra* note 22, at 26 (noting that there "is some literature on FV screening practices among law practitioners. A common research finding is that family law lawyers (as well as other legal personnel) do not tend to be knowledgeable about FV. This lack of awareness may result in women's experiences of FV being ignored in family law cases. This, in turn, can have negative effects for women and their children in determining custody, relocation, parenting time, distribution of assets, whether or not to participate in mediation or other forms of alternative dispute resolution, and the type of parent education that is needed.").

397. Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing their Experiences* 167 U. Pa. L. Rev. 399, 454 (2019) [hereinafter Epstein & Goodman].

398. *Id.*

399. I really like the concept developed by Jose Medina of "virtuous listening." *See* Epstein & Goodman, *supra* note 398, at 455 (citing JOSE MEDINA, *Varieties of Hermeneutical Injustice* in ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE (Ian James Kidd et al. eds. 2017).

The Canadian mental health system is starting to acknowledge systematic inequalities. The Mental Health Commission of Canada recently recognized that:

> Profound and unacceptable inequities in access and mental health outcomes persist in Canada. Closing these gaps requires that we recognize the mental health system's history of discrimination and human rights violations, along with the intersecting and systemic social, cultural, and economic factors that impact the mental health of individuals and communities.[400]

Our court system needs to do the same by considering these human rights inequalities rather than just ignoring and dismissing them.

We also need to cease questioning the timing of abuse disclosures. It is difficult to believe, but judges are still questioning the timing of DV disclosures during custody matters. Then-Chief Justice McLachlin recognized over 20 years ago that the timing of disclosure should not lead to an adverse inference against someone who is subjected to abuse. She stated that trial judges:

> [S]hould recognize and so instruct a jury that there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.[401]

Though we have long known this truth, timing continues to be used today to discredit victims in many family matters. We need to stop women from being considered "imperfect victims" when they do not behave exactly as we expect or need.[402] This has been part of the legal mosaic for over twenty years, so when will we start to believe victims?

The family law system in Canada is far from perfect. Some judges and lawyers use PA as a weapon against women. Women are not being believed regarding something as fundamental as their own mental disorder diagnoses (or

400. MENTAL HEALTH COMM'N OF CAN., *Toward an Integrated and Comprehensive Equity Framework for Mental Health Policy and Programming: Needs Assessment Report* 1 (2023) https://mentalhealthcommission.ca/wp-content/uploads/2023/06/Toward-an-Integrated-and-Comprehensive-Equity-Framework-for-Mental-Health-Policy-and-Programming.pdf [https://perma.cc/CG9C-UU88].

401. R v. DD, [2000] 2 S.C.R 275 (Can.).

402. LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM (2023).

lack thereof). It is true that there are improper uses of PA and DV,[403] but we must stop allowing the exceptions to be the rule. The system cannot be another tool of the abuser. First, do no harm. This medical phrase should be added to our Barristers and Solicitors oath as we are currently doing so much harm to so many, including to the most vulnerable amongst us.

403. Harman & Lorandos, *supra* note 81, at 206, also note that they are "optimistic, based on the data reported here, that the decision-makers can discern when children are at risk for family violence in the many forms it takes, including PA, and are implementing strategies to protect the best interests of children."

DISPELLING THE RFRA SHIBBOLETH: AFFIRMING RELIGIOUS FREEDOM AND EXPRESSIVE RIGHTS

*James deBoer**

ABSTRACT

Is the Constitution big enough to guarantee the rights of small or less popular religions as well as of employees, tenants, and other dependents of religious exemption claimants?

This paper will demonstrate how federal First Amendment jurisprudence has created the paradox of a zero-sum game between these two relatively marginalized and powerless groups. First, the history of free exercise cases and related legislation will show how—in this area of law as in many others—the social context of the claimants is critical in understanding the Court's attitudes and reasoning; Supreme Court decisions consistently responded to and shaped public opinion for better or worse. And, throughout the second half of the twentieth century, the Court persistently drew on implicitly Christian concepts to evaluate the religious claims of non-Christian litigants, also evincing a preference for Euro-white ethnocentrism over religionists of other backgrounds. In response to developments in Supreme Court interpretation, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA) and then the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which have served as the principal engines for free exercise claims in the intervening decades.

The Roberts Court has instituted several profound shifts in free exercise jurisprudence. Perhaps most importantly, it has been sharply circumscribing courts' roles in evaluating religious claims. Beginning with its own cases, the Court has articulated a basic ethos of religious freedom for all who seek it as the default. This all-comers orientation has been a welcome change for members of minority religions. But the consequences of a "no questions asked" religious exceptionalism may well be devastating for the employees and tenants of religious objectors.

This paper, therefore, proposes two insights for an alternative framework for assessing freedom of religion claims. First, returning to the concerns animating the watershed mid-twentieth century religious freedom cases, a claimant's religious minority status ought to have some bearing on the handling of their case; a religionist whose faith practices are well represented in and

familiar to Congress, courts, and society at large is in a constitutionally-cognizably different posture than, for instance, members of a small religious community that consists largely of racial minority non-citizens. Second, the right of free exercise stemming from the First Amendment must be interpreted in congruence with the entirety of the rights of conscience and expression guaranteed therein. Incorporating these insights could serve as a corrective for the accustomed privileging of religious claimants to the detriment of impacted third parties, such as employees.[1]

I. FREE EXERCISE HISTORY

A. The Crucible of the Second World War, and its Aftermath

The origins of modern free exercise jurisprudence can be traced to two school patriotism cases and the crucible of a nation grappling with fascism. On November 6, 1935, the Minersville, PA Board of Education adopted a regulation requiring all teachers and students to salute the American flag daily, upon which the Superintendent of the Minersville public schools immediately expelled three students for not having done so in the past,[2] including Lillian Gobitis, 12, and her brother William, 10.[3] The children and their family were practicing Jehovah's Witnesses, which at that time was considered a fringe religion.[4] The family sued on the basis that according to their religion, saluting the flag constituted obeisance to a power other than God, an impermissible idolatry.[5] Therefore, they argued that expulsion for refusal to salute the flag constituted an infringement of their freedom of religion as guaranteed by the First Amendment.[6]

Demonstrating a remarkable capacity for judicial empathy,[7] the trial judge acknowledged that, "it is not for this court to say that since the act has no

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* This article is dedicated to the late Judge Robert A. Katzmann.

** The writer is dually ordained in the United Church of Christ and the American Baptist Churches.

1. In this paper, the word "claimant(s)" refers to those seeking exemptions under the First Amendment, RFRA, or RLUIPA. (Free exercise litigants can be in the posture of either defendant or plaintiff, so "claimant" encompasses both.) Lower case "free exercise" will refer to any cases arising from free exercise claims, whether based on the United States Constitution, RFRA, RLUIPA, or state law. "Free Exercise" will be capitalized if the claim is based directly on the First Amendment.

2. Gobitis v. Minersville Sch. Dist., 24 F. Supp. 271, 272–73 (E.D. Pa. 1938), *overruled by* 310 U.S. 586 (1940).

3. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591 (1940).

4. *Cf.* Prince v. Massachusetts, 321 U.S. 158, 175–76 (1944) (Murphy, J., dissenting) ("Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes.").

5. *Gobitis*, 24 F. Supp. at 273.

6. *Id.* at 273–74.

7. *See, e.g.*, MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (Oxford Univ. Press 2010) (discussing how judges need to inhabit the worldviews of people whose experiences are unfamiliar to them in order to effectively promote equity and justice).

religious significance to us it can have no such significance to them."[8] In a nod to international and domestic developments, the court went on to observe:

> Our country's safety surely does not depend upon the totalitarian idea of forcing all citizens into one common mold of thinking and acting or requiring them to render a lip service of loyalty in a manner which conflicts with their sincere religious convictions. Such a doctrine seems to me utterly alien to the genius and spirit of our nation and destructive of that personal liberty of which our flag itself is the symbol.[9]

Precisely because the sought-for exemption was from a symbolic exercise, with no bearing on "public safety, health or morals or the property or personal rights of their fellow citizens," the court granted the exemption.[10] The Third Circuit upheld this ruling,[11] but the Supreme Court reversed in an 8-1 decision.[12]

The Court's holding turned the logic of the trial court on its head. Precisely because the objected-to rule *didn't* respond to everyday concerns but rather sought to inculcate a reverence for the Republic and foster a sense of national fellowship and identity, the school board decision should stand, and the exemptions should be denied:[13] "We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security."[14] In principle, the school board itself or the state legislature could create exemptions if it wanted to, but the Court must not intrude upon the democratic will of the people expressed in the legislature, especially where the Court did not perceive that Jehovah's Witnesses had been systematically excluded from participation in the political process.[15]

As Justice Stone presciently observed in dissent, the national unity forged by the outcome of *Gobitis* would be built upon the exclusion and vilification of Jehovah's Witnesses.[16] The intervening couple of years saw a marked uptick in persecutions, strengthened by the Court's imputation that failure to salute the

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8. *Gobitis*, 24 F. Supp. at 274.

9. *Id.*

10. *Id.* at 274.

11. Minersville Sch. Dist. v. Gobitis, 108 F.2d 683 (3d Cir. 1939) *aff'g* 24 F. Supp. 271 (E.D. Pa. 1938), *overruled by* 310 U.S. 586 (1940).

12. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *rev'g* 108 F.2d 683 (3d Cir. 1939) *and* 24 F. Supp. 271 (E.D. Pa. 1938); Ignatius M. Wilkinson, *Some Aspects of the Constitutional Guarantees of Civil Liberty*, 11 FORDHAM L. REV. 50, 57 (1942) (specifying the vote count).

13. *See Gobitis*, 310 U.S. at 595–96, 598–99.

14. *Id.* at 595. The Court declined to address the theological arguments advanced by the School Board, that the Witnesses were mistaken in their equation of flag-saluting with idolatry and in fact that the Bible compelled it. *Id.* at 598 ("The commandments of Jehovah, as set forth in the Bible, do not prohibit the saluting of a national flag but on the contrary approve of that practice.").

15. *See id.* at 599–600.

16. *Id.* at 606 (Stone, J., dissenting) ("This seems to me no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will." (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938))).

flag was unforgivably un-American.[17] But with the international confrontation against totalitarianism and increased awareness of how fascism relies upon thought control and stifling dissent, the Court, just three years later, reversed course in *Barnette*.[18]Justice Jackson's opinion for a 6 to 3 majority chronicled how ideologues purporting to achieve unity in the name of national, religious, or political projects are often tempted to "resort to an ever-increasing severity;" and in the end, "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters."[19] The Court ruled that schools could not require students who raise religious objections to recite the pledge of allegiance.

A case stemming from the 1950s demonstrates the inherent challenges in evaluating free exercise claims when the objected-to majoritarian cultural practice is based on religious principles. In *Braunfeld v. Brown*, the Court held that Jewish business owners were properly denied an exemption to the Sunday closing laws, even though the plaintiffs' religious observation of Saturday sabbaths put them at a comparative disadvantage.[20] Drawing heavily on its decision in *McGowan v. Maryland*,[21] a facial Establishment clause challenge to Blue Laws, the Court reasoned that Sunday closing laws had evolved from "wholly religious sanctions to legislation concerned with the establishment of a day of community tranquility, respite and recreation, a day when the atmosphere is one of calm and relaxation rather than one of commercialism."[22] The Court declined to acknowledge that such a designated day coinciding with the Christian Sabbath might fulfill a spiritual if not expressly dogmatic purpose, enshrining the religious and religious-derived sensibilities of the majority with no exception for minorities.[23]

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17. *See* Laura Krugman Ray, *Circumstance and Strategy: Jointly Authored Supreme Court Opinions*, 12 NEV. L.J. 727, 730 (2012) ("The aftermath of the decision, coming as Germany's military forces were sweeping across Europe and British troops were being evacuated from Dunkirk, was a sustained nationwide outbreak of violence directed at Jehovah's Witnesses, sometimes with the participation of law enforcement officers, that included beatings, shootings, a tar and feathering, and even a castration, together with a strongly hostile response to *Gobitis* from the press and the law review. Although President Roosevelt, hosting the Frankfurters at Hyde Park, expressed his support for the majority opinion, Eleanor Roosevelt found its treatment of school children disturbing."). *see also* Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 996–98 (1999). The *Barnette* Court may also have been motivated by the virulent attacks against Witnesses that surged after the *Minersville* decision. *Barnette* also cites free speech as an independent ground for its holding, but it is impossible to reconcile with *Minersville.* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

18. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943). The Court's decision even noted that the original objected-to regulation, enacted by the Board of Education in January of 1942, required a stiff-arm salute that was objected to for being "too much like Hitler's." *Id.* at 627–28.

19. *Id.* at 640–41.

20. Braunfeld v. Brown, 366 U.S. 599, 605–06 (1961).

21. McGowan v. Maryland, 366 U.S. 420 (1961).

22. *Braunfeld*, 366 U.S. at 602.

23. *Id.* at 609–10. The Court also noted that granting an exemption would potentially put the Jewish business owners at a competitive advantage over Sunday Sabbatarian business owners, who would then complain that *they* were the ones being discriminated against. *Id.*

These early cases set up some of the major themes that would recur throughout the course of religious exercise jurisprudence.[24]As seen in both *Braunfeld* and *Gobitis*, religious liberty cases almost inevitably place courts in the position of ranking governmental objectives in order of importance to determine which ones should be subject to exemptions. Examining the context for *Gobitis and Barnette* shows how religiously idiosyncratic groups almost always experience social ostracization and marginalization. Underlying these patterns is a frequent disconnect between worldviews: for institutions often populated by members of the religious mainstream like courts and legislatures, the salient beliefs, practices, and objections of religious exemption seekers often seem so alien and disruptive as to be unintelligible, or else the burden that enforced compliance would cause is minimized.

B. The Exemption Apogee (at least as applied to certain Christian groups)

Two years after *Braunfeld*, the Court embarked in a new direction.[25] Adell Sherbert was an Adventist who, in accordance with her faith, observed Saturdays as her Sabbath; she was denied unemployment insurance benefits for refusal to work on Saturdays.[26] Departing from the thrust of its *Braunfeld* decision, the Court recognized the inherent burden imposed on non-Sunday Sabbatarians through this requirement.[27] Placing the applicant in such a bind was in effect not so different from exacting a monetary penalty from Saturday worshippers.[28] The Court credited, rather than minimized or sidelined, the claimant's sincere religious belief, granted her the exemption, and debuted a new approach to free exercise claims.

The test that emerged in *Sherbert*, came into sharper focus in *Yoder*:[29] the claimant must advance a sincere conscientious objection based on religion; then, the court must weigh whether the operation of the objected-to regulation advances a "compelling state interest," so that the claimant's compliance should be required notwithstanding the burden.[30] Absent such a compelling state interest, the exemption should be granted. Amish claimants in *Wisconsin v. Yoder* alleged that compulsory education for the claimants' children, who were under sixteen years of age and had completed the eighth grade, impinged upon the claimants'

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24. *See* Emp't Div., Dept. of Hum. Res. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring) ("The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish."), discussed *infra* note 90 and accompanying text.

25. This was thanks principally to the efforts of Justice Brennan. *See* De'Siree N. Reeves, *Missing Link: The Origin of Sherbert and the Irony of Religious Equality*, 15 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 204 (2019).

26. Sherbert v. Verner, 374 U.S. 398, 399–401 (1963).

27. *Id.* at 404. ("The [lower court] ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.").

28. *Id.*

29. See *infra* note 31 and accompanying text for a discussion of Wisconsin v. Yoder, 406 U.S. 205 (1972).

30. NAACP v. Button, 371 U.S. 415, 438 (1963).

free exercise.[31] The Court evaluated the parents' contention that mandatory attendance at secular public school after the eighth grade would socialize their children in ways contrary to Amish teachings, imperiling their children's well-being and their community's way of life.[32] The Court ultimately credited this claim after reviewing Amish history, examining the theological reasoning presented, and sifting through expert testimony and granted the exemption.[33]

Of special note in the *Yoder* case was the Court's general approbation of the Amish character. As Professor Ronald Krotoszynski has thoroughly cataloged, Justice Burger seemed to find that the Amish personified traditional American ideals and that their exemplary spirit merited the exemption.[34] He cited with gusto their instantiation of the admonition contained in the New Testament, 'be not conformed to this world,'[35] waxing poetic about their "inherently simple and uncomplicated" life in a "church-oriented community, separated from the outside world and 'worldly' influences."[36] He compared them favorably to medieval monastics, whom he credited with saving Western civilization.[37] He also appreciated "the Amish qualities of reliability, self-reliance, and dedication to work"[38] and that "the Amish have an excellent record as law-abiding and generally self-sufficient members of society."[39]

In subsequent decades, the Court reviewed a number of free exercise claims, granting them only in a small handful of instances—perhaps an unconscious effect of the high bar set by the Old Order Amish. In 1981, a Jehovah's Witness sought and received unemployment insurance when he quit because his employer reassigned him from the steel sheet roll foundry to armament manufacturing.[40] Although the Court claimed this outcome was required by *Sherbert*, in fact the holding was broader—purporting to establish a right to access state unemployment benefits for anyone resigning as a matter of religious conscience.[41] The Court also took pains to note that a claimant need not demonstrate that their objection is shared by all co-religionists to make out a free exercise claim.[42] Then in 1987, the Court addressed the case of Paula Hobbie, who became an Adventist and was fired from her job at a jewelry store for

31. Wisconsin v. Yoder, 406 U.S. 205 (1972).

32. *Id.* at 218.

33. *Id.* at 219.

34. Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U.L. REV. 1189, 1225–27 (2008).

35. *Yoder*, 406 U.S. at 216.

36. *Id.* at 217.

37. *Id.* at 223. ("We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles.").

38. *Id.* at 224.

39. *Id.* at 212–13.

40. Thomas v. Review Bd. Ind. Emp. Security Div., 450 U.S. 707, 709 (1981).

41. *Id.* at 717.

42. *Id.* at 714–16. However, Chief Justice Burger for the Court did acknowledge that one could "imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Id.* at 715.

refusing to work on Saturdays.[43] The unemployment bureau denied her application on the basis that refusal to work Saturdays constituted disqualifying misconduct.[44] The government argued that Hobbie had a diminished religious exercise concern because she only converted after beginning her employment. [45] The Court soundly rejected this argument because freedom of religion includes the freedom to change religions.[46]

C. Varieties of Religious Experience

By the time of *Hobbie*, a long string of free exercise defeats in the 1970s and 1980s had already destabilized the *Sherbert-Yoder* regime; these cases illustrate the challenges the Court experienced adjudicating free exercise claims that did not resemble majoritarian patterns of worship.[47] Rather, the Court's working definition of spirituality appears to have been a person's individual communion with the divine, often made manifest as a series of credal propositions or duties;[48] with participation in periodic assembly with fellow believers.[49] Adherents provide financial support to their religious institutions on a voluntary basis.[50] Not coincidentally, these contours follow mainline Protestant perspectives.[51]

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43. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 137–38 (1987).

44. *Id.* at 138–39.

45. *Id.* at 143.

46. *Id.* at 143–44. *See also* Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829 (1989) (holding that plaintiff established a free exercise claim when his refusal to work on Sundays resulted in a denial for unemployment benefits, even though his motivation was based on personal religious reasons rather than fulfillment of requirements imposed on him by a religious sect, because sect membership is not a prerequisite to stating a free exercise claim).

47. *See* Krotoszynski, *supra* note 34, at 1240–43 (discussing how courts deploy majoritarian understandings of religion to evaluate free exercise claims).

48. *United States v. Macintosh*, 283 U.S. 605, 633–34 (1931) (Hughes, C.J., dissenting) ("The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."); *see also* Marci Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L. J. 713, 721-22 (1993) ("the Court has decided its free exercise jurisprudence by repeatedly employing the [belief/conduct] paradigm, which is highly reminiscent of a central Protestant Christian theological structure [that creates a dichotomy between faith and works].").

49. H.R. Rep. No. 106-219, at 18 (1999) ("Religions are practiced by communities of believers. At the very core of religious liberty is the ability to assemble for worship.").

50. JAMES HUDNUT BEUMLER, IN PURSUIT OF THE ALMIGHTY'S DOLLAR: A HISTORY OF MONEY AND AMERICAN PROTESTANTISM (2007) (discussing voluntary donations to support congregational worship as the prevailing organizational model among Protestant denominations).

51. *Cf.* WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 27 (Matthew Bradley ed., Oxford University Press 2012) (defining religion as "the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider divine"). James' seminal work also further universalized Protestantism by positing that all major religions are characterized by "a sense that there is something wrong about us as we naturally stand" and "a sense that we are saved from the wrongness by making proper connection with the higher powers." *Id.* at 384.

Indigenous religion, for one, does not always fit this paradigm. In *Bowen v. Roy*, Abenaki parents argued that a government requirement for their daughter to have and use a social security number to be eligible for certain programs would damage her spirit.[52] In reviewing the claim, the Court dismissed the possibility that governmental use of the social security number could constitute a religious burden because the Roys were not being required to take any action against their will.[53] And, the Court held that the family's burden of being required to furnish the number in order to obtain benefits was not substantial enough to warrant interference with the administration of a large-scale government program.[54] In so holding, the Court characterized the law as "wholly neutral in religious terms and uniformly applicable" apparently not conceiving how the law might *not* have been religiously neutral for the Roys and others similarly situated.[55] The Court also characterized the Roys' claim as seeking to "use the Free Exercise Clause to demand Government benefits, but only on their own terms[,]…" apparently not taking into account why the Roys' request represented more than personal preference.[56]

Conceptualizing religious exercise in individualistic terms, the Court also failed to appreciate the critical importance of land in spiritual practice. In 1988, in *Lyng v. Northwest Indian Cemetery Protective Association*, the Court heard a free exercise claim brought to protect the Chimney Rock area, a sacred site for the Yurok, Karok, and Tolowa groups located on federal land.[57] The Court acknowledged that "[i]ndividual practitioners use[d] this area for personal spiritual development," that "some of their activities [we]re believed to be critically important in advancing the welfare of the Tribe," and that the proposed government logging activity could potentially be as disruptive to these religious functions as the plaintiffs claimed.[58] Nevertheless, the Court held that the resulting environmental degradation would neither force the plaintiffs to "violat[e] their religious beliefs; nor…penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[59] Judeo-Christian understandings of religion as something personal, portable, and propositional would seem to have factored into this holding; it is otherwise very difficult to understand how the Court could find that destruction of sacred sites essential to the spiritual well-being of the Yurok, Karok, and Tolowa groups would not impinge on their religious exercise.

It is also striking that the Court evaluated the respondents' claims through an individualistic lens, examining the impact of the proposed land use on "individual practitioners" and "any person" rather than appreciating how spirituality is essentially a collective endeavor for many cultures. Individual participation can

52. Bowen v. Roy, 476 U.S. 693, 695–96 (1986).

53. *Id.* at 699–701 (reasoning that it was the government that maintained the number, not the family, and as such there could not be a free exercise burden on the family).

54. *Id.* at 702–07.

55. *Id.*

56. *Id.* at 711–12.

57. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

58. *Id.* at 451.

59. *Id.* at 449.

be meaningful and critical, but even individuals who do not participate in a collective ritual might still take a very active interest in the ritual's being carried out by representatives of the community on the entire community's behalf.[60] The dissent drew out the cultural assumptions made by the majority, observing that "any attempt to isolate the religious aspects of Indian life 'is in reality an exercise which forces Indian [*sic*] concepts into non-Indian [*sic*] categories.'"[61] Relationship with the land is paramount, and "[i]n marked contrast to traditional Western religions, the belief systems of Native Americans do not rely on doctrines, creeds, or dogmas….Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land."[62] Thus, the categories of Judeo-Christian religious exercise as recognized by prior case law should not serve as a straightjacket on the cognizability of claims asserted by indigenous groups.[63]

The Church of Scientology also suffered from the Court's preconceived notions of spirituality and worship. One year after *Lyng*, Justice Marshall, who had joined Justice Brennan's dissent in that case, authored the majority opinion in *Hernandez v. Commissioner*, joined—among others—by fellow *Lyng* dissenter Justice Blackmun.[64] In *Hernandez*, the Church of Scientology argued that denying tax exemptions to payments for individual spiritual counseling sessions violated the religion clauses. The Court first found as a matter of statutory interpretation that the I.R.S. had latitude to treat the transfers not as "contribution[s] or gift[s]," deductible under the code, but as "payments made in the expectation of gaining religious benefits or access to a religious service," in other words, "as a *quid pro quo* exchange."[65] Building on that interpretation, the Court then found that any burden thus occasioned on a particular religion by virtue of its "sales of commodities or services as a means of fund-raising, relative to those groups that raise funds primarily by soliciting unilateral donations" could rise neither to an Establishment nor Free Exercise violation because the I.R.S.'s

60. Leading sociologist of religion Grace Davie has documented and analyzed the fairly commonplace phenomenon of "vicarious religion," whereby religion is "performed by an active minority but on behalf of a much larger number, who (at least implicitly) not only understand, but, quite clearly, approve of what the minority is doing." Grace Davie, *Vicarious Religion: A Methodological Challenge*, *in* EVERYDAY RELIGION: OBSERVING MODERN RELIGIOUS LIVES 21, 22 (Nancy T. Ammerman ed., 2007). This genre of communal deputization complicates attempts to define religious exercise as an ultimately individual experience and the presumption that religious ceremonies can only benefit those who participate directly. *See also Lyng*, 485 U.S. at 462 (Brennan, J., dissenting) ("Although few Tribe members actually make medicine at the most powerful sites, the entire Tribe's welfare hinges on the success of the individual practitioners."); *accord* Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269, 273 (2012).

61. *Lyng*, 485 U.S. at 459 (Brennan, J., dissenting) (quoting D. Theodoratus, Cultural Resources of the Chimney Rock Section, Gasquet–Orleans Road, Six Rivers National Forest (1979)).

62. *Lyng,* 485 U.S. at 460–61 (Brennan, J., dissenting); *see also* VINE DELORIA JR., GOD IS RED, 66–67, 154, 172, 272–75 (Fulcrum Publ'g 3d ed. 2003) (1973).

63. *Lyng,* 485 U.S. at 465–66 (Brennan, J., dissenting).

64. Hernandez v. Comm'r, 490 U.S. 680 (1989).

65. *Id* at 692–93, 702.

distinction between the two classes of donations had the facially plausible secular purpose of promoting charitable giving.[66]

The dissent of Justice O'Connor, joined by Justice Scalia (both of whom were in the *Lyng* majority), listed a number of *quid pro quo* payments in other religions for which the I.R.S. had permitted deductions, raising the possibility that the majority justices were willing to privilege payments made in the context of congregational worship over payments for private training sessions because of their implicit expectations of how religions ought to finance themselves.[67]

Another late 1980s case illustrates the uphill struggle of free exercise claims originating from outside of the religious mainstream—even when the relief sought was not so different from what the Court had granted before. In *O'Lone v. Estate of Shabazz*, the Court denied the request of a group of incarcerated Muslim claimants challenging a work schedule that prevented them from attending Friday afternoon weekly prayers as mandated by their religion.[68] The Court initially acknowledged, in its first-ever cite to the Koran, that observance of Jumu'ah is commanded for Muslims between midday and mid-afternoon on Fridays.[69] Yet the Court noted that such "very stringent requirements" in terms of timing rendered the request exceptionally difficult to accommodate.[70] Nor was the alternative weekend work proposed by the plaintiffs a feasible option, owing to the extra guard-hours that would be required to supervise such details.[71] As the dissent highlighted, the prison's arrangements reflected a Judeo-Christian ethnocentrism according to which work was assigned Mondays through Fridays, enabling Jewish and Christian inmates to participate in their core religious activities, but preventing Muslim inmates from participating in theirs.[72]

These cases from the late 1980s highlight the Court's collective limitations in grappling with free exercise claims that featured unfamiliar patterns of spirituality. This is by no means intended as a criticism of individual justices or the Court as an institution, but rather a reflection of the human tendency to assimilate new information based on prior knowledge and experience.[73]

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66. *Id.* at 696 ("[A] statute primarily having a secular effect does not violate the Establishment Clause merely because it 'happens to coincide or harmonize with the tenets of some or all religions.'") (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)); *Hernandez*, 490 U.S. at 699.

67. *Hernandez*, 490 U.S. at 708–10, 711 (O'Connor, J., dissenting) ("If the perceived difference lies in the fact that Christians and Jews worship in congregations, whereas Scientologists, in a manner reminiscent of Eastern religions…gain awareness of the 'immortal spiritual being' within them in one-to-one sessions with auditors…such a distinction would raise serious Establishment Clause problems."). *See* JAMES HUDNUT BEUMLER, IN PURSUIT OF THE ALMIGHTY'S DOLLAR: A HISTORY OF MONEY AND AMERICAN PROTESTANTISM (2007) (discussing voluntary donations to support congregational worship as the prevailing organizational model among Protestant denominations).

68. O'Lone v. Est. of Shabazz, 482 U.S. 342 (1987).

69. *Id.* at 345.

70. *Id.* at 351.

71. *Id.* at 352–53. Thus, the Court denied the exemption sought.

72. *Id.* at 365–67 (Brennan, J., dissenting).

73. Quite a few years earlier, Justice Jackson had identified precisely this tendency in *United States v. Ballard*, the case that held that courts were competent to evaluate the sincerity

D. Favored Minorities

On at least two occasions, the Court rejected a minority religionist's free exercise claim, only for Congress to subsequently legislate the requested exemption; in both cases, the religion in question, though a minority, enjoyed some degree of social favor. Captain Simcha Goldman was an Air Force psychologist who sued in order to wear a yarmulke.[74] The Court found that the government's need for uniformity of appearance justified its regulation against all indoor head coverings and denied the request.[75] As the dissent perceived, the military's prescribed default appearance of men with heads uncovered derives from Christian cultural tradition: applying the regulation across the board including to a Jewish believer meant imposing majoritarian values on him.[76] It is especially incongruous that the government expressly argued Captain Goldman should not be allowed to wear a yarmulke because it was a marker of an ethnic identity that would detract from conformity with a general-purpose American identity.[77]

Congress recognized the untenable position in which the Court's decision placed Captain Goldman and others similarly situated and created a mandatory religious apparel exemption for all military dress codes with the sole exception

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of religious beliefs even while proscribed from evaluating their ultimate truths. 322 U.S. 78, 84, 86–88 (1944). Writing in dissent, Justice Jackson had observed:

In the first place, as a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer. *Id.* at 92–93 (Jackson, J., dissenting).

Justice Jackson subsequently cited the philosopher William James for the proposition that jurors with their own religious experience would naturally be far more likely to credit the sincerity of believers' claims that come before them. *Id.* at 93–94. Kent Greenawalt provides the insight that where sincerity may be fairly straightforward to determine with respect to initial claimants who face the risk of sanction should they not prevail, it could ironically be harder for subsequent claimants following suit once there is precedent for a particular exemption. KENT GREENAWALT, EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED 218 (2016).

74. Goldman v. Weinberger, 475 U.S. 503, 504 (1986). Captain Goldman was also a rabbi. *Id.*

75. *Id.* at 508–10. *See* GREENAWALT *supra* note 73, at 134 (noting that exceptions to the dress code had been authorized for Christian military personnel in the past).

76. *Goldman*, 475 U.S. at 520 (Brennan, J., dissenting) ("The [Air Force's] visibility test permits only individuals whose outer garments and grooming are indistinguishable from those of mainstream Christians to fulfill their religious duties.").

77. *Id.* at 517 (Brennan, J., dissenting). As the dissent noted, given that that general-purpose identity was really just reiterated Christian cultural norms, such a paradigm was exclusionary on the basis of ethnicity as well as religion. *Cf. id.* at 519 ("To the contrary, a yarmulke worn with a United States military uniform is an eloquent reminder that the shared and proud identity of United States serviceman embraces and unites religious and ethnic pluralism.").

of ceremonial units while performing ceremonial functions.[78] The House Conference report indicates that Congress had yarmulkes in mind.[79] Although Judaism was and is a minority religion, congressional solicitude in this direction is unsurprising given that mid-century American society characterized itself as a "Judeo-Christian civilization," hence some degree of accommodation for Jewish practitioners was needed to support that self-appellation.[80]

The Amish also fared better in Congress than in the Court during the 1980's narrowing of free exercise exemptions. In 1982, the Court took up the free exercise claim of an Amish employer who refused to pay into the Social Security system on behalf of his employees, who were also Amish.[81] Appellee Edwin Lee argued that for the Amish, caring for family and neighbors in case of old age or disability is a religious principle, and paying into the Social Security system on behalf of employees would signify his lack of faith.[82] The Court reasoned that the Social Security system is similar to the income tax system, and that religious-based exemptions to government expenditure would become hopelessly unmanageable.[83] In the interest of uniformity, the exemption was denied.[84]

However, five years later, Congress modified the social security laws to create a carve-out for situations like Mr. Lee's: where an employer is "conscientiously opposed to acceptance of the benefits of any private or public insurance"[85] for religious reasons, they are permitted to decline to withhold on

78. National Defense Authorization Act for Fiscal Years of 1988 & 1989, Pub. L. 100-180, § 508(a)(2), 101 Stat. 1019, 1086 (codified at 10 U.S.C. § 774).

79. H.R. Rep. No. 100-446, at 638 (1987) (Conf. Rep.).

80. *See* United States v. Seeger, 380 U.S. 163, 189 (1965) (Douglas, J., concurring) (referring generally to "our Judeo-Christian civilization); *cf.* Harris v. McRae, 448 U.S. 297, 319 (1980) (noting that just because a government regulation parallels Judeo-Christian strictures does not implicate a violation of the Establishment Clause). *See* ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY, 33–38 (2013) (tracing the development of elite perspectives of American national religious character from generally Protestant, to generically Christian, to nonsectarian monotheist, also understood as Judeo-Christian). To be sure, the fact that American society characterized itself as Judeo-Christian does not mean that concern for Jewish religious needs arose out of genuine concern; it is entirely plausible that the official favor extended to Jewish American needs was largely discursive, as required to maintain the Judeo-Christian construct. *See generally* Robert O. Smith, *Disintegrating the Hyphen: The "Judeo-Christian Tradition" and the Christian Colonization of Judaism*, 5 REORIENT 73 (2019) (cautioning that Christians have often deployed the term "Judeo-Christian" to promote basically Christian perspectives under the guise of advancing broader consensus principles). The term Judeo-Christian appears in this paper to indicate patterns of religious observance common to both traditions.

81. United States v. Lee, 455 U.S. 252, 254 (1982).

82. Neither the trial court nor the Supreme Court noted whether the factual record included the employees' perspectives. The case was heard on direct petition, without intervening Circuit Court involvement. *Id.* at 255.

83. *Id.* at 259–60.

84. *Id.* at 261.

85. SSA HANDBOOK, WHEN MAY MEMBERS OF CERTAIN RELIGIOUS GROUPS RECEIVE AN EXEMPTION FROM THE SOCIAL SECURITY TAX?, https://www.ssa.gov/OP_Home/handbook/handbook.11/handbook-1128.html [https://perma.cc/4DVC-LLL7].

behalf of co-religionist employees who hold the same objections.[86] Of note is that the exemption is only available to members of a "recognized religious sect,"[87] which potentially opens to the door to favoritism in I.R.S. determinations as to which individuals and religions qualify. The Congressional record indicates that cultural approbation for the Amish played a significant role in the passage of the bill.[88] This is not surprising, given the American romanticization of the Amish.[89]

II. THE SHELVING, RESUSCITATION, DELIMITATION, AND RESURRECTION OF *SHERBERT-YODER*

In retrospect, the string of free exercise defeats before the Court in the 1980s signaled the infirmity of the Sherbert-Yoder test, especially the extent to which two fundamental components of the test—the nature of religious exercise and what constituted a compelling government interest—were evidently so indeterminate. The Court finally retired it in *Smith* in 1990, holding that judicial exemptions were not appropriate for laws of general applicability.[90] Yet this was by no means the final word, and Congress and the Court went back and forth in various efforts to reprise *Sherbert-Yoder*. This Part traces that trajectory, drawing attention to political pre-suppositions around the kinds of minority religionists

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86. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 1988 U.S.C.C.A.N. (102 Stat.) 3342, 3781 (codified as amended at I.R.C. § 3127). ("Exemption from Social Security for employers and their employees who are both members of certain religious faiths.").

87. I.R.C. § 3127(a)(1).

88. *An Act to Amend the Internal Revenue Code of 1986 and Title II of the Social Security Act to Provide an Exemption from Coverage under the Social Security Program on a Current Basis (Pursuant to Applications Filed in Advance) for Employers and their Employees in Cases where Both are Members of Faiths Opposed to Participation in Such Program: Hearing on H.R. 2259 Before the H. Subcomm. on Soc. Sec. of the Comm. on Ways and Means*, 100th Cong. 11 (1987) (statement of Hon. Dick Schulze, Sponsor and Rep. in Cong. from Pennsylvania) (the provisions of H.R. 2259 were incorporated into H.R. 4333, which became Pub. L. 100-647):

> I am here before you today to take up the cause of a special interest group. This group is without the services of any high powered Washington lobbyist. In fact, Mr. Chairman, most of the members of this special interest group do not even vote. Their special interest is an admirable one of which we should be aware and for which we should have respect. Their interest is a wish to live and labor under God's law, to take care of their own without Government assistance. These fine and plain people are a symbol to our fast-paced society. They are a symbol of our heritage, of our work ethic, and of our benevolent nation's creation.

Analysis of Sponsor Schulze's statement suggests that advocacy for the Amish served a broader rhetorical purpose than pure concern for Amish as such. Citing a less-favored religious minority, the erstwhile Chief Actuary of the Social Security Administration opposed the measure on the grounds that nominal Muslims might exaggerate their religious beliefs to evade payroll taxes. *Id.* at 22 (statement of Robert J. Myers).

89. *Cf.* Melissa Beattie-Moss, *Probing Question: Do we Romanticize the Amish*, PENN STATE UNIV. (Apr. 12, 2011) https://www.psu.edu/news/research/story/probing-question-do- we-romanticize-amish [https://perma.cc/NH56-VZ9V].

90. Emp. Div., Dept. of Hum. Res. V. Smith, 494 U.S. 872, 890 (1990). For the *Sherbert* test, *see* Sherbert v. Verner, 374 U.S. 398, 399–401 (1963).

who needed protecting, as well as the burdens they would need to meet to prevail in their free exercise claims.

A. Smith sidelines Sherbert

Alfred Smith and Galen Black were members of the Native American Church.[91] This religion periodically utilizes peyote in congregational worship.[92] But peyote is a controlled substance, and Oregon law makes no exceptions for religious use.[93] Thus, when Smith and Black were terminated from their employment for ingestion of peyote, the state unemployment insurance authority determined they were ineligible for benefits because they had been fired for "misconduct," that is, for violating a law.[94] The respondents appealed on free exercise grounds.[95]

If the Court were to have followed in the mold of previous free exercise cases, one would have expected an evaluation of the free exercise claim, including how important the use of peyote is to practitioners and an assessment of the burden imposed by denial of unemployment benefits. Supposing the Court found for the respondents in that regard, the Court would have turned to whether there was a compelling state interest in uniform enforcement of controlled substances law so as to preclude the exemption. Given the run of precedents up until that point, the answer almost certainly would have been yes, and the exemption would have been denied.[96]

However, the Court did not merely issue another free exercise denial. Rather, speaking through Justice Scalia, the Court re-interpreted the history of its free exercise case law to reach the proposition that the Free Exercise clause only protects religious beliefs, not conduct flowing from them.[97] Remarkably, Justice Scalia buttressed this interpretation with a quote from Justice Frankfurter's *Gobitis* opinion, despite the fact that *Barnette* had explicitly overruled *Gobitis*.[98] Justice Scalia reasoned that the *Sherbert-Yoder* test presented serious jurisprudential challenges, namely, the lack of basis for courts to evaluate "both the importance of the law at issue and the centrality of the practice at issue."[99] Assessing practices would only become more complicated as the variety of religions proliferated.[100] Furthermore, Justice Scalia wrote that it was not the role

91. *Smith*, 494 U.S. at 874.

92. *Id.* at 903–04 (O'Connor, J., concurring).

93. *Id.* at 874, 876.

94. *Id.* at 874.

95. *Id.* at 875–76.

96. *See generally*, *id.* at 903–06 (O'Connor, J., concurring).

97. *Smith*, 494 U.S. at 877–79.

98. *Id.* at 879; W. Va. State Bd. of Educ. V. Barnette, 319 U.S. 624, 642 (1943).

99. *Smith*, 494 U.S. at 887 n.4; *see also id.* (quoting United States v. Lee, 455 U.S. 252 at 263 n.2 (Stevens, J., concurring) ("Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'")).

100. *Id.* at 888–89 (noting that the difficulty in applying the *Sherbert-Yoder* Test and the myriad exemptions to laws of general applicability that might flow from it would only increase

of the judiciary to act as a super-legislature and dictate which laws are so important that they can admit no exemptions.[101]

Henceforward only *legislative* exemptions would be permitted, and laws of general applicability—so long as they were constitutional—were to be enforced uniformly.[102] The Court also appeared to leave a carve-out for unemployment compensation cases such as those it had earlier decided[103] where a person's beliefs but not criminal conduct had led to their termination, and where the statute in question provided for "individualized governmental assessment of the reasons for the relevant conduct."[104] The *Smith* decision received much criticism, especially owing to the impact on members of religious minorities.[105] Yet perhaps the *Smith* Court does deserve credit for being aware of the human limitations bound to manifest in free exercise determinations.

B. The Religious Freedom Restoration Act (RFRA)

Responding to *Smith*, and out of concern for the rights of religious claimants, Congress in 1993 overwhelmingly passed the Religious Freedom Restoration Act ("RFRA").[106] Legislators explicitly centered the experience of religious minorities who lacked sufficient political clout to win legislative accommodations that could no longer seek judicial exemptions following *Smith*.[107] Drawing upon Congress' power to enforce the rights guaranteed by the Fourteenth Amendment,[108] the Act purported to restore the pre-*Smith* regime by permitting the government to "substantially burden a person's exercise of

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"in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them").

101. *See id.* at 889 n.5. Justice Scalia drew an explicit contrast with the compelling interest test in free speech and racial equal protection cases, because in those situations, the challenged government regulation is already content- specific; as the concept is deployed in free exercise cases, the compelling government interest prong entails an evaluation of the government's true interest in *any* given law of general applicability. *See id.* at 885–87.

102. *Id.* at 889–90. Though perhaps not entirely clear from its language, *Smith* left open the possibility that a law specifically *targeting* a group's religious practice could still give rise to a colorable free exercise claim, an eventuality which was realized in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), *see infra* text accompanying note 119.

103. *See supra* notes 40-46 and accompanying text.

104. *Smith*, 494 U.S. at 884.

105. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1894 n.26 (2021) (Alito, J., concurring), discussed *infra* notes 175–81 and accompanying text.

106. KOPPELMAN, *supra* note 80, at 5–6; Religious Freedom Restoration Act of 1993: Roll Vote No. 331, 103d Cong. https://www.senate.gov/legislative/LIS/roll_call_votes/vote1031/vote_103_1_00331.htm [https://perma.cc/9WE4-SXRY] (showing vote of 97 to 3 on final passage of "[a] bill to protect the free exercise of religion.").

107. S. REP. NO. 103-111, at 8 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1897–98. ("State and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths, an explicit fundamental constitutional right . . . To assure that all Americans are free to follow their faiths free from governmental interference, the committee finds that legislation is needed to restore the compelling interest test.").

108. *Id.* at 14–15.

religion," only when that application is the least restrictive means of furthering a compelling governmental interest.[109] The language of the RFRA drew heavily from the *Sherbert-Yoder* framework.[110]

But did Congress have a sufficient constitutional basis to impose such a wide-ranging exemptions regime upon state governments? Originally, "government" was defined to include both the federal government and the states.[111] Because the First Amendment's Free Exercise Clause had been incorporated against the states,[112] Congress relied on the authority granted by Section Five of the Fourteenth Amendment to make RFRA binding on the states.[113] The Senate Judiciary Committee Report accompanying the bill acknowledged that members of minority religious groups were bearing the brunt of the *Smith* exemption-skeptic regime. The more distressing outcomes included Hmong and Jewish decedents having their bodies subject to autopsies as required by local health rules, despite the teachings of their religions and their families' religious wishes.[114] Thus, although it could have been more explicit, Congress advanced a remedial rationale for its need to exercise Section 5 authority.[115] However, just four years after RFRA's passage, the Supreme Court took up the issue of its constitutionality as applied to the states. In *City of Boerne v. Flores*, the Catholic Archbishop of San Antonio challenged a municipality's denial of a permit for a church renovation project for historic preservation reasons.[116] The

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109. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141 § 3, 1993 U.S.C.A.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997), excerpted in pertinent part:

a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
    a. is in furtherance of a compelling governmental interest; and
    b. is the least restrictive means of furthering that compelling governmental interest.

110. The Act expressly purported to restore the pre-*Smith*, *Sherbert-Yoder* standard. *Id.* § 2(b)(1). This, however, raises the question of whether Congress may permissibly incorporate prior judicial glosses in its enactments other than via operative text, which remains an unsettled area of law. *Cf.* Blanchard v. Bergeron, 489 U.S. 87, 99 (1989) (Scalia, J., concurring in the judgment and concurring in part) ("What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.").

111. Religious Freedom Restoration Act of 1993 42 U.S.C. § 2000bb-1.

112. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

113. S. REP. NO. 103-111, at 8 (1993), *as reprinted in* 1993 U.S.C.C.A.N. at 1903, https://harryphillipsaic.com/wp-content/uploads/2012/09/S-REP-103-111.pdf [https://perma.cc/TH5D-5EGQ].

114. *Id.* at 8 & n.13. Other examples included bans on door-to-door religious solicitation and restrictions on religious land use falling disproportionately on members of religious minorities.

115. Even then, however, the Senate report did not claim that the RFRA was supplanting the Free Exercise Clause, merely adding an additional statutory safeguard. *Id.* at 14 n.43. Thus, two claims in theory would be available in free exercise cases: a constitutional claim under the Free Exercise Clause, to be governed by *Smith*, and a statutory claim under the RFRA.

116. City of Boerne v. Flores, 521 U.S. 507, 511–12 (1997). The Court concluded municipalities were covered entities under RFRA. *Id.* at 516.

Archbishop appealed, citing RFRA.[117] In hearing the case, the Supreme Court reviewed whether RFRA could be constitutionally applied to the states, discussing several cases evaluating congressional exercise of the analogous Fifteenth Amendment enforcement authority (Section 2), finding it to attach only where Congress responded to a "widespread and persisting deprivation of constitutional rights."[118]

The Court then evaluated whether RFRA could be an appropriate exercise of Congress's remedial authority, leading into this topic with mention of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* [hereinafter *Lukumi*].[119] There, a municipality had enacted a purportedly neutral law of general applicability that nevertheless was clearly designed to criminalize the activities of a particular religious and ethnic minority. The Court struck the law down as a violation of the Free Exercise clause.[120] Yet the *Flores* Court limited its holding in *Lukumi* to the proposition that "a law targeting religious beliefs as such is never permissible."[121] On the other hand, the Court reasoned, laws of general applicability that are not animated by religious prejudice, even though they may have a detrimental impact on adherents of minority faiths, do not furnish grounds for remedial enforcement because the burdens imposed are merely "incidental," and "not the object or purpose of the legislation."[122] Accordingly, the Court held that the congressional record lacked evidence of *recent* discrimination against any particular religion, and thus Congress could not exercise remedial authority over the states.[123]

Strikingly, the Court also passed over the possibility that laws of general applicability might manifest the *implicit* ethno-religious biases of the majoritarian culture—with devastating effect on members of minority religions

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117. *Id.* at 512.

118. *Id.* at 526 (discussing South Carolina v. Katzenbach, 383 U.S. 301 (1966), and Katzenbach v. Morgan, 384 U.S. 641 (1966), in which the Court upheld Congressional suspension of otherwise constitutional literacy tests as an exercise of its Fifteenth Amendment, Section 2 remedial power). The *Oregon v. Mitchell* Court had found that Congress lacked Section 2 authority to impose on states the requirement that persons eighteen years of age and older be permitted to vote because a pattern of discrimination against that age group had not been established. *Flores*, 521 U.S. at 518–19 (discussing Oregon v. Mitchell, 400 U.S. 112 (1970)).

119. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

120. *Flores,* 521 U.S. at 529.

121. *Id.* at 531 (quoting *Lukumi*, 508 U.S. at 529).

122. *Id.* The Court thus appeared to elide two distinct senses of the word "incidental": *occurring without intention* and *a minor consequence*. *Incidental*, Merriam-Webster Dictionary (11th ed. 2003). *See, e.g.,* Braunfeld v. Brown, 366 U.S. 599, 615–16 (1961) (Brennan, J., dissenting) ("[T]he Court, in my view, has exalted administrative convenience to a constitutional level high enough to justify making one religion economically disadvantageous. The Court would justify this result on the ground that the effect on religion, though substantial, is indirect.").

123. *Flores*, 521 U.S. at 531 ("It is difficult to maintain that they are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country."). Additionally, the scope of the RFRA was untenable given its shaky remedial foundations. *See id.* at 534 ("This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.").

like the Hmong—and that such possible outcomes give rise to equal protection concerns as well.[124] Referring to the example of the Sunday closing laws at issue in *Braunfeld*, legislators hailing from majoritarian backgrounds might enact laws that further entrench their majoritarian perspectives with only a limited conscientiousness about the detrimental impacts on non-majoritarian practitioners.[125] In such a scenario, it may be inaccurate to attribute the law to *bias* against the minority group, but it would also be inaccurate to characterize the burden on the minority group as incidental, as though the further reification of the majority worldview and attendant stigmatization of the minority group were extrinsic to the import of the legislation.[126]

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124. *Id.* at 531. The Court's cultural blinders are reflected by its reference to the concern of the autopsies being raised by "Hmong immigrants," *id.*, even though You Vang Yang, the plaintiff in the autopsy case cited by the RFRA Senate Report, was a U.S. citizen. You Vang Yang v. Sturner, 728 F. Supp. 845, 846 n.2 (D.R.I. 1990), *vacated*, 750 F. Supp. 558 (D.R.I. 1990).

125. *See Braunfeld*, 366 U.S. at 602. In *Braunfeld*, the Court reasoned that the purpose of Sunday closing laws was protecting a day for "calm and relaxation" more so than promoting religion per se, without recognizing the essential spiritual content implicit in the concept of a uniform day of rest corresponding with the Christian sabbath. *Id. But see* Est. of Thornton v. Caldor, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) ("In my view, the Connecticut Sabbath law has an impermissible effect because it conveys a message of endorsement of the Sabbath observance."), *see infra* note 371 and accompanying text for a deeper discussion of the case.

126. *See, e.g.*, Douglas Laycock and Steven T. Collis, *2016 Roscoe Pound Lecture: Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 27 (2016) ("An initial failure to exempt the religious practice [in question] may result from simple ignorance that any such practice exists. But persistence in that refusal after the issue is presented nearly always results from hostile indifference."). Kent Greenawalt offered the example of a zoning ordinance preventing new houses of worship from opening in commercial districts—a measure that implicitly favored well-established religions, which had resources to locate in pricier residential areas or had grandfathered-use premises in the commercial zones. Professor Greenawalt asked, "what if the adopters had no discriminatory objective in mind but would probably not have imposed the restriction if it had impaired major faiths?" GREENAWALT, *supra* note 73, at 148. Professor Greenawalt's insight gives rise to the inference that in place of the traditional discriminatory intent/impact dichotomy, discrimination law should also recognize discriminatory import. This could be defined as when the social context in which a measure is passed imbues it with discriminatory meaning even where the legislators themselves may not necessary have evinced a discriminatory purpose, and without need to evaluate disparate impacts. Another illustration of discriminatory import would be the decision of the Alabama Department of Public Safety to implement an English-only policy for its driver's examination, purportedly pursuant to Amendment 509 to the Alabama Constitution establishing English as the official state language. Sandoval v. Hagan, 7 F.Supp.2d 1234, 1243 (M.D. Ala. 1998). The plaintiff alleged that "[t]he defendants' refusal to administer the examination in languages other than English or to allow for the use of translators or interpretive aids discriminates against the plaintiff and others similarly situated on the basis of national origin." *Id.* at 1244. At trial, the court dismissed all of the intentional discrimination claims with the plaintiff's consent. *Id.* at 1313. Nevertheless, in its final opinion, the court enumerated several circumstances that suggested the discriminatory significance of this measure. *Id.* That said, this case was understood to fall on the disparate impact side of the intent/impact typology, and the Supreme Court subsequently found no private cause of action for disparate impact claims. Alexander v. Sandoval, 532 U.S. 275, 290–93 (2001).

C. Rise of RLUIPA

Congress responded by enacting The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), an attempt to safeguard free exercise in two unrelated although especially sensitive areas. By that time, religious land use concerns had surfaced in instances such as *Islamic Center of Mississippi, Inc. v. City of Starkville*, where members of religious minorities were precluded from building their sanctuaries because of the prejudicial application of local zoning codes[127]; as well as in cases such as *Flores*, in which municipalities denied permit applications including those of majoritarian religions.[128] Meanwhile, even before *Smith*, incarcerated persons' access to free exercise faced the considerable obstacle of the reflexive deference generally accorded to prison authorities' assessments of disciplinary needs.[129]

RLUIPA reprised RFRA's test for land use, prohibiting all governments from applying land use law in a way that substantially burdens the religious exercise of religious organizations, unless it is the least restrictive means of furthering a compelling government interest.[130] Institutionalized persons are relieved of substantial burdens on their free exercise except in instances where the application of the regulation in question is the least restrictive means of furthering a compelling interest—although, for institutionalized persons, Congress spelled out that even laws of general applicability must yield to free exercise claims when not in service of a compelling interest.[131] The Act amended RFRA to conform with the holding in *Flores* that it does not apply to the states, and also redefined religious exercise as not necessarily "compelled by, or central to" a person's religion.[132]

Congress was careful to gird this legislation with every possible defense against a finding of unconstitutionality. First, RLUIPA's land use section explicitly encompasses every state or local "program or activity" that receives federal funding, relying on authority to tie financial incentives to policy goals.[133] The institutionalized persons section likewise derives its authority from federal funding.[134] Interstate commerce was included for both sections, although it is not intuitively clear how interstate commerce could bear on the majority of claims likely to arise in either category.[135]

Section 2(a)(2)(C) offers perhaps the most innovative, even daring inoculation against a finding of unconstitutionality such as befell RFRA: that section, specific to religious land use, extended RLUIPA protections to whenever "government makes, or has in place formal or informal procedures or practices

127. Islamic Ctr. of Miss., Inc. v. City of Starkville, 840 F.2d 293 (5th Cir. 1988).

128. City of Boerne v. Flores, 521 U.S. 507 (1997).

129. *See* O'Lone v. Est. of Shabazz, 482 U.S. 342 (1987).

130. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 2(a)(1)(A)–(B), 114 Stat. 803 (codified at 42 U.S.C. § 2000cc).

131. *Id.* § 3(a)(1)–(2).

132. *Id.* §§ 7–8. *See infra* note 267 and accompanying text (construing this provision).

133. *See* Religious Land Use and Institutionalized Persons Act of 2000 § 2(a)(2)(A); New York v. United States, 505 U.S. 144, 167 (1992) (collecting cases).

134. *See* Religious Land Use and Institutionalized Persons Act of 2000 § (3)(b)(1).

135. *Id.* § 2(a)(2)(B); *id.* § (3)(b)(2).

that permit the government to make, individualized assessments of the proposed uses for the property involved."[136] At first pass it may be unclear why this should be spelled out; after all, if the goal of RLUIPA is to prevent discriminatory land use decisions, processes involving maximal discretion would likely be the most heavily scrutinized anyway. But a glance back at *Smith* reveals the rationale for this clause; the *Smith* majority, in reorienting away from the *Sherbert* test, distinguished *Sherbert* and two other unemployment insurance cases[137] from other free exercise claims on the grounds that unemployment insurance determinations inherently involve individualized assessments of an individual's willingness and availability to work—thus construing the Court's earlier decisions to mean only that applicants' "religious hardship" should factor into such evaluations.[138] Although it was by no means clear in the aftermath of *Smith* that religious claims in the narrowly circumscribed realm of unemployment and analogous settings would still receive the same protections guaranteed by *Sherbert*, RLUIPA evidently adopted this language as an attempt to further ensure the Act's constitutionality.[139]

Beyond the architecture of the Act, the congressional findings also grounded RLUIPA in a rights-protecting, remedial orientation.[140] The House Report discussed the discrimination faced by members of religious minorities in securing permits for places of worship,[141] specifically highlighting denials for Mormon, Jewish and Pentecostal sanctuaries.[142] Interestingly, by the late 1990s, discriminatory animus against houses of worship had expanded to religions in general, as many municipalities sought to protect their tax base by developing regulatory schemes to preclude the development of *all* new houses of worship—which, of course, would benefit established religions that already possessed physical centers and exclude new or less popular groups.[143]

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136. *Id.* § 2(a)(2)(C)

137. Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987).

138. Emp. Div., Dep't. of Hum. Res. V. Smith, 494 U.S. 872, 883–85 (1990); *see* City of Boerne v. Flores, 521 U.S. 507, 514 (1997).

139. Luke Meier*, RLUIPA and Congressional Intent*, 70 ALB. L. REV. 1435, 1438 (2007) (arguing that the land use portion of RLUIPA may not need to rely on Section 5 given that land use decisions are inherently individualized and *Smith* left open the door for the constitutionality of free exercise claims concerning individual determinations). *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) (revitalizing the individual exemption regime carve-out alluded to in *Smith*).

140. Such as the Court found was insufficiently done in the legislative history of the RFRA to justify exercise of remedial Section 5 authority. *Flores*, 521 U.S. at 530-31 ("RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.").

141. H.R. REP. NO. 106-219, at 20 (1999), *as reprinted in* 1999 U.S.C.C.A.N. (report on the Religious Liberty Protection Act of 1999), https://www.congress.gov/106/crpt/hrpt219/CRPT-106hrpt219.pdf [https://perma.cc/ZC6H-9TNJ].

142. *Id.* at 22–23.

143. *Id.* at 18–20 ("[A]ttempting to locate a new church in a residential neighborhood is typically an exercise in futility…unless a church can meet in a single house, the only way to

Also, the House Report for RLUIPA endeavored to incorporate *Flores*'s endorsement of Congress's Section 5 authority to remedy *racial* discrimination,[144] noting instances of often-explicit anti-Hispanic, anti-Black, and anti-Korean discrimination in the denials of church permits.[145] The Report also cited testimony that a municipality denied permits to a "[B]lack mosque" four times, only to subsequently issue permits to a "white church," thus underscoring the ways in which religious affiliation is an expression of ethnic or racial identity, and discrimination against specific religions is also racial.[146]

D. The Court Partially Blesses RLUIPA and RFRA

Several years after the passage of RLUIPA, in *Cutter v. Wilkinson*, the Court rejected a facial challenge to the institutionalized persons portion of RLIUPA.[147] Incarcerated members of Satanist, Wicca, and Asatru[148] religions, and of the Church of Jesus Christ Christian,[149] alleged that Ohio prison authorities refused to accede to their religious requirements even though the accommodations sought were analogous to what religiously mainstream peers already received.[150] The prison argued that RLUIPA violated the Establishment Clause. The Court did not address other prospective constitutional challenges to either the institutionalized persons provision or the land use provision.[151] Rather,

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build a church in a residential zone is to find several adjacent lots that are on the market simultaneously, buy them, and tear down the houses—an unfeasible strategy on its face…Commercial districts, therefore, are the only feasible avenue for the location of new churches…[yet]…[l]and use schemes exist permitting churches *only* in residential areas."). *Cf.* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755 (1999) (discussing motivations for why communities might prefer not to have any new religious development).

144. *See Flores*, 521 U.S. at 525–26 ("After South Carolina v. Katzenbach*,* the Court continued to acknowledge the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination.").

145. H.R. REP. NO. 106-219, at 23 n.111 (1999), *supra* note 141.

146. *Id.* The institutionalized persons prong of RLUIPA was supported by testimony concerning religious discrimination in prisons. 146 CONG. REC. 16698, 16699 (July 27, 2000) (joint statement of Senator Hatch and Senator Kennedy on The Religious Land Use and Institutionalized Persons Act of 2000). *See generally* Khyati Y. Joshi, *Brick by Brick: The Struggles for Religious Freedom*, YALE DIVINITY SCH. REFLECTIONS, Spring 2016, at 12–13; Moustafa Bayoumi, *Racing Religion*, CR: THE NEW CENTENNIAL REV., Sept. 2006, at 267 (discussing the case of *In re* Hassan, 48 F. Supp. 843 (E.D. Mich. 1942), in which the court denied naturalization to an Arab applicant, on the grounds that Arabs are not white because most Arabs are Muslims.).

147. Cutter v. Wilkinson, 544 U.S. 709, 720–23 (2005).

148. Focusing on northern European religious tradition revived from prior to Christianity.

149. A church that emphasizes white Christian identity, historically affiliated with Aryan Nations. *Aryan Nations/Church of Jesus Christ Christian*, ANTI-DEFAMATION LEAGUE (Jan. 2, 2005), https://www.adl.org/resources/profile/aryan-nationschurch-jesus-christ-christian [https://perma.cc/YB4Z-LC4G].

150. *Cutter*, 544 U.S. at 712–13 (2005).

151. Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning*

limiting its analysis to Establishment Clause factors, the Court found RLUIPA did not offend the Establishment Clause because it "alleviate[d] exceptional government-created burdens on private religious exercise," did not seem likely to interfere with prison administration, did not seem likely to impose other third-party burdens, and did not "differentiate among bona fide faiths."[152] The allusion to "exceptional government-created burdens," together with a recitation of the Congressional findings of religious discrimination against prisoners strongly suggested that the Court considered the institutionalized persons prong of RLUIPA a valid exercise of Congress's Section 5 authority.[153] Subsequent case law has confirmed that this prong of RLUIPA is indeed constitutional.[154]

One year later, the Court took up the constitutionality of RFRA as applied to the federal government. As may be recalled, *Flores* had explicitly reached only RFRA's application to the states: whether it was constitutional as applied to federal settings remained undetermined.[155] In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, practitioners of an indigenous religion originating in Brazil sought an exception to the Controlled Substances Act for hoasca, a beverage used in religious rites that contains a scheduled hallucinogen.[156] The Court clarified that RFRA continued to apply to the federal government. But the Court did not explain the basis for Congressional authority to enact RFRA: it remained unclear whether this was purely statutory, or if there could remain a Fourteenth Amendment basis even after *Flores.* This question will be addressed in greater detail in Part Four.[157]

The other instructive contribution of *O Centro* was its discussion of the assignment of burdens of production under RFRA.[158] Following the text of the statute, the Court explained that the government must demonstrate a

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Practices, 9 GEO. MASON L. REV. 929, 984–85 (2001) (noting the probable constitutionality of the land use provisions of RLUIPA given that "[t]he [legislative] record identified land-use laws passed out of anti-religious bigotry, as well as laws applied with that animus. Discriminatory application is particularly common because zoning laws across the country are overwhelmingly discretionary; in other words, the 'generally applicable' laws described in Smith are virtually nonexistent in the land-use context.").

152. *Cutter*, 544 U.S. at 720, 722–23.

153. *Id.* at 720. Given the facial challenge posture of the case, the facts were not at issue beyond that prisoners who were members of non-mainstream religions sought religious accommodations. *Id.* at 712. The constitutionality of the land use provisions has yet to be litigated before the Court.

154. Holt v. Hobbs, 574 U.S. 352 (2015).

155. Several circuit courts assumed or concluded that RFRA's application to federal government remained valid even post-*Flores.* Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001); Adams v. Comm'r, 170 F.3d 173, 175 n.1 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 937 (2000); Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 859 (8th Cir. 1998), *cert. denied sub nom*, 525 U.S. 811 (1998). *See generally* Aaron Keesler, *Religious Land-Use and the Fourteenth Amendment's Enforcement Clause: How the FMLA Paved the Way to the RLUIPA's Constitutionality*, 3 AVE MARIA L. REV. 315, 327 n.82 (2005).

156. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006).

157. See *infra*, notes 479–98 and accompanying text.

158. *O Centro*, 546 U.S. at 430–31.

compelling interest in uniform application of the law in question to the claimant (and, it can be inferred, to others similarly situated).[159] Accordingly, because in *O Centro* the government did not show that a small group's religious use of hoasca would imperil the administration of the Controlled Substances Act, the Court issued a preliminary injunction.[160] Notably, the Court did not grant presumptive deference to the government in meeting its burden to show why it had a compelling interest in the statute's uniform enforcement.[161]

Furthermore, to the extent to which a statute already carved out certain exemptions, the government's claim to have a compelling interest was correspondingly diminished: "a law cannot be regarded as protecting an interest of the highest order…when it leaves appreciable damage to that supposedly vital interest unprohibited."[162] Indeed, even previous exemptions granted by the agency charged with enforcing the statute could and should factor into the analysis of whether in fact there is a compelling interest at stake.[163] This type of underinclusiveness analysis is common to other areas of First Amendment law.[164]

By way of summary, the Supreme Court in *Smith* retired the *Sherbert-Yoder* test and ruled that facially neutral laws of general applicability could no longer be subject to court-created exemptions.[165] Congress responded by enacting the *Sherbert-Yoder* test through legislation.[166] However, the Court found Congress lacked a constitutional basis to do so with respect to the states.[167] Congress tried again, this time with a more robust record, limiting its application to institutionalized persons and land use.[168] In *Cutter*, the Court upheld application of the new law to institutionalized persons;[169] though the Court has not yet weighed in on the land use prong, a critical mass of circuit courts have assumed that prong is also constitutional. Moreover, the Court has also denied *certiorari* for some of these cases, suggesting this provision passes constitutional

159. 42 U.S.C.A. § 2000bb-1 (West, Westlaw through Pub. L. No. 118-13).

160. *O Centro*, 546 U.S. at 428–29.

161. *Id.* at 429–30, 439.

162. *Id.* at 433 (quoting Fla. Star v. B.J.F., 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in judgment)); *see* Fraternal Order of Police v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999), discussed *infra* note 305.

163. *See* Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Free Exercise Exemptions*, 38 HARV. WOMEN'S L.J. 35, 63 (2015). Arguably this analysis disincentivizes legislative exemptions in the first instance. *But see* Matthew Nicholson, Note, *Is* O Centro *a Sign of Hope for RFRA Claimants?*, 95 VA. L. REV. 1281, 1297, 1301–13 (2009) (arguing that RFRA claimants would still be unlikely to prevail even under the guidelines established by *O Centro*).

164. *See, e.g.*, Erznoznik v. Jacksonville, 422 U.S. 205 (1975) (ban on drive-in movie theaters from showing movies with nudity if visible from the street found under-inclusive); Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979) (striking down ban on newspapers from publishing names of juvenile defendants in part on the grounds that the law in question did not also prohibit same for electronic media).

165. Emp. Div., Dep't. of Human Res. V. Smith, 494 U.S. 872 (1990).

166. Religious Freedom Restoration Act of 1993 § 2, 42 U.S.C. § 2000bb.

167. City of Boerne v. Flores, 521 U.S. 507 (1997).

168. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc.

169. Cutter v. Wilkinson, 544 U.S. 709, 720–23 (2005).

muster.[170] Meanwhile, in *O Centro*, the Court unambiguously confirmed the ongoing applicability of RFRA to federal government.[171]

The significance of these two unanimous rulings in favor of religious minorities cannot be overstated. In a short span of time, the Court has come to empower adherents of religions that it once would have dismissed (socially and procedurally) to assert claims under RFRA and RLUIPA. Does this shift reflect broadening understandings and experiences in society?[172] Has the experience of examining the robust Congressional record compiled for RLUIPA persuaded the Court of the discrimination that members of religious minorities face?[173] There is also an alternative explanation proceeding more from the school of legal realism: perhaps incidental exemptions for religious minority groups are but the corollary for granting Christian claimants vastly more potent exemptions.[174]

E. Possible Next Steps

Court watchers have been speculating, with sound basis, that the Court may be moving towards overturning *Smith* and reinstating the Sherbert-Yoder test in some form. In fact, in a recent case, the petitioners pressed the Court to do just that.[175] In *Fulton v. City of Philadelphia,* Catholic Social Services claimed that the city violated their First Amendment Free Exercise rights by withholding foster care contracts pursuant to the city's requirement that agencies make

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170. *See, e.g.*, Int'l Church of Foursquare Gospel v. City of San Leandro, 673 F.3d 1059, 1067 (9th Cir. 2011), *cert. denied*, 565 U.S. 882 (2011); Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 914 (2008); Midrash Sephardi, Inc. v. Surfside, 366 F.3d 1214, 1237 (11th Cir. 2004) (because RLUIPA codifies existing first amendment and equal protection rights against state action, it is appropriate and constitutional use of Congress' authority under § 5 of fourteenth amendment), *cert. denied*, 543 U.S. 1146 (2005).

171. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

172. *Cf.* Our Lady of Guadalupe Sch. V. Morrissey-Berru, 140 S. Ct. 2049, 2064–66 (2020) (surveying the importance of religious education in various faith traditions represented in the United States including Judaism, Islam, Adventists, and Latter-Day Saints), discussed *infra* note 204 and accompanying text.

173. *See O Centro*, 546 U.S. at 436 (citing *Cutter*, 544 U.S. at 709, in which the Court upheld the constitutionality of RLUIPA against an Establishment Clause challenge, in its opinion upholding application of RFRA to federal government law).

174. *See* Ian Millhiser, *The Supreme Court Hands Down a Loss for Rogue Law Enforcement Officers–and a Win for the Religious Right*, VOX (Dec. 10, 2020, 8:00 AM) https://www.vox.com/platform/amp/2020/12/10/22167672/supreme-court-tanzin-tanvir-clarence-thomas-religion-muslim-rfra-religious-liberty [https://perma.cc/B6X9-Q5Z5] (explaining how the "enraging" case of Homeland Security agents placing plaintiffs on a no-fly list for refusal to act as informants gave rise to the Court's holding that government officials can be personally liable for money damages in RFRA actions, a development that almost certainly will disproportionately benefit majoritarian claimants). *Cf.* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (granting public school Christian football coach permission to lead prayer on the public school field immediately after the game as a First Amendment freedom). As will be seen, this consideration leads to the challenge of ensuring that exemptions for religious claimants don't occasion unjust burdens on those downstream of the exemption, such as employees or tenants. For religious objections to anti-discrimination law in housing, *see, e.g.*, Smith v. Fair Emp. & Hous. Comm'n, 913 P.2d 909 (1996).

175. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874 (2021).

placements with all families, including same-sex married couples.[176] The district court and the circuit court had considered this requirement to be neutral and generally applicable, and therefore denied relief to the agency.[177] But, sidestepping the occasion to overturn *Smith*, Chief Justice Roberts, writing for a unanimous Court, recalled that the *Smith* Court had specifically acknowledged that exemptions from laws of general applicability may be judicially required when the law in question implicates individualized determinations. The foster care contract included a provision that required participating agencies not to discriminate on the basis of sexual orientation, unless granted an exception by the Commissioner.[178] The Court found that this established a rubric for individualized determinations.[179] Thus, the Commissioner should have granted the exception or articulated a compelling reason not to, according to the individual exemption prong described in *Smith*.[180]

Three justices, however, would have taken this occasion to overturn *Smith*,[181] and three more exhibited some degree of ambivalence towards it.[182] So, in the short term it is well within the realm of possibility that the Court would set aside or substantially cabin *Smith.* The continued role for RFRA and RLUIPA, if any, under such a scenario is one among many areas of uncertainty.

III. HOBBY LOBBY AND THE STATUS QUO: GREATER DEFERENCE TO RELIGIOUS EXEMPTION-SEEKERS, ALTHOUGH BURDENS AND COMPELLING INTEREST REMAIN NEBULOUS

The marquee RFRA Supreme Court case of the past decade has been *Hobby Lobby*. Shortly after passage of the Affordable Care Act, the Hahns, a Christian Mennonite family that owns Conestoga Wood Specialties, and the Greens, who own Hobby Lobby, brought a lawsuit seeking to interpose RFRA against application of the Affordable Care Act's contraceptive coverage mandate to their companies.[183] The resulting 2014 Supreme Court decision granting the exemption is notable for four reasons. First, the majority opinion unequivocally held that corporations are persons within the statutory language of RFRA, meaning that corporations that hold religious beliefs may vindicate them via RFRA.[184] Second, the Court clarified the evaluation of burdens in RFRA claims.

176. *Id.*
177. *Id.* at 1876.
178. *Id.* at 1871.
179. *Id.* at 1877.
180. *Id.* at 1882.
181. Fulton v. City of Philadelphia, 141 S. Ct. at 1883 (Alito, J., concurring).
182. *Id.*at 1882 (Barrett, J., concurring).
183. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 696–98, 700–04 (2014).
184. *Id.* at 717–19. Many questions remain unanswered. In *United States v. Sterling*, 75 M.J. 407, 415 (C.A.A.F. 2016), the Court of Appeals for the Armed Forces observed that activity "claimed to be religiously motivated at least in part…falls within RFRA's expansive definition of 'religious exercise.'"). This opens the door to the possibility that other corporate boards, partly out of religion but moreover to cut costs, will seek to follow in *Hobby Lobby*'s footsteps. Whereas the uncertainty would doubtless prevent such a company from mounting a

As discussed above, RFRA prohibits application of laws that "substantially burden" a claimant's exercise, but courts have long grappled with how to assess what the burden really is.[185] In *Hobby Lobby*, the Court streamlined the "substantial burden" analysis by holding that sincerity is the only appropriate evaluation for a court to undertake.[186] Even though contraceptive coverage would not necessarily lead to abortion because each policyholder would still be the one to make such a choice, the Court ruled that attenuation analysis in religious claims is beyond the scope of judicial competence.[187] Thus, *Hobby Lobby* has distilled the substantial burden step of a RFRA claim to an inquiry of whether the *repercussions* faced by a RFRA claimant would be substantial in the event that the law in question is applied with full force against the claimant.[188]

Third, the Court analyzed compelling governmental interests in a groundbreaking way: it bypassed them altogether. It proceeded directly to the question of whether the regulations at play advanced the goal of contraceptive coverage by using the least restrictive means.[189] Since the coverage could be provided in another way—by enabling the businesses to opt out using the same process already granted to religious employers—the exemption was awarded to the claimants.[190]

Fourth, the Court spoke volumes—through its silence—about how the impacts on third parties should be assessed. In a case arising out of a law that was passed to ensure that workers could conveniently and reliably access contraceptive coverage, the Court largely omitted the perspectives of the workers and their insured family members, and relegated concerns about third-party impacts to a footnote.[191]

RFRA claim in the first instance, once the exemption has been established, this scenario becomes far more plausible. GREENAWALT, *supra* note 73 at 218.

185. *See Burwell*, 573 U.S. at 685 (This inquiry had also posed a challenge under the *Sherbert-Yoder* line of cases prior to *Smith*.).

186. *Hobby Lobby*, 573 U.S. at 725–26.

187. *Id.* at 724–25.

188. *Id.* at 720.

189. Why exactly the Court bypassed this step is not clear from the face of the opinion, but Ira Lupu suggests that the majority relied on Justice Kennedy's vote yet recognized that he and other members of the majority would differ on the question of whether government has a compelling interest in the provision of contraceptive care. Lupu, *supra* note 163, at 84–86. *See Hobby Lobby*, 573 U.S. at 737 (Kennedy, J., concurring) ("It is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees.").

190. *Hobby Lobby*, 573 U.S. at 728–30 (finding that government funding of the coverage in question could serve as a less restrictive alternative). The dissent of Justice Ginsburg disputed the Court's characterization of the proposed alternative as a viable alternative, *id.* at 764–68, and Ira Lupu has detected a difference in nuance in the definition of least restrictive alternative, that is, how substantively equivalent the alternative must be to qualify, with the dissent insisting that the least restrictive alternative must constitute "equally effective means" to fulfill the statutory goal, (Hobby Lobby, 573 U.S. at 2801 (Ginsburg, J., dissenting)), and the Court's opinion presupposing that the least restrictive alternative may consist of a somewhat more speculative alternative, such as direct government funding for the service at issue. Lupu, *supra* note 163, at 88–89.

191. *Hobby Lobby*, 573 U.S. at 729 n.37.

This Part will explore each of these aspects of *Hobby Lobby*, incorporating perspectives from other Supreme Court, circuit court, and district court cases and touching on relevant developments in related law. Pursuant to the Court's teaching that RFRA cases can inform RLUIPA analysis and vice versa, both kinds of cases are intermingled in the following discussion.[192]

A. Corporate Free Exercise

Corporate personhood has long been a hotly debated topic in First Amendment jurisprudence,[193] and some have argued that recognizing free exercise rights of for-profit corporations represents a nonsensical over-extension of the corporate personhood doctrine.[194] After all, what does free exercise on the part of a for-profit corporation look like? Can a corporation itself really have religion, or is the analysis effectively of the religion of the control group or the majority shareholders or the control group subject to the shareholders?[195] And if one core attribute of the corporate form is its independent legal existence, then is it not incongruous to impute the religious views of the current managers or current owners to the corporation itself?[196]

Yet religious exercise has traditionally been conceptualized in the Anglo-American context as a group activity.[197] And indeed, even utilizing for-profit

192. New Doe Child #1 v. Cong., 891 F.3d 578, 586 n.1 (6th Cir. 2018) (Moore, J., dissenting) ("Although the Supreme Court was analyzing the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") in *Holt*, the Court has stated that this is a 'sister' act to RFRA and has not drawn a distinction between what constitutes a substantial burden under RFRA and what constitutes a substantial burden under RLUIPA.") (quoting Holt v. Hobbs, 574 U.S. 352, 356 (2015)); *Holt,* 574 U.S. at 357 (stating that statutory language of RLUIPA "mirrors RFRA").

193. *See, e.g.,* Citizens United v. Fed. Election Comm's, 558 U.S. 310, 343 (2010) (overturning bars on direct corporate and union spending on elections, on the grounds that corporations' free speech rights, just like natural persons' rights, include the right to spend money in elections and describing corporate speech as "contribut[ing] to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster.") (quoting First Nat'l Bank of Bos. v. Bellotti*,* 435 U.S. 765, 783 (1978)).

194. Carliss N. Chatman, *The Corporate Personhood Two-Step*, 18 NEV. L.J. 811, 837 (2018) ("[M]any of the Court's concerns regarding rights particular to human beings are misplaced. If a right is one which a corporation personally cannot enjoy, extending the right to the corporation as a proxy for 'the people' is improper."); *see also* Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 41 (2014) (discussing how religion extends beyond just weekly congregate worship to infuse many aspects of practitioners' lives).

195. *See* Kent Greenfield & Daniel A. Rubens, *Corporate Personhood and the Putative First Amendment Right to Discriminate*, B.C.L. SCH. FAC. PAPERS, at 11–12 (Apr. 1, 2021) https://lira.bc.edu/work/ns/dc195f3a-5461-4e1d-ba2a-9c814d9cba99 [https://perma.cc/3VRL-NUTZ] (posing these and other related, intractable questions).

196. Chatman, *supra* note 194, at 857.

197. Garrett Epps, *How the Case of an Amish Farmer Could Doom Hobby Lobby in Court*, THE ATLANTIC, Feb. 12, 2014, at 4, https://www.theatlantic.com/national/archive/2014/02/how-the-case-of-an-amish-farmer-could-doom-hobby-lobby-in-court/283783 **[**https://perma.cc/2SF3-PWWL**]** ("It is routine to say that free exercise is an individual right, and that 'corporations are not people.' But…[f]ree

corporate forms for religious undertakings is by no means a new development—the Massachusetts Bay Company received its royal charter as a profit-making venture, and in effect the shareholders of the company were not only the colony's principal magistrates,[198] but also its church leaders.[199] Professor Haig Smith has noted how Massachusetts Bay colonists understood corporate organization as more than merely a formal structure, infusing it with religious significance—just as shareholders were bound together financially in a corporation, prospering or diminishing in value in unison, so too were Christians bound in congregational fellowship, with each member's spiritual wellbeing integrally connected.[200]

Accordingly, the Court found that because Congress had not specified natural persons, it must have intended to include corporate persons; and then bolstered this finding by blurring the line between the interests of corporate and natural persons:

> Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA's definition of "persons." But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or

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exercise is *primarily* a group right, extended to religious bodies, in corporate form or other wise [sic]. The term 'free exercise' in fact originally referred to a right held only by groups.").

198. John Dickinson, *The Massachusetts Charter and the Bay Colony (1628-1660)*, *in* COMMONWEALTH HISTORY OF MASSACHUSETTS 93, 93–123 (Albert Bushnell Hart ed., 1927) (stating that all ten Massachusetts Bay Company shareholders who migrated to the colony in 1630 became assistants).

199. William G. Robbins, *The Massachusetts Bay Company: An Analysis of Motives*, 32 THE HISTORIAN 83, 95 (1969) (listing the twelve shareholders of the Massachusetts Bay Company); PERRY MILLER, ORTHODOXY IN MASSACHUSETTS 1630-1950 135, 160 n.2 (1959) (describing three of the twelve shareholders as founders of the Charlestown-Boston congregational church [Winthrop, Dudley, and Johnson]); *First Parish of Watertown (Watertown, Mass.) Records, Chronological Timeline*, MASSACHUSETTS HISTORICAL SOCIETY (2004), https://www.masshist.org/collection-guides/view/fa0062 [https://perma.cc/WW37-DYMT] (naming a company shareholder as a principal leader of the Watertown church [Saltonsall]); Philip F. Gura, *"The Contagion of Corrupt Opinions" in Puritan Massachusetts: The Case of William Pynchon*, 39 WM. & MARY Q. 469, 471 (1982) (describing a company shareholder as founding member of the Roxbury congregation); WILLIAM I. BUDINGTON, HISTORY OF THE FIRST CHURCH, CHARLESTOWN 15 (1845) (stating that shareholder served as "ruling elder" of Charlestown congregation [Nowell]); JOHN WINTHROP, HISTORY OF NEW ENGLAND FROM 1630 TO 1649, 44, 44 n.3 (1852) (describing shareholder as deacon and eventually ruling elder of Boston church [Colbron]).

200. HAIG Z. SMITH, RELIGION AND GOVERNANCE IN ENGLAND'S EMERGING COLONIAL EMPIRE, 1601-1698, at 99–102 (2022) https://link.springer.com/content/pdf/10.1007/978-3-030-70131-4.pdf [https://perma.cc/H7ZJ-NUTN] ("[I]t is then not illogical to suggest that [the colony's sponsors] chose the joint stock corporate structure as a secular base for their 'godly project' since it mirrored the same collectivism of their Church.").

> another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.[201]

The argument that Congress intended to include RFRA within the definition of persons, because Congress failed to specify "natural persons," is not convincing. It is similar to the unpersuasive argument that Congress had no need to specify natural persons, because corporate personhood pre-supposes a separate legal existence of the corporation apart from its owners that is patently incapable of manifesting religious sentiment. The Court's wording appears to suggest that corporate principals may utilize the corporate form to achieve their own personal religious objectives, even though corporate responsibilities—taxes, penalties, and criminal and civil liability—remain cabined to the corporate form.[202]

A parallel development applicable to religious organizations may shed light on possible directions for the doctrine of corporate free exercise. The ministerial exception, which derives from both the Free Exercise and the Establishment Clauses, purports to free religious institutions from disruptive government interference.[203] First announced by the Court in 2012, and then consolidated and expanded in 2020, this doctrine confers broad latitude to religious institutions in hiring and firing those of their employees who advance a core mission of the institution, through exemptions from anti-discrimination law.[204]

In *Hosanna Tabor*, religious school teacher Cheryl Perich filed a complaint under the ADA that she had faced discrimination related to her diagnosis of narcolepsy.[205] The church that operated the school claimed it was exempt from such an application of the ADA because Perich was a minister of education and because the Establishment Clause would be offended if churches' selections of ministers were subject to the oversight of the EEOC and other regulatory regimes.[206] After citing prior cases where the Court had eschewed involvement in internal religious disputes, the Court upheld the ministerial exception, finding it required by not only the Establishment Clause but also the Free Exercise Clause.[207]

This decision extends far beyond those employment regulations that pose a direct conflict with the religion's creeds, to encompass all employment

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201. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706–07 (2014).

202. It is also noteworthy that while the employees of a corporation are discursively included to help illustrate that a corporation consists in essence of natural persons, yet the Court appeared unconcerned with how those same employees would be impacted when the principals' religious values are imposed, through RFRA exemptions, on the entire organization. *See infra*, notes 340–53 and accompanying text (discussing third-party impacts). This application of RFRA could lead to abuse, especially if cost-conscious organizations claim religious exemptions for business reasons.

203. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 185–90 (2012).

204. *Id.* at 188; Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2064, 2066 (2020).

205. *Hosanna-Tabor*, 565 U.S. at 177–79.

206. *Id.* at 180–82.

207. *Id.* at 185–89.

regulations related to selection and termination of personnel serving in a ministerial capacity.[208] In 2020, the Court extended the ministerial exception by an order of magnitude to all teachers whose portfolios include religious instruction, ruling that they are outside of the protections of the Age Discrimination in Employment Act and the Americans with Disabilities Act (as well as all other discrimination protections).[209] The logic of the ministerial exception now seems strained beyond the breaking point, as the persons in question are basically employees and not leaders, lacking the majority of indicia that distinguished Perich as a minister in *Hosanna-Tabor*.[210] Instead, the Court seems to be setting up religious institutions and their organizations as a sphere apart immune from employment laws.[211]

The expansion of RFRA to corporations raises the possibility that much of the ministerial exception doctrine of *Hosanna-Tabor* and *Our Lady of Guadalupe School* will eventually migrate to corporate RFRA jurisprudence, leaving broad institutional domains in both the private and non- profit sectors outside of the protections of anti-discrimination legislation. An example that could serve as a precursor for this merger is *Penn v. New York Methodist Hospital*.[212] Chaplain Marlon Penn sued his employer for racial discrimination.[213] The hospital is an avowedly secular institution, yet maintains a pastoral care department as do many other secular hospitals.[214] In fact, attention to a "patient's right to religious and other spiritual services" is obligatory for all hospitals receiving the Joint Commission accreditation standard.[215] Nevertheless, the court deferred to the hospital's characterization of its chaplaincy program as an expression of its religious heritage sufficient to qualify it as a religious institution for purposes of the ministerial exception.[216] And because the plaintiff was a chaplain, and thus a ministerial employee within the *Hosanna-Tabor* definition, his lawsuit was dismissed.[217]

In the wake of *New York Methodist Hospital*, any institution may bring its one-time religious affiliation to bear in resisting discrimination claims. More cases like this one could continue to bridge the gap between RFRA and ministerial exception jurisprudence, creating a capacious carve-out zone in American society for institutions, nonprofit and for-profit alike, whose active or

208. *Id.* at 188–89.

209. Our Lady of Guadalupe Sch. V. Morrissey-Berru, 140 S. Ct. 2049, 2066 (2020).

210. *Id.* at 2075, 2081 (Sotomayor, J., dissenting).

211. *Id.* at 2082. *See generally* Paul Horwitz, *Act III of the Ministerial Exception*, 106 NW. U.L. REV. 973, 976–80 (2012) (arguing that religious institutions and government constitute two separate "kingdoms," with government involvement with and oversight of religious institutions best kept to a minimum).

212. Penn v. N.Y. Methodist Hosp., 884 F.3d 416 (2d Cir. 2018).

213. *Id.* at 421–22.

214. *Id.* at 419, 425.

215. John Ehman, Joint Comm'n Comprehensive Accreditation Manual for Hosps., Penn Med. (May 18, 2023), https://www.uphs.upenn.edu/pastoral/resed/JCAHOrefs.pdf [https://perma.cc/NU79-4NS3].

216. *Penn*, 884 F.3d at 425 ("[T]he hospital's Department of Pastoral Care has retained a critical aspect of [its] religious identity in order to provide religious services to its patients.").

217. *Id.* at 426.

even vestigial religiosity excuses them from discrimination law.[218] This potential development substantially raises the stakes for employees of corporations, because RFRA exemptions from federal worker rights law combined with the ministerial exception to anti-discrimination law could render them entirely bereft of any meaningful workplace protections.[219]

B. Shifting Definitions of Burdens

As may be recalled, RFRA and RLUIPA permit government to "substantially burden a person's exercise of religion" only when that application is the least restrictive means of furthering a compelling governmental interest.[220] In evaluating when elements of a religious practice are important enough to qualify as "substantial," courts have educed four related metrics—canonicity, fungibility, pragmaticality, and attenuation—which are rapidly coalescing into a single test for sincerity. As will be discussed, the Court has largely foreclosed evaluation of the first four considerations, though they occasionally resurface under the rubric of sincerity analysis.

1. Canonicity

The statutory language of both RFRA and RLUIPA requires claimants to demonstrate the imposition of a "substantial burden" on their free exercise. On its face, this wording does not specify whether the burden must be objective or subjective; which is to say whether some authority within a claimant's religion must attest to the burden or if a claim can be maintained solely on the basis of an individual's idiosyncratic practice.

An early example of canonicity already touched on was *Thomas*.[221] There, Eddie Thomas, a Jehovah's witness, objected to working in a facility that

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218. *See generally History of Hosps.*, PENNNURSING, https://www.nursing.upenn.edu/nhhc/nurses-institutions-caring/history-of-hospitals [https://perma.cc/3S3Z-DHW5] (last visited July 25, 2022) (religious origins of hospitals); Luis Ferruz, Fernando Muñoz, & María Vargas, *Managerial Abilities: Evidence from Religious Mut. Fund Managers*, 105 J. BUS. ETHICS 503, 515–16 (2012), http://www.jstor.org/stable/41413234 [https://perma.cc/69YS-TY99] (religious mutual fund managers); Christopher Dodson, *The Origins of Blue Cross and Lessons for Today*, N.D. CATH. CONF. (July 2015) https://ndcatholic.org/yourresources/editorials/column0715 [https://perma.cc/2PEZ-8CEN] (health insurance).

219. *See* Kathleen A. Brady, *Religious Accommodations and Third-Party Harms: Constitutional Values and Limits*, 106 KY. L.J. 717, 742 (2018) (highlighting the concern that "[p]owerful religious groups" may wield their influence in legislatures and courts to procure exemptions that burden others who are underrepresented in the political process).

220. RELIGIOUS FREEDOM RESTORATION ACT, S. REP. NO. 103-111, at 8 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1897–98.

221. *See generally* Thomas v. Review Bd. of the Ind. Emp. Security Div., 450 U.S. 707 (1981) (demonstrating that the most egregious examples of canonicity are when the Court arrogates to *itself* religious interpretive authority). In *United States v. Macintosh*, 283 U.S. 605, 625 (1931), the Court denied an exemption to a theologian seeking to naturalize who objected to promising to bear arms for his adoptive homeland. A divided Court concluded that his religious perspective must be erroneous because America was "a Christian people" whose

manufactured armaments, and was therefore disqualified from receiving unemployment benefits.[222] Both the administrative law judge and the Indiana Supreme Court found that other members of the claimant's faith did not share Mr. Thomas' scruples, including another Jehovah's Witness who worked at the same company, and the state high court denied the exemption on the grounds that Mr. Thomas' objection was based on inchoate personal preference rather than a "cardinal" religious rule.[223] The Supreme Court reversed, noting that:

> Intrafaith differences. . .are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. . .it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.[224]

Nevertheless, canonicity as a metric for evaluating substantial burdens has persisted, perhaps because it seems to confer some degree of objectivity to what might otherwise appear an amorphous analysis. In 2011, Abdul Maalik Muhammad sought a RLUIPA exemption to the grooming rule at the prison in which he was incarcerated so that he could maintain a one-half inch beard in accordance with his Salafi Muslim faith.[225] In evaluating the force of Muhammad's free exercise claim, the magistrate considered the fact that not all Muslims believe men should grow beards as indicative that Mr. Muhammad was under no obligation to, omitting an analysis of whether the Salafist Movement may have more stringent expectations.[226]

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policies "made for war as those for peace, [we]re not inconsistent with the will of God." (citing Holy Trinity Church v. United States, 143 U.S. 457, 470, 471 (1892)). *See also* Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 304–05 (1985) (discounting the claimants' argument that receiving wages constituted a substantial free exercise burden on their associates, because "there is nothing in the Act to prevent the associates from returning the amounts to the Foundation, provided that they do so voluntarily"); Krotoszynski, *supra* note 34, at 1225 n.82 (characterizing the Court's opinion therein as "essentially rewrit[ing] the associates' theology").

222. *Thomas*, 450 U.S. at 710–12.

223. *Id.* at 712–13; Thomas v. Review Bd. of the Ind. Emp. Sec. Div., 391 N.E.2d 1127, 1133 (Ind. 1979) ("Thomas is not required by statute to violate a cardinal tenet of his religion. Our review of the record here reveals that the basis of claimant's belief is unclear. The precise belief is not articulated. He does not show how the exercise of his religious beliefs is hampered.").

224. *Thomas*, 450 U.S. at 710.

225. Holt v. Hobbs, 574 U.S. 352, 355, 358–60 (2015). Mr. Muhammad had previously been called Gregory Holt.

226. Holt v. Hobbs, No. 5:11–cv–00164–BSM–JJV, 2012 WL 994481 at 3 (E.D. Ark., Jan. 27, 2012). *See* Joas Wagemakers, *Salafism and the Religious Significance of Physical Appearances*, OXFORD UNIVERSITY PRESS BLOG (Jan. 11, 2017), https://blog.oup.com/2017/01/salafism-physical-appearances [https://perma.cc/9V2S-F2T8] (explaining that Salafi men wear long beards as a spiritual practice in honor of the Prophet). This case was overturned by the Supreme Court on appeal, as discussed *infra*, note 265 and accompanying text.

And in Wisconsin, David Schlemm, an incarcerated person and member of the Navajo tribe, brought a RLUIPA claim seeking an exception to prison food rules so that fresh game meat could be delivered for the annual Ghost Feast.[227] The district court ruled that fresh game meat need not be permitted in order to prevent a substantial burden on Mr. Schlemm's free exercise.[228] Underpinning this decision was the fact that Mr. Schlemm was unable to point to anything whether "in the materials provided by your expert or in the literature that suggests that it's not an adequate Ghost Feast if the food, particularly the game meat, is not fresh and able to be cooked."[229] The Circuit Court affirmed, finding no clear error.[230] Thus, the claimant's own experience and interpretation was insufficient to carry his burden of showing a substantial burden.[231]

2. Fungibility

When courts evaluate, consciously or subconsciously, whether the claimant has alternative ways to pursue their free exercise, they engage in a fungibility analysis. This may seem a reasonable mechanism for assessing a substantial burden, since if the claimant has other ways to worship, then presumably the hardship caused by denial of their claim is not as great as otherwise.

In *O'Lone v. Estate of Shabazz*, discussed above, the Court denied the request of Muslims who were incarcerated to obtain an exemption from the prison work schedule in order to attend Friday prayers.[232] The Court based its decision in part on the record's evidence that:

> [R]espondents are not deprived of all forms of religious exercise, but instead freely observe a number of their religious obligations. The right to congregate for prayer or discussion is "virtually unlimited except during working hours," and the state-provided imam has free access to the prison. Muslim prisoners are given different meals whenever pork is served in the prison cafeteria. Special arrangements are also made during the month-long observance of Ramadan, a period of fasting and prayer. During Ramadan, Muslim prisoners are awakened at 4 a.m. for an early breakfast, and receive dinner at 8:30 p.m. each evening.[233]

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227. Schlemm v. Carr, 760 F. App'x 431, 433–35 (7th Cir. 2019); Bruce Vielmetti, *Court: Imprisoned Navajo Can Eat Venison in Religious Observance*, J. SENTINEL (Apr. 23, 2015) https://archive.jsonline.com/news/crime/court-imprisoned-navajo-can-eat-venison-in-religious-observance-b99487109z1-301078601.html [https://perma.cc/KDW6-SHDX] (specifying the plaintiff's tribal affiliation).

228. *Schlemm*, F. App'x at 434–35.

229. *Id.* at 434.

230. *Id.* at 436.

231. *Id.* at 434–35. In rendering this decision, the trial court also cited, somewhat tangentially, that there is a Native American tradition of drying game meat, although the court did not explain how that tradition would have bearing on the particular requirements of the Ghost Feast as understood by the plaintiff.

232. *See* O'Lone v. Est. of Shabazz, 482 U.S. 342 (1987).

233. *Id.* at 352.

The Court thus reasoned that the ability for the claimants to fulfill their faith in other ways helped justify the denial of participation in Friday Jumu'ah prayers.[234]

The trial court's decision in *Holt v. Hobbes*, also mentioned above, furnishes an example of fungibility analysis in the RFRA/RLUIPA era.[235] There, the court justified its denial of Abdul Maalik Muhammad's request to grow facial hair in part on the grounds that prison officials permitted Mr. Muhammad to utilize a prayer rug, keep halal, and celebrate Islamic holidays.[236]

In *Smith v. Dunn*, Willie Smith, an incarcerated individual with a scheduled execution, brought a RLUIPA claim arguing that his spiritual advisor, Pastor Wiley, should be present with him in the execution room at the time of the execution.[237] The district court evaluated whether Mr. Smith had established a likelihood of success on the merits at the preliminary injunction phase, turning to whether he had satisfied his burden of showing that not having Pastor Wiley present would constitute a substantial burden on his religious practice.[238] The court found that alternatives which lessened the impact of the burden, rendering it legally insufficient to support a RLUIPA claim.[239] In particular, Mr. Smith could pray with Pastor Wiley prior to the execution, and Pastor Wiley could be present in the viewing room on the other side of a glass wall, within view of Mr. Smith; and the court determined that was close enough.[240] Interposing court-crafted alternatives is the hallmark of fungibility analysis.[241]

3. Pragmaticality

A third metric utilized by courts has been pragmaticality. The antecedents for this metric also date to the *Sherbert-Yoder* era, and, like other cases from that era, evince a Judeo-Christian orientation.[242] Pragmaticality means the extent to which the objected-to government action constrains a ritual or practice as opposed to offending a more theoretical belief or ontological principle. Stated succinctly in *Bowen v. Roy*, the pragmaticality lens assumes there is no cognizable burden if the challenged government action does not "affirmatively compel appellees, by

234. *Id.*

235. Holt v. Hobbes, 574 U.S. 352 (2015).

236. *Id.* at 359. The Supreme Court would subsequently reject this line of reasoning, *see id.* 361–62, yet as will be seen from the following example of *Smith v. Dunn*, courts nonetheless continue to deploy fungibility analysis even after *Holt*.

237. Smith v. Dunn, 516 F. Supp. 3d 1310, 1323 (M.D. Ala. 2021).

238. *Id.* at 1321–22.

239. *Id.* at 1322–25.

240. *Id.* at 1323–25.

241. This approach was rejected by the Eleventh Circuit, which overturned the lower court's decision and granted the injunction. Smith v. Comm'r, Ala. Dep't of Corr., 844 Fed. App'x 286, 291, 295 (11th Cir. 2021).

242. See Kathleen Sands, *Territorial, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases*, 36 AM. INDIAN L. REV. 253, 289 (2011); Skibine supra note 60 at 273–74, 76; *see generally* Lori G. Beaman, *Aboriginal Spirituality and the Legal Construction of Freedom of Religion,* 44 J. CHURCH & ST. 135*,* 136–37 (discussing how the domination of the religious landscape by "mainstream Christianity" has often resulted in "a narrow interpretation of religion and religious freedom" for religious minorities).

threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons."[243]

Conduct-centric analysis predominated the court's decision in *Navajo Nation v. U.S. Forest Service*.[244] A coalition of half a dozen tribes argued that the San Francisco Mountain Range, located on government property, held a sacred meaning for them that would be degraded by use of artificial snow made from reclaimed water by a ski resort franchisee operating on the mountain's slopes.[245] However, the Ninth Circuit applied a pragmaticality analysis, noting that "a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)."[246] The court noted that the logistics of the tribes' religious exercises could proceed unhindered: "there are no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of such artificial snow. No plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified."[247] Rather, "the sole effect of the artificial snow is on the Plaintiffs' subjective spiritual experience"—which the court determined amounted to nothing more than "the Plaintiffs' feelings about their religion."[248] Accordingly, the claim was denied on the grounds that the tribe's religious exercise was not and could not be substantially burdened by this practice.[249]

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243. Bowen v. Roy, 476 U.S. 693, 703 (1986). Thus, the *Bowen* Court held that religious concerns over the government's *internal* use of an SSN for the claimants' daughter could not constitute a cognizable free exercise claim, in a quip brimming with mockery. *Id.* at 699–701 ("Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets."). *See* Skibine, *supra* note 60, at 280 (discussing how the Court, pre-RFRA, limited the definition of what constituted a substantial burden to either actual coercion or benefits withheld).

244. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc), *cert. denied*, 556 U.S. 1281 (2009).

245. *Id.* at 1062–63.

246. *Id.* at 1069.

247. *Id.* at 1063.

248. *Id.*

249. *Id.* at 1078. *But see id.* at 1096 (Fletcher, C.J., dissenting):

> In addition to misstating the law under RFRA, the majority misunderstands the nature of religious belief and practice. The majority concludes that spraying up to 1.5 million gallons of treated sewage effluent per day on Humphrey's Peak, the most sacred of the San Francisco Peaks, does not impose a "substantial burden" on the Indians' "exercise of religion." In so concluding, the majority emphasizes the lack of physical harm. According to the majority, "[T]here are no plants, springs, natural resources, shrines with religious significance, nor any religious ceremonies that would be physically affected" by using treated sewage effluent to make artificial snow. In the majority's view, the "sole effect" of using treated sewage effluent on Humphrey's Peak is on the Indians' "subjective spiritual experience." Maj. Op. at 1063.

The majority's emphasis on physical harm ignores the nature of religious belief and exercise, as well as the nature of the inquiry mandated by RFRA. The majority characterizes the Indians'

This conduct-centric articulation of free exercise has resurfaced in multiple scenarios, usually by governmental parties arguing there is no substantial burden. Plaintiffs Alan Carmichael, Lawrence Donald Lewis, and Mitchell Pakosz sought to renew their passports but objected to providing their social security numbers, claiming that furnishing their social security numbers was tantamount to identifying with it—a violation of their Christian faith.[250] In response, the government claimed that the social security requirement "does not pressure Plaintiffs to change their behavior and violate their religion,"[251] evoking the pragmatical lens that a substantial burden can arise only if participation in religious acts, rites, and rituals is impaired (*Sherbert*) or the claimant is coerced into an objectionable setting for an ongoing period of time (*Yoder*).[252] Put differently, "'[r]eligious exercise necessarily involves an action or practice' and, therefore, a plaintiff must allege 'that he is put to a choice' between complying with a government requirement and violating his religious beliefs."[253]

4. Attenuation

A closely related factor in the analysis is attenuation, the possibility or likelihood that the objected-to substantial burden will in fact come to pass. A Sikh ROTC applicant named Iknoor Singh sued under RFRA to wear a turban,

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religious belief and exercise as merely a "subjective spiritual experience." Though I would not choose precisely those words, they come close to describing what the majority thinks it is *not* describing—a genuine religious belief and exercise.

Contrary to what the majority writes, and appears to think, religious exercise invariably, and centrally, involves a "subjective spiritual experience." Religious belief concerns the human spirit and religious faith, not physical harm and scientific fact. Religious exercise sometimes involves physical things, but the physical or scientific character of these things is secondary to their spiritual and religious meaning. The centerpiece of religious belief and exercise is the "subjective" and the "spiritual." As William James wrote, religion may be defined as "the feelings, acts, and experiences of individual men [and women] in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine." WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE 31-32 (1929).

The majority's misunderstanding of the nature of religious belief and exercise as merely "subjective" is an excuse for refusing to accept the Indians' religion as worthy of protection under RFRA. According to undisputed evidence in the record, and the finding of the district court, the Indians in this case are sincere in their religious beliefs. The record makes clear that their religious beliefs and practice do not merely require the continued existence of certain plants and shrines. They require that these plants and shrines be spiritually pure, undesecrated by treated sewage effluent.

250. Carmichael v. Pompeo, 486 F. Supp. 3d 360, 364, 365 (D.D.C. 2020).

251. *Id.* at 370.

252. This articulation was also picked up in *Singh v. McHugh,* 185 F. Supp. 3d 201, 204 (2016).

253. *Carmichael*, 486 F. Supp. 3d at 368 (quoting Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008)). The court found the government's argument on this point unavailing and denied its motion for summary judgment. However, it did not directly challenge the government's substantial burden articulation, basing its holding on the finding that, in fact, in this instance, that the claimants *did* have to choose "between adhering to their religious beliefs…and receiving a government benefit." *Id.* at 371.

unshorn hair, and a beard.[254] In arguing that Army regulations to the contrary did not occasion a substantial burden on Iknoor Singh's free exercise, the government argued that since Mr. Singh had not yet joined ROTC, he had not yet confronted the dilemma of violating his religious practice by conforming with the grooming requirements, or facing discipline.[255] Therefore, his claim was too attenuated.[256]

The attenuation issue presented in *Hobby Lobby* is as follows: under regulations promulgated pursuant to the Affordable Care Act, the Department of Health and Human Services required all employer health plans to provide coverage, without cost sharing, for all FDA-approved contraceptives, including four that operated after the moment of fertilization.[257] But the Greens and the Hahns articulated their religious belief that human personhood begins at fertilization, and argued that this mandate would violate their companies' religious beliefs.[258] The government, and the dissent, argued that the Affordable Care Act regulations merely required that the contraceptives be made available without cost sharing;[259] whether any employees actually utilized the contraceptives would be their own decision.[260] As Justice Ginsburg stated, the linkage was "thus interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed."[261]

5. The Four Analyses Subsumed under, and Sublimated into, the Sincerity Test

The *Hobby Lobby* Court was ultimately not persuaded by the attenuation argument. Rather, the Court held that courts must credit the religious conviction of an RFRA claimant with no further investigation of how reasonable or unreasonable that conviction may be.[262] If the plaintiffs believed that contributing to the availability of impermissible contraceptives violated their religious tenets, then the court must accept that a governmental requirement to do so implicates a

254. *Singh*, 185 F. Supp. 3d at 204.

255. *Id.* at 211.

256. *See id.* However, following the filing of the lawsuit, the Army processed Mr. Singh's exemption application and denied it, thereby occasioning a justiciable burden. *Id.* Following summary judgment for the Plaintiff, *id.* at 233, the Army subsequently issued a rule codifying this ruling with respect to turbans, beards, and hijabs. Meghann Meyers, *New Army Policy Oks Soldiers to Wear Hijabs, Turbans and Religious Beards*, Army Times, Jan. 5, 2017 https://www.armytimes.com/news/your-army/2017/01/05/new-army-policy-oks-soldiers-to-wear-hijabs-turbans-and-religious-beards [https://perma.cc/Z67F-G82Y].

257. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 697–98 (2014).

258. *Id.* at 701–05.

259. *Id.* at 682, 758–61 (Ginsburg, J., dissenting).

260. *Id.* at 760.

261. *Id.*

262. *Id.* at 723–24.

cognizable burden on the plaintiffs' free exercise, regardless of how many additional links in the chain an outside observer might perceive.[263]

The Court further clarified that a plaintiff could meet the litigation burden of showing a substantial free exercise burden by demonstrating that the governmental sanction for non-compliance would be substantial.[264] In the case of Hobby Lobby Stores, the penalties could amount to as much as $475 million per year if the company opted out of the objected-to contraceptives only, or $26 million per year if the company canceled its plan entirely.[265] The Court presupposed that amounts in the tens of millions are "enormous," and therefore legally sufficient to constitute a substantial burden, obviating any need for a particularized inquiry into what percentage of a company's overall operating revenue the penalties represent.[266]

Hobby Lobby thus refracted the substantial burden step into a straightforward inquiry: is the claimant sincere? And, in cases where the claimant would face a sanction for non-compliance, is the sanction substantial? Decided the year after *Hobby Lobby*, *Holt v. Hobbes*, referenced above, applied identical logic to evaluating substantial burdens under RLUIPA.[267] Citing to *Hobby Lobby*, the *Holt* Court held that to satisfy the substantial burden prong of a RLUIPA claim, the claimant need only show that "the relevant exercise of religion is grounded in a sincerely held religious belief," and that the regulations "substantially burdened that exercise of religion." Mr. Muhammad was able to clear this threshold because if he were to "contravene[] [the grooming policy] and grow[] his beard, he [would] face serious disciplinary action."[268] And, as *Hobby Lobby* had rejected attenuation analysis, the *Holt* Court cast aspersions on both the fungibility analysis and the canonicity analyses in evaluating substantial burdens.[269] Addressing fungibility, the Court held that "RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise (here, the growing of a ½–inch beard), not whether the RLUIPA claimant is able to engage in other forms of religious exercise."[270] And, turning to canonicity, the Court observed that, "the District Court went astray

263. *Id. But see* Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & RELIGION 139, 151–52 (2009) (arguing that "all exercise of religion [should be] constitutionally protected, but [] less weighty government interests [should be permitted to] justify burdens on less weighty religious practices").

264. *Hobby Lobby*, 573 U.S. at 726. Scholars Ira Lupu and Robert Tuttle identified two valences of the substantial burden test – the religious burden occasioned on the claimant, and the secular burden in the form of penalties for non-compliance. Lupu, *supra* note 163, at 80.

265. *Hobby Lobby*, 573 U.S. at 704.

266. *Id.* In 2017, Hobby Lobby Stores' gross revenue was $4.3 billion per year. Scott S. Smith, *Hobby Lobby's David Green Goes By 'The Book,' Not Conventional Wisdom*, INVESTORS BUSINESS DAILY (May 22, 2017, 7:30 AM), https://www.investors.com/news/management/leaders-and-success/hobby-lobbys-david-green-goes-by-the-book-not-conventional-wisdom [https://perma.cc/AK3S-23YU]. $26 million divided by $4.3 billion is approximately 0.6%.

267. Holt v. Hobbs, 574 U.S. 352, 360–61 (2015).

268. *Id.*

269. *Id.* at 359–64.

270. *Id.* at 359–63.

when it relied on petitioner's testimony that not all Muslims believe that men must grow beards. Petitioner's belief is by no means idiosyncratic. But even if it were, the protection of RLUIPA…is 'not limited to beliefs which are shared by all of the members of a religious sect.'"[271]

Thus, after *Hobby Lobby* and *Holt*, sincerity appears to be what matters the most, although the Court is yet to squarely address pragmaticality. Justice Ginsburg's synopsis in the *Hobby Lobby* dissent seems fairly on point: "today's decision elides entirely the distinction between the sincerity of a challenger's religious belief and the substantiality of the burden placed on the challenger."[272] Yet, for reasons alluded to above, it is difficult to understand how courts could fairly and effectively parse the other forms of analysis that had gone into substantial burden determinations.

6. Whither Sincerity?

In words that could apply equally to RFRA as to RLUIPA, the Sixth Circuit recently noted that "RLUIPA's sincerity prong is not a difficult hurdle for prisoners. The sincerity prong just requires courts 'to determine whether the line drawn' by the plaintiff between conduct consistent and inconsistent with her or his religious beliefs 'reflect[] an honest conviction.'"[273] Yet a more granular study of the sincerity analysis demonstrates the tendency of courts to find new ways to deny the exemption and rule for the government.[274]

One interesting and potentially troubling development linked to the increased emphasis on sincerity as the essence of the substantial burden test has been the tendency of courts to give greater credence to claimants who have been exceptionally tenacious in pursuing their claims; where a claimant appears to have struggled longer and harder for their free exercise claim, a court may be more willing to grant the sincerity of their belief.[275] One sympathizes with courts'

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271. *Id.* at 362 (quoting Thomas v. Rev. Bd. Of Ind. Emp. Sec. Div., 450 U.S. 707, 715–16 (1981)).

272. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 760 (2014) (Ginsburg, J., dissenting).

273. Ackerman v. Washington, 16 F.4th 170, 180 (6th Cir. 2021) (quoting New Doe Child #1 v. Cong., 891 F.3d 578, 586 (6th Cir. 2018)), discussed *infra* note 284.

274. *See* Nicholson, *supra* note 163, at 1303 (also discussed *infra* note 318 in the context of how courts engage in implicit balancing with respect to claimants' burdens and governmental interests).

275. *See* Fox v. Washington, 949 F.3d 270 (6th Cir. 2020). James Fox and Scott Perreault are members of the Christian Identity religion, a white separatist religion. They sued the department of corrections where they are currently incarcerated, seeking to receive full-immersion baptism and permission to gather with co-religionists to observe the seven holidays of Passover, the Feast of Unleavened Bread, Pentecost, Trumpets, the Day of Atonement, the Feast of Tabernacles, and the Last Great Day." *Id.* at 273 n.1. The facility denied formal recognition to this group, which is needed to hold religious gatherings, in part because of connotations with racial extremism. *Id.* at 275. On appeal from an adverse ruling in the district court, the circuit court found that the plaintiffs had satisfied the sincerity prong of the RLUIPA analysis, noting that the plaintiffs had "adhered to Christian Identity for many years," and that they had "maintained this lawsuit for over six years and have not wavered in their dedication to pursuing the relief they request, even as their immediate circumstances have changed by

legitimate desire to treat perseverance as an evaluable proxy for sincerity; on the other hand, this tendency would seem to disadvantage litigants who have become discouraged along the way.

In 2019, Mohammed Sabra applied for a Consular Report of Birth Abroad for his daughter, Baby M.[276] Mr. Sabra and his wife are United States citizens living in Gaza;[277] their child, Baby M., is entitled to United States citizenship.[278] The embassy requested proof of maternity, in the form of a DNA test or photographs of Mrs. Sabra during her pregnancy, but the Sabras objected on religious grounds.[279] Evaluating the government's motion to dismiss, the court noted that the government did not dispute the Sabras' sincerity;[280] nevertheless, the court conducted a sincerity analysis, and found the fact that Mrs. Sabra "has in the past refused certain medical procedures based on her religious beliefs" helped substantiate the Sabras' sincerity, since it demonstrated a long-standing faith-based practice of the Sabras.[281] Should it matter if Mrs. Sabra's faith practice had developed more recently?[282]

Another development of the sincerity-only emphasis of *Hobby Lobby* and *Holt* has been that some of the pre-*Hobby Lobby* metrics for substantial burden analyses have re-emerged as sub-factors in the sincerity test. Eating dairy is a long-standing tradition for the Jewish holiday of Shavuot.[283] Mark Shaykin and Gerald Ackerman sued the Michigan Department of Corrections to eat meat on the Sabbath and on certain holidays, as well as dairy on Shavuot.[284] Shaykin testified that he was "supposed to eat" cheesecake for Shavuot, although he could not say whether religious law commanded or merely commended it, but he felt "it would fulfill [his] religious beliefs in a better way."[285] Ackerman affirmed the traditional religious association of cheesecake with Shavuot.[286] The District Court found for the plaintiffs and issued an order requiring meat on the Sabbath and cheesecake on Shavuot.[287] The Department of Corrections appealed, arguing

way of transfers to different correctional facilities." *Id.* at 277–78. The Circuit Court reversed the District Court, which had denied the claim on the basis of finding that the Plaintiffs' free exercise was not substantially burdened. *Id.* at 273.

276. Sabra v. Pompeo, 453 F. Supp. 3d 291, 298 (D.D.C. 2020).

277. *Id.*

278. *Id.*

279. *Id.* at 306.

280. *Id.* at 327.

281. *Id.* at 328. Accordingly, the Court denied the government's motion for summary judgment on Mr. Sabra's RFRA claim. *Id.* at 331–32.

282. *See* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144 (1987) (finding that the fact that claimant converted subsequent to her employment was not significant in free exercise claim); *see also* Ackerman v. Washington, 16 F.4th 170, 181 (6th Cir. 2021) (discussing treatment of probative value of claimants' length of adherence and steadfastness in other cases).

283. *Shavuot 2022*, MY JEWISH LEARNING, https://www.myjewishlearning.com/article/shavuot-2022 [https://perma.cc/E87K-K84L] (last visited May 2, 2022).

284. Ackerman v. Washington, 16 F.4th 170, 176 (6th Cir. 2021).

285. *Id.* at 177.

286. *Id.* at 177–78.

287. *Id.* at 179.

that the trial court erred in crediting the plaintiffs' sincerity because the plaintiffs had not adduced any outside evidence for cheesecake being required.[288] Thus, the government sought to incorporate canonicity concerns into the sincerity analysis.[289]

The Supreme Court has yet to take up the question of what lines of inquiry are permissible for evaluating sincerity. Given the deferential posture towards claimants' sincerity indicated by *Holt* and *Hobby Lobby*, it is natural that the focus in recent years has shifted more to the compelling interest prong. Discussion of that prong follows.

C. Compelling Interest

Once a claimant successfully demonstrates a substantial burden, the inquiry shifts to the government; the government may still prevent the exemption by demonstrating that application of the law or regulation in question to the claimant (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest.[290]

1. Background

The terminology of "compelling interest" in free exercise jurisprudence first debuted in Justice Brennan's dissent in *Braunfeld v. Brown*, in which he argued that a state's "administrative convenience" in maintaining Sunday as a day of rest was not a "compelling state interest" that "overbalance[ed]" the claimant's free exercise interest.[291] Two years later, Justice Brennan's *Sherbert* opinion ensconced the compelling interest analysis as the second step in free exercise determinations.[292] In *Sherbert*, the compelling interest test was *not* satisfied by the South Carolina Employment Security Commission's goal of discouraging fraudulent applications that might ensue if applicants could avoid working Saturdays by claiming to be Adventists because it was too speculative.[293] Subsequently, in *Wisconsin v. Yoder*, the state's interest in universal post-eighth grade education was not sufficiently compelling to overcome the free exercise needs of the Amish claimants.[294]

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288. *Id.* at 180, 183.

289. *Id.* The Circuit Court deferred to the trial court's finding of sincerity as a matter of fact, employing a clear error standard of review. *Id.* at 183–84. Canonicity as a proxy for sincerity was also at issue in *Sabra*, where the government, despite not claiming to contest the Sabras' sincerity, submitted several statements from consular application handlers stating that they had not personally encountered Islamic objections to DNA testing despite having collectively processed several dozen DNA tests. Sabra v. Pompeo, 453 F. Supp. 3d 291, 327 (D.D.C. 2020).

290. Holt v. Hobbs, 574 U.S. 352, 357–58 (2015); *see supra text* accompanying notes 158–61 and accompanying text (discussing Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006)).

291. *See* Braunfeld v. Brown, 366 U.S. 599, 613–16 (1961) (Brennan, J., dissenting).

292. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963).

293. *Id.* at 407.

294. *See* Wisconsin v. Yoder, 406 U.S. 205, 221–23, 229 (1972).

During the next fifteen years, the compelling interest test moved with increasing rapidity from the compelling interest of the government in the application at issue—such as not allowing religious claimants to qualify for unemployment benefits if they are unwilling to work Saturdays, not allowing Amish to complete public schooling early—to the government's compelling interest in the statutory scheme as a whole.[295] Examples of the latter include tax collection, [296] minimum wages,[297] and assignment of social security numbers.[298] Indeed, greater deference to the government's articulation of what constitutes a compelling interest, taken together with constricted parameters around what constitutes a religious burden,[299] helped create the dismal track record for Free Exercise claims at the Supreme Court that Justice Scalia cited when retiring the *Sherbert-Yoder* test in *Smith*.[300]

RFRA recentered the compelling interest analysis on the application of the law in question to the claimant (and, it can be inferred, to others similarly situated).[301] The Court reiterated this emphasis in its first federal RFRA case.[302] Accordingly, because in *O Centro* the government did not show that a small group's religious use of hoasca would imperil the success of the Controlled Substances Act, the preliminary injunction was granted.[303] As mentioned above, the burden was squarely on the government to show why it had a compelling interest in the statute's uniform enforcement.[304] And, if either the statute or the government agency had already permitted exemptions analogous to the instant case, its argument for having a compelling interest in application to the claimant was weakened.[305]

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295. *See* Nicholson, *supra* note 163, at 1291–93; *see also* Lupu, *supra* note 163, at 52–53.

296. *See* United States v. Lee, 455 U.S. 252 (1982).

297. *See* Tony & Susan Alamo Found. V. Sec'y of Lab., 471 U.S. 290 (1985).

298. *See* Bowen v. Roy, 476 U.S. 693 (1986).

299. *See*, *e.g.*, *id.* at 701–07 (stating that "governmental regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons."); *see also supra* notes 52–56 and accompanying text (discussing *Bowen v. Roy*, 476 U.S. 693 (1986)).

300. *See* Emp. Div., Dep't of Hum. Res. V. Smith, 494 U.S. 872, 883–84 (1990).

301. *See* 42 U.S.C.A. § 2000bb-1.

302. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–33 (2006); *see also* Tanner Bean, *"To the Person": RFRA's Blueprint for a Sustainable Exemption Regime*, 2019 BYU L. REV. 1, 11–13 (2019).

303. *O Centro*, 546 U.S. at 428–29.

304. *Id.* at 429–30, 439.

305. *Id.* at 433 (citing Church of Lukumi Bablu Aye, Inc. v. Hialeah, 508 U.S. 520, 547 (1993)); *see also* Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999) (explaining that an exemption to rule against facial hair could not be denied for religious claimants if it had been granted to other police officers because of medical concerns; "The Department's decision to allow officers to wear beards for medical reasons undoubtedly undermines the Department's interest in fostering a uniform appearance through its "no-beard" policy [prohibiting beards sought for religious reasons]."). To be sure,

2. Continuing Uncertainty

Despite the apparent clarifications of *O Centro*, confusion persists in the application of the compelling interest test. In the first place, there is no consensus on what level of importance constitutes compelling. In other areas of law such as constraints on free speech and discrimination, compelling government interest corresponds to strict scrutiny and constitutes a very high bar.[306] But governments have successfully proffered less robust compelling government interests in successfully resisting free exercise claims, such as the purported government interest in preventing the importation of a claimant's leopard skin,[307] in banning the possession of eagle feathers,[308] and in expanding Chicago O'Hare International Airport.[309] Channeling the superseded reasoning of *Gobitis*, the court in *United States v. Ali* determined there is a compelling government interest in requiring everyone to rise when the judge enters and leaves.[310] This wide

evaluating the government's compelling interest on the basis of previously-granted exemptions may well incentivize legislatures and administrative agencies to become more parsimonious with granting exemptions. *See* Lupu, *supra* note 163, at 65, 83–84, 97–98 (noting that the Obama administration's refusal to include exceptions for non-profit religious organizations in Executive Order No. 13672, 79 Fed. Reg. 42971 (July 21, 2014), which prohibits sexual orientation and gender identity discrimination for federal contractors, may prove pivotal in later RFRA argumentation over whether government has a compelling interest in eliminating anti-LGBTQ discrimination).

306. *Cf.* City of Richmond v. J.A. Croson Co. 488 U.S. 469, 505 (1989) (applying compelling government interest test after finding strict scrutiny was warranted), discussed *infra* note 493 and accompanying text. Justice Scalia's *Smith* opinion highlights why the compelling interest test *must* be a lower bar in religious exemption than in discrimination cases, to avoid the "anarchy" expected to result if all but the most vital of law were subject to exemption. Emp. Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 885–88 (1990). *See also* Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws*, 48 B.C.L. REV. 781, 792–814 (2007) (discussing the emergence of anti-racism as a compelling government interest and outlining instances of official cognizance of governmental interests in opposing gender-based and sexual-orientation discrimination).

307. United States v. Adeyemo, 624 F. Supp. 2d 1081 (N.D. Cal. 2008).

308. United States v. Antoine, 318 F.3d 919, 921–22 (9th Cir. 2003), *abrogated on other grounds* 38 F.4th 742 (9th Cir. 2022); United States v. Hardman, 297 F.3d 1116, 1128 (10th Cir. 2002); United States v. Hugs, 109 F.3d 1375 (9th Cir. 1997); United States v. Winddancer, 435 F. Supp. 2d 687 (M.D. Tenn. 2006).

309. Saint John's United Church of Christ v. Chicago, 502 F.3d 616, 634-35 (7th Cir. 2007). *See also* GREENAWALT, *supra* note 73 at 71 (noting that in practice, courts apply intermediate scrutiny when evaluating the "compelling interest" prong). *But see* Laycock, *supra* note 263, at 168 (arguing that the test is the same, but government inherently has more interest in laws governing conduct than in laws impacting speech).

310. United States v. Ali, No. CRIM 10-187 MJD, 2012 WL 4128387 (D. Minn. Sept. 19, 2012). *Compare id.* at 13 ("given the purpose of the rising requirement, making an exception for those people who already may be predisposed to question the Court's authority would undermine such purpose and erode the Court's authority and embolden non-risers to further challenge such authority.") *with Minersville Sch. Dist.v. Gobitis*, 310 U.S. 586, 595–96 (1940) ("National unity is the basis of national security….The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. 'We live by symbols.'").

discrepancy is to be expected because a court must determine the government has a compelling interest in order to find for it at the second step in RFRA cases.[311]

The myriad of ostensibly compelling interests inevitably gives rise to a regime in which some compelling interests are advanced more vigorously than others, depending on the political climate.[312] Not only might a government decline to prosecute or defend a RFRA claim, but it might also voluntarily grant a RFRA exemption, which may diminish if not waive the compelling interest argument mounted by subsequent administrations. Miracle Hill in South Carolina provides foster family matching for foster children.[313] As an evangelical Christian organization, it requires mentors and families to sign its doctrinal statement and in the past declined to work with non-evangelical families.[314] Such a policy conflicts with antidiscrimination requirements for federal funding;[315] yet, citing RFRA, the Department of Health and Human Services has authorized an exemption for Miracle Hill without the need for litigation.[316] Given the voluntary nature of this exemption, future governments will face a steeper climb in proving that non-discrimination in foster care is a compelling government interest.[317]

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311. *See* Lupu, *supra* note 163, at 65, 71–75 (2015) (noting tendency of courts to find for the government in the compelling interest analysis); GREENAWALT, *supra* note 73, at 70–71, 146–47 (observing that the scrutiny employed in the compelling interest analysis for RFRA and RLUIPA is in fact usually intermediate scrutiny).

312. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2392 (2020) (Alito, J., concurring) The government asserted a compelling governmental interest in the provision of contraceptive services in *Hobby Lobby* but disclaimed such an interest in that subsequent litigation.

313. Letter from Stephen Wagner to Governor Henry McMaster (Jan. 23, 2019), Administration for Children and Families, at 2 https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf [https://perma.cc/398K-AYYA].

314. Haley Walters, *Judge denies motions to dismiss Catholic woman's lawsuit over SC foster-care religious rule*, GREENVILLE NEWS (Aug. 14 2020) https://www.greenvilleonline.com/story/news/2020/08/14/catholic-womans-sc-foster-care-lawsuit- moves-forward/3354527001 [https://perma.cc/F2SE-EDVE]

315. 45 C.F.R. § 75.300(c) (2023).

316. Wagner, *supra* note 311, at 3. Miracle Hill itself is not a party to litigation brought in response by a Catholic on Establishment and Equal Protection grounds. Maddonna v. Dept. Health and Hum. Servs., No. 6:19-CV-3551-TMC, 2020 WL 13178283, at 711 (D.S.C. Aug. 10, 2020).

317. The conceptual instability of the compelling interest test is compounded by the possibility, endorsed in several circuits, the RFRA can serve as a defense for parties in private litigation. Shruti Chaganti, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L. REV. 343, 344 (2013). The way this most often manifests is when a federal statute confers a private cause of action, and the defendant invokes RFRA. There is merit to allowing RFRA defenses in such cases; if courts have recognized that RFRA provides a defense to federal enforcement of certain laws, why should a different result obtain when private parties sue to enforce those same laws under private causes of action? *See id.* at 361–62. Yet, this application raises the prospect of private parties litigating what is or is not a compelling government interest, with possibly precedential effect. Courts have thus been called upon to adjudicate, in actions between private parties, the degree to which government has a compelling interest in uniform enforcement of the ADEA, Hankins v. Lyght, 441 F.3d

3. "Hydraulic Pressure"

O Centro's tightening of the compelling interest test has also led to "hydraulic pressure" on the substantial burden test, as pointed out by Matthew Nicholson. This is to say, a court that finds the government's case generally meritorious, yet realizes there is no compelling government interest in application of the statute in question, may instead find no substantial burden at step one.[318] This process may have impacted the reasoning in *Navajo v. Forest Services*, where the Ninth Circuit, without reaching the question of whether there was a compelling government interest in use of reclaimed water to create snow for a ski resort on government property, held that the religious interest of the claimant tribes in their right to unpolluted sacred land was not substantially burdened.[319]

Chief Judge Posner picked up on the functional interconnection between the substantial burden and compelling interest test in *Mack v. O'Leary*, a 1996 Seventh Circuit RFRA case that was ultimately remanded in the wake of *Flores*.[320] In that case, Judge Posner evaluated the RFRA claim of a Moorish Science Temple practitioner seeking to celebrate Prophet's Day Banquet in honor of the religion's founder, and affirmed the judgment in favor of the corrections official defendants.[321] In doing so, he recognized that although not required, the Banquet was highly important for Moorish Science Temple practitioners, and that the disallowance of the requested celebration constituted a substantial burden.[322] Yet, the disciplinary and administrability concerns advanced by those responsible for administering a prison with 300 denominations represented enough of a compelling interest to deny the RFRA claim.[323] Although not quite saying so, Judge Posner seemed to indicate that the non-requisiteness of the ritual was a factor in his decision.[324] RFRA itself does not articulate a balancing test between substantial burden and compelling interest, but that may be what effectively does or should happen.[325]

96, 107 (2d Cir. 2006); in Title VII of the Civil Rights Act, Redhead v. Conf. of Seventh-Day Adventists, 440 F. Supp. 2d 211, 220 (E.D.N.Y. 2006), *adhered to on reconsideration*, 566 F. Supp. 2d 125 (E.D.N.Y. 2008); in the Fair Housing Act, Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries, 717 F. Supp. 2d 1101, 1117 (D. Idaho 2010), *a'ff'd on other grounds*, 657 F.3d 988 (9th Cir. 2011); and in the avoidance provisions of the Bankruptcy Code (as applied to tithes), *In re* Hodge, 220 B.R. 386 (D. Idaho 1998). Notably, the United States was an intervenor in this last case to defend the constitutionality of RFRA, although it does not appear to have presented arguments on whether it had a compelling interest in universal enforcement of the law in question. *Id.* at 393.

318. Nicholson, *supra* note 163, at 1302–03.

319. *Id.* at 1302–03; Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1067 (9th Cir. 2008) (en banc).

320. Mack v. O'Leary, 80 F.3d 1175, 1181 (7th Cir. 1996).

321. *Id.* at 1177–78, 1180–81.

322. *Id.*

323. *Id.*

324. *See id.* at 1180–81.

325. *Id.*; GREENAWALT, *supra* note 73, at 143.

4. Compelling Interest in Light of *Holt* and *Hobby Lobby*

The contributions of *Holt* and *Hobby Lobby* have only partially clarified the nature of the governmental compelling interest, although *Hobby Lobby* has perhaps opened a detour around it. In *Holt*, as may be recalled, the claimant sought to grow a one-half-inch beard.[326] The corrections officials argued they had a compelling interest in denying the exemption.[327] In evaluating this prong of the argument, the Court credited the government interest of preventing contraband from entering the prison.[328] Yet, turning to the question of whether the complete prohibition on facial hair was truly the least restrictive means, the Court found that the Department had not meaningfully shown "why the vast majority of States and the Federal Government permit inmates to grow 1⁄2-inch beards, either for any reason or for religious reasons, but it cannot."[329] Accordingly, the Court granted the exemption to Mr. Muhammad.[330]

In *Hobby Lobby*, as noted above, the Court found first that a for-profit corporation may bring a free exercise claim under RFRA, and second that the substantial burden test was satisfied based on the sincerity of the claimants and the extensive penalties that would accrue should they refuse to comply with the ACA requirements.[331] The next step in the RFRA framework would be determining whether the government had a compelling interest in requiring coverage of the contraceptive methods in contention; and lastly would come the question of whether application of the law was the least restrictive means of furthering that interest.[332]

In *Hobby Lobby*, however, the Court bypassed the question of whether in fact the government had a compelling interest in the provision of the contraceptives, opting instead to consider the least restrictive means question directly.[333] First, the government could simply fund the objected-to contraceptives.[334] Although figures for this were unavailable, the Court reasoned that it would be minor as a percentage of the total cost of the Affordable Care

326. Holt v. Hobbs, 574 U.S. at 355.

327. *Id.* at 356.

328. *Id.* at 363.

329. *Id.* at 368–69.

330. *Id.* at 370.

331. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 692–93 (2014).

332. 42 U.S.C.A. § 2000bb-1, discussed *supra* note 111 and accompanying text.

333. In passing, the Court acknowledged the government's argument that "the mandate serves a compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing" because studies indicated that even a small co-payment deters utilization. *Hobby Lobby*, 573 U.S. at 727 (2014). The Court also noted that there were some exceptions to the mandate, notably for grandfathered plans. *Id.* at 727–28. Some judicial realists suppose that avoiding the question of the governmental compelling interest directly was necessary for the majority opinion to retain the support of Justice Kennedy, who was sympathetic to the need for the contraception provision. If the lead opinion had simply held that there was no compelling interest in play at all, it would have lost his vote; but the other justices in the majority coalition were reticent to acknowledge a compelling government interest. Thus, the Court prescinded from deciding the question. *See, e.g.*, Lupu, *supra* note 163, at 85.

334. *Hobby Lobby*, 573 U.S. at 728–30.

Act.[335] Second, the Department of Health and Human Services had already developed an alternative for non-profit religious organizations with objections.[336] In particular, organizations could opt out from providing contraceptive coverage, and the health plan administrator would be responsible for contraceptive coverage without cost to the beneficiary.[337] Because alternatives were available in principle, the Court granted the relief sought by the claimants.[338]

It remains to be seen whether this shortcut utilized by the Court in *Hobby Lobby* will be available in future cases. On one hand, it could encourage creative problem-solving by incentivizing claimants to imagine alternative ways to satisfy the government interest without impacting their religion. On the other hand, inasmuch as the compelling interest analysis is passed over altogether, there seems to be a significant risk that the "least restrictive means" alternative put forward might not actually address the government need. Using the facts of *Hobby Lobby* as an example, perhaps the compelling government interest is not only in ensuring that people have contraceptive care but also that contraceptive care is part of the package of covered services provided by employers to their employees. To the extent to which the compelling interest analysis is omitted, the law's purpose can become malleable in service of finding alternatives.[339]

D. Third-Party Ramifications

1. Hobby Lobby

Following the traditional format of free exercise jurisprudence, the *Hobby Lobby* opinion examined the issue from the perspectives of the claimant and the government. Yet the principal dissent moved directly to the subjectivity of those who would use the contraceptives: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[340] The dissent demonstrated that the addition of the contraceptive mandate to the ACA was motivated in part "by cost barriers [that] operated to block many women from obtaining needed care at all."[341] The dissent further highlighted "the disproportionate burden women carr[y] for comprehensive health services and the adverse health consequences of excluding

335. *Id.* at 728–29. The Court considered the proportionality of the contraceptive costs to the costs of the ACA, but not the proportionality of the potential penalties to the claimants' receipts. *See* Smith *supra* note 266 and accompanying text.

336. *Hobby Lobby*, 573 U.S. at 730–31.

337. *See id*. at 734. Contraceptive coverage pays for itself because of the pregnancy and other healthcare costs avoided. Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L.L. REV. 343, 351 (2014).

338. *Hobby Lobby*, 573 U.S. at 736.

339. *See id.* at 734 (discussing and rejecting HHA's argument that "applying the contraceptive mandate to for-profit employers with sincere religious objections is essential to the [ACA's] comprehensive health-insurance scheme.").

340. *Id.* at 741 (Ginsburg, J., dissenting) (quoting Planned Parenthood of Se. Pa. v. Casey*,* 505 U.S. 833, 856 (1992)).

341. *Id.* at 742; *see also* Gedicks & Van Tassell, *supra* note 337 at 376–77 (providing specific out-of-pocket contraceptive cost information).

contraception from preventive care available to employees without cost sharing."[342] Access to the full range of contraceptive options is essential, among many other reasons, because some people have other health conditions that pregnancy would exacerbate.[343] In urging that there really is a compelling government interest in minimizing out-of-pocket contraceptive costs, the dissent again took the perspective of low-wage healthcare users, noting that "the cost of an IUD is nearly equivalent to a month's full-time pay for workers earning the minimum wage," that "almost one-third of women would change their contraceptive method if costs were not a factor," and that "only one-fourth of women who request an IUD actually have one inserted after finding out how expensive it would be."[344] And comprehensive coverage in which contraceptive care is part of the patient's plan as opposed to provided separately could very well be critical.[345] Ultimately, the dissent charged that the Court gave undue precedence to the claimants without adequately considering the interests and needs of those most impacted.[346]

The Court addressed in two places the role of third parties, that is, persons who were the intended beneficiaries of a law or regulation, do not take part in the litigation, and whose interests may be prejudiced by the outcome.[347] In footnote thirty-seven, the Court referenced the government's argument that exemptions should not be available from statutes that provide benefits to third parties.[348] However, the Court reasoned that one could frame "any Government regulation as benefiting a third party."[349] While courts should "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries," that consideration could "often" be incorporated into the compelling interest and less restrictive means analysis.[350]

And, later, the Court addressed the dissent's argument that employers might seek religious exemptions from laws requiring nondiscrimination in hiring.[351] The Court stated that these concerns were baseless because the government has a compelling interest in preventing racial discrimination and the current statutory and regulatory framework is appropriate to accomplish that objective.[352] Yet as

342. *Hobby Lobby*, 573 U.S. at 743.

343. *Id.*

344. *Id.* at 762.

345. *Id.* at 765–66. *See* Gedicks & Van Tassell, *supra* note 337 at 379 (describing the specific material burdens to would-be enrollees of contraceptive plans that could be anticipated if the exemption sought in *Hobby Lobby* were to be granted).

346. *Hobby Lobby*, 573 U.S. at 764.

347. Strikingly, the Court referred to this group as "nonbeneficiaries" in the sense that they are not receiving the benefit of the exemption, although it may equally be said that, because of the exemption, they are not receiving the benefit of the governmental program as established. *Id.* at 729 n.37.

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.* at 733.

352. *Hobby Lobby*, 573 U.S. at 734. Nevertheless, in principal future RFRA corporate claimants *might* succeed in effectuating racially discriminatory employment practices if they

many commentators were quick to point out, there are other forms of discrimination besides racial discrimination–will those receive the same consideration by the Court in future cases?[353]

This Section will briefly survey earlier cases in which courts have appeared to take cognizance of possible third-party impacts of proposed religious exemptions in free exercise claims. As will be seen in these cases, courts have often implicitly and problematically construed impacted third-party stakeholders as members of the culturally Christian mainstream, or else deferred to management prerogatives.[354] As such, the Court has not squarely confronted the issue of how to account for the interests of third parties who are from marginalized or underrepresented groups, especially when management itself, rather than an employee, raises the exemption claim.

2. Robust Third-party Concern in Late Twentieth Century Jurisprudence

In *Braunfeld v. Brown*, discussed above, Abraham Braunfeld, Isaac Friedman, Alter Diament, S. David Friedman, and Joseph Friedman sought an exemption to the Sunday closing laws in order to observe the Jewish Sabbath on Saturdays without losing a day in their workweeks.[355] Among other rationales for declining to grant the exemption, the Court cited potential impacts on distinct groups of third-party stakeholders:[356] non-Jewish shop owners in the same markets as those receiving an exemption to open on Sundays would be placed at a competitive disadvantage, since on Sundays, Jewish shop owners would have "an absolutely free run and no competition from Christian shopkeepers at all."[357] Further, there would potentially be a burden placed on the claimants' employees either to work on Sundays or else to gradually be replaced by co-religionists.[358]

The 1964 Civil Rights Act protects workers against discrimination on the basis of religion *inter alia*.[359] Mindful that facially neutral policies cannot meaningfully guarantee equal opportunity in the field of religion, the EEOC adopted guidelines, subsequently codified by Congress, requiring employers to offer reasonable accommodations for their employees' religious observances

label them as religious, e.g., seeking to hire only other members of the same faith. Mark Strasser, *Narrow Tailoring, Compelling Interests, and Free Exercise: On ACA, RFRA, and Predictability*, 53 U. LOUISVILLE L. REV. 467, 505–07 (2016).

353. *See, e.g.,* Lupu, *supra* note 163, at 93; Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity- Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2532–33 (2015).

354. *See infra* note 408, for demographic information highlighting the anachronism of the presumption that most Americans attend church on Sundays.

355. Braunfeld v. Brown, 366 U.S. 599, 600 (1961). The full names of the litigants are provided in Braunfeld v. Gibbons, 184 F. Supp. 352 (E.D. Pa. 1959).

356. *Braunfeld*, 366 U.S. at 608–09.

357. *Id.* at 609 n.6.

358. *Id.*

359. Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(i).

unless doing so would cause undue hardship.[360] In *Trans World Airlines v. Hardison*, the Court addressed how to construe "undue hardship."[361]

Plaintiff Larry Hardison was a member of the Worldwide Church of God, which observes a Saturday Sabbath.[362] Initially, he had sufficient seniority in the building where he worked to obtain a satisfactory shift schedule under the collective bargaining agreement.[363] However, when Mr. Hardison transferred buildings, he entered the new worksite almost at the bottom of the seniority list.[364] Therefore, he sought an accommodation from the company to allow him to work in congruence with his Sabbath schedule, but the company decided there were no viable alternatives.[365] When Hardison did not come to work on Saturday, TWA fired him.[366]

The Court considered the ways in which providing an accommodation to Mr. Hardison would have constituted an undue hardship: allowing him to work only four days without assigning anyone to cover his position on Saturdays would have hampered airline operations; sending a supervisor would have entailed having one fewer supervisor somewhere else; and using some other worker would have required paying the overtime premium.[367] Conversely, granting Mr. Hardison a shift schedule higher up in the chain of seniority than he was otherwise entitled would require an infringement of the collective bargaining agreement.[368] In this regard, the Court evidenced a noteworthy solicitude for Hardison's fellow employees:

> In considering criteria to govern th[e] allocation [of weekend shifts], TWA and the union had two alternatives: adopt a neutral system, such as seniority, a lottery, or rotating shifts; or allocate days off in accordance with the religious needs of its employees. TWA would have had to adopt the latter in order to assure Hardison and others like him of getting the days off necessary for strict observance of their religion, but it could have done so only at the expense of others who

360. Trans World Airlines, Inc. v. Hardison, 432 U.S. 66, 69 (1977). This case has recently been clarified in Groff v. DeJoy, 600 U.S. 447, 468 (2023), in which the Court held that an employer must go to more than *de minimis* lengths to accommodate their employees' religious accommodation requests.

361. *Trans World*, 432 U.S. at 69.

362. *Id.* at 67.

363. *Id.* at 67–68.

364. *Id.* at 68.

365. *Id.* at 68–69.

366. *Id.* at 69.

367. *Trans World*, 432 U.S. at 84 ("To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship.").

368. *Id.* at 80. Indeed, the Court's strong policy of ascribing precedence to collective bargaining agreements seems likely to have animated this decision at least in part. *See* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578–80 (1960) (noting that prioritizing compliance with collective bargaining agreements is "the substitute for industrial strife" and holding that "[a] collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is…an effort to erect a system of industrial self-government.").

> had strong, but perhaps nonreligious, reasons for not working on weekends.[369]

Thus, the Court highlighted the interests and needs of non-religious co-workers when considering the request of religious exemption claimant, going so far as to note that "Title VII does not contemplate such unequal treatment."[370] In drawing this conclusion, the Court purported to rely on the canon against implied repeal, explaining that were Congress to have intended for the Civil Rights Act to partially supersede the Wagner Act, it would have made its intentions "clear and express."[371] However, highlighting the needs of the claimant's co-workers and utilizing the phrase "unequal treatment" at least raises the possibility that even were Congress to have issued a clear statement, the privileging of religious concerns over secular may have offended the Equal Protection Clause.[372]

Eight years later, the Court decided another case arising from an observant individual's refusal to work on their Sabbath. Donald Thornton was a manager at Caldor's department store, which required him to work on Sundays.[373] Mr. Thornton invoked a Connecticut law that excused workers from working on their religious sabbaths;[374] in response, the store offered him a transfer to a Massachusetts store or a demotion, and did in fact demote him, leading to his resignation from the company.[375] He then claimed that this conduct constituted an impermissible constructive discharge under section 53–303e(b), and the administrative board as well as the reviewing appellate state court agreed.[376]

However, the Connecticut Supreme Court struck down the statute as impermissible under the federal Constitution, and the United States Supreme Court granted a review of that decision.[377] Here, the Court applied a test from *Lemon v. Kurtzman* to determine whether the Establishment Clause proscribed the broad protections guaranteed by the Connecticut law, evaluating the effect of the law on "the convenience [and] interest of the employer," as well as other employees, including those who are secular and those who might be religious but do not have a sabbath day.[378] The Court quoted Judge Hand's pre-*Sherbert* observation that "[t]he First Amendment…gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own

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369. *Hardison*, 432 U.S. at 80–81.

370. *Id.* at 81.

371. *Id.* at 79.

372. The terminology "Title VII does not contemplate such unequal treatment," may allude to the constraints that Article 14 imposes on federal government through the doctrine of reverse incorporation. *See infra* notes 480–99 and accompanying text.

373. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 706 (1985).

374. *Id.* (citing CONN. GEN. STAT. § 53-303e(b) (1985)).

375. *Caldor, Inc.*, 472 U.S. at 706.

376. *Id.* at 707.

377. *Id.* at 707–08.

378. *Id.* at 709, 710 n.9 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)); *but see* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (announcing abandonment of the *Lemon* test).

religious necessities."[379] And, the Court considered how the law prioritized the religious practice of individual workers' sabbath observance with no apparent secular purpose.[380]

Based on these findings, the Court struck down the law as violative of the Establishment Clause.[381] Interestingly, the Court appeared to leave the door open to the possibility that a version of the law could withstand constitutional scrutiny if it provided an exception for employers who made reasonable accommodations.[382] The irony was not lost on observers at the time: the Connecticut law ran afoul of the Establishment Clause because it did not offer an exception for businesses that attempted to make reasonable accommodations for their employees' sabbath observances, and the Court had previously held that "reasonable accommodations" should be construed to require nothing more than *de minimis* exertion.[383] Any such law would manifestly offer next to no protections for employees.

Thus, in effect, earlier case law tended not to vindicate claims in which one employee's free exercise interest was set against both management prerogative and the interests of other employees. However, the relevant question remains open as to whether co-workers have a constitutionally cognizable interest in being free from coercive effect in religious matters at the workplace, even when that interest does not dovetail with management's interests in conducting its affairs as it sees fit.[384]

3. Contemporary Applications

Two recent circuit court cases have also touched on the question of non-beneficiaries in adjudicating RFRA claims. In *Harris Funeral Homes*, the Sixth Circuit addressed the RFRA claim of a business owner who sought to be exempted from anti-discrimination law as applied to gender identity and presentation.[385] Aimee Stephens informed Thomas Rost, her supervisor and the

379. *Id.* at 710 (quoting Otten v. Baltimore & Ohio R. Co., 205 F.2d 58, 61 (2d Cir. 1953)).

380. *Caldor, Inc.*, 472 U.S. at 708–10. *See infra* notes 431–46 and accompanying text (discussing the theory that the Establishment Clause provides a backstop against religious exemptions that create third-party harms).

381. *Caldor, Inc.*, 472 U.S. at 710–11.

382. *Id.* at 710.

383. *E.g.*, Lucy V. Katz, *Caesar, God and Mammon: Business and the Religion Clauses*, 22 GONZ. L. REV. 327, 336, 343–44 (1986) ("Title VII has thus become the measure of constitutionality in this area. The Court in *Thornton* took the statutory requirements of Title VII (reasonable accommodation and lack of undue hardship) and engrafted them onto the first amendment prohibition against the establishment of religion. Not only Title VII, but now the Constitution, prohibits protection of workers against religious discrimination unless the discrimination can be eliminated without undue hardship for the employer…[a]n extraordinary merger of legislation and the first amendment.").

384. *See also*, Cutter v. Wilkinson, 544 U.S. 709 (2005) (touching on the theme of third-party burdens).

385. *See* Micah Schwartzman et al., *The Costs of Conscience*, 106 KY. L.J. 781, 809 (2017) ("In short, when religious exemptions generate harms to third parties, there is liberty of conscience *on both sides*.").

owner of the company, of her gender identity and intent to begin presenting as female[386] Mr. Rost, who has religious beliefs about the inappropriateness of gender transitioning, informed Ms. Stephens that she could not work for the company unless she conformed with gender-specific dress code because he intended for the funeral home to express his religious values.[387]

The court began by evaluating whether Ms. Stephen's alleged gender identify discrimination fell within the protections of Title VII, and, finding that it did, the court took up the question of the religious exemption.[388] The court recognized the extreme discomfort that Ms. Stephens dressing in female-associated attire would cause Mr. Rost and accepted that his beliefs were sincere.[389] Nevertheless, it utilized a belief/exercise dichotomy that the treatment of burdens in *Hobby Lobby* might have appeared to have vitiated; the court boiled down Mr. Rost's argument to the claim that his religious vocation of serving grieving families would be diminished by Ms. Stephens' attire, and held as a matter of law that Mr. Rost's faith would not be burdened by Ms. Stephens' attire because her right to wear it was legally protected.[390] The reasoning here might be somewhat circular, and the court's last word on the topic would seem a reprise of the pragmaticality analysis. "At bottom, the fact that Rost sincerely believes that he is being compelled to make such an endorsement does not make it so."[391] Thus, the interest of the nonbeneficiary prevailed over the RFRA claimant.

Although the *Harris* Court in this decision proceeded through all the RFRA steps in order, one wonders whether, in this instance as elsewhere, there might not have been a background balancing. In the earlier parts of the court's decision laying out the facts and then addressing the applicability of Title VII, the court highlighted the core expressive interest at issue in the litigation: enabling Ms. Stevens "to become the person that [in her] mind [she] already is."[392] A pre-requisite to gender-reassignment surgery was living as a woman for one year, including attire; thus, a win for Ms. Stevens would vindicate her right and the rights of others similarly situated to live into the biology that matched their

386. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 567 (6th Cir. 2018).

387. *Id.* at 567-69. The district court granted Harris Funeral Home's RFRA claim on summary judgment, but the Sixth Circuit reversed, granting summary judgment to Stephens because the religious exercise of the funeral homes would not be substantially burdened, and, in the alternative, there was a compelling government interest in anti- discrimination with no less restrictive alternative. *Id.* at 581. However, on appeal, the case was consolidated and the only issue before the Court was whether the 1964 Civil Rights Act applies to gender identity as well as members of the lesbian, gay, bisexual, and transgender community. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1754 (2020). The Court did not reach RFRA's compelling interest test since the RFRA claim was waived, although the *Bostock* opinion did include this portentous phrase: "Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases." *Id.*

388. *Harris Funeral Homes*, 884 F.3d at 580–81.

389. *Id.* at 585–86.

390. *Id.* at 586, 588–90.

391. *Id.* at 589.

392. *Id.* at 568 (quoting Ms. Stephen's letter to Mr. Rost).

identity.[393] The court noted that a transgender person is "inherently 'gender-non-conforming,'" seeming to recognize the vital self-definitional interest at the heart of a transgender discrimination claim.[394] It would appear that the court considered this interest stronger than Mr. Rost's religious interest in having his religious worldview reflected in the attire of his employees.[395]

A 2020 First Circuit case also surfaced a potential clash between the claimant and third-party interests, educing a judicial analysis with important information about background assumptions often operative in free exercise cases.[396] Olga Perrier-Bilbo was a French citizen approved for naturalization to United States citizenship.[397] However, on the grounds of her religious identity as an atheist, she objected to the closing words of the prescribed oath, which read: "I take this obligation freely, without any mental reservation or purpose of evasion; so help me God."[398] United States Citizenship and Immigration Services offered her the option of participating in the swearing-in but not saying the objectionable words, or having her own private ceremony.[399] She argued that the RFRA afforded her the right to be sworn in at a ceremony that omitted the problematic wording altogether.[400]

Evaluating the RFRA claim, the court only reached the first stage of the analysis because it upheld the district court finding that there was no substantial burden.[401] The court recited the pragmaticality formulation of *Navajo Nation*, without appearing to re-evaluate it in light of *Hobby Lobby*.[402] Here, the court reasoned that Perrier-Bilbo had the option of remaining silent or of participating in her own ceremony, and neither scenario would force her to violate her

393. *Id*.

394. *Harris Funeral Homes*, 884 F.3d at 576.

395. *Id.* at 588–89. The result may well have been different if the apparent stakes were lower for the plaintiff, involving, say, an employer's RFRA defense to a cisgender male raising a sex discrimination claim for disparate treatment in family care leave policies. *See, e.g.* Complaint, EEOC v. Estée Lauder Cos., No. 2:17-cv-03897 (E.D. Pa. Aug. 30, 2017); Press Release, EEOC, Estée Lauder Companies to Pay $1.1 Million to Settle EEOC Class Sex Discrimination Lawsuit (July 17, 2018), https://www.eeoc.gov/newsroom/estee-lauder-companies-pay-11-million-settle-eeoc-class-sex-discrimination-lawsuit [https://perma.cc/6VBG-BLDP] (discussing settlement between E.E.O.C. and company based on allegation that company had provided new fathers less paid leave and related benefits for child bonding than it provided to new mothers). For a discussion of ways in which stigma might constitute part of a third-party burden, see Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines: Hobby Lobby's Puzzling Footnote 37*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 323, 331 (Micah Schwartzman et al. eds., 2016) [hereinafter *Of Burdens*].

396. Perrier-Bilbo v. United States, 954 F.3d 413, 431 (1st Cir. 2020).

397. *Id.* at 419–20.

398. *Id.* at 420.

399. *Id.*

400. *Id*.

401. *Id.* at 431–32.

402. There can only be a substantial burden if "individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit…or…coerced to act contrary to their religious beliefs by the threat of…sanctions." *Perrier-Bilbo*, 954 F.3d at 431, (quoting Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1067 (9th Cir. 2008) (en banc)).

religious belief.[403] Thus, the fact that she could not participate in a public ceremony in which she would fully participate in the recited oath could not constitute a cognizable substantial burden according to the court.[404]

The court took an interesting interpretive step in explaining the position of Perrier-Bilbo: "The Government has only stopped Perrier-Bilbo from imposing her religious mandates on others."[405] Thus, Perrier-Bilbo's desire to take part in a public ceremony in which she was comfortable was formulated as a desire to force her own ideas onto everybody else.[406] The court evidently did not pause to consider whether the phrase "so help me God" might be uncomfortable for many other naturalized citizens in addition to the plaintiff: in 2012, 30% of all new legal permanent residents in the United States held non-monotheistic or atheistic worldviews.[407] Even in the present moment, despite readily accessible evidence to the contrary, courts still operate under the default assumption that the vast majority of the public espouses monotheistic or Judeo-Christian religion.[408] Against this background universalizing assumption, there is an even

403. *Perrier-Bilbo*, 954 F.3d at 431.

404. *Id*.

405. *Id*.

406. *Id.*

407. *Cf. The Religious Affiliation of U.S. Immigrants: Majority Christian, Rising Share of Other Faiths*, PEW RSCH. CTR. (May 17, 2013), https://www.pewforum.org/2013/05/17/the-religious-affiliation-of-us-immigrants [https://perma.cc/A3JJ-LFSH] (noting an increasing proportion of immigrants with non-monotheistic or atheistic worldviews). One supposes that the religious makeup of new legal permanent residents offers a suggestion of the religious makeup of new citizens, *but see* Emily Willingham, *U.S. Records Reveal Bias against Muslim and Black Citizenship Applicants*, SCI. AM. (Mar. 15, 2022), https://www.scientificamerican.com/article/u-s-records-reveal-bias-against-muslim-and-black-citizenship-applicants [https://perma.cc/2LD6-MFGQ].

408. *Cf.* KOPPELMAN, *supra* note 80, at 38–41 (explaining that only 77% of Americans identified as Christian in 2008, and that nonbelievers together with non-monotheists accounted for 16% of the adult population in 2004); *see also In U.S., Decline of Christianity Continues at Rapid Pace*, PEW RSCH. CTR. (Oct. 17, 2019), https://www.pewresearch.org/religion/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace [https://perma.cc/276M-U4ZL] (reporting that only 65% of Americans identify as Christians in 2018 and 2019, compared with 26% who identify as agnostic, atheist, or "nothing in particular"). Only 62% of those identifying as Christians say they attend worship once a month or more. *Id*. Furthermore, it should not even be presumed that all monotheists are comfortable closing a pledge with the oath "so help me God." *See, e.g.,* Quakers & Moravians Act 1838, 1 & 2 Vict. c. 77 (Eng.) (extending privilege of substituting an affirmation for prescribed oaths for members of certain religious sects and prior affiliates, including for Moravians, a branch of Christianity). For further background on why the oath "so help me God" referring to God in the singular might not be appropriate for practitioners of non- monotheistic and nontheistic religions, *see* Martha C. Nussbaum, *"'Under God:' The Pledge Present, Past, and Future* (Oct. 30, 2008) https://www.law.uchicago.edu/news/under-god-pledge-present-and-future [https://perma.cc/984W-HHAQ]; *HAF Legal Advocacy 2004-Today*, HINDU AMERICAN FOUNDATION, https://www.hinduamerican.org/projects/legal-advocacy [https://perma.cc/4BKN-R5CX] (last visited Nov. 12, 2023) (summarizing amicus brief filed in opposition to government display of Ten Commandments in *Van Orden v. Perry*, 545 U.S. 677 (2005) on the grounds that "religious precepts contained on the monument vary significantly from the non-Judeo-Christian concepts regarding the nature of God and the relationship between man and God," and quoting with approbation the dissent of Stevens, J.,

greater risk that courts will fail to adequately entertain the interests of impacted third parties when a majoritarian religionist is the party advancing a RFRA claim.[409]

4. Summation

The combined force of *Hobby Lobby*'s four path-marking developments renders the problem of adequate safeguards for third-party nonbeneficiaries all the more urgent. First, corporations as well as individuals may claim religious exemptions. Thus, there is every reason to anticipate a greater number of employers advancing RFRA claims to block implementation of workplace-related legislation. Second, at least in principle, the claimant no longer needs to satisfy the criteria of canonicity, pragmaticality, fungibility, or attenuation; it is sufficient to cite a sincerely held belief and for there to be sanctions for non-compliance. The question of whether the government's interest is truly compelling can be resolved in the negative if there was ever a previous exemption granted – setting up a positive feedback loop in which narrowly-tailored legislative and administrative exemptions pave the way for broad-reaching judicially-granted exemptions under RFRA and RLUIPA. Finally, there does not seem to be any meaningful articulation as of yet for the interests of third parties.

At the same time, the development of substantial burden jurisprudence together with a more critical review of what constitutes a compelling government interest has opened the door for the occasional success of non-majoritarian claimants like Iknoor Singh, David Schlemm (for the Ghost Feast), and Abdul Maalik Muhammad (in *Holt v. Hobbs*).[410] The question then becomes how to consolidate the advances in exemptions for non-majoritarian religionists without damaging the interests of third parties.

IV. PROTECTING MEMBERS OF RELIGIOUS MINORITIES AND THIRD PARTIES

This final part will review several possible strategies for ensuring that the interests of third parties are adequately accounted for in the adjudication of free exercise claims. First, the interests of third parties might already be inherent to the RFRA/RLUIPA analysis, because the interests of parties that governmental

"[The] Judeo-Christian God [] is rejected by Hinduism, as well as nontheistic religions, such as Buddhism.").

409. *See generally* United States v. Seeger, 380 U.S. 163, 174–75, 180–82 (discussing how the term "God" together with the concept of a personal deity taking an active conscious interest in human affairs is inapposite for many faith traditions including contemporary expressions of Christianity); *id.* at 191 (Douglas, J., concurring) ("[I]f 'God' is taken to mean a personal Creator of the universe, then the Buddhist has no interest in the concept.") (citing EDWARD CONZE, BUDDHISM: ITS ESSENCE AND DEVELOPMENT (1951)).

410. The survival of the *Sabra* claim in the summary judgment phase is another example of non-majoritarian claimants receiving the benefit of RFRA. Sabra v. Pompeo, 453 F. Supp. 3d 291 (D.D.C. 2020).

legislation is designed to protect form part of the governmental interest.[411] Another approach, supported by Justice Ginsburg's *Hobby Lobby* dissent, is to find an Establishment Clause violation in exemptions that cause third-party harms.[412] A third option would be to step away, either judicially or legislatively, from broad-strokes free exercise decision-making in favor of more granular, area-by-area exemption regimes. And the fourth, which perhaps requires the heaviest lift but might yield the greatest protections, would be new legislation re-centering RFRA's remedial nature and as such, imposing limits on its capacity to harm the expressive rights of third parties. This approach may also ensure that RFRA and RLUIPA continue to work for members of religious minorities.

A. Third-Party Harms Can Be Accounted for as Part of the Compelling Interest Prong

Arguably, adjudication of the impact of RFRA on third-party harms is already incorporated into RFRA jurisprudence as part of the compelling interest analysis.[413] When courts evaluate the nature of the government's compelling interest in statutes that provide specific protections to individuals, such as anti-discrimination or health insurance laws, the third parties who might be impacted by the exemption are necessarily within the class contemplated by the statute or program.[414] If the adjudicating court indeed finds the asserted interest to be compelling, then the sought-after exemption is only granted if an alternative is identified that would provide the same services.[415] When the law in question is an anti-discrimination measure, the compelling government interest may also be understood to comprise the law's "expressive function," which is the intrinsic value of legislative affirmation for historically underrepresented populations.[416]

This approach draws strength from the Court's *Hobby Lobby* decision. Defending its holding against the dissent's argument that religious companies could use RFRA to discriminate post-*Hobby Lobby*, the Court declared that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."[417] Individuals

411. Note that concern for the impacts on third parties as implicated by the government's pursuit of a compelling interest is not new or unique to free exercise claims. *See* Fullilove v. Klutznick, 448 U.S. 448, 514–15 (1980) (Powell, J., concurring).

412. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 764 (2014) (Ginsburg, J., dissenting).

413. *See* Garnett, *supra* note 194, at 45-46.

414. *Cf.* Carl Esbeck, *When Religious Exemptions Cause Third-Party Harms: Is The Establishment Clause Violated?*, 59 J. CHURCH & STATE 357, 358 (2016) (characterizing prospective third-party harms as relevant "evidence," which the RFRA test as it stands incorporates into the compelling interest test).

415. However, Ira Lupu casts doubt as to whether, in practice, theoretical availability of a least restrictive alternative sufficient to satisfy RFRA's test means that those impacted will in fact still be able to access the protections or benefits in question. *See* Lupu, *supra* note 163, at 86–91.

416. Brady, *supra* note 219, at 732.

417. *Hobby Lobby,* 573 U.S. at 733.

at risk of racial discrimination fall under the protection of the government's compelling interest in preventing it.[418]

Hobby Lobby went even further, acknowledging that courts *do* consider third-party impacts in free exercise cases by working those concerns into the compelling interest analysis: "That consideration will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest."[419] At least implicitly, the Court thereby suggested some sort of a balancing takes place not unlike the substantial burden/compelling interest balance hinted at by Chief Judge Posner in *Mack v. O'Leary*.[420] Nevertheless, the Court emphasized that there is no statutory or constitutional reason to preclude RFRA claims just because they entail third-party harms.[421]

There seem to be at least three shortcomings with this approach, leaving vulnerable third-party interests unaccounted for. First, the government's interest in a statutory scheme may be orthogonal to third-party concerns. Suppose the Department of Agriculture issues a regulation that organizations contracting with the Department to provide food relief in impoverished communities must develop organizational diversity statements in order to better serve their communities. A contractor might object to having to prepare a diversity statement on religious grounds; and in that case, it's unlikely that the interests of the contractor's BIPOC employees in having such a statement would align with the government's interest in the regulation, since the Department's focus was on improving the community's experience, not the workers.[422]

A related challenge to presuming that third-party interests are accounted for in the compelling interest test is a certain derivative ambiguity from RFRA's "to the person" test;[423] if the compelling interest must be compelling with respect to the particular claimant in question, would the prospective third-party harm be minimized if those impacted constitute a sufficiently small or discrete group? *United States v. Lee*, discussed earlier, provides an example of how this could play out.[424] There, an Amish business owner argued for a free exercise exemption

418. As Ira Lupu has noted, however, the Court "conspicuously left open the possibility" that exemptions from other forms of anti-discrimination law such as gender and sexual orientation might be entertained. Lupu, *supra* note 163, at 93. At the same time, Lupu appears optimistic that courts will recognize government's compelling interest in eliminating discrimination. *Id.* at 97.

419. *Hobby Lobby,* 573 U.S. at 729 n.37.

420. *See Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996).

421. *Hobby Lobby,* 573 U.S. at 729 n.37.

422. *See* Press Release, USDA, USDA Announces Joint Final Rule Regarding Equal Treatment of Faith-Based Organizations USDA-Supported Social Service Programs (December 14, 2020), www.usda.gov/media/press-releases/2020/12/14/usda-announces-joint-final-rule-regarding-equal-treatment-faith [https://perma.cc/5M3R-YNHG] (announcing new rule that "religious and non-religious organizations are treated equally in USDA-supported programs, and…religious organizations do not lose their legal protections and rights just because they participate in federal programs and activities.").

423. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–33 (2006).

424. United States v. Lee, 455 U.S. 252, 254 (1982).

to contributing social security payments on behalf of his employees.[425] However, the Court found that the government's interest in general compliance with the Social Security system was compelling, and denied the exemption.[426] Note, however that *Lee* was decided before RFRA; if a present-day party in Edwin Lee's shoes could argue that his or her employees were so few that permitting the exemption would not jeopardize the Social Security system as a whole, perhaps a court would find that the government did not have a compelling interest in the particular application in question after all.

But the third and principal shortcoming of this approach is the problem of government disclaiming its compelling interest. As scholars Schwartzman, Tebbe, and Schragger explain, "the government will not always be the party objecting to a religious exemption."[427] Even if it is, it may concede certain constructions of its compelling interest in a way that prejudices third parties, or elect to settle the case in the interest of resolving the litigation.[428] And the possibility under RFRA that what is or is not a compelling government interest depends on the presidential administration underscores how little protection this approach really provides.[429]

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425. *Id.* at 256–57.

426. *Id.* at 258–61.

427. Schwartzman et al., *supra* note 385, at 797.

428. Schwartzman and co-authors add to these three shortcomings the objection that from the perspective of fairness, no "significant costs" should be foisted onto third parties as a result of free exercise exemptions, even when there is no compelling government interest to the contrary. *Id.* at 796.

429. The aftermath of *Hobby Lobby* demonstrates why relying on the compelling interest test to protect third parties can leave vulnerable groups undefended. Taking their cue from the Supreme Court, the agencies responsible for administering the Affordable Care Act expanded the opt-out parameters of the contraceptive mandate to include for-profit companies. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51118 (proposed Aug. 27, 2014) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147). At the same time, some religious employers argued that the mechanics of the opt-out provision still implicated their participation in the provision of contraceptive coverage, inasmuch as they were required to complete an opt-out form; the Court heard this challenge in Zubik v. Burwell, remanding with instructions to the parties to reach a compromise. 578 U.S. 403, 408 (2016). However, the outgoing administration could not find a way forward. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2377 (2020). Then, in 2017, the new administration issued a new rule that non-profit and for-profit religious employers, including corporations, may entirely opt out of providing contraceptive coverage for religious or moral reasons, with no provisions for ensuring that the impacted employees receive alternative coverage. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47792, 47806-08 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147). In the summer of 2020, the Court upheld this broad exemption, reasoning that it was within the purview of the government in complying with RFRA. *Little Sisters of the Poor*, 140 S. Ct. at 2382–84. The dissent of Justice Ginsburg noted that between 70,500 and 126,400 people would imminently lose access to contraceptive coverage as a result of this decision. *Id.* at 2408 (Ginsburg, J., dissenting).

B. Exemptions that Occasion Harms to Third Parties Constitute an Impermissible Establishment

The converse of the compelling interest approach is the impermissible establishment interpretation suggested by several scholars and seemingly endorsed by Justice Ginsburg. Far from trusting that third-party concerns will be accounted for in the government agency's articulation of its compelling interest, these scholars assert that governmental action in the form of RFRA or RLUIPA grants that burden third parties is an impermissible religious establishment.[430]

This argument begins with an overview of the Establishment Clause and its historical antecedents, including the controversy over Virginia's church tax in the late eighteenth century.[431] When adjudicating Establishment Clause questions directly, the Court has distilled the propositions that "government may not coerce anyone to support or participate in religion or its exercise,"[432] and that "governmental intervention in religious matters can itself endanger religious freedom."[433] Yet Schwartzman et al. plausibly advance the thesis that the Establishment concerns were (and are) broader, extending to any circumstance in which an individual must support a religion or religious expression against their will.[434] Although RFRA itself is not an impermissible establishment,[435] the use of a government exemption to deny a protection or benefit to a third party is.[436]

The third-party-harm-as-establishment thesis draws support from several Supreme Court cases.[437] As mentioned earlier, the Court in *Lee* denied an Amish business owner's request for an exemption from paying into his employees' social security accounts.[438] The Court's language indicates concern for both the

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430. *See Little Sisters of the Poor*, 140 S. Ct. at 2407–08 (Ginsburg, J., dissenting) ("Government…may not benefit religious adherents at the expense of the rights of third parties."); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 764 (2014) (Ginsburg, J., dissenting) ("No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect."). An alternative articulation of this principle would be that "avoiding third-party burdens constitutes a [stand-alone] compelling government interest." *Of Burdens*, *supra* note 395, at 327.

431. Schwartzman et al., *supra* note 385, at 784–85; *Of Burdens*, *supra* note 395, at 329 (claiming that being forced to pay for someone else's free exercise constitutes a tax).

432. Lee v. Weisman, 505 U.S. 577, 587 (1992).

433. Van Orden v. Perry, 545 U.S. 677, 681 (2005) (holding that a display of Ten Commandments on Texas statehouse grounds did not violate Establishment Clause).

434. Schwartzman et al., *supra* note 385, at 784–87.

435. Garnett, *supra* note 194, at 45; Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (rejecting facial Establishment challenge to RLUIPA).

436. *See* Schwartzman et al., *supra* note 385, at 786 ("the line between lifting burdens and providing affirmative support is often unclear").

437. *See generally Of Burdens*, *supra* note 395, at 328–29 (reviewing the trajectory of treatment of impermissible third-party burdens in *Lee*, *Caldor*, and *Cutter*). The hallmark free exercise case, *Sherbert v. Verner*, included a step that subsequently dropped out of the *Sherbert-Yoder* framework: whether a finding for the plaintiff could offend the Establishment Clause. Sherbert v. Verner, 374 U.S. 398, 409 (1963).

438. United States v. Lee, 455 U.S. 252, 254 (1982).

system-wide implications of allowing exemptions like Mr. Lee's,[439] as well as the personal impact on the employees in question.[440]

And in *Estate of Thornton v. Caldor*, discussed above,[441] the Court found that "[t]he statute has a primary effect that impermissibly advances a particular religious practice,"[442] by allowing the religious needs of Sabbatarians to impinge upon "other employees required to work in place of the Sabbath observers."[443] As the Court later explained in *Cutter v. Wilkinson*, "We held the law invalid under the Establishment Clause because it 'unyielding[ly] weigh[ted]' the interests of Sabbatarians 'over all other interests.'"[444]

The inference that the First Amendment sets limits to permissible free exercise exemptions based on non-beneficiary harms was articulated most clearly in *Cutter* itself, a unanimous opinion.[445] In holding RLUIPA constitutional with respect to incarcerated persons, the Court explained that RLUIPA does not violate the Establishment Clause because, unlike in *Estate of Thornton*, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."[446]

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439. *Id.* at 259. ("The social security system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees.").

440. *Id.* at 261. ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."). *See Of Burdens*, *supra* note 395, at 333.

441. Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

442. *Id.* at 710.

443. *Id.*

444. Cutter v. Wilkinson, 544 U.S. 709, 722 (2005) (quoting *Caldor, Inc.*, 472 U.S. at 710). *See* Schwartzman et al., *supra* note 385, at 788. It is unfortunate that proponents of the Third Party/Establishment thesis do not find problematic *Caldor's* grouping together of business owners and affected co-jurisprudence, that third-party harms of any kind constitute a hard limit. Employers would likely gain a veto workers in the category of impacted non-beneficiaries. Should that interpretation be imported into free exercise over any RFRA claims raised by their employees. For example, if the majority of the Santa Fe O Centro Espírita Beneficente União do Vegetal members worked for a single employer, that employer would potentially object that a hoasca exemption would be an impermissible Establishment because it could interfere with work performance, therefore harming the employer's interests. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977) (establishing that Title VII of the Civil Rights Act requires only *de minimis* efforts from employers to accommodate the religious observances of their employees because anything further would pose an undue hardship).

445. *Cutter*, 544 U.S. at 709; *see* Schwartzman et al., *supra* note 385, at 788.

446. *Cutter*, 544 U.S. at 720. Accordingly, "[s]hould inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution," courts would entertain as-applied challenges. *Id.* at 726. Thus, parties seeking to resist a RLUIPA claim could do so either through prevailing at the compelling interest stage of the analysis, if they are governmental parties, or potentially by raising an Establishment claim, if they are adversely impacted third-party incarcerated persons. This was not, but perhaps could have been, the procedural posture of O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), where the Court denied an exemption to Muslim prisoners because other prisoners might be burdened by the exemption. This was also one of the hypothetical scenarios posed by Schwartzman et al.:

Several proponents of free exercise exemptions have voiced concerns about the Establishment approach. Professor Richard Garnett argues that the Establishment Clause prohibits approval or endorsement not of religion in general but of any particular religious practice.[447] In a similar vein, Professor Mark Storslee contends that the Establishment concerns are fundamentally about control: the Establishment Clause is implicated only to the extent that government deploys religion to manage or manipulate the population.[448] Clearly, neither of these understandings comes into play when Congress passes a law of general applicability to which certain exemptions may be granted only because of the actions of those private parties who choose to bring RFRA claims.

Some scholars also raise what has been referred to as the "baselines" objection, a critique that seems to operate more on a theoretical level than an operational level: because RFRA applies to all federal laws, any new statute that Congress passes is already subject to RFRA.[449] Therefore, in instances where rights may appear to have been conferred on third parties, those rights have *not* been conferred to the extent that mediating parties (employers, landlords, public accommodations) object on religious grounds.[450] There is no Establishment Clause violation because the rights have never actually been granted (or perhaps we might say, they have not accrued).

This argument seems a little far-fetched, however. *Goldberg v. Kelly* held that government entitlements give rise to rights, and the Fourteenth Amendment, § 5 enforcement authority grants Congress the power to protect civil rights.[451] To posit that rights do not really exist because there might always be a RFRA claim later is too speculative.[452] Indeed, these scholars acknowledge that there are some rights so basic to American jurisprudence that enabling employers to transgress upon them would be inequitable.[453] Differentiating these two categories proves

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"Government taxes nonreligious inmates to provide kosher meals to Jewish inmates." Schwartzman et al., *supra* note 385, at 786.

447. Garnett, *supra* note 194, at 47–48.

448. Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 903 (2019) ("When rulers wanted to control their subjects, controlling the religious beliefs of the populace was—and continues to be—a powerful tool.").

449. Laycock, *supra* note 263, at 153.

450. *See* Minow, *supra* note 306, at 788 n.43, 813 for discussion of exemptions and anti-discrimination law in the housing context.

451. Goldberg v. Kelly, 397 U.S. 254, 262 (1970); *cf.* Nevada Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 726–32 (2003) (upholding constitutionality of exercise of Congress' Fourteenth Amendment, § 5 power in passing the Family and Medical Leave Act).

452. The reliability of rights in such an instance is reminiscent of Schrödinger's Cat—the rights exist, or not, until such time as an objection might be lodged. *See Edwin Schrödinger*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Erwin-Schrodinger [https://perma.cc/972L-Y64K] (last visited Sept. 19, 2020).

453. Thomas C. Berg, *Religious Exemptions and Third-Party Harms*, 17 FEDERALIST SOC'Y REV. 60, 61 (Oct. 2016) https://fedsoc.org/commentary/publications/religious-exemptions-and-third-party-harms [https://perma.cc/CZT3-XPQW] (proposing that third-party harms should only be cognizable in the case of violation of "legal prohibitions…focused on a limited set of direct harms to another's body, physical or financial property, or contractual rights").

thorny:[454] simply casting the distinction as the difference between statutory entitlements versus common law antecedents is highly unsatisfactory, given that common law develops in dialogue with statutory enactments,[455] and that federal protections for historically underrepresented groups tend to be of more recent vintage.[456]

Although the baselines challenge might not carry the day, there is another concern implicated by the Establishment argument that should give us pause: it is precisely the more marginalized religions that can anticipate posing the greatest inconvenience to third parties who hail from or are default participants in majoritarian culture.[457] Thus, far from serving to enforce neutrality, using the Establishment Clause to prevent third-party harms would have the effect of reproducing majoritarian religious-cultural norms.[458] Two of the cases cited by proponents of this thesis highlight this concern; *Lee* denied the claim of a member of a discrete minority group that lives in the United States as a people apart "separated from the outside world;"[459] and *Caldor* raised the possibility of the widespread havoc that would result for the "normal" Monday to Friday business schedule if numerous Friday Sabbatarians were to insist on having Fridays off[460]—supporting the inference that members of religious minorities could indeed face steeper hurdles under this framework.

C. Implementing Statutory Accommodation Regimes for a Broader Swath of Governmental Activities

A third approach to comprehensively account for third-party harms, strongly endorsed by Professor Kent Greenawalt, is to foster the development of topic-specific accommodation regimes.[461] Such mini-regimes would enable legislators to appropriately tailor the exemptions in question to take account of

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454. Perhaps the desire to center RFRA adjudication on common law grounds reflects uneasiness around the mercurial nature of the compelling interest test.

455. *See generally* Elizabeth Sepper, *Religious Exemptions, Harm to Others, and the Indeterminacy of a Common Law Baseline*, 106 KY. L.J. 661 (2017) (discussing this dynamic in the context of public accommodations and medical duties to treat).

456. Proponents of the Establishment theory also note that the Court's religious school funding decisions provide support for measuring the *status quo ante* for purposes of determining third-party burdens after the benefit has been conferred. *Of Burdens*, *supra* note 395, at 333.

457. *See, e.g.*, *Of Burdens*, *supra* note 395, at 334 (evaluating *Lee* from the perspective of business competitors who would be placed at a comparative disadvantage if the claimant received the exemption); *id.* at 338 (positing that the imposition of a competitive disadvantage on employers not exempt from paying the minimum wage—or other benefits—occasioned by the granting of an exemption would constitute an impermissible material burden on third parties).

458. Braunfeld v. Brown, 366 U.S. 599, 602 (1961) (holding that the state's desire to create a Sunday free from the hustle and bustle of business was grounds to uphold Sunday closing law against Jewish claimants who close on Saturdays, and therefore only operate five as opposed to six days a week).

459. Wisconsin v. Yoder, 406 U.S. 205, 217 (1972).

460. *Caldor*, 472 U.S. at 709.

461. GREENAWALT, *supra* note 73, at 224.

third-party interests when appropriate.[462] Part and parcel of this approach would be promulgating general rules that can obviate the need for accommodations, such as allowing all police officers or prisoners to wear short beards.[463]

This proactive accommodations approach has a long track record. In the earliest chapters of American history, colonies and newly-independent states passed laws permitting Quakers to affirm instead of swear in accordance with their religion.[464] The priest-penitent privilege was codified in a New York statute in 1828, protecting communications made with a person's religious leader regardless of the denomination.[465] The 1948 Selective Service Act Amendment created an accommodation for persons with religious objections,[466] just the latest in a long tradition of legislative accommodations exempting members of peace churches from compulsory military service.[467] And as may be recalled, in 1987, after the Supreme Court held against Captain Goldman in his effort to wear a head covering, Congress responded by legislating the right for service members to wear unobtrusive religious apparel.[468]

Another influential legislative accommodation regime has been the Church Amendment.[469] Enacted soon after *Roe v. Wade*, this law grants medical professionals and hospitals that receive federal funding the option not to conduct sterilization or abortion procedures if they have "religious beliefs or moral convictions" to the contrary without running the risk of losing that funding.[470]

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462. *Id.* This approach was specifically endorsed by the court in Smith. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 890 (1990). A good example of a topic-specific statute would be Professor Alex Tallchief Skibine's proposal for a specific cause of action that would enable Native tribes to vindicate their needs to access sacred sites while also accounting for the needs of others who utilize federal lands for economic and other purposes. *See* Skibine, *supra* note 60, at 288–97.

463. *See, e.g.*, Holt v. Hobbes, 574 U.S. 352 (2015); Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366–67 (3d Cir. 1999).

464. Brady, *supra* note 219, at 717–18.

465. R. Michael Cassidy, *Sharing Shared Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy Penitent Privilege?*, 44 WM. & MARY L. REV. 1627, 1638–39 (2003).

466. The Court subsequently read the accommodation to include those with deeply held moral convictions. United States v. Seeger, 380 U.S. 163, 165–66, 172, 187 (1965).

467. GREENAWALT, *supra* note 73, at 25. It is not clear how a free exercise claim against compulsory armed service would fare in the absence of a legislative accommodation. In the window between *Sherbert* and *Smith* the Supreme Court did not hear any such cases, nor has there been a military draft since RFRA. For the Court's robust denial of such a claim prior to *Sherbert*, see United States v. Macintosh, 283 U.S. 605, 625 (1931) (rejecting free exercise claim of conscious objector seeking citizenship but refusing armed service because "unqualified allegiance to the Nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God").

468. Goldman v. Weinberger, 475 U.S. 503, 50 (1986); 10 U.S.C.A. § 774 (West 1987).

469. 42 U.S.C.A. § 300a-7 (West 1973).

470. Sepper, *supra* note 455, at 673. Even then, the Amendment provoked concerns over how the institutional objection was to manifest. Sara Dubow, *"A Constitutional Right Rendered Utterly Meaningless": Religious Exemptions and Reproductive Politics, 1973-2014*, 27 J. POL'Y HIST. 1, 15 (2015). The Church Amendment remains in force for those states that permit abortions in the aftermath of the overturning of *Roe v. Wade*. *See* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).

And the Church Amendment echoed *Seeger* in including moral as well as religious motivations. The Amendment also included employment protections for doctors at anti-abortion hospitals who conduct abortions off-premises, thus purporting to secure the rights of conscience of all parties concerned.[471]

There are challenges to this approach, however. Justice Harlan posited a reading of the Establishment Clause that the principle of religious neutrality was violated any time Congress passed accommodations for religious persons in general, but not similarly situated secular persons.[472] This stringent reading of what the Establishment Clause permits has never been accepted by the Court.[473] Nevertheless, Justice Harlan's concern was recently reprised by a D.C. district court, which agreed with a secular pro-life organization's claim that the contraceptive coverage accommodation for only religious employers constituted differential treatment that could not survive rational basis review.[474] According to the court, a more persuasive rationale for the distinction would be required than the government-advanced purposes of "accommodating religious exercise by religious institutions" when secular institutions with similar moral objections were excluded.[475] This decision was appealed; however, the government agreed to a voluntary dismissal, so the question remains open.[476] If, in fact, all accommodations must be granted on an even-handed basis to secular as well as religious objectors, the discretionary exemptions ecosystem proposed by Professor Greenawalt may become less feasible.

There are two other possible complications to supposing that third-party harms can be resolved with topic-based accommodations. First is prejudice on the part of legislators.[477] Legislators with particular religious outlooks might either approve of accommodations regimes that do not take sufficient account of the needs of religious minorities or discount the needs of parties adversely impacted by the religious activities of majoritarian practitioners. Additionally, there is the challenge of unknowability. Whether from lack of personal

471. Dubow, *supra* note 168, at 15–16 (2015). *See* GREENAWALT, *supra* note 73, at 102–04 (arguing that the Church Amendment in general is sound policy, but that the accommodation should only be available to institutions "whose convictions not to supply abortions are drawn from their understandings of their faiths," in order to maximize access to reproductive health services). *But see* NeJaime & Siegel, *supra* note 353, at 2538–22, 2555–58 (tracking the expansion of religious refusals building upon the Church Amendment).

472. Welsh v. United States, 398 U.S. 333, 357–59 (1970) (Harlan, J., concurring).

473. Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970) ("[T]here is room for play in the joints."). Moreover, *Smith* established the acceptability of such regimes. Emp. Div., Dep't. of Hum. Res. v. Smith, 494 U.S. 872, 890 (1990).

474. March for Life v. Burwell, 128 F. Supp. 3d 116, 125–28 (D.D.C. 2015); Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870, 39873 (July 2, 2013).

475. *March for Life*, 128 F. Supp. 3d at 126. This conclusion was partially based on the finding that "moral philosophy about the sanctity of human life" is shared between religious and secular organizations. *Id.* at 127.

476. March for Life v. Azar, No. 1:14-cv-01149-RJL, 2018 WL 4871092 (D.C. Cir. Sept. 17, 2018).

477. Krotoszynski, *supra* note 34, at 1271; Laycock, *supra* note 263, at 162-63 ("Judges *sometimes* are willing to protect unpopular minorities, but legislators are hardly ever willing…").

experience or simply because the future needs of nascent religions are not yet discernible, relying on concrete accommodations regimes will almost surely leave some religious exercise under protected.

D. Reconstitutionalize: Incorporate First Amendment Autonomy and Conscience Interests by Balancing Religious Claimants' and Employees' Conscience-Based and Autonomy-Based Needs

An alternative option is to re-orient free expression jurisprudence towards protecting the interests of both members of religious minorities and third-party beneficiaries: Congress could re-authorize RFRA, basing its enactment squarely on its Fourteenth Amendment, § 5 enforcement authority of the First Amendment as applied through reverse incorporation to the federal government. This would place RFRA jurisprudence squarely within the main current of equal protection jurisprudence with equality and inclusivity concerns such as those identified by Justice Stone's *Carolene Products* footnote endogenous to RFRA interpretation.[478] At the same time, re-grounding free-exercise protection in the First Amendment would also help guarantee the expressive rights of third parties. By way of background, the Court in *O Centro* affirmed Congress' authority for enacting RFRA as it pertains to federal government, yet did not specify the source of that authority; did *Flores* render RFRA a purely statutory exercise of Congress putting limits on its own creations? Or could the authority underlying RFRA still be based on Fourteenth Amendment, Section 5 *reverse* incorporation power to enforce equal protection as against the federal government?[479]

The doctrine of reverse incorporation and Congress's Section 5 remedial authority is largely grounded in racial equality jurisprudence, but in principle extends to all categories of equal protection. In 1954, in a companion case to *Brown v. Board*,[480] the Court struck down Washington, D.C.'s statutory education segregation scheme because equal protection as guaranteed by the Fourteenth Amendment also applies to federal government through the Fifth Amendment guarantee of due process.[481] The unanimous Court did not specify whether the *entirety* of Fourteenth Amendment jurisprudence operates with equal force on federal government, or if only certain equal protection principles were

478. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Justice Brennan cited this footnote in his *Braunfeld* dissent, and his *Sherbert* opinion turned in part on the discriminatory import of South Carolina's Saturday work requirement. Braunfeld v. Brown, 366 U.S. 599, 613 (1961) (Brennan, J., dissenting), *see also* Sherbert v. Verner, 374 U.S. 398, 406 (1963). *See* Lupu, *supra* note 163, at 50.

479. Chief Justice Roberts' opinion did note that RFRA "adopts a statutory rule comparable to the constitutional rule rejected in *Smith*." Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006). Yet, inasmuch as RFRA originally sought to ground its statutory enactment in § 5 constitutional authority, it is by no means clear that the statutory/constitutional contrast in this phrase means RFRA's force is now purely statutory and lacking in constitutional valence.

480. Brown v. Board of Educ., 347 U.S. 483 (1954).

481. Bolling v. Sharpe*,* 347 U.S. 497, 499 (1954).

transferable;[482] however, two decades later, the Court averred that "[our] approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."[483]

In *Fullilove*, the Court reviewed Congress' enactment of the Minority Business Enterprise (MBE) provision of 1977, which permitted the Secretary of Commerce to only disburse federal stimulus dollars to local and state entities that expended 10% or more of such moneys on contracts with MBEs.[484] The challengers claimed that non-minority contractors were unfairly prejudiced by this requirement.[485] The lead opinion of Chief Justice Burger examined the legislative record and context of the bill's passage, and, finding abundant evidence that MBEs were disproportionately sidelined in contracts, held that the remedial action was appropriate.[486] The opinion analyzed the "amalgam of [] specifically delegated powers" that Congress relied on in passing this provision, concluding that it used Article I spending authority to the extent that it bound federal agencies and Fourteenth Amendment Section 5 authority where it impacted state and local grantees.[487] Yet Chief Justice Burger's opinion conveys an understanding that the remedial nature of the enactment was critical for its legality generally,[488] not just with respect to the sub-federal recipients.[489]

The Powell concurrence went further in specifically attributing Fourteenth Amendment Section 5 authority to Congress for remedial actions directed toward

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482. *Id.* at 499 (acknowledging that "[t]he 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law.'"). Chief Justice Earl Warren's opinion also drew on nineteenth century decisions to hold that "[T]he constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government, or by the states, against any citizen because of his race." (internal quotation marks removed) (quoting Gibson v. Mississippi, 162 U.S. 565, 591 (1896)). *Id. See* Jim Chen, *Come Back to the Nickel and Five: Tracing the Warren Court's Pursuit of Equal Justice Under Law*, 59 WASH. & LEE L. REV. 1203, 1216–20 (2002).

483. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975). *See also* Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

484. Fullilove v. Klutznick, 448 U.S. 448, 453 (1980).

485. *Id.* at 455.

486. *Fullilove*, 448 U.S. 448.

487. *Id.* at 473, 474–78.

488. "A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the…general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." *Id.* at 472 (quoting U.S. CONST. amend. XIV, § 5) (citation omitted).

489. "Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Id.* at 483–84.

the federal government;[490] "the Enforcement Clauses of the Thirteenth and Fourteenth Amendments confer upon Congress the authority to select reasonable remedies to advance the compelling state interest in repairing the effects of discrimination."[491] Justice Marshall's concurrence, joined by Justices Brennan and Blackmun, reiterated their position in *Bakke* that race-conscious policies are generally constitutional when geared toward reversing legacies of racism.[492]

That the *Fullilove* Court found Congress had relied basically on its Section 5 remedial power was seconded by the plurality opinion of Justice O'Connor in *City of Richmond v. J.A. Croson Co.*[493] There, Justice O'Connor distinguished the Congressional MBE set-aside program from the municipal program then before the Court on the grounds that Congress is "expressly charged by the Constitution with competence and authority to enforce equal protection guarantees," thus reiterating that Congress relied on this authority in passing the MBE provision in 1977.[494] Justice Scalia's concurrence seconded this interpretation of *Fullilove*.[495] Although *Adarand* subsequently found that Congressional and sub-federal affirmative action programs should be subject to the same strict scrutiny, that decision did not address Congress's general Section 5 authority with respect to federal government operations.[496]

Admittedly, because the *field* of congressional activity when Congress acts upon federal government is the same whether its authority derives from the Fourteenth Amendment or from Article I, the question of Congress's Section 5

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490. "Consideration of these factors persuades me that the set-aside is a reasonably necessary means of furthering the compelling governmental interest in redressing the discrimination that affects minority contractors. Any marginal unfairness to innocent nonminority contractors is not sufficiently significant—or sufficiently identifiable—to outweigh the governmental interest served by § 103(f)(2). When Congress acts to remedy identified discrimination, it may exercise discretion in choosing a remedy that is reasonably necessary to accomplish its purpose." *Id.* at 515 (Powell, J., concurring).

491. *Fullilove*, 448 U.S. at 510, 516–17 ("Congress has been given a unique constitutional role in the enforcement of the post-Civil War Amendments. In this case, where Congress determined that minority contractors were victims of purposeful discrimination and where Congress chose a reasonably necessary means to effectuate its purpose, I find no constitutional reason to invalidate § 103(f)(2).").

492. *Id.* at 521–22 (Marshall, J., concurring) ("Today, by upholding this race-conscious remedy, the Court accords Congress the authority necessary to undertake the task of moving our society toward a state of meaningful equality of opportunity."); *see* Univ. of Cal. Regents v. Bakke, 438 U.S. 265, 324–79 (1978) (Marshall, J., concurring in part and dissenting in part).

493. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 472 (1989) (joined by the Chief Justice and Justice White).

494. *Id.* at 488. The lead opinion continued, "Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct." *Id.*

495. *Id.* at 521 (Scalia, J., concurring) (noting that "[w]e have in some contexts approved the use of racial classifications by the Federal Government to remedy the effects of past discrimination" and that "[the Federal Government's] legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment.").

496. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (applying Fourteenth Amendment strict scrutiny to federal race-based classifications via reverse incorporation of the Fifth Amendment due process guarantee).

authority for legislating federally has been dormant since *Adarand* standardized the scrutiny implicated by racial classifications at the state and federal levels. Yet this power has never been explicitly abrogated. In fact, *Adarand*'s holding that all Fourteenth Amendment jurisprudence is applicable against the federal government via the Fifth Amendment means that Section 5 authority is valid for action pertaining to federal as well as to state government.[497] This raises the question of whether RFRA could theoretically remain viable as an exercise of Section 5 authority as applied to the federal government, having already been struck down as an invalid exercise of Section 5 authority as applied to the states.[498] But that dilemma is readily addressed by reformulating RFRA legislatively, with a more robust legislative record, applied only to the federal government. The bar for constitutionality should be lower because whereas *Flores* expressly cited federalism concerns, those concerns are absent for remedial action directed towards the federal government.[499]

If RFRA is indeed remedial, then it would follow that the extent to which believers' burdens are compounded by socio-political marginalization ought to play an important role in evaluating their free exercise claims.[500] This would provide a mechanism to ensure that the claims of members of religious minorities receive robust protection commensurate with the exclusion they experience in society, whether deliberate or unintentional.[501] A *remedial* footing would especially honor the Court's early decades of free exercise jurisprudence when the Court revealed a particular solicitude for marginalized groups such as Jehovah's Witnesses, Adventists, and Amish. On the other hand, absent a remedial basis, RFRA may as well just continue consolidating the interests of

497. *Id.* at 234–36.

498. City of Boerne v. Flores, 521 U.S. 507, 532–34 (1997).

499. *Id.* at 534 (1997) ("This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.").

500. I.e., whether there is "prejudice against discrete and insular minorities…which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect [them], and which may call for a correspondingly more searching judicial inquiry." United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Arguing from the perspective of avoiding Establishment clause violations, Karin Jønch-Clausen has set forth a very similar procedure. Karin Jønch-Clausen, *Between Accommodation and Favoritism: The Need for a Political Power Factor in Religious Exemption Adjudication*, 21 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 49 (2021). Professor Jønch-Clausen suggests that each free exercise claim should be evaluated in the context of the "political power factor" that its proponent's position enjoys in the political process, such that, e.g., exemptions on the basis of religious objections to homosexuality or abortion would be less readily vindicated because both of those views have been well-represented in the political process. *Id.* at 64–67. The end result of what is suggested here may be similar, although the emphasis should be on the underrepresentation *vel non* of the claimant's group, rather than the political salience of their position.

501. *See generally* Brady, *supra* note 219, at 742 (warning about "religious accommodations that benefit powerful faiths at great expense to groups whose unpopularity, marginalization, or other vulnerability to mistreatment makes them disadvantaged in the political process" in the context of discussing how and when third-party burdens offend the Establishment Clause).

majoritarian religious groups that are already well-represented in society to the detriment of religious minorities.[502]

Furthermore, a *constitutional* grounding of RFRA locates RFRA in the generative, rights-conscious medium of first-amendment jurisprudence. What is meant here builds on the insight that the expression protections of the First Amendment form a cohesive unit:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[503]

There can be no established federal religion so that each American may be free to reach their own understanding.[504] Inasmuch as one's experience leads to religious observance, free religious exercise is guaranteed as a way of safeguarding the underlying beliefs.[505] People must be permitted to speak freely and publicly based on how they understand the world. And democracy depends upon the right of all citizens to communicate their insights and interpretations through self-expression,[506] media, assembly, and, ultimately, petition.

The concept of conscience permeates the First Amendment.[507] Although that word does not appear, the Framers considered it and perhaps omitted it only on the grounds of seeming redundant.[508] Professor David Richards has traced Enlightenment understandings of conscience to the philosophers Locke

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502. *See* MARCI A. HAMILTON & EDWARD R. BECKER, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 6(2005). ("The secularization thesis has permitted organized religion to don the garb of the underdog, when in fact its political power has been quite potent, even if usually behind the scenes."). *See also* GREENAWALT, *supra* note 73, at 15 (noting that exemptions are more readily assented to when the outlook of the claimants is epistemologically accessible to decision-makers).

503. U.S. CONST. amend. I.

504. *Cf.* THOMAS PAINE, THE AGE OF REASON 2 (London, Freethought Publishing Company 1880) (1794) ("My own mind is my own church. . .[i]t is necessary to the happiness of man, that he be mentally faithful to himself. Infidelity…consists in professing to believe what he does not believe [as imposed by an established church].").

505. James Madison, *Memorial and Remonstrance*, ¶ 1 (1785). ("The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.").

506. Cohen v. California, 403 U.S. 15 (1971) (finding free speech protections applicable to expressive conduct).

507. The term "conscience" was used in Congressional debate about the First Amendment: "[T]he rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." 1 ANNALS OF CONG. 730 (remarks of Representative Daniel Carroll of Maryland, 1789). *See generally* René Reyes, *Common Cause in the Culture Wars?*, 27 J.L. & RELIGION 231, 248–49 (2011).

508. Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 403–04 (2002); Krotoszynski, *supra* note 34, at 1255 ("Given the absence of any explanation for the addition of the new 'free exercise' language, and no debate regarding its adoption, one could reasonably conclude that the members viewed the changes [away from language of conscience] as merely technical, rather than as substantive in nature.").

and Bayle, who taught that the ability to make sense of the world around us must not be impinged by the State, because our understanding forms the basis for enacting our freedom.[509] Freedom of conscience is thus defined as "the capacity of persons themselves to originate and assess [moral] claims."[510]

The interpretive lens of conscience situates expressive speech and expression of personal identity as rights adjacent to, and not entirely severable from, religious freedom.[511] The *Harris Funeral Homes* case illustrates this point.[512] Aimee Stephens informed Mr. Rost that she intended to begin presenting as female, in keeping with her understanding of who she is and her gender identity.[513] Thomas Rost had a religious objection to biologically male employees presenting in female-associated attire.[514] A purely statutory basis for RFRA yields the inference that Mr. Rost's interests should be prioritized over Ms. Stephens' because his concerns are religious and hers are not.[515] On the other hand, construing religion not as a separate *sui generis* category but instead in conversation with other seminal First Amendment concerns can lead to understanding both Mr. Rost's and Ms. Stephens' claims as claims of identity, expression, and autonomy.[516]

A conscience-aware RFRA, grounded in Congress' remedial *constitutional* authority, would require a court not only to evaluate the government's compelling interest but also to weigh the expressive rights, substantive due process rights, and protections based on suspect class (or semi-suspect class), of claimants and third parties implicated by the exemption request;[517] and where any of these basic rights would be directly offended by the RFRA exemption, the

509. DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION 85, 97 (1989).

510. *Id.* at 81.

511. *Id.* at 162. *See* Minow, *supra* note 306 at 782 (discussing "the liberty of conscience at the core of the free exercise clause"). There is much resonance between protections for conscience and substantive due process protections. *See* Planned Parenthood v. Casey, 505 U.S. 833, 851-52 (1992) (linking rights guaranteed by substantive due process with "conscience and belief") ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."); Mark L. Rienzi, *The Case for Religious Exemptions–Whether Religion Is Special or Not*, 127 HARV. L. REV. 1395, 1400 n.16 (2014) (reviewing BRIAN LEITER, WHY TOLERATE RELIGION? (2013) and ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013) (discussing linkages between conscience, private space where a person is secure from government coercion, and substantive due process)).

512. Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).

513. *Id.* at 566.

514. *Id.* at 567–69.

515. To be sure, RFRA's current design would not necessarily protect Ms. Stephens even if there *were* a religious component to her concerns (the irony of allowing RFRA exemptions to Title VII is that RFRA could then enable companies to discriminate on the basis of religion in the name of religious freedom).

516. *See* Schwartzman et al., *supra* note 385, at 809 ("[W]hen religious exemptions generate harms to third parties, there is liberty of conscience *on both sides.*").

517. *See* NeJaime & Siegel, *supra* note 353, at 2585–86 (arguing that dignitary harms of third parties should properly be included as part of the government's compelling interest test); GREENAWALT, *supra* note 73, at 173–74, 213 (arguing dignitary harm should not be discounted in free exercise analysis).

exemption should not be granted.[518] The substantive due process rights would center on the right to familial development and "private space."[519] Taking cognizance of suspect class would ensure protections against discrimination even when the government itself disclaims its compelling interest. This framework would bring into the foreground the implicit balancing that already seems endemic in free exercise adjudication.[520]

Limiting the class of cognizable third-party burdens to expressive and substantive due process interests may leave some third- party interests under-protected. Most paradigmatically would be if a company were to interpose a religious objection to paying the minimum wage.[521] In such a scenario, none of the categories mentioned would be broad enough to protect the interests of the employees. Thus, it would be hoped that Congress amends the minimum wage law to clarify that it is not subject to RFRA.

Despite this vulnerability, maintaining strict limits on the cognizable burdens would be important, because otherwise, attenuated harms could be interposed to preclude exemptions.[522] In *Estate of Thornton v. Caldor*, the Court ruled that the law allowing workers to observe a Sabbath of their choosing would harm employers financially because they would be obligated to honor employees' choices regardless of the impact on company operations.[523] And in *Braunfeld*, the Court denied the exemption sought by Jewish business owners, in part because it would incur an economic disadvantage for competitors.[524] Thus,

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518. These three categories would implicate the First Amendment rights not only of speech and expressive action, but also assembly. Griswold v. Connecticut, 381 U.S. 479, 483 (1965) ("The right of 'association,' like the right of belief, is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.") (citation omitted).

519. *See id.* at 484 ("Various [constitutional] guarantees create zones of privacy."); Carey v. Population Servs., Int'l, 431 U.S. 678, 685 (1977) (discussing core areas of concern in which individuals enjoy personal autonomy inherent in the right of privacy); Mark Rienzi uses "private space" to describe one's substantive due process interest in making personal life decisions. Rienzi, *supra* note 511, at 1400 n.16 (2014) ("[The Supreme Court has used a] 'private space' argument…in numerous substantive due process cases to justify restrictions on government interference with certain decisions that the Court deems deeply personal and important.") (citing Lawrence v. Texas, 539 U.S. 558, 574 (2003)). *But see* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (casting doubt on the past sixty years of substantive due process jurisprudence).

520. *See supra*, notes 320–25 and accompanying text.

521. *See* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 306 (1985) (denying a free exercise exemption from the operation of federal minimum wage law on the commercial activities of a religious non-profit organization).

522. *See* Lochner v. New York, 198 U.S. 45 (1905).

523. Although Friday is a day of prayer for Muslims, it is not a sabbath. *Jum'ah*, Britannica.com, https://www.britannica.com/topic/jumah [https://perma.cc/BM4R-XF5Q] (2020). This lends credence to the interpretation of *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), that the infirmity of the accommodation was its favoring of Sabbatarian religions.

524. Braunfeld v. Brown, 366 U.S. 599, 608-09 (1961).

should purely economic third-party harms be included, there is a significant chance that attenuated third-party interests might be imported into the analysis.[525]

The revised RFRA procedure would be as follows: in the initial step of the analysis, the court evaluates whether the claimant is identified with a discrete and insular minority.[526] If so, the court accords greater deference to the claimant's articulation of their substantial religious burden in light of the fact that their religious worldview is presumptively less accessible to the legislature or the court.[527] Subsequently, the government's showing that it has a compelling interest in the application of the law in question "to the person" would take cognizance of the claimant's marginalized status, thus implicating a higher threshold for the government to show the importance of uniform application upon people lacking meaningful participation in the political process.

In the final step of the analysis, the court identifies impacted third parties' expressive rights, substantive due process rights, and protections based on

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525. *Cf.* Burwell v. Hobby Lobby, 573 U.S. 682, 729 n.37 (2014) (noting as a hypothetical that a government requirement that restaurants remain open on Saturdays could be interpreted as creating a right for employees to make extra money, such that if third-party economic harms preclude application of RFRA, Saturday Sabbatarians would be unable to operate restaurants). The decision to opt out of contraceptive coverage, the gravamen of *Hobby Lobby*, incurs more than an economic harm. Schwartzman et al. link matters of bodily integrity with harm to liberty of conscience. Schwartzman et al., *supra* note 385 at 807. And as Douglas NeJaime and Reva B. Siegel persuasively argue, there can be "harmful social meanings" communicated to the employees of a company that requires them to obtain their contraceptive coverage through an alternative method. NeJaime & Siegel, *supra* note 353, at 2581–84 (proposing that preventing dignitary harms and bolstering the social meanings implicit in statutory programs are objectives already intrinsic to the RFRA compelling interest test). Characterizing the decision to use contraceptives as sinful stigmatizes the personal decision to use contraceptives in accordance with the constitutional right to direct the development of one's own family, effecting a "dignitary harm." *Id.* at 2580–84; *see* Brady, *supra* note 219, at 731 (discussing dignitary harms occasioned by denial of services to members of the LGBTQ community on religious grounds). Implicit in this analysis is an inherent equal protection violation, because long- running cultural gender discrimination uniquely penalizes women for non-procreative sexual activity. *Cf.* Redhead v. Conference of Seventh-Day Adventists, 440 F. Supp. 2d 211, 222–24 (E.D.N.Y. 2006), *adhered to on reconsideration*, 566 F. Supp. 2d 125 (E.D.N.Y. 2008) (holding that a terminated unmarried pregnant female teacher may have suffered impermissible discrimination if the employer enforced its policy against pre-marital intimate relations against women but not men) ("[P]unishment singularly directed at the Hester Prynnes, without regard to the Arthur Dimmesdales, is not permissible."); *see also* Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 667 (6th Cir. 2000) (finding that an employer violated the Civil Rights Act if it "enforced its premarital sex policy in a discriminatory manner—against only pregnant women, or against only women.").

526. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

527. To be sure, the increased deference that courts have been according to claimants in the substantial burden analysis may render this alteration somewhat less urgent; yet to the extent that the *Navajo* pragmaticality formulation frequently recurs, and insofar as canonicity, fungibility, and attenuation analysis may be returning as aspects of the sincerity evaluation, grounding a court's RFRA engagement with an awareness of the claimant's minority religion status vel non could help bolster the court's awareness for when a claimant's perspective is more likely to diverge from majoritarian understandings—including, in all likelihood, from the court's own experience. Krotoszynski, *supra* note 34, at 1236–37 (explaining how even judges who are not adherents to majoritarian religious traditions may nevertheless assimilate majoritarian religions' perspectives and norms).

suspect class. If the exemption would significantly damage any of these categories of rights, it should be denied. The inclusion of this final step is important given the current instability and infirmity of the compelling interest test as a safeguard for third-party interests.

Reclaiming the remedial, constitutional gravamen of RFRA could effectively safeguard the rights of third parties while also ensuring the free exercise of members of religious minorities.[528]

CONCLUSION

At heart, participation in a free society means governmental acknowledgment of individuals' capacities to develop their faculties and personality in accordance with their own experience and understanding of the world. A nation composed of persons who have not enjoyed this right cannot be a democracy in the fullest sense. Yet, longstanding patterns of discrimination have systematically deprived many people in this country of their ability to flourish as full participants in society. Thus, governmental protections based on gender, race, disability status, veteran status, sexual orientation, and many others are vitally important.

The conflict currently unfolding over religious exemptions is, in essence, an iteration of the longstanding tension and ambiguity between liberty and equality. It is a tension that can never be entirely resolved, only negotiated. The broad range of areas of government involvement in many facets of our collective life has introduced impacted third parties into a paradigm previously composed of just individual and the state. Yet, at the same time, any consensus between the major political parties as to what constitutes a compelling government interest is swiftly evaporating.

Efforts to protect religious minorities while also safeguarding the rights of groups that rely on anti-discrimination protections must, therefore, be very carefully drafted so that courts have clear standards and direction for how to interpret the law. On the one hand, RFRA must not be exercised to deprive historically under-represented communities of the hard-won protections guaranteed by the Fourteenth Amendment. On the other hand, RFRA must not be limited to only those situations in which the exemption provided is *de minimis*. Often, exemptions for practitioners of a less-familiar religion do carry a cost to

528. One other elaboration on this exception might be to include that a third-party burden cannot be inferred absent a relationship between the claimant and third party. Otherwise, as the Court experienced in *Braunfeld*, there may be a temptation to read in business competitors as impacted third parties in denying exemption for minority religion claimants; and other analogs like consumers or fellow prisoners in other cases. *Braunfeld*, 366 U.S. at 608–09 (1961). *See* Schwartzman et. al., *supra* note 38, at 803–05 (discussing how under the lottery system for the draft, each exempted draftee causes the person with the next number to take his or her place; acknowledging that treating free exercise claims as furthering impermissible establishments when resulting in third-party harms would be unable to vindicate free exercise objections to military service). Lastly, the mechanics and precedents concerning what constitutes a substantial burden should not be altered, because, for the first time, minority religion claimants have been prevailing at this step of the analysis in recent years following the Court's leadership.

society; that cost is worth paying, but not by the very people who already disproportionately shoulder the burden of prejudice and stereotypes.

WELCOME TO THE WORLD: RETHINKING CHILDREN'S PRIVACY RIGHTS IN THE AGE OF SHARENTING

Elizabeth McIntire

INTRODUCTION

Wren Eleanor is three years old and, in many ways, just like any other American toddler. She loves being with her mom, eating lots of treats, and playing with her toys. There is, however, something unique about Wren; over 17 million people follow her on TikTok.[1] The account is run by her mom, Jacquelyn, and is filled with videos of them eating, playing, dancing, and living their lives. This summer, some followers became concerned by some videos on Wren's account. These followers, including other moms, noticed that some videos were

1. Jacquelyn Paul (Wren & Jacquelyn, @wren.eleanor), TIKTOK (Nov. 10, 2022), https://www.tiktok.com/@wren.eleanor?lang=en [https://perma.cc/N8BX-KPL9].

not creating the engagement[2] a three-year-old's page normally would.[3] For example, a video of Wren in a cropped, orange shirt was saved over 45,000 times; uncomfortable and "creepy" comments were left on all her videos from other TikTok accounts; and frequently searched phrases like "Wren Eleanor hotdog" or "Wren Eleanor pickle" were the most popular searches associated with the account.[4] There were also concerns that Wren's mother was not only exploiting the engagement but encouraging it to get more likes, more followers, and more money.[5]

There are children and parents like Wren and Jacquelyn all over social media. It would take less than a few minutes of scrolling on any social media platform to see someone's picture, video, or post about their child. These posts are most often from parents showing the world the funny, relatable, and/or cute things their child does. Parents use social media for a wide range of reasons, including finding social support, advice, and emotional validation.[6] They also use social media to keep family and friends connected to their children.[7] Mothers are especially prolific on social media, with 92% of moms in the United States using at least one form of social media.[8] They use it primarily for (1) emotional connection and (2) for the practical ways it helps in their busy lives.[9]

Parents have other motives behind posts that belong to "kidfluencer" accounts, or accounts starring children with large social media followings.[10] These accounts are mostly run by parents to monetize their children's play

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2. "Social media engagement is an umbrella term for actions that reflect and measure how much your audience interacts with your content." *Social Media Engagement: What It Is and Tips to Improve It*, SPROUT SOCIAL (Oct. 20, 2022), https://sproutsocial.com/insights/social-media-engagement/ [https://perma.cc/Q83G-PGBN].

3. EJ Dickson, *A Toddler on TikTok Is Spawning a Massive Mom-Led Movement*, ROLLING STONE (July 20, 2022), https://www.tiktok.com/@wren.eleanor?lang=en [https://perma.cc/N8BX-KPL9].

4. Fox News, *'Wren Eleanor' TikTok Movement Inspires Moms on Social Media to Remove Photos of Kids: 'Sick People'*, NEW YORK POST (July 26, 2022), https://nypost.com/2022/07/26/wren-eleanor-tiktok-movement-inspires-moms-on-social-media-to-remove-photos-of-kids-sick-people/ [https://perma.cc/E4BP-RELU].

5. Christine Organ, *Why the Wren Eleanor Controversy Makes Parents So Uncomfortable*, MOTHER.LY (Aug. 25, 2022), https://www.mother.ly/life/motherly-stories/wren-eleanor-social-media/ [https://perma.cc/798R-RFUB].

6. Divna Haslam, Amelia Tee & Sabine Baker, *The Use of Social Media as a Mechanism of Social Support in Parents*, 26 J. CHILD & FAMILY STUD. (2017); *see also* Maeve Duggan, Amanda Lenhart, Cliff Lampe & Nicole B. Ellison, *Parents and Social Media*, PEW RSCH. CTR. (July 16, 2015), https://www.pewresearch.org/internet/2015/07/16/parents-and-social-media/ [https://perma.cc/76UV-78XW].

7. The New York Times, *Why Kids Are Confronting Their Parents About 'Sharenting'*, YOUTUBE (Aug. 7, 2019), https://www.youtube.com/watch?v=YRPUZ3pufAg [https://perma.cc/5TR9-7RHZ].

8. Ronit Plank, *Parent Check: Why Are You Really Sharing That Photo of Your Kid on Social Media*, CARE.COM (June 25, 2022), https://www.care.com/c/parents-sharing-kids-private-lives-on-social-media/ [https://perma.cc/B9XG-63ZQ].

9. *Id.*

10. Marina A. Masterson, Comment, *When Play Becomes Work: Child Labor Laws in the Era of "Kidfluencers"*, 169 U. PA. L. REV. 577, 579 (2021).

through sponsorships, advertisements, and endorsements.[11] These posts are less for the social benefit of the parent or child and more to create engagement with the account.[12] This engagement can directly benefit the account through the size of the following. Brands increasingly recognize the importance of teaming with social media influencers and "kidfluencers."[13] These accounts have a much larger impact on the internet than personal accounts; thus, the identities and information of these children spread further and quicker.[14]

Though there are short-term benefits for parents when they post information about their child on social media, there are lurking harms to the child. The greatest harm is the loss of the child's privacy. This harm exists regardless of how many followers a parent's account has. Children are growing up in a digital world, with an internet already familiar with them by the time they log in by themselves. From sonograms to birth announcements, potty-training and picky eating, first days of school and first crushes, the information parents share on the internet strips away privacy rights from children who are not aware that these rights exist. Along with a loss of privacy and the ability to create their own identity, sharing information online about a child, "sharenting," may leave a child vulnerable to embarrassment, identity fraud, bullying, and possibly labor extortion.[15] By allowing parents to post whatever they want about their child, parents may severely and permanently harm their child and expose them to a digital world that has been proven to do young people more harm than good.[16]

The law leaves children's online privacy largely unregulated. Current legal protections do not address the harms done by posting a child's information and/or image online. Social media platforms, websites, and applications are regulated in collecting and handling data on child users and accounts, but individual digital

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11. *See id.*

12. *See* Jessica Pacht-Friedman, Note, *The Monetization of Childhood: How Child Social Media Stars Are Unprotected from Exploitation in the United States*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 361, 363–65 (2022).

13. *Id.* at 370; *Influencer Marketing Spending Surges to $4.6 Billion – Here Are the Most Important Areas to Target*, Retail TouchPoints (last visited Jan. 5, 2024), https://www.retailtouchpoints.com/resources/influencer-marketing-spending-surges-to-4-6-billion-here-are-the-most-important-areas-to-target#:~:text=Influencer%20marketing%20spending%20in%20the,their%20budget%20in%20this%20area [https://perma.cc/GD2W-Y3M7].

14. Several "kidfluencer" accounts, like Ryan Kaji or Ava and Leah Clements, have millions of followers across platforms. This is obviously much less than the average social media user. For example, the average Instagram user has less than 700 followers. *See* Alexander Eser, *Essential Instagram Follower Statistics In 2024*, ZIPDO (June 14, 2023), https://zipdo.co/statistics/instagram-follower/#:~:text=The%20average%20number%20of%20followers%20for%20an%20Instagram%20user%20is,%2C%20interests%2C%20and%20engagement%20levels [https://perma.cc/6ETN-VP3J].

15. *See* Melanie N. Fineman, Note, *Honey, I Monetized the Kids: Commercial Sharenting and Protecting the Rights of Consumers and the Internet's Child Stars*, 111 GEO. L.J. 847 (2023).

16. *See* Erin Carpenter, *How Social Media is Affecting the Lives of Minors Including Current Legal Safeguards and Their Weaknesses*, 5 CHILD & FAMILY L.J. 75 (2017).

privacy is left entirely to user discretion.[17] As social media becomes a more pervasive aspect of modern life, it is becoming increasingly apparent that there must be more protections for children's online data. The United States must expand its data privacy protections, following the example of other governments. Importantly, these expansions must go beyond protections existing anywhere else, putting more responsibility on social media platforms than individual users and accounts. This would reduce the amount of child data created.

This article seeks to show how children's privacy rights are in extreme danger, and proposes that, to mitigate the harms, social media platforms should be required, through federal legislation, to assist users in making better decisions. Part I addresses the background of digital privacy rights for children. This requires understanding privacy rights in the United States and how those rights have developed in the era of social media. Part I also explores the concept of "sharenting" and federal legislation addressing children's digital privacy rights. Part II examines the problems children face by reduced privacy from "sharenting." Part III compares the approach of the United States with the approach of other governments, domestic and foreign. Finally, Part IV proposes federal legislative solutions to help children maintain and restore digital privacy. Without significant legislative change, today's children will face financial, emotional, and physical harms now and in the future. Expanding protections is essential to the future of American youth.

I. BACKGROUND

Children's privacy rights are not easily defined. It is important to understand what privacy rights look like in the United States. The general right to privacy is not completely defined or protected in American jurisprudence. That makes it difficult to understand exactly what rights are at stake when citizens willingly or unknowingly publish their information on social media. Privacy rights become even more complicated when those rights belong to children. Parents are assumed to be the guardians of their child's image and information. However, parents are often the perpetrators of violating their child's privacy using social media. What rights to privacy do children have when parents violate those rights? Do children and minors have any avenue for protecting their privacy rights or recovering from loss of privacy? These questions are essential to all children, minors, and young adults in the United States as they grow and realize how much of their information was put online without their knowledge or consent. These questions are even more complicated when the children are social media famous or "kidfluencers."

A. Privacy Rights in the United States

Privacy law does not have a comprehensive national regulatory structure. The right to privacy is not explicitly granted in the federal Constitution or the

17. Or parental discretion, if you are younger than 13 years of age.

Bill of Rights. Ten states' constitutions protect a citizen's right to privacy.[18] Other states' courts have recognized an implied constitutional right to privacy.[19] The Supreme Court has read the right to privacy into several parts of the Constitution.[20] For example, the government cannot invade certain privacy expectations covered by the Fourth Amendment's right to be free from unreasonable searches and seizures.[21] However, these protections only guard individuals against governmental intrusion[22] and are not guaranteed until adopted into state or federal law.[23]

The concept of the "right to privacy" was popularized by Justices Warren and Brandeis in 1890.[24] They argued that common law had recognized a "right to be left alone" but had not quite classified it as such.[25] The law professors wrote the article in response to growing concern about new technologies in the late nineteenth century, which allowed others to take and circulate portraits of private people without the person's consent.[26] Since then, the right to privacy has been adopted in American jurisprudence and is still primarily defined as the right to be left alone.[27] State courts have recognized rights protecting several different aspects of privacy, including the right against invasion of privacy by appropriation of name or likeness,[28] intrusion on seclusion,[29] and false light.[30] The right to privacy is often in tension with other constitutional rights, like the freedoms of press and speech.[31]

Data privacy law in the United States is often considered a "patchwork" of federal and state laws, making it difficult to track what is and is not covered.[32] Internet consumers are thus vulnerable to privacy violations, even if they are supposed to be covered by law.[33] The invasion of privacy by non-governmental

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18. Larry W. Thomas, TRANSPORTATION RESEARCH BOARD, LEGAL ISSUES CONCERNING TRANSIT AGENCY USE OF ELECTRONIC CUSTOMER DATA, LEGAL RSCH. DIG. 48, 3 (2017).

19. *Id.* at 37–38.

20. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (An implied right of privacy within the Bill of Rights prohibits the government from preventing married couples from using contraception.).

21. U.S. CONST. amend IV.

22. *Griswold*, 381 U.S. at 484–85.

23. This was one of the main takeaways from the Court's recent decision in *Dobbs v. Jackson*, 142 S.Ct. 2228 (2022). This was even more apparent in Justice Thomas' concurrence. *Dobbs*, 142 S.Ct. at 2314 (Thomas, J., concurring).

24. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4. HARV. L. REV. 193 (1890).

25. *Id.* at 193.

26. *Id.* at 195–96.

27. Restatement (Second) of Torts § 652B cmt. a (Am. L. Inst. 1977).

28. *See* AFL Phila. LLC v. Krause, 639 F.Supp. 2d 512 (E.D. Pa. 2019).

29. *See* Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998).

30. *See* Graboff v. Colleran Firm, 744 F.3d 128, 136 (3d Cir. 2014).

31. Toffolini v. LFP Publ'g Grp., 572 F.3d 1201, 1207–08 (11th Cir. 2009).

32. Thorin Klosowski, *The State of Consumer Data Privacy Laws in the US (And Why It Matters)*, NEW YORK TIMES (Sept. 6, 2021), https://www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us/ [https://perma.cc/EEH8-236R].

33. *Id.*

actors is a tort generally governed by state courts.[34] Existing state and federal privacy laws in state and federal statutes are limited to protect specific privacy interests. For example, the federal government passed the Family Educational Rights and Privacy Act (FERPA) in 1974 to protect the privacy of student education records.[35] FERPA does not define a student or parent's privacy rights but nonetheless seeks to protect those rights.[36] States have passed legislation to safeguard specific privacy rights through restrictions on everything from genetic testing[37] to drones.[38] Only five states—California, Colorado, Connecticut, Utah, and Virginia—have passed comprehensive consumer data privacy laws that are in effect or will take effect in the next several years.[39]

Some legislation exists to protect a child's right to privacy. Federal regulations impose extra requirements on organizations like schools[40] and hospitals[41] to protect a child's information. The Children's Online Privacy and Protection Act (COPPA) is the only federal law that addresses a child's right to privacy digitally. It was passed in 1998 and "imposes certain requirements on operators of websites or online services directed to children under 13 years of age," as well as on operators that "have actual knowledge that they are collecting personal information online from a child under 13 years of age."[42] The primary purpose of COPPA is to give parents more control over what information is collected about their children online.[43] Regulating the amount of personal information collected mitigates safety risks children face in the digital age.[44] COPPA has supremacy over state law but is intended to work with consistent state law.[45]

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34. *See, e.g.*, Rimert v. Meriwether & Tharp, LLC, 865 S.E.2d 199 (2021); Hill v. Nat'l Collegiate Athletic Ass'n, 7 Cal. 4th 1 (1994).

35. Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g.

36. *See id.*

37. ALASKA STAT. § 18.13.010-100 (2022).

38. OR. REV. STAT. § 837.320 (2022).

39. *State Laws Related to Digital Privacy*, NAT'L CONF. OF STATE LEGISLATURES (June 7, 2022), https://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-related-to-internet-privacy.aspx [https://perma.cc/93SM-UPRK].

40. *Federal Laws Enabling Parents to Protect Their Children's Privacy: FERPA, PPRA and COPPA*, PARENT COAL. FOR STUDENT PRIV. (last visited Feb. 19, 2023), https://studentprivacymatters.org/ferpa_ppra_coppa/ [https://perma.cc/2AQ8-NQYM].

41. U.S. DEP'T OF HEALTH & HUM. SERVS., *Does the HIPAA Privacy Rule Allow Parents the Right to See Their Children's Medical Records?*, (Dec. 19, 2002), https://www.hhs.gov/hipaa/for-professionals/faq/227/can-i-access-medical-record-if-i-have-power-of-attorney/index.html [https://perma.cc/BMN4-CJ72].

42. Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501-6505; *see also* 16 C.F.R § 312.2.

43. *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM'N (July 2020), https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions [https://perma.cc/3FEC-H87E].

44. Eldar Haber & Tammy Harel Ben Shahar, *Algorithmic Parenting*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 19 (2021).

45. *Jones v. Google*, 56 F.4th 735, 737–38 (9th Cir. 2022).

The Federal Trade Commission (FTC) is the primary enforcement agency for protecting consumer privacy and security.[46] It enforces COPPA and brings lawsuits against companies that violate the Act.[47] In 2019, the FTC brought allegations that the company Musical.ly (now known as TikTok) knowingly collected personal information from children in violation of COPPA;[48] the company eventually agreed to settle for $5.7 million.[49] Among other things, the complaint alleged that Musical.ly knew children were using their app but did not seek parental consent before collecting names, email addresses, and other personal information from users under the age of 13.[50] The company also made user accounts public by default, even those of younger users.[51] Children's profile bios, usernames, pictures, and videos could be seen by anyone if the default settings were not changed.[52] The company was required to make the monetary payment as well as "comply with COPPA going forward and to take offline all videos made by children made under the age of 13."[53] Despite government oversight, companies can easily skirt COPPA requirements. For example, organizations commonly classify a website or app as not primarily directed to children but directed toward mixed audiences.[54] Because COPPA does not have expansive protections and is the only federal law protecting children's online privacy, companies would rather spend more time avoiding COPPA than complying with it.[55] It is not comprehensive enough to protect children's privacy rights in the social media era.[56]

There have been several attempts to update and strengthen COPPA, many of which are still in progress.[57] One update has been the expansion of the Better Business Bureau's Children Advertising Review Unit. After COPPA was passed, this unit began helping businesses comply with COPPA, seeking change through

46. *Privacy and Security Enforcement*, FED. TRADE COMM'N (last visited Dec. 2, 2023), https://www.ftc.gov/news-events/topics/protecting-consumer-privacy-security/privacy-security-enforcement [https://perma.cc/2E8U-P89S].

47. 16 C.F.R. § 312.9.

48. Complaint, U.S. v. Musical.ly, No. 2:19-cv-1439.

49. *Video Social Networking App Musical.ly Agrees to Settle FTC Allegations That it Violated Children's Privacy Law*, FED. TRADE COMM'N (Feb. 27, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/02/video-social-networking-app-musically-agrees-settle-ftc-allegations-it-violated-childrens-privacy [https://perma.cc/7AXK-2PQG].

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *See, e.g.*, N.M. *ex rel.* Balderas v. Tiny Labs Prods., 516 F. Supp. 3d 1293 (D.N.M. 2021).

55. Ariel Fox Johnson, *13 Going on 30: An Exploration of Expanding COPPA's Privacy Protections to Everyone*, 44 SETON HALL LEGIS. J. 419, 421 (2020).

56. Suzanne Kaufman, Note, *The Invisible, Yet Omnipresent Ear: The Insufficiencies of the Children's Online Privacy Protection Act*, 78 N.Y.U. ANN. SURV. AM. L. 101 (2022).

57. *Data Protection: Children's Privacy*, ELEC. PRIVACY INFO. CTR., https://epic.org/issues/data-protection/childrens-privacy/ (last visited Dec. 5, 2022) [https://perma.cc/7E9T-29U9].

voluntary cooperation and enforcement action.[58] The Children Advertising Review Unit is a private agency that works in tandem with government agencies to protect children's online privacy and is a safe-harbor program.[59] Despite these amendments and updates, COPPA is not equipped to handle the problems children face from social media in their daily lives.

B. Privacy Protections on Social Media

Social media is a dense space of personal information. In 2021, over 4.26 billion people worldwide used social media.[60] When a user creates an account on a social media platform, they are typically required to disclose information like their name, birth date, country of residence, and email. Once an account is created, the platform tracks a user's activity. Because accounts are typically free, platforms use advertisements to make money. User information is continuously gathered and kept by the platform's operators and is commonly used to target advertisements specifically to the user.[61] Social media companies make a significant amount of their revenue by selling users' data to data collection companies.[62] Social media companies have very little incentive to protect users' information.

Beyond tracking and selling data, social media platforms do not guarantee a user's personal information will remain private. If a user makes their posts "private," available to only a restricted network of other users, information shared within that private network is still not safe from greater circulation.[63] Data breaches happen more in the United States than in any other country in the world.[64] In 2021, 212.4 million users were affected by a data breach.[65] Companies seem unconcerned by these breaches despite losing customer trust.[66]

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58. *Children's Advertising Review Unit*, BETTER BUS. BUREAU, https://bbbprograms.org/programs/all-programs/children%27s-advertising-review-unit (last visited Dec. 5, 2022) [https://perma.cc/F2G8-GJNB].

59. *Id.;* 16 C.F.R. § 312.11 (2023).

60. S. Dixon, *Number of Global Social Network Users 2017-2027*, STATISTA (Aug. 29, 2023), https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/ [https://perma.cc/N5JW-M95R].

61. Eliza Crawford, *Website Tracking: Why and How Do Websites Track You?*, COOKIEPRO (Nov. 16, 2020), https://www.cookiepro.com/blog/website-tracking/ ("[A] 2017 survey found that 79% of websites use trackers that collect user data.") [https://perma.cc/W7ZC-Z3AU].

62. Aliza Vigderman & Gabe Turner, *How Much Would You Sell You Social Media Data For?* SECURITY (Jan. 23, 2023), https://www.security.org/blog/how-much-would-you-sell-your-social-media-data-for/ [https://perma.cc/2T3V-YA3A].

63. Brian Mund, *Social Media Searches and the Reasonable Expectation of Privacy*, 19 YALE L.J. & TECH. 238 (2017).

64. Jason Cohen, *United States Has the Most Data Breach Victims in the World*, PC MAG. (Dec. 10, 2021), https://www.pcmag.com/news/united-states-has-the-most-data-breach-victims-in-the-world [https://perma.cc/UF24-Z7J8].

65. Natasha Singer, *Britain Plans Vast Privacy Protections for Children*, N.Y. TIMES, Jan. 21, 2020, at B3.

66. Emma Bowman, *After Data Breach Exposes 530 Million, Facebook Says It Will Not Notify Users*, NPR (Apr. 9, 2021), https://www.npr.org/2021/04/09/986005820/after-data-

In addition, even if a parent keeps their social media accounts set to a high privacy setting and only allow a small group of people to see information about their children, even that small group may violate the child's privacy.[67]

Information posted on social media platforms is not safe from malicious use. Most federal courts have been hesitant to recognize expectations of privacy on social media.[68] In many situations, law enforcement can legally access and use a suspect's social media information.[69] Criminal law doctrines have adapted to include information found on social media (for example, the third-party doctrine).[70] Additionally, information posted online may be used for more nefarious and obviously illegal purposes. Social media users often post information that can be used against them in cases of fraud or identity theft. Individuals who maintain an active social media presence are more likely to be targets of fraud than those who do not.[71]

C. Children's Privacy Rights

Like adults, children are not explicitly granted the right to privacy in the federal Constitution. Minors and children are guaranteed the same constitutional rights as adults, such as due process[72] and freedom of speech.[73] However, the government may limit a child's freedom "to choose for themselves in the making of important, affirmative choices with potentially serious consequences."[74] The government is limited in what it can make children do because of the fundamental right to parent.[75] This right has been recognized as protected by the Due Process Clause of the Fourteenth Amendment.[76] While the government must often defer to the parent's choices for their child, "the family is not beyond regulation in the public interest."[77] For centuries, the common law often viewed

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breach-exposes-530-million-facebook-says-it-will-not-notify-users [https://perma.cc/WU4A-RWWB]; Herb Weisbaum, *Trust in Facebook Has Dropped by 66 Percent Since the Cambridge Analytica Scandal*, NBC NEWS (Apr. 18, 2018), https://www.nbcnews.com/business/consumer/trust-facebook-has-dropped-51-percent-cambridge-analytica-scandal-n867011 [https://perma.cc/KZ6B-29NT].

67. Keltie Haley, Note, *Sharenting and the (Potential) Right to Be Forgotten*, 95 IND. L.J. 1005, 1009–10 (2020).

68. *See, e.g.*, U.S. v. Meregildo, 883 F. Supp. 2d 523 (S.D.N.Y. 2012); United States v. Bledsoe, No. 21-204 (BAH), 630 F. Supp. 3d 1 (D.D.C. Aug. 22, 2022).

69. KRISTIN FINKLEA, CONG, RSCH. SERV., R47008, LAW ENFORCEMENT AND TECHNOLOGY: USING SOCIAL MEDIA 1 (2022).

70. *See, e.g.*, United States v. Graham, 824 F.3d 421 (4th Cir. 2016).

71. Sam Cook, *Identity Theft Facts & Statistics: 2019-2022*, COMPARITECH (Oct. 7, 2022), https://www.comparitech.com/identity-theft-protection/identity-theft-statistics/ [https://perma.cc/EJS6-LRE2].

72. *In re* Winship, 397 U.S. 358 (1970).

73. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

74. Bellotti v. Baird, 443 U.S. 622, 635 (1979).

75. Troxel v. Granville, 530 U.S. 57, 66 (2000); Meyer v. Nebraska, 262 U.S. 390 (1923).

76. *Id.*

77. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

children as being under the complete control of parents, especially fathers.[78] Because of that view, children's rights have been slower to develop and receive recognition in the law.[79] The development of children's rights is recent.[80] A child's right to privacy has not been well-defined because of a history of parental rights that has allowed parents, as guardians of their child's education and upbringing, to make all decisions for their children, including what information is public and which is private.[81] "[P]arental rights seem to be an almost impenetrable legal force for children to overcome."[82] This force pervades every area of a child's life, including their online identity.

Parents are the natural guardians of their child's identity online. Children are subject to their parent's decisions on what information to disclose about the child online. Modern-day parents engage in "sharenting," or sharing details about their children's lives online, at a high rate.[83] It has become a common cultural practice to post about children on social media with increasing frequency. On average, American parents share over 1,500 photos of their kids by the time they turn five,[84] which has increased from 1,000 over the past five years.[85] With limited exceptions,[86] parents can post whatever they want about their child, even if it is embarrassing, overly personal, or revealing. According to a study done by the University of Michigan, 74% of parents they polled said they know of parents who overshare, 56% said they have seen parents post embarrassing information about their children, 51% said they could identify a child's location by the post, and 27% reported seeing other parents share inappropriate photos of their children.[87] Because sharenting is so personal and so frequent, it can be dangerous.

Even if parents use the most stringent privacy settings on social media, there are no guaranteed protections when putting information about their children

78. Anne C. Dailey and Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 87–90 (2021).

79. *Id*.

80. Stuart N. Hart, *From Property to Person Status*, 46 AM. PSYCH. 53, 54 (1991).

81. *See* Shannon Sorenson, *Protecting Children's Right to Privacy in the Digital Age: Parents as Trustees of Children's Rights*, 36 CHILD. LEGAL RTS. J. 156 *passim* (2016).

82. Haley, *supra* note 66, at 1014–15.

83. Tehila Minkus, Kelvin Liu & Keith W. Ross, *Children Seen but Not Heard: When Parents Compromise Children's Online Privacy*, INT'L WORLD WIDE WEB CONF. COMM., May 2015, at 776 ("Facebook has become a 'modern day baby book,' with the number of parents who post pictures of their children falling in the range of 66% to 98%.").

84. Beth Ann Mayer, *Why Parents Overshare on Social Media and When It Might Be Dangerous*, PARENTS (Feb. 1, 2022), https://www.parents.com/parenting/better-parenting/sharenting-meaning-and-when-it-might-be-dangerous/ [https://perma.cc/F6NC-VYRJ].

85. Christine Wang, *Parents Start Their Kids' Online Presence Before They Turn 2*, CNBC (Feb. 22, 2016. 10:55 AM), https://www.cnbc.com/2016/02/22/parents-start-their-kids-online-presence-before-they-turn-2.html [https://perma.cc/96ZF-X9WN].

86. There are obvious restrictions on posting certain things, like child pornography, even for parents. There may also be limited exceptions for separated parents who share custody and have explicit social media restrictions.

87. *Parents on Social Media: Likes and Dislikes of Sharenting,* C.S MOTT CHILD.'S HOSP.: NAT'L POLL ON CHILD.'S HEALTH (Mar. 16, 2015), https://mottpoll.org/reports-surveys/parents-social-media-likes-and-dislikes-sharenting [https://perma.cc/7LU9-Q3VW].

online. Data breaches, a common occurrence, can have an extremely detrimental effect on children. And instances of data breaches continue to rise.[88] Most data involved in breaches is consumer information from online databases.[89] Data breaches can reveal a great deal of personal information, which, even if it is not immediately misused, is "perpetually valuable."[90] This means that when hackers have obtained consumer data, they can retain it in their possession as a mechanism for causing harm whenever they want to use it.[91] Data breaches cost people millions of dollars every year,[92] but it is often difficult or sometimes impossible for victims to be made whole.[93] For children, they may never be aware that their information was stolen; by the time they are able to realize the harm, they may not be able to track how their information was lost. They may never be able to find a proper remedy to their financial loss, which may be permanent by the time they are aware of it.

Parents can change their privacy settings even after they have posted about their children, but parents and their kids will deal with the consequences of putting that child's information on the internet. The internet is a permanent and unforgiving place. A popular TikTok parent, Maia Knight, recently began blurring or hiding her twin daughters' faces on her social media.[94] After sharing their lives on social media for the twins' first two years, Maia began to take more steps to protect their privacy. By the time she started this transition, their account was hugely popular. They had over 8.6 million followers, and their videos were liked over 1.2 billion times.[95] After Maia made a TikTok addressing this, she was "stitched" or "mentioned" in hundreds of comments and videos criticizing her decision. One user got almost 88 thousand likes with one video saying this was too late, that her children had already been seen by millions and were well-known.[96] Others commented (and continue to comment) that they missed the twins and wanted to see them, regardless of what Maia wanted. Maia continues

88. Chris Morris, *Data Breaches Continue to Skyrocket in 2022*, NASDAQ (May 19, 2022, 1:36 PM), https://www.nasdaq.com/articles/data-breaches-continue-to-skyrocket-in-2022 [https://perma.cc/ZDK3-FEH3].

89. Gabriela Nastasi, Note, *Where Victims of Data Breach Stand: Why the Breach of Personally Identifying Information Should Be Federally Codified as Sufficient Standing for Data Breach Causes of Action*, 38 CARDOZO ARTS & ENT. L.J. 257, 257–58 (2020).

90. *Id.* at 259.

91. *Id.*

92. *Cost of a Data Breach 2022: A Million-Dollar Race to Detect and Respond*, IBM, https://www.ibm.com/reports/data-breach (last visited Mar. 1, 2023) [https://perma.cc/UEM3-M74T].

93. Nastasi, *supra* note 88, at 259-60.

94. Maia Knight (@maiaknight), TIKTOK (Dec. 23, 2022), https://www.tiktok.com/@maiaknight/video/7180340280397139246?is_copy_url=1&is_from_webapp=v1&lang=en [https://perma.cc/FA5L-KGFJ].

95. Maia Knight (@maiaknight), TIKTOK, https://www.tiktok.com/@maiaknight?lang=en (last visited Mar. 7, 2023) [https://perma.cc/6H5A-QTDR].

96. TJ Lavin (@tj_lavin), TIKTOK (Jan. 3, 2023), https://www.tiktok.com/@tj.lavin/video/7184410055125601579?is_copy_url=1&is_from_webapp=v1&lang=en&q=violet%20and%20scout&t=1673369529726 [https://perma.cc/MBC8-FCTY].

to post about her life but maintains a stronger level of privacy—but Violet and Scout will always have their baby faces and toddler lives living on the internet. It is uncertain what this will mean for their futures.

The law has not defined what privacy rights children have on social media. Federal legislation like COPPA and FERPA provide parents with more power to control the information about their children online but do not define what privacy rights a child has. These laws assume that parents and children have the same interests in relation to the child's online privacy and security.[97] Most legal protections for children's data privacy focus on what social media platforms do with the information given to them. However, the platforms themselves are only a small part of the danger children face.[98] Platforms have terms of agreement in attempts to protect minors, including parental restrictions and educational information.[99] But, platform-created policies and resources are insufficient to protect children from privacy violations of their own or their parent's making.

While parents are the main offenders of posting information about a child on social media, non-parents can also post content containing a child or minor. For the most part, it is legal for strangers to photograph or videotape someone else's child and post or publish those photos without the consent of the parent.[100] Posting pictures of a child online without permission is not enough to constitute an invasion of privacy.[101] Several states have tried to pass legislation that would make it illegal to post pictures or videos of minors on social media without the permission of their parent, but the efforts stalled. For example, Georgia initially passed a bill that made it a crime for anyone other than parents to photograph a child but later amended the bill for fear of it being too broad.[102] Several other states have laws that restrict registered sex offenders from photographing, filming, or videotaping a minor without parental consent.[103] There are no laws beyond those addressing child pornography that determine when it is and is not okay to post images of children online.

Courts have exercised judicial restraint, failing to recognize children's privacy rights without legislation. Recent case law found that claimed invasions of privacy for children are not protected by one of the four forms of the invasion

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97. Haley, *supra* note 81, at 1014.

98. Eldar Haber & Tammy Harel Ben Shahar, *Algorithmic Parenting*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 20 (2021).

99. *See, e.g.*, *Privacy Policy for Younger Users*, https://www.tiktok.com/legal/privacy-policy-for-younger-users?lang=en (last modified Jan. 1, 2023) [https://perma.cc/Z76G-RHY6].

100. Brian Farkas, *Child Photography or Videotaping Consent Laws*, LAWYERS.COM (May 27, 2020), https://www.lawyers.com/legal-info/personal-injury/types-of-personal-injury-claims/child-photography-or-videotaping-consent-laws-are-changing.html [https://perma.cc/PE5E-WJXU].

101. *See* Sakala v. Milunga, No. PWG-16-790, 2017 WL 2986364, *1, *4 (D. Md. July 13, 2017).

102. Walter C. Jones, *Georgia Lawmakers Try to Tweak Law on Photos of Kids*, FLA. TIMES-UNION (Feb. 15, 2011), https://www.jacksonville.com/story/news/2011/02/16/georgia-lawmakers-try-tweak-law-photos-kids/15914134007/ [https://perma.cc/L7B2-KZVY].

103. *See, e.g.,* WIS. STAT. § 948.14 (2022); People v. Rollins, 2021 IL App (2d) 181040, 183 N.E.3d 997, *appeal denied*, 175 N.E.3d 131 (Ill. 2021).

of privacy tort.[104] Some argue that the tort of breach of confidentiality could help children whose information was spread on social media by parents or loved ones without their consent.[105] However, this is an undeveloped and underutilized theory in United States courts.[106] Civil law has also fallen short of protecting children's images online and allowing them to be compensated for any damages caused by someone posting their images or information online.

The law has also struggled to protect children as celebrities. The Fair Labor Standards Act ("FLSA") prohibits employers from employing "any oppressive child labor in commerce . . . or in any enterprise engaged in commerce."[107] However, another section of the FLSA provides that child performers are exempt from its child labor provisions.[108] At the federal level, there have been several failed attempts to protect the privacy of famous children and their families.[109] Thus, child performers are dependent on state laws for protection.[110] These laws, often known as "Coogan laws," are not developed to protect children in social media, online videos, and reality television programs.[111] Only Illinois has passed legislation to guarantee a portion of social media influencing earnings go to the child.[112] Now, as more and more children are the featured stars of social media accounts run by their parents, people are becoming more concerned about the lack of protection for these children, protection of the money they earn, and the privacy they lose.

Minors on social media who create content and make money from product promotion are often referred to as "kidfluencers." These children can generate thousands of dollars a month, as 9-year-old YouTuber Ryan Kaji made $30 million in 2020.[113] To be able to generate followings and land brand endorsements and deals, "kidfluencers" and their parents must post often. This means that information about the intimate details of a child's life is shared, from

104. Michael Shephard, *Child Privacy in the Digital Age and California's Child Deletion Statute*, 23 J. TECH. L. & POL'Y 134, 139 (2018).

105. Holly Kathleen Hall, *Oversharenting: Is It Really Your Story to Tell?*, 33 J. MARSHALL J. INFO. TECH. & PRIVACY L. 121, 131 (2018).

106. *Id.*

107. 29 U.S.C. § 212(c).

108. 29 C.F.R. § 570.125. (2023).

109. Cameron Danly, *Paparazzi and the Search for Federal Legislation*, 38 W. ST. UNIV. L. REV. 161, 168 (2011).

110. *Federal Child Labor in Entertainment & Performing Arts*, MINIMUM-WAGE.ORG (2023) https://www.minimum-wage.org/federal/entertainment-child-labor-laws [https://perma.cc/54ZZ-RAES].

111. Pacht-Friedman, *supra* note 12, at 362.

112. Mallory Yu, Sarah Handel & Ailsa Chang, *Illinois Influencers Under 16 Will Now be Entitled to a Portion of Their Earnings*, NPR (Aug. 21, 2023), https://www.npr.org/2023/08/21/1195095952/illinois-influencers-under-16-will-now-be-entitled-to-a-portion-of-their-earning [https://perma.cc/3TBY-VBAG].

113. Rupert Neate, *Ryan Kaji, 9, Earns $29.5m as This Year's Highest-Paid YouTuber*, THE GUARDIAN (Dec. 18, 2020), https://www.theguardian.com/technology/2020/dec/18/ryan-kaji-9-earns-30m-as-this-years-highest-paid-youtuber [https://perma.cc/N6DU-VUVM].

sonograms, to birth videos, to potty training attempts.[114] These social media famous children are extreme but helpful examples of how the privacy of young individuals can be eroded through social media.

II. PROBLEMS AND IMPLICATIONS OF VULNERABLE CHILDREN'S ONLINE PRIVACY

In 2009, the YouTube account "booba1234" posted a video of his 7-year-old son, David, after David received anesthesia at the dentist's office.[115] The 2-minute video features only David, with his father's voice in the background. A week after posting, the video had over 140 million views; David was even featured on The Today Show.[116] Hundreds of videos spoof David's car monologue, including a video of Joseph Gordon-Levitt recreating the scene on Jimmy Kimmel Live.[117] David's dad posted the video on YouTube to make it easier to share with family and friends, never imagining that anyone else would see it.[118] David's life went back to normal pretty quickly; his family made thousands of dollars after the video, and he's occasionally asked to be "David After Dentist." Almost 15 years later, 7-year-old David will permanently exist and follow today's David. This scenario is not uncommon. When parents post cute, funny, or relatable videos and photos of their children online, the posts can take on new life. "Going viral" can often have unintended consequences—some good and some very bad. The same is true for posts that do not become as famous as 7-year-old David after the dentist.

Posting children on social media inevitably weakens their privacy rights. The harms that follow have long-lasting effects. Because "sharenting" accounts for the bulk of children's information being shared online, it is also the main cause of weakened privacy rights for young people. When children are posted on social media, a digital footprint is created. This digital footprint, defined as the data left behind when a person posts online, may last indefinitely and may follow a child into adulthood, whether or not their image went "viral." A digital footprint encompasses any information shared by other people, including parents. 92 percent of children in the United States have an online presence before the age of two years old.[119] Even though the child may be unaware of their online

114. Sapna Maheshwari, *Online and Earning Thousands, at Age 4: Meet the Kidfluencers*, N.Y. TIMES (Mar. 1, 2019), https://www.nytimes.com/2019/03/01/business/media/social-media-influencers-kids.html [https://perma.cc/H9TV-B2HR].

115. Booba1234, *David After Dentist*, YouTube (Jan. 30, 2009), https://www.youtube.com/watch?v=txqiwrbYGrs [https://perma.cc/4H8W-7QGG].

116. BuzzFeedVideo, *I Accidentally Became a Meme: David After Dentist*, YOUTUBE (Mar. 27, 2021), https://www.youtube.com/watch?v=juPMJOpSzzg [https://perma.cc/FF46-4QFD].

117. Jimmy Kimmel Live, *Joseph Gordon-Levitt Recreates David After Dentist*, YOUTUBE (Mar. 7, 2014), https://www.youtube.com/watch?v=VIZht1_JJpM [https://perma.cc/HK6G-3YS5].

118. BuzzFeedVideo, *supra* note 115.

119. Sophie Allaert, Mélina Cardinal-Bradette & Elif Sert, *How to Protect Our Kids' Data and Privacy*, WIRED (July 7, 2019), https://www.wired.com/story/protect-kids-data/ [https://perma.cc/ZKZ4-VKDJ].

presence, that presence can have extremely detrimental effects, like vulnerability to identity fraud, discrimination, and abuse.

A. Embarrassment and "Child Shaming"

In 2010, then-CEO of Google, Eric Schmidt, suggested that every young person legally change their name when they turn 18 to avoid embarrassing online information.[120] Some said that Schmidt's suggestion was "ludicrous."[121] But, research suggests that information posted online about a child can follow them into adulthood, for better or worse.[122] Sharenting can negatively impact a child's ability to receive college and job offers because of "dataveillance,"[123] which is the practice of digitized surveillance, recording the details of a person's life through information on the internet.[124] Dataveillance can monitor and record a wide range of information about a child, including "details of appearance, growth, development, health, social relationships, moods, behavior, educational achievements and other features."[125] Dataveillance can begin for children before they are born, thus producing a wealth of information about a person well before they enter the workforce or attend higher education.[126]

Mental health is an important example of the issues associated with posting about a child online. Posting about a child's mental illness or health struggles can advocate for disability rights and research or increase support for a particular community or family. However, it can also put deeply personal and/or medical information about a child in a very public setting. Posting about a child with a disability can help parents find community.[127] But it can also harm a child's social and emotional development[128] and lead to bullying and public embarrassment.[129] Parents may also share information about their child's problematic behavior, hoping to get advice or support, but this can also look like parents publicly disciplining their child.[130]While these posts may be funny or

120. Bianca Bosker, *Google CEO Eric Schmidt Advises You Change Your Name to Escape Online Shame*, THE HUFFINGTON POST (Aug. 17, 2010), https://www.huffpost.com/entry/google-ceo-eric-schmidt-s_n_684031 [https://perma.cc/Z9EA-VKZL].

121. *Id.*

122. *See* Hall, *supra* note 104.

123. Haley, *supra* note 66, at 1010/

124. Deborah Lupton & Ben Williamson, *The Datafied Child: The Dataveillance of Children and Implications for Their Rights*, 19 NEW MEDIA & SOC'Y 780, 781 (2017).

125. *Id.*

126. *Id.* at 788.

127. There are many Facebook groups, Instagram hashtags, TikTok accounts, etc., for parents of children with disabilities.

128. Gianna Melillo, *Why 'Sharenting' is Sparking Real Fears About Children's Privacy*, THE HILL (Sep. 16, 2022), https://thehill.com/changing-america/enrichment/arts-culture/3644577-why-sharenting-is-sparking-real-fears-about-childrens-privacy/ [https://perma.cc/QA5N-Y9SA].

129. Haley, *supra* note 66, at 1010.

130. *Id.* at 1011; Margaret Myer, *Are You Guilty of 'Oversharenting'?*, PBS (Mar. 16, 2015), https://www.pbs.org/newshour/nation/guilty-oversharenting [https://perma.cc/7QSG-R2D4].

relatable, online shaming can harm a child's development in a more amplified and visible way.[131] This form of "sharenting" is not only disrespectful and harmful to children, "but unlike more traditional forms of punishment, these parents are creating an indelible digital footprint that will likely follow many of these children into adulthood."[132] Additionally, children may disagree with how their parent portrays them online, leading to frustration and embarrassment.[133]

B. Identity Fraud and Digital Harm

Weakened privacy rights have financial impacts. If the right to privacy is the right to be left alone, sharenting can invade a child's right to have their financial information left alone and protected. Increased identity theft is a monetary example of how children's privacy rights are being weakened by a digital footprint. Child identity fraud is becoming an unavoidable problem of parents' creation. Children are much more likely to experience identity fraud than adults, as much as 51 times more likely.[134] Research shows that from 2021 to 2022, more children than ever before experienced the exposure of their personal information in a data breach, and almost one million children fell victim to identity fraud.[135] By 2030, sharenting could account for two-thirds of identity fraud, which translates to seven million individual incidents and a cost of over $800 million.[136]

Posting content of children on social media can also lead to other forms of digital harm. Digital kidnapping occurs when a person takes a minor's photo or video from the internet and reposts the content as if it is their own.[137] This means that a parent's photo or video of their child can have a life that lasts much longer than they anticipated in places they can't control, including on accounts used for illegal or inappropriate activity.[138] It isn't illegal for people to repost photos and content of children not their own. For parents who have had their child's image

131. *The Dark Side of Public Shaming Parenting*, VALENTIN & BLACKSTOCK PSYCHOLOGY, http://www.vbpsychology.com/the-dark-side-of-public-shaming-parenting/ [https://perma.cc/PU37-S3TJ].

132. Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L.J. 839, 853–54 (2017).

133. Gaelle Ouvrein & Karen Verswijvel, *Sharenting: Parental Adoration or Public Humiliation?*, 99 CHILD. & YOUTH SERVS. REV. 319, 320 (2019).

134. Tatum Hunter, *Children Are Targets for ID Theft: Here's What Parents Need to Know*, WASH. POST (June 14, 2022), https://www.washingtonpost.com/technology/2022/06/14/what-is-child-identity-theft/ [https://perma.cc/K9AX-M6BH].

135. Tracy Kitten, *Child Identity Fraud: The Perils of Too Many Screens and Social Media*, JAVELIN (Oct. 26, 2022).

136. The New York Times, *Why Kids are Confronting Their Parents About "Sharenting" NYT Opinion*, YOUTUBE (Aug. 7, 2019), https://www.youtube.com/watch?v=YRPUZ3pufAg [https://perma.cc/5TR9-7RHZ].

137. Steven Bearak, *Digital Kidnapping: What It Is and How to Keep Your Kids Safe on Social Media*, PARENT MAP (Nov. 16, 2017), https://www.parentmap.com/article/kidnappers-kids-photos-digital-kidnapping-social-media [https://perma.cc/SN8F-9Y6B].

138. Pacht-Friedman, *supra* note 12, at 377.

"digitally kidnapped," they can only try to get the person to take down the post or hope the social media platform will take it down for them.[139] Social media influencers may be financially harmed by digital kidnapping.[140] Content owners may try to claim copyright infringement, but copyright for social media content is still developing. In addition, claiming copyright infringement may be litigious and expensive.[141] For those reasons, it is an impractical way of recourse.

As discussed above, photos of children are frequently taken from their original source and used for darker purposes, such as resharing the photos or content on predatory sites. "A study conducted by the Australian government's eSafety commission found approximately 50% of images shared on pedophile sites were taken from social media sites."[142] In addition to being taken from their original source, predators will often comment on a post of a child to sexualize the post. In 2019, YouTube had to suspend comments on videos of children under 13 after coming under fire "for failing to keep pedophiles from posting suggestive remarks on such videos."[143] Some of the comments weren't overtly sexual but hinted at compromising or questionable parts of the video, including commenting a timestamp where the child's backside or bare legs could be seen.[144] A child's image and information may be subject to predatory behavior when put on the internet, regardless of who posted it or what was intended. This may not directly harm a child financially or physically, but a child should never be subjected to this kind of attention or behavior.

C. Bullying, Harassment, and Abuse

Most social media users experience some sort of bullying or harassment on the internet. In 2021, 41% of Americans personally experienced some form of online harassment.[145] "Online harassment is, at its core, an individual intruding on the privacy of the home of an individual, through the use of unwanted speech online."[146] Bullying and harassment are detrimental to the mental well-being of

139. Bearak, *supra* note 136.

140. Caroline Russ, *Tweet Takers & Instagram Fakers: Social Media & Copyright Infringement*, 22 TUL. J. TECH. & INTELL. PROP. 205, 210 (2020).

141. *Id.* at 216.

142. Bahareh Ebadifar Keith & Stacey Steinberg, *Parental Sharing on the Internet: Child Privacy in the Age of Social Media and the Pediatrician's Role*, 171 JAMA PEDIATRICS 413, 413 (2017).

143. Daisuke Wakabayashi, *YouTube Bans Comments on Videos of Young Children in Bid to Block Predators*, N.Y. TIMES (Feb. 28, 2019), https://www.nytimes.com/2019/02/28/technology/youtube-pedophile-comments.html [https://perma.cc/F4TM-JBPJ].

144. *Id.*

145. Emily A. Vogels, *The State of Online Harassment*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/ [https://perma.cc/ZJN4-M49Q].

146. Dylan E. Penza, Comment, *The Unstoppable Intrusion: The Unique Effect of Online Harassment and What the United States Can Ascertain from Other Countries' Attempts to Prevent It*, 51 CORNELL INT'L L.J. 297, 306 (2018).

those it is directed toward and even to those who perpetuate it.[147] 95% of victims of cyberbullying reported negative effects, "with the majority of victims reporting feelings of sadness, hopelessness, and powerlessness."[148] Cybervictimization has severe and long-lasting effects on adolescents' mental health.[149] Social media users are also victims of sexual harassment, and social media influencers are major targets.[150] This harassment disproportionately affects women and girls.[151] As parents prematurely expose their children to online criticism, these children will have to deal with virtual harassment and bullying at a much higher and more frequent rate than generations before them.

Sharenting and "kidfluencing" opens the door for harassment of children. Some parents of kidfluencers do not allow their children to read comments or messages. It is impossible, however, to completely protect a child from online harassment, especially as the child gets older. It is difficult to hold online harassers legally accountable. Often, users are anonymous. Social media providers have no legal obligation to remove harassing or offensive content from their platforms.[152] Children and parents must protect themselves from this harassment; the law offers only limited options for redress and protection.[153]

D. Labor Extortion

Monetizing children through social media not only destroys the child's privacy but may also become labor extortion. User-generated content from child labor is exempt from child labor laws. As a result, child influencers "lack the legal right to the earnings they generate [and] recourse to demand safe working conditions and protections via labor laws."[154] A majority of Americans believe child labor laws should extend to kids who are social media influencers.[155] In spite of this support, it is unlikely that kidfluencers can expect protections anytime soon.[156] Because social media influencing is largely unregulated, it is

147. Kimberly Miller, *Cyberbullying and Its Consequences: How Cyberbullying is Contorting the Minds of Victims and Bullies Alike, and the Law's Limited Available Redress*, 26 S. CAL. INTERDISC. L.J. 379, 386–88 (2017).

148. Charisse L. Nixon, *Current Perspectives: The Impact of Cyberbullying on Adolescent Health*, 5 ADOLESCENT HEALTH, MED. & THERAPEUTICS 143, 144 (2014).

149. *Id.*

150. *See* Samantha M. Adams, Note, *Influencing the Legislature: The Need for Legislation Targeting Online Sexual Harassment of Social Media Influencers*, 99 WASH. U. L. REV. 695 (2021).

151. *Id.* at 703.

152. *Id.* at 707.

153. *Id.*

154. Jennifer Venis, *Social Media: Rise of 'Kidfluencers' Pushes Legislators to Engage with Children's Rights Online*, INT'L BAR ASS'N (Sept. 6, 2022), https://www.ibanet.org/Social-media-Rise-of-kidfluencers-pushes-legislators-to-engage-with-childrens-rights-online [https://perma.cc/ZZ52-VP7U].

155. Zoha Qamar, *Why 'Kidfluencers' Have So Few Protections – Even As Americans Support Regulating the Industry*, FIVETHIRTYEIGHT (Jan. 3, 2023), https://fivethirtyeight.com/features/why-kidfluencers-have-so-few-protections-even-as-americans-support-regulating-the-industry/ [https://perma.cc/KV4V-XCTW].

156. *Id.*

often a cheaper way for companies to promote themselves. To pass laws regulating kidfluencers would be politically difficult, even at the state level.[157] There is little research into how kidfluencers are affected by work requirements; to enact any change, that information must first be gathered.[158]

III. COMPARATIVE LOOK

Though the right to privacy is supported by Americans of all backgrounds, privacy rights in the United States are not as strongly protected compared to other countries. Governments across the world have taken varied approaches to protecting children's privacy rights. Most of the laws specifically addressing a minor's online privacy empower children to take control of their own digital presence through deletion or erasure of content containing information about them. Article 16 of the UN's Convention on the Rights of the Child declares, inter alia, that "[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy . . . nor to unlawful attacks on his or her honour and reputation."[159] The UN recognizes a child's privacy as a fundamental right.[160] Some countries, like Canada, Australia, India, and Mexico, make no distinction between child and adult privacy.[161] France has recently expanded their privacy laws; it is now potentially illegal to share private details of others.[162] This means that children could potentially sue their parents for posting too much about them online.[163] Looking at how other countries enshrine privacy protections, especially for their children, can help us understand how to create better legislation in the United States.

A. The EU General Data Protection Regulation

The European Union's General Data Protection Regulation (GDPR) is a regulation that sets forth rules regarding the use, process, and protection of

157. *Id.*

158. *Id.*

159. G.A. Res. 44/25, Convention on the Rights of the Child, at 16 (Nov. 20, 1989).

160. *Id.*

161. Paul Bischoff, *Where in the World is Your Child's Data Safe? 50 Countries Ranked on Their Child Data Protection Legislation*, COMPARITECH (May 25, 2022), https://www.comparitech.com/blog/information-security/child-data-privacy-by-country/ [https://perma.cc/L8PQ-LFXS].

162. Kristof Van Quathem, Alex Bertrand & Nicholas Shepherd, *France Enacts New Law on Parental Controls*, COVINGTON (Mar. 10, 2022), https://www.insideprivacy.com/data-privacy/kristof-van-quathem-nicholas-shepherd-alix-bertrand/ [https://perma.cc/DQ8T-JAQ8].

163. Zoya Garg, Elmer Gomez & Luciana Yael Petrzela, *If You Didn't 'Sharent,' Did you Even Parent?*, N.Y. TIMES (Aug. 7, 2019), https://www.nytimes.com/video/opinion/100000006620643/parents-social-media-oversharing.html [https://perma.cc/32PH-KTJV]; *see also* Myria Saarinen, Elise Auvray, Floriane Cruchet, Charlotte Guerin, & Alex J. Park, *Data Protection in France: Overview*, THOMSON REUTERS (Oct. 4, 2022), https://uk.practicallaw.thomsonreuters.com/6-502-1481?comp=pluk&transitionType=Default&contextData=(sc.Default)&firstPage=true&OWSessionId=1f96c7d608d649f189088d462a3e842e&skipAnonymous=true#co_pageContainer [https://perma.cc/F25B-7SYE].

personal data.[164] It requires organizations that collect data of people in the European Union to abide by its obligations.[165] The regulation is broad and far-reaching, with fines that can reach up to tens of millions of euros.[166] It is much more comprehensive than data privacy law in the United States.[167] The GDPR continues to develop as it is litigated in European courts.[168] For example, in 2023, the Court of Justice of the European Union ruled that consumer groups can autonomously file lawsuits on behalf of consumers against an individual or entity allegedly responsible for an infringement of data protection law.[169]

The GDPR has a specific section that addresses children's online data.[170] It recognizes that children's personal data must be afforded special protections.[171] However, these protections limit children's online opportunities and do not consider the best interests of the child.[172]

B. Great Britain's Children's Code

In 2020, the United Kingdom expanded its protections for children's privacy data through the Age Appropriate Design Code, known also as the Children's Code. Among the many protections, the Children's Code requires companies that target children to make the highest level of privacy default for accounts, to stop using features that prompt users to provide more data, and to switch off geo-location services that track where they are based.[173] It also prohibits websites offering services to minors from influencing minors to share unnecessary personal information or to select weaker privacy options.[174] After its introduction, several tech platforms made adjustments to notification, privacy, and registration requirements.[175] Tech companies resisted the expansive

164. Commission Regulation 2016/679, 2016 O.J. (L 119) [hereinafter General Data Protection Regulation].

165. *Id.*

166. *Id.*

167. Mark Peasley, Note, *It's Time for an American (Data Protection) Revolution*, 52 AKRON L. REV. 911, 917 (2018).

168. Jennifer Bryant, *CJEU Ruling on GDPR Litigation Builds 'Jurisprudence on Data Protection'*, IAPP (May 24, 2022), https://iapp.org/news/a/cjeu-ruling-on-gdpr-litigation-by-consumer-groups-builds-jurisprudence-on-data-protection/ [https://perma.cc/XP4Z-HRYV].

169. *Id.*

170. General Data Protection Regulation, *supra* note 163, at 75.

171. *GDPR-K: Children's Data and Parental Consent Under the GDPR*, CLARIP, https://www.clarip.com/data-privacy/gdpr-child-consent/ [https://perma.cc/X39R-57XN]. (last visited Mar. 9, 2023).

172. Milda Macenaite, *From Universal Towards Child-Specific Protection of the Right to Privacy Online: Dilemmas in the EU General Data Protection Regulation*, 19 NEW MEDIA & SOC'Y 765, 765 (2017).

173. Jane Wakefield, *Children's Internet Code: What Is It and How Will It Work?*, BBC NEWS (Sept. 1, 2021), https://www.bbc.com/news/technology-58396004 [https://perma.cc/L774-52R9].

174. Natasha Singer, *Britain Plans Vast Privacy Protections for Children*, N.Y. TIMES (Jan. 21, 2020), https://www.nytimes.com/2020/01/21/business/britain-children-privacy-protection-kids-online.html [https://perma.cc/2TE4-LC2U].

175. Wakefield, *supra* note 172, at 3.

protections, arguing that the restrictions would harm start-up companies that provide services for children.[176] Despite this resistance, the UK government passed the law, saying that children should have special protections online just as they do in real life.[177]

Privacy litigation in the United Kingdom is traditionally decided under the Human Rights Act (HRA).[178] The HRA may continue to be used to protect child privacy, but the Children's Code may offer another avenue for recovery. While these expansions will help keep social media platforms more accountable in protecting children's privacy, they still lack essential protections. For example, there is little in the regulations that addresses sharenting. And children younger than 13 can circumvent the protections by simply lying about their age.[179]

C. California Child Deletion Statute

California has passed several laws that offer more data protections for children than the federal government. In 2004, the state enacted the California Online Privacy Protection Act (CalOPPA), becoming the first law requiring commercial websites operating in the state to have a privacy policy.[180] The "Online Eraser" law, passed in 2015, allows minors in California to take down content or information they posted themselves as registered users on an online service.[181] While it was an earnest attempt to help children gain more control of their digital footprint, it did not allow minors the option to delete what parents or others posted about them.[182] Former Governor Jerry Brown signed the California Consumer Privacy Act (CCPA), which became effective in 2020. This law applies to certain businesses that collect personal information from consumers in California and operate in California.[183] Under the CCPA, consumers have several rights concerning their data: the right to request disclosure of their data collected by an organization, the right to access their personal data from the organization, the right to request the deletion of personal data, and the right to opt out of website requirements. [184]

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176. Singer, *supra* note 173, at 2.

177. *Id.*

178. *See* Hall, *supra* note 104, at 124.

179. Wakefield, *supra* note 172, at 4.

180. *California Online Privacy Protection Act (CalOPPA)*, CONSUMER FED'N OF CAL.: EDUC. FOUND. (July 29, 2015), https://consumercal.org/about-cfc/cfc-education-foundation/california-online-privacy-protection-act-caloppa-3/ [https://perma.cc/9PLT-262P].

181. Legal Research Team, *The "Online Eraser" Law*, TERMSFEED (Feb. 18, 2023), https://www.termsfeed.com/blog/online-eraser/ [https://perma.cc/YT4U-PXUY].

182. Michael Shephard, Note, *Child Privacy in the Digital Age and California's Child Deletion Statute*, 23 J. TECH. L. & POL'Y 134, 140 (2018).

183. *CCPA (CPRA) versus the GDPR*, FREE PRIVACY POLICY (Mar. 3, 2023), https://www.freeprivacypolicy.com/blog/ccpa-versus-gdpr/ [https://perma.cc/TQS7-RMAN] ("It applies to businesses (legal entities that operate for profit) that meet a minimum of one of the following characteristics: Declares an annual gross revenue over $25 million; Derives 50 percent or more of annual revenue from selling personal data; Buys, sells, or shares personal information of 50,000 or more consumers, devices, or households in California").

184. *Id.*

IV. LEGISLATIVE SOLUTIONS

The law does not have enough protections for children's privacy rights in the social media age. Federal legislation should adopt more comprehensive requirements for social media platforms to guard children's privacy and prevent parents from sharenting as prolifically. These laws should require social media platforms to implement more obstacles and disincentives as well as educational tools for parents on sharenting and monetizing children as "kidfluencers." The Federal Trade Commission (FTC) should be empowered to execute these laws, just as it executes COPPA. Creating stricter legislation regulating platforms is the most feasible and quickest way to protect children's privacy online.

This solution could help children currently by affecting how parents share information about their children online. The United States government should enact legislation like the GDPR and expand protections like the United Kingdom's Children's Code in addition to this kind of legislation. There are certain aspects of the GDPR that are not covered by the US's COPPA, like the right to be forgotten. However, even with the additional protections described in the GDPR, children lack immediate protection against their personal information being shared on social media. Children must recognize the right before they can exercise it. "While the right to be forgotten does not protect children from many of the immediate harms associated with sharenting (such as the disclosure of embarrassing or private information to friends and family on Facebook), nor does it completely remove that content from websites and social media sites, it does help eliminate some of its long-term harms."[185] The protections described in this article should be used in tandem with the protections available in the European Union.

A. Platform Regulation

The federal government can regulate businesses like Facebook and TikTok through the US Constitution's Commerce Clause.[186] Among other things, state and federal governments can regulate wages within their borders, taxes the companies pay, and privacy regulations for users in the state or nation. While the government can regulate certain aspects of a social media company, there are other concerns that do not fall within the government's reach. For example, it is unclear whether the government may force companies to moderate content on their platforms. This question has become especially relevant given the increasing spread of misinformation online.[187]

Social media platforms currently have their own regulations on what kinds of content are not allowed. Under Section 230 of the Communications Decency Act of 1996, platforms are granted broad authority to suspend or ban users who

185. Keltie Haley, Note, *Sharenting and the (Potential) Right to Be Forgotten*, 95 IND. L.J. 1005, 1020 (2020).

186. U.S. CONST. art. I, § 8, cl. 3.

187. Anshu Siripurapu & Will Merrow, *Social Media and Online Speech: How Should Countries Regulate Tech Giants*, COUNCIL ON FOREIGN RELS. (Feb. 9, 2021, 11:30 AM), https://www.cfr.org/in-brief/social-media-and-online-speech-how-should-countries-regulate-tech-giants [https://perma.cc/DQH9-VJ25].

violate certain policies, "as well as take down, block, or flag the content."[188] Most platforms have policies that prohibit graphic violence, child sexual exploitation, and hateful content or speech.[189] Many claim that the First Amendment protects individuals' speech from oppression by the United States government, not private entities.[190] Social media platforms, among other businesses, do not have a freewheeling First Amendment right to censor what people say.[191]

The law is unclear on what user content social media platforms can and cannot regulate; the law becomes even more complicated when the regulations come from the government. Censorship of any kind is concerning given the history of governmental abuses.[192] This issue is important and deserves more study and research; as social media platforms continue to reckon with misinformation and abuse, the law should strive to adapt to protect First Amendment rights while balancing the rights, privacy, and safety of all. However, for the government to institute more protection for children's data privacy, they do not need to censor or prohibit online expression. Instead, the protections suggested allows users to make more informed decisions.

B. Protections & Remedies

These protections are not strict regulations on parents but instead nudges for them to act in ways more beneficial to their children. Nudge theory, born out of behavioral economics, focuses on adaptive design changes to a person's decision environment as a way to influence their behaviors and decisions.[193] This theory, as described by Thaler and Sunstein in "Nudge," addresses when humans make the default choice, even though the default choice is the worse choice.[194] To help these individuals make better choices, they suggest presenting choices in different ways to decision-makers in a strategy called choice architecture.[195] Helping parents make better decisions for their children on social media is the

188. Marta R. Vanegas, *Regulating Social Media Content – A Primer*, CONTRA COSTA CNTY. BAR ASS'N (Mar. 2022), https://www.cccba.org/article/regulating-social-media-content-a-primer/ [https://perma.cc/TWN3-7QFG].

189. *See, e.g.*, *Facebook Community Standards*, META, https://transparency.fb.com/policies/community-standards/ [https://perma.cc/DDL8-BFQ4] (last visited Mar. 9, 2023).

190. Dipayan Ghosh, *Are We Entering a New Era of Social Media Regulation?*, HARV. BUS. REV. (Jan. 14, 2021), https://hbr.org/2021/01/are-we-entering-a-new-era-of-social-media-regulation [https://perma.cc/AZE6-LU5B].

191. NetChoice, LLC. v. Paxton, 49 F.4th 439, 445 (5th Cir. 2022).

192. Jamie Susskind, *We Can Regulate Social Media Without Censorship. Here's How*, TIME (July 22, 2022), https://time.com/6199565/regulate-social-media-platform-reduce-risks/ [https://perma.cc/YU9Z-7BS8].

193. Roberta Fusaro & Julia Sperling-Magro, *Much Anew About 'Nudging'*, MCKINSEY & CO. (Aug. 6, 2021), https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/much-anew-about-nudging [https://perma.cc/SAH3-7NJQ]; *see also* Cass R. Sunstein, Christine Jolls & Richard H. Thaler*, A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1474 (1998).

194. *Id.* at 108.

195. Thaler & Sunstein, *supra* note 192, at 95; *Designing Better Choices*, L.A. TIMES (Apr. 2, 2008), https://www.latimes.com/archives/la-xpm-2008-apr-02-oe-thalerandsunstein2-story.html [https://perma.cc/EJW5-92AN].

perfect scenario for nudge theory because it is a situation of benefits now, costs later.[196] Just as "most people do not need any special encouragement to eat another brownie, but they could use some help exercising more,"[197] parents don't need much encouragement to post the cute video or silly picture of their child, but they do need help understanding what impacts that post could have.

Social media platforms can be choice architects, which are people or things that are responsible for organizing the context in which people make decisions.[198] The federal government can require social media platforms to become more intentional choice architects in what parents post about their children. This would still allow social media users to make choices about what they post but would encourage platforms "to steer people's choices in directions that will improve their [children's] lives."[199]

The regulation suggested does not require the platforms to prohibit certain content containing children or their information. It simply creates more barriers to making these posts. TikTok currently has a feature that adds a disclaimer to the bottom of a video that features a mention of COVID-19 or a dangerous activity. This could be done for videos and posts about children; content featuring children could include a link to or a summary of information about children's privacy rights. This information could also be required for parents to see before posting information or images of their child. These disclaimers would be small nudges, encouraging parents to educate themselves about their child's digital footprint and, possibly, not post at all. Platforms already have parental controls and child protection settings;[200] disclaimers should be added to make those controls and settings easier to find and read.

C. Why Address Children's Rights Before Parental Rights

This article does not focus on changing parental rights; much research has already explored that option and found it unworkable or ineffective. As discussed above, parental rights are not listed in the Constitution but have been repeatedly considered by the Supreme Court as fundamentally protected by the Due Process Clause of the Fourteenth Amendment.[201] Some suggest that parental rights should be reevaluated in society and law to protect the privacy rights of children with the advent of social media.[202] Focusing on parental rights often requires change on the individual level, hoping that parents will take into consideration

196. Thaler & Sunstein, *supra* note 192, at 95.

197. *Id.*

198. *Id.* at 3.

199. *Id.* at 7.

200. *TikTok Privacy Settings: Controls & Settings Guide*, INTERNET MATTERS, https://www.internetmatters.org/wp-content/uploads/parent-controls-docs/parental-control-tiktok-privacy-and-safety-settings.pdf [https://perma.cc/RKF6-5527] (last visited Mar. 9, 2023).

201. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 66 (2000).

202. *See* Shannon Sorensen, *Protecting Children's Right to Privacy in the Digital Age: Parents as Trustees of Children's Rights*, 36 CHILD.'S LEGAL RTS. J. 156 (2016).

their child's privacy rights and psychological development.[203] This is complicated because many of the parents' decisions enshrined in the fundamental right to parent their child directly conflict with the child's long-term interests.[204] Ideally, parents are the best avenue for protecting children's privacy rights, but it is unrealistic to believe that changing parental rights or affecting all or most parents will have a noticeable difference. In addition, parents should not need to be experts on digital privacy once they have children.[205]

V. CONCLUSION

The high school graduating class of 2023 was born after Facebook was created.[206] The segment of the US population turning 21 this year was born the same year Friendster, one of the first social networking sites, was established.[207] Today's children and minors have never known a world without social media. Social media may benefit society with increased connectedness, more accessible information, and emerging economic opportunities.[208] But the drawbacks are, arguably, not worth the benefits. The full effects of social media are still unknown. As today's children grow into the social media world, they will be confronted with how to navigate their lives online. The law should develop quickly to protect children from loss of privacy through social media. There should be more legislative protections to help children maintain privacy and have more control over their online data. Without more protective legislation, we are leaving our children increasingly vulnerable in an increasingly digital and dangerous world.

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203. Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L.J. 839, 882 (2017).

204. *Id.* at 883.

205. Gianna Melillo, *Why 'Sharenting' is Sparkling Real Fears About Children's Privacy*, THE HILL (Sep. 16, 2022), https://thehill.com/changing-america/enrichment/arts-culture/3644577-why-sharenting-is-sparking-real-fears-about-childrens-privacy/ [https://perma.cc/5F3E-TXZC].

206. *Facebook Launches*, HISTORY (Feb. 2, 2021), https://www.history.com/this-day-in-history/facebook-launches-mark-zuckerberg [https://perma.cc/7UUL-9LQA] ("On February 4, 2004, a Harvard sophomore named Mark Zuckerberg launches The Facebook. . . ").

207. Ulunma, *Before Facebook There Was… Friendster? Yes, That's Right!*, HARV. DIGIT. INITIATIVE (Mar. 21, 2020), https://d3.harvard.edu/platform-digit/submission/before-facebook-there-was-friendster-yes-thats-right/ [https://perma.cc/457J-4DAA].

208. Lauren Friedman Suits, *5 Benefits of Using Social Media*, LINKEDIN (Apr. 22, 2014), https://www.linkedin.com/pulse/20140422162738-44670464-5-benefits-of-using-social-media/ [https://perma.cc/9HYC-CMBS].

THE ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS V. GASCÓN SWINGS AND MISSES THE MARK ON CALIFORNIA'S THREE STRIKES LAW

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1. J.D. Candidate 2024 at the University of Wisconsin Law School. This work is dedicated to my parents, May and Farr Barimani, and especially to my sister, Parvene, who "has had it open on [her] laptop for the last year" and "will get around to reading it any day now." I am grateful to Professor Ashby Fox, Jennifer Gisi, Kate Pence, and Mac Blessen for their time and feedback. Thank you to the entire staff of the Wisconsin Journal of Gender, Law, and Society for your edits, and to Montana Beeson for your remarkable oversight. All errors are my own.

INTRODUCTION

Amidst nationwide protests in 2020 calling for changes to the criminal justice system, the residents of Los Angeles came together to elect the district attorney who would lead the country's largest local prosecutor's office.[2] The city had a choice: George Gascón, "champion of . . . reducing mass incarceration," or incumbent Jackie Lacey.[3] Voters sided with Gascón and cast 236,000 more ballots in his favor.[4] Shortly after his election, Gascón began vindicating his campaign promise and electoral mandate to enact policies combatting mass incarceration.[5] To that end, Gascón issued department-wide special directives aimed primarily at addressing racial disparities.[6] The special directives were predicated upon numerous studies of the detrimental effects of lengthy sentences.[7] Among these directives were instructions to prosecutors to refuse to seek out, and to withdraw any current attempts to seek out, longer prison sentences for defendants tried under California's Three Strikes Law.[8] The Association of Deputy District Attorneys (ADDA) brought suit to enjoin Gascón from enforcing these directives, arguing that the directives required deputy district attorneys to violate their ethical duties and opened them up to court sanctions.[9] The trial court agreed and granted sweeping preliminary relief.[10] The appellate court affirmed in great part, and reversed on one unrelated ground.[11]

The California Court of Appeals erred when it affirmed the trial court's decision to block the district attorney from enforcing special directives aimed at interrupting racial disparities in incarceration. Even setting aside functional and policy arguments—of which there are many—the judiciary may not so extensively limit an executive branch official's exercise of power without violating separation of powers. In Part I, this note will discuss the background and effects of California's Three Strikes Law. In Part II, it will examine the

2. James Queally, *George Gascón will be L.A. County's next district attorney, promises swift changes*, L.A. TIMES (Nov. 6, 2020, 6:15 PM), https://www.latimes.com/california/story/2020-11-06/george-Gascón-la-district-attorney-race-jackie-lacey-concede [https://perma.cc/SSU5-F7E9].

3. *Id.*

4. *Id.*

5. *Id.*

6. The Ass'n of Deputy Dist. Att'ys v. Gascón, 295 Cal. Rptr. 3d 1, 12–13 (Cal. Ct. App. 2022).

7. Special Directive 20-08 at 1–2, https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-08.pdf [https://perma.cc/5ZLC-74DN]; Special Directive 20-14 at 3, https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-14.pdf [https://perma.cc/E7HM-DXRL].

8. *Gascón*, 295 Cal. Rptr. 3d at 13.

9. *Id.* at 21.

10. *Id.* at 13–16.

11. *Id.*

California Court of Appeals' decision in *Gascón*. In Part III, it will outline foundational separation of powers principles and argue that those principles were incorrectly applied in *Gascón*. And in Part IV, it will summarize the myriad policy reasons—community safety, cost reduction, and democratic self-governance—supporting the district attorney's directives and argue that the Three Strikes Law is fundamentally incompatible with our criminal system's mission of bringing justice.

PART I: BACKGROUND

Against the backdrop of the early 1990s tough-on-crime climate, California passed the Three Strikes Law through a voter initiative as part of a broader, national reaction to perceived leniency for violent offenders.[12] Particularly after a high-profile murder in California by a released offender, the public hoped that the Three Strikes Law would effectuate true change in the way that the state imprisoned convicted individuals. Specifically, the public wanted longer prison sentences for offenders with a history of violent and serious crime. This section explores the history and goals underpinning the Three Strikes Law. It will then look at how and whether almost three decades of applying the Law has borne out those goals.

A. California adopted the Three Strikes Law to ensure longer prison sentences for convicted criminals with a history of serious or violent felony convictions.

In 1993, two California assemblymen introduced a bill that would later become the Three Strikes Law.[13] After the Assembly Committee on Public Safety defeated the bill shortly after it was introduced, "[p]ublic outrage over the defeat sparked a voter initiative to add [the law] . . . to the ballot in the November 1994 general election."[14] While the ballot initiative was circulating, Richard Allen Davis kidnapped 12-year-old Polly Klaas from her home and murdered her.[15] Davis had a criminal history that included two kidnapping convictions, and he had served only half of his most recent prison sentence.[16] California voters feared rising crime rates and disapproved of "the penal system's revolving door: short sentences and early paroles for violent offenders."[17] Klaas' murder

12. The 1980s and first half of the 1990s saw a litany of tough-on-crime sentencing laws: mandatory minimum sentence laws (all 50 states), three strikes laws (26 states), life without parole laws (49 states), and truth-in-sentencing laws (28 states). Michael Tonry, *Making American Sentencing Just, Humane, and Effective*, 46 CRIME & JUST. 441, 470 (2016).

13. Ewing v. California, 538 U.S. 11, 14 (2003).

14. *Id.* at 14.

15. *Id.* at 14-15.

16. *Id.*

17. Robert C. Peck, *Ewing v. California: Upholding California's Three Strikes Law*, 32 PEPP. L. REV. 191, 192 (2004) (citing Brian P. Janiskee & Edward J. Erier, *Crime, Punishment, and Romero: An Analysis of the Case Against California's Three Strikes Law*, 39 DUQ. L. REV. 43, 50 (2000)).

vindicated voter sentiments, and the ballot initiative qualified faster than any initiative in California history.[18] The assembly resubmitted an amended version of their original bill that overwhelmingly passed both houses and was then approved by voters by a margin of 72 to 28 percent.[19]

The law was designed to "ensure longer prison sentences and greater punishments for those who commit a felony and have been previously convicted of serious and/or violent felony offenses."[20] The California Penal Code explicitly recognizes 42 felony offenses as "serious and/or violent."[21] The list of "violent" prior offenses includes murder, mayhem, rape, forcible sex crimes, child molestation, robbery, and kidnapping.[22] The list of "serious" prior strikes enumerates over 27 offenses including arson, burglary, and providing drugs to minors.[23] The law works as a two-tiered sentencing enhancement for both second and third-time convicted individuals.[24] Defendants convicted of a felony who have previously been convicted of a serious or violent felony are sentenced under the Three Strikes Law.[25] If the defendant has one prior serious or violent felony, they must be sentenced to "twice the term otherwise provided as punishment for the current felony conviction."[26] If the defendant has two prior serious or violent felony convictions, they must be sentenced to an "indeterminate term of life imprisonment."[27]

Though intended to apply only to "serious and violent" offenders, the Three Strikes Law and the prosecutors empowered by it have cast an ever-broader net. It would be difficult to find someone who views an offense that threatens death, sexual assault, or serious bodily injury as somehow not serious or violent. But prosecutors have discretion, and have frequently exercised that discretion, to also treat misdemeanors as felonies when the defendant already has a criminal history.[28] To wit, a quarter of people incarcerated in California prisons under Three Strikes sentencing ended up there not for those serious and violent offenses defined by the legislature, but for "wobblers," which are misdemeanors that are treated as felonies.[29] Some crimes, such as the misdemeanor of petty theft, become "wobblers" because of the defendant's criminal history.[30] Though "wobblers" can technically be classified as either felonies or misdemeanors, California law presumes they are felonies except "when the [prosecutorial]

18. *Ewing*, 538 U.S. at 15.
19. *Id.*
20. CAL. PENAL CODE § 667 (2021).
21. *See* CAL. PENAL CODE § 1192.7(c).
22. *Id.*
23. *Id.*
24. *See* CAL. PENAL CODE § 627.
25. Ewing v. California, 538 U.S. 11, 16 (2003).
26. CAL. PENAL CODE § 667(e)(1).
27. CAL. PENAL CODE § 667(2)(2)(A).
28. *Ewing*, 538 U.S. at 18–20.
29. *Three Strikes Basics*, STANFORD LAW SCHOOL, https://law.stanford.edu/three-strikes-project/three-strikes-basics/ [https://perma.cc/SXB5-M62H].
30. *Ewing*, 538 U.S. at 16.

discretion is actually exercised" to make the crime a misdemeanor.[31] And despite the clear intent to ensure longer sentences for those previously convicted of serious or violent crimes, the Three Strikes Law has caught mostly drug users and petty thieves in its wider-than-expected net.[32] Indeed, California's Three Strikes Law is one of the harshest habitual offender laws in the nation:

> The law forbids the court from suspending a prison sentence and granting probation. The law precludes the court from committing an offender to any facility other than state prison. The court may not consider the length of time between the prior strike conviction and the current offense. Finally, the court must impose consecutive, rather than concurrent, terms of imprisonment in certain situations. The law also drastically limits the good-time and work-time credits that offenders can accumulate to reduce their sentence; offenders must now serve eighty percent of their sentence and cannot receive such credits until physically in prison. Those sentenced to indeterminate life sentences are not eligible for parole until they have served the entire minimum term. Out-of-state prior convictions as well as certain juvenile adjudications qualify as 'strikes' as long as they meet California's 'serious' or 'violent' definition.[33]

The California legislature designed the Three Strikes Law to effectuate longer prison sentences and harsher punishments for those previously convicted of serious or violent felonies. But legislators, prosecutors, and judges have expanded the list of felonies considered serious or violent throughout the Three Strike Law's lifetime to be one of the most unforgiving in the nation. The Three Strikes Law as applied ensnares ever more repeat offenders while leaving behind its original purposes.

B. "Tough on crime" policies like the Three Strikes Law disproportionately penalize people of color while failing to achieve their stated goals.

The Committee on Revision of the Penal Code spent two years investigating California's legal system, concluding that "[t]he Three Strikes Law has been applied inconsistently and disproportionately against people of color, and the crime-prevention effects the law aimed to achieve have not been realized."[34]

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31. *Id.* (quoting People v. Williams, 163 P.2d 692, 696 (Cal. 1945)).

32. Samara Marion, *Justice by Geography? A Study of San Diego County's Three Strikes Sentencing Practices from July – December, 1996*, 11 STAN. L. & POL'Y REV. 29, 30 (1999) (citing data from Cal. Dep't of Corrs.).

33. Autumn D. McCullogh, *Three Strikes and You're In (For Life)*, 24 T. JEFFERSON L. REV. 277, 283-84 (2002).

34. David Greenwald, *Committee Recommends Ending Three Strikes, LWOP in California*, DAVIS VANGUARD (Dec. 17, 2021), https://www.davisvanguard.org/2021/12/committee-recommends-ending-three-strikes-lwop-in-california/ [https://perma.cc/BCJ4-W3ZU].

After nearly three decades of vigorously applying the Three Strikes Law, judges and prosecutors have failed on their promise to keep communities safer. Since the aim of the Law was to target violent repeat felons, that must be the metric by which one evaluates its efficacy. And by that metric, it fails. Prosecutors and judges sentence under the Three Strikes Law far more often in cases involving nonviolent marijuana users than in cases involving offenders who have been convicted of violent felonies.[35] One study found that 85% of offenders convicted under Three Strikes sentences were convicted for nonviolent or drug offenses.[36] Thus, there is no evidence that the Three Strikes Law has secured its "single most criminological objective of reducing violent crime."[37]

Instead of using the Three Strikes Law for its intended objective of imprisoning violent offenders and keeping communities safe, judges and prosecutors have used it to exacerbate racial disparities in sentencing. 33,000 people are imprisoned for indeterminate life sentences under the Three Strikes Law.[38] Of those, 7,400 have current convictions that are neither serious nor violent.[39] Over 26,000 are people of color.[40] While black people make up less than 30% of the prison population, they "account for 45% of people serving a third strike sentence."[41] The Three Strikes Law is also "applied disproportionately against mentally ill and physically disabled defendants."[42] These numbers, while harrowing, make sense given that prosecutors and judges apply the Three Strikes Law in a way that does not honor its original intent. The war on drugs, which includes enhanced penalties for possessing and selling marijuana and crack, has already increased the likelihood that black people and other racial minorities will face felony prosecutions and convictions.[43] Similarly, policing practices that target racial minorities also increase the likelihood that racial minorities will be disproportionately impacted.[44] The Three Strikes Law, then, enhances not only sentences, but the already disparate way that this nation polices.

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35. David Schultz, *No Joy in Mudville Tonight: The Impact of* Three Strike *Laws on State and Federal Corrections Policy, Resources, and Crime Control*, 9 CORNELL J.L. & PUB. POL'Y 557, 573-74 (2000).

36. *Id.* at 574.

37. Schultz, *supra* note 34, at 574.

38. Greenwald, *supra* note 33.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *See* David Schultz, *Rethinking Drug Criminalization Policies*, 25 TEX. TECH L. REV. 151, 157–66 (1993) (discussing the racial impact and social costs associated with the war on drugs).

44. *See* Jennifer A. Larrabee, *DWB (Driving While Black) and Equal Protection: The Realities of an Unconstitutional Police Practice*, 6 J.L. & POL'Y. 291, 293-94 (1997) (noting the practice of black people being stopped by the police solely on account of race); *see also* Iver Peterson, *Whitman Concedes Troopers Use Race in Stopping Drivers*, N.Y. TIMES, Apr. 21, 1999, at 1 (reporting that New Jersey Governor Christine Todd Whitman and the Attorney General Peter G. Verniero acknowledged that state troopers have singled out black and Hispanic motorists to stop along the highway and that "77% or more of those asked to consent to a search of their vehicle during a stop are minorities.").

PART II: THE CALIFORNIA APPELLATE COURT OPINION

This Part summarizes the lawsuit brought by the ADDA, the district and appellate courts' holdings, and the appellate court's reasoning in reaching its holding.

A. Background and procedural history

At issue in *Gascón* was whether "the voters, through the initiative process, or the Legislature, through legislation, [could] require prosecutors to plead and prove prior convictions to qualify a defendant for the alternative sentencing scheme prescribed by the three strikes law."[45] Gascón enacted special directives that prohibited deputy district attorneys from alleging strikes under the Three Strikes Law, and required deputy district attorneys to dismiss or seek leave to remove from the charging document allegations of strikes.[46] The ADDA sought a preliminary injunction and a writ of mandate to prevent enforcement of the special directives because they violated prosecutors' duties to "plead and prove" prior strikes under the three strikes law.[47] Gascón argued that (1) he did not have a ministerial duty to comply with the legal duties ADDA alleged he violated and (2) the trial court violated separation of powers when it granted the preliminary injunction for the ADDA.[48] The California Court of Appeals disagreed with both of these arguments when it affirmed most of the trial court's decision.[49]

B. The appellate court affirmed that the district attorney had a ministerial duty to follow the Three Strikes Law.

A writ of mandate is "a way to compel a public entity to perform a legal, typically ministerial, duty."[50] And a ministerial duty is one "that a public officer is obligated to perform in a prescribed manner required by law when a given state of facts exists,"[51] without regard to the public officer's "own judgment or opinion concerning the propriety of such an act."[52]

The question here, then, was whether the district attorney had a ministerial duty. To determine whether a statute creates such a duty, California courts require that "the mandatory nature of the duty must be phrased in explicit and forceful language."[53] The Three Strikes Law provides that it "shall be applied in every case in which a defendant has one or more prior serious or violent felony

45. The Ass'n of Deputy Dist. Att'ys v. Gascón, 295 Cal. Rptr. 3d 1, 10 (Cal. Ct. App. 2022).

46. *Id.*

47. *Id.*

48. *Id.* at 11.

49. *Id.*

50. *Id.* at 528 (quoting Roger v. Cnty. of Riverside, 2020, 44 Cal. App. 5th 510, 529).

51. *Gascón*, 295 Cal. Rptr. 3d at 22 (quoting Schmid v. City and Cnty. of San Francisco, 274 Cal. Rptr. 3d 727, 749 (Cal. Ct. App. 2021)).

52. Collins v. Thurmond, 258 Cal. Rptr. 3d 830, 860 (Cal. Ct. App. 2016).

53. *Gascón*, 295 Cal. Rptr. 3d at 22–23.

convictions."[54] Also, the "prosecuting attorney shall plead and prove each prior serious or violent felony conviction except as provided in [exception]."[55] The appellate court agreed with the trial court in considering this language sufficiently "explicit and forceful" to impose a ministerial duty.[56] When Gascón chose not to pursue sentencing under the Three Strikes Law, the court said, he violated his ministerial duty.[57]

C. The appellate court rejected Gascón's separation of powers argument.

Gascón argued next that if the statute created a mandatory duty, it would violate separation of powers by "limiting prosecutorial discretion 'to plead a criminal charge.'"[58] The court disagreed, citing six previous California Court of Appeals decisions that held the Three Strikes Law does not violate separation of powers.[59] The court did not, however, review the reasoning applied in those prior opinions.

The court also emphasized that a mandatory duty was consistent with legislative intent, and that "nothing in the plain language of the statute suggests a prosecutor has any discretion not to plead or prove known strikes."[60] The court reasoned there was no permissive language such as "when warranted" or "if deemed appropriate."[61] Finally, the court looked to the legislative history for further evidence that this duty was mandatory.[62] At a senate hearing on the bill that became the Three Strikes Law, a committee considered whether the prosecutor should be required to "plead and prove each prior felony conviction?"[63] The committee concluded that the prosecutor would be required to do so, reasoning that "[n]o other law has such a firm ban on prosecutorial discretion."[64] The appellate court summarized its opinion: "Giving a prosecutor the discretion to decide whether to allege prior serious or violent felony convictions in light of the Legislature's and the voters' clear intent to eliminate any such discretion, would violate the separation of powers doctrine, not honor it."[65]

PART III. CRITIQUE OF THE CALIFORNIA APPELLATE COURT'S DECISION

The appellate court erred in striking down the special directives for two reasons. First, prosecutors have significant discretion to make decisions in the

54. CAL. PENAL CODE § 667(f)(1) (2021).
55. *Id.*
56. *Gascón*, 295 Cal. Rptr. 3d at 23.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 27.
61. *Id.*
62. *Id.* at 29.
63. Sen. Com. on Judiciary, Analysis of Assem. Bill No. 971 (1993-1994 Reg. Sess.)
64. Sen. Com. on Judiciary, Analysis of Assem. Bill No. 971 (1993-1994 Reg. Sess.) *as amended* Jan. 26, 1994.
65. *Gascón*, 295 Cal. Rptr. 3d at 37.

pursuit of justice, and courts have affirmed that discretion time and again. Second, prohibiting the district attorney from exercising his discretion violates separation of powers as an example of the judiciary exercising and controlling the executive power.

A. Prosecutors have well-settled discretionary authority to make decisions in the pursuit of justice.

In striking down the special directives, the appellate court created an impermissible double standard whereby it permits prosecutorial discretion when used to maximize incarceration but denies that same discretion when used to elevate new, empirically sound approaches to justice that reduce racial inequalities and prioritize community safety.

Prosecutorial discretion "is firmly entrenched in American law."[66] Prosecutorial discretion is also "basic to the framework of the California criminal justice system"[67] and is codified in the California Constitution.[68] The independence of the prosecutor, then, is underpinned by the separation of powers doctrine enshrined in both the United States and California Constitutions. And the elected prosecutor must use this independence to pursue justice and protect public safety.[69] A prosecutor's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done."[70] She has a duty "to think about the delivery of criminal justice on a systemic level, promoting criminal justice policies that further broader societal ends."[71]

When considering charging decisions, prosecutors have discretion at two different stages: the charging of the current offense and the pleading of sentence enhancements.[72] Courts have long upheld significant prosecutorial discretion at each stage.[73] But they have emphasized that discretion in pleading sentence enhancements bears special significance.[74] While prosecutorial discretion in charging the current offenses is necessarily checked by instructing on lesser included offenses, no such check exists for the pleading of sentence

66. McCleskey v. Kemp, 481 U.S. 279, 311–312 (1987).

67. People v. Valli, 114 Cal. Rptr. 3d 335, 346 (2010).

68. *See* CAL. CONST. art. III, § 3.

69. *See* Berger v. United States, 295 U.S. 78, 88 (1935); Robert J. Smith & Justin D. Levinson, *The Impact of Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE UNIV. L. REV. 795, 805 (2012) ("Prosecutors enjoy more unreviewable discretion than any other actor in the criminal legal system" and wield that immense discretion at all stages of the criminal legal process, from charging decisions to bail recommendations to plea offers.).

70. *Berger*, 295 U.S. at 88.

71. R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOYOLA UNIV. OF CHICAGO L.J. 981, 983 (2014).

72. *See* People v. Birks, 960 P.2d 1073, 1089 (Cal. 1998).

73. *See* People v. Tirado, 251 Cal. Rptr. 3d 412, 417 (Cal. Ct. App. 2019); People v. Garcia, 259 Cal. Rptr. 3d 848, 852 (Cal. Ct. App. 2020).

74. *Garcia*, 259 Cal. Rptr. 3d at 852 (noting that a prosecutor's authority is "even greater when it comes to alleging sentencing enhancements").

enhancements.[75] Because of this difference, a "prosecutor's decision not to charge a particular enhancement 'generally is not subject to supervision—or second guessing—by the judicial branch.'"[76] It follows that prosecutorial discretion must apply with even greater force to the decision, as embodied by Gascón's special directives, not to plead sentence enhancements. A group of 67 current and former elected prosecutors and attorney generals highlighted the incongruence between the case law and the appellate court's "unprecedented . . . judicial interference in the discretionary policy decisions of an elected prosecutor," noting that no California court had ever before overridden a prosecutor's decision "*not* to file charges or sentence enhancements."[77] The California Appellate Court's decision thus undermines well-settled prosecutorial discretion.

B. The significant weight of authority behind prosecutorial authority means that enjoining the district attorney from exercising said authority violates separation of powers.

Mandamus was not an appropriate remedy here because the district attorney's duty is discretionary. The district attorney's duty to charge people convicted of crimes is not ministerial, and so the Three Strikes Law does not create mandatory duties.[78] The district attorney has discretion in charging. Mandamus, or an order from the court to the district attorney ordering the district attorney fulfill his ministerial duties, is not appropriate when a duty is discretionary.[79] Therefore, mandamus was inappropriate.

Whether an officer's duty is ministerial does not depend on whether the statute is phrased in mandatory terms. Rather, a duty is ministerial when an officer "is required to perform it in a prescribed manner when a given state of facts exists . . . and without regard to his, her, or its own opinion concerning the act's propriety."[80] Even when the statute phrases the duty in mandatory terms, then, the duty cannot be ministerial when it involves the officer exercising his discretion.

Also, if a court compelled an executive branch official to perform a discretionary duty, "it would violate . . . separation of powers."[81] Part of prosecutorial discretion is enacting office-wide policies. For example, U.S. Attorney General Holder instituted a policy that prosecutors would not charge

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75. *Id.*

76. *Id.* (citing People v. Mancebo, 41 P.3d 556 (Cal. 2002)).

77. Brief of Amici Curiae 67 Current and Former Elected Prosecutors and Attorneys General in Support of Appellants at 15–16, Ass'n of Deputy Dist. Att'ys for Los Angeles Cnty. v. Gascón, 295 Cal. Rptr. 3d 1 (Cal. Ct. App. 2022) (No. B310845).

78. *See* Orange Cnty. Emps. Assn. v. Cnty. of Orange, 285 Cal. Rptr. 799, 806 (Cal. Ct. App. 1991) ("If the act sought to be ordered involves the exercise of judgment and discretion, performance of the act is not a ministerial duty.").

79. Los Angeles City & Cnty. Emps. Union v. Los Angeles City Bd. of Educ., 528 P.2d 353, 356 (Cal. 1974).

80. Hudson v. Cnty. of Los Angeles, 181 Cal. Rptr. 3d 109, 122 (Cal. Ct. App 2014).

81. Monarch CableVision, Inc. v. City Council of Pacific Grove, 48 Cal. Rptr. 550, 553 (Cal. Ct. App. 1966).

mandatory minimum sentences based on drug quantity unless the defendant's crime was violent or the defendant was the leader of a criminal organization.[82] Then, Attorney General Sessions instructed prosecutors to "always charge and pursue the most serious, readily-provable offense . . . including mandatory minimum sentences."[83] Policy-based approaches, then, are underpinned by prosecutorial discretion. And prosecutorial discretion is subject to the supervision of the people and the Attorney General, not the judiciary. "Nothing in the Constitution or . . . law[s] of this state gives to any court a similar power of supervision or control over the official conduct of the district attorney."[84] Just as the district attorney may not exercise judicial power, the judiciary may not exercise or control the executive's prosecutorial discretion. Mandamus, then, is inappropriate here—and wherever courts are asked to intervene against a district attorney's policies—as a tool to compel the exercise of prosecutorial discretion in any particular way.

Even if the Three Strikes Law creates mandatory duties, though, mandatory duties are not necessarily ministerial; mandatory duties can still involve an exercise of discretion, while ministerial duties cannot.[85] This difference has important ramifications for what the appellate court in *Gascón* did. Courts cannot issue writs of mandamus to executive officials when the duties involve any exercise of discretion.[86] Consider the statute at issue in *California Public Records Research, Inc. v. County of Yolo*. There, the statute required that an official "charge and set fees," but did not set the fee amount.[87] The California appellate court ruled that a writ of mandamus could not compel the official to charge a particular fee because deciding on the fee amount "necessarily requires the exercise of significant discretion."[88] There was little question that this was a mandatory duty, as the official had no choice but to charge and set fees. But it was a mandatory duty that involved the exercise of discretion.

By contrast, a court can grant mandamus to compel an officer to pay a particular salary where the statute expressly mandates the amount to be paid.[89]

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82. Memorandum from the Attorney General to the United States Attorneys and Assistant Attorney General for the Criminal Division 2 (Aug. 12, 2013), available at https://bit.ly/3AdAKff [https://perma.cc/HBA9-JWE2].

83. Memorandum from the Attorney General to All Federal Prosecutors 1 (May 10, 2017), available at https://bit.ly/3yqDVQ5 [https://perma.cc/RS3A-TJAM].

84. People v. Mun. Ct., 103 Cal. Rptr. 645, 656 (Cal. Ct. App. 1972).

85. *Hudson*, 181 Cal. Rptr. 3d at 122.

86. Cal. Pub. Recs. Rsch., Inc. v. Cnty. of Yolo, 209 Cal. Rptr. 3d 26, 47 (Cal. Ct. App. 2016).

87. *Id.*

88. *Id.*; *see also* AIDS Healthcare Found. v. Los Angeles Cnty. Dep't of Pub. Health, 128 Cal. Rptr. 3d 292, 297–298 (Cal. Ct. App. 2011) (holding that a court cannot grant mandamus to compel an officer to comply with a statutory duty to "take measures" to prevent the spread of diseases because the statute does not dictate what steps that action entails).

89. A.B.C. Fed'n of Teachers v. A.B.C. Unified Sch. Dist., 142 Cal. Rptr. 111, 116 (Cal. Ct. App. 1977); *see also* Jenkins v. Knight, 293 P.2d 6, 9 (Cal. 1956) (holding that a court can grant mandamus to compel an officer to comply with a statutory duty to fill a political vacancy

In each of the examples above and in footnotes 85 through 88, there was a mandatory duty (charge fees, pay salaries, take measures to stop the spread of a disease, and fill political vacancies). But the court appropriately held that mandamus was appropriate only in those situations where the statute created a ministerial duty such that the officer had no discretion in carrying out the specifics of that duty.

The Three Strikes Law at issue in *Gascón*, even if it created a mandatory duty, cannot under any interpretation be classified as creating a ministerial duty. Execution of the law hinges on prosecutorial discretion, the literal archetype for discretionary duties. The Three Strikes Law leaves open to prosecutorial discretion far more than even the statutes in *County of Yolo* or *AIDS Healthcare*. Specifically, there are three points at which the prosecutor exercises discretion. First, the prosecutor decides whether a conviction should be pleaded as a strike. While the Three Strikes Law does enumerate offenses that must count as strikes, the prosecutor has discretion to consider other offenses that are not statutorily prescribed.[90] Second, the prosecutor chooses what evidence to bring to prove the strike. And third, the prosecutor decides whether to dismiss a strike. The Three Strikes Law allows the prosecutor to move to dismiss a strike if doing so would be "in the furtherance of justice."[91] Clearly, the prosecutor must exercise discretion to determine what constitutes the furtherance of justice. If the duties created by statute in *County of Yolo* and *AIDS Healthcare* were mandatory but not ministerial, it follows that the duty created by the Three Strikes Law is the same, and that mandamus is not appropriate.

Furthermore, the only cases where a California court has ever issued a writ of mandamus to a district attorney are noncriminal in nature.[92] In these cases, the legislature reallocated the discretion to another party.[93] One such statute permitted a board of supervisors to compel the district attorney to institute public nuisance proceedings.[94] Though the California Supreme Court could not ordinarily compel a district attorney to prosecute a criminal case, the explicit legislative delegation of discretion from the prosecutor to the board of supervisors allowed this to happen.[95] No such delegation of discretion to another actor creates a ministerial duty when looking at the Three Strikes Law. Because the legislature did not intend for the prosecutor's discretion to be exercised by another actor, the default presumption that the prosecutor's duty is mandatory, but not ministerial, persists.

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by issuing "writs of election…at once" because the statute leaves the officer with no discretion as to how or when to fill the political vacancy).

90. *See* CAL. PEN. CODE § 1192.7(c) (2021).

91. CAL. PEN. CODE § 667(f)(2).

92. *See* People v. Avery, 38 P.3d 1, 2 (Cal. 2002) (trial transcript from earlier proceeding); People v. Bartow, 54 Cal. Rptr. 2d 482 (Cal. Ct. App. 1996) (appellate opinion); People v. Guerrero, 748 P.2d 1150 (Cal. 1998) (plea form).

93. Bd. of Supervisors v. Simpson, 227 P.2d 14, 17 (Cal. 1951).

94. *Id.*

95. *Id.* at 18.

PART IV: PUBLIC SAFETY, RACIAL JUSTICE, ECONOMIC EFFICIENCY, AND DEMOCRATIC SELF-GOVERNANCE ARE INCOMPATIBLE WITH THE THREE STRIKES LAW.

This section highlights and explains the many policy arguments against sentencing under the Three Strikes Law. First, the Three Strikes Law has not achieved its stated goal of reducing violent crime; it has actually undermined that goal. Second, the Law has disproportionately harmed black and brown communities despite its promise of objectivity. Third, the Law brings with it increased and unjustified costs. And fourth, publicly elected officials must be allowed to enact the constitutional policies that they campaigned on and with which they earned the approval of voters.

A. Excessive sentences put the greater community at risk.

In states with high incarceration rates, like California, increasing the number of people incarcerated typically increases crime rates.[96] The effects that culminate in this outcome include the breakdown of social and family bonds that guide people away from crime, the imprisonment of adults who could otherwise nurture children, the loss of income, and the reduction in future income potential.[97] Excessive prison sentences are cited as a leading cause of rising family poverty, community deterioration, juvenile delinquency, poor student performance, childhood depression, and mental instability.[98] Currently, 2.7 million children in America have incarcerated parents.[99] Beyond the economic impact, the "separation strain" strongly suggests that incarceration has damaging consequences on long-term relationships with children.[100] "Intimidating security procedures, geographic distances between prison facilities, the time consuming nature of visits, and the general lack of visiting arrangements" all contribute to the difficulty in maintaining relationships with incarcerated parents.[101] Being incarcerated also makes it more likely that parents will lose their parental rights either upon or after being convicted.[102] The separation strain results in many other damaging emotional effects:

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96. Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA INST. OF JUST. (July 2017) at 2, https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf [https://perma.cc/MV3Y-2UTX].

97. *Id.*

98. Michael D. Tanner, *Poverty and Criminal Justice Reform*, CATO INST. (Oct. 21, 2021), https://www.cato.org/study/poverty-criminal-justice-reform [https://perma.cc/266C-JHBC].

99. PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY, 4 (Ellen Wert) (2010).

100. Jalila Jefferson-Bullock, *The Time is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences*, 83 UMKC L. REV. 73, 92 (2014).

101. *Id.* at 94.

102. *See id.* at 96 (discussing the effects of the Adoption and Safe Families Act on parental rights).

> Long-term effects include "questioning of parental authority, negative perceptions of police and the legal system," and "impaired ability to cope with future stress or trauma, disruption of development, and intergenerational patterns of criminal behavior." One study suggests that children with incarcerated fathers are significantly more likely than other children to be suspended or expelled from school. These effects manifest in damaging behaviors that directly affect all of society.
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> According to studies, maternal incarceration is strongly predictive of a child's propensity to engage in criminal behavior, and children of incarcerated mothers are at a higher risk for delinquency as they reach adolescence. Sadly, maternal incarceration has recently increased by 122 percent, doubling from "29,500 in 1991 to 65,600 in 2007."
>
> Whether mother or father is incarcerated, the risk of intergenerational incarceration is a significant factor to children of incarcerated parents. Parental crime, arrests and incarceration interfere with the "ability of children to successfully master developmental tasks and to overcome the effects of enduring trauma, parent-child separation, and an inadequate quality of care." Together, the combination of these outcomes produces significant long-term consequences, including intergenerational incarceration, and an incarceration rate six times that of their counterparts.[103]

Excessively harsh sentences have the dual adverse effects of bringing about these outcomes and doing little to deter crime; the severity of punishment has no significant impact on an individual's decision to engage in criminal activity.[104] Thus, excessive sentences destabilize and economically debilitate the lives of those most impacted and do little to prevent crime.

B. Excessive sentencing disproportionately impacts black and brown communities.

From the outset of enacting the Three Strikes Law, the disparate impact on black and brown people was apparent.[105] In just the first six months of passage, black people constituted 57.3% of those charged with a third strike, while white people made up only 12.6%.[106]

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103. *Id.* at 98.

104. Ashley Nellis, No *End in Sight: America's Enduring Reliance on Life Sentences*, THE SENTENCING PROJECT (Feb. 17, 2021), https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/ [https://perma.cc/K432-F57H].

105. Schiraldi & Godfrey, *Racial Disparities in the Charging of Los Angeles County Three "Strike" Cases*, CTR. ON JUVENILE AND CRIM. JUST. (Oct. 1994), http://www.cjcj.org/uploads/cjcj/documents/racial_disparities_in_the_charging_of_la_countys_third_strike_cases.pdf [https://perma.cc/V9FZ-HXCH].

106. *Id.* at 1.

Furthermore, because black men are overrepresented in all criminal justice statistics—including arrests, incarceration, and execution—they will be more susceptible to the law. Today, one in four young black men is either incarcerated or on probation or parole.[107] Because black communities are over-policed, their residents are more likely to have prior "strikes" despite committing crime at rates comparable to white people.[108] Therefore, more black than white offenders will be subject to life sentences.

C. Imprisoning people for life prohibitively increases prison costs at the taxpayers' expense, with little crime reduction to show for it.

The Three Strikes Law has imposed heavy increases in prison spending without any significant gains to show for it. When people are sentenced to prison for life, they age while in prison, obviously. The estimated cost of maintaining an older prisoner is about $60,000 per year, three times the cost of incarcerating a young offender.[109] Yet people over the age of 60 commit only one percent of serious and violent crimes.[110] And only 8% of people released from prison when they are 50 or older are arrested for new crimes within three years of release, as compared to the 60% recidivism rate for twenty-year-olds.[111] As the National Institute of Justice has noted, over half of all juvenile offenders continue offending "up to age 25," but this figure plummets by two-thirds in the following five years.[112] As a result of committing a disproportionate number of crimes, young adults make up a disproportionate number of new prison entrants.[113] In

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107. ACLU, *10 Reasons to Oppose "3 Strikes, You're Out,"* https://www.aclu.org/other/10-reasons-oppose-3-strikes-youre-out [https://perma.cc/M4HR-J7R7] (Mar. 17, 2002).

108. *Id.*

109. *Id.*

110. *Id.*

111. U.S. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS iii (2015) https://oig.justice.gov/reports/2015/e1505.pdf [https://perma.cc/RK9G-EU7N]; *see also* Edward Lyon, *Compassionate Releases Needed for an Aging Prisoner Population*, PRISON LEGAL NEWS (Nov. 6, 2019), https://www.prisonlegalnews.org/news/2019/nov/6/compassionate-releases-needed-aging-prisonerpopulation/ [https://perma.cc/8GPJ-F4RP].

112. Nat'l Inst. of Justice, *From Juvenile Delinquency to Young Adult Offending* (2014), https://nij.ojp.gov/topics/articles/youth-justice-involvement-young-adult-offending [https://perma.cc/N4LA-RFQ8].

113. Cal. Dep't of Corr. & Rehab., *Characteristics of Felon New Admissions and Parole Violators Returned with a New Term: Calendar Year 2013*, at 17 (2014), https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2021/05/ACHAR_d2013.pdf [https://perma.cc/464B-88HE]. If anything, this figure understates the number of young adults entering prison every year. The state agency reports new inmates based on their age when admitted to the Department of Corrections and Rehabilitation, not their age at the time of offense. *Id.* at 34. So, some proportion of the 25-29-year-olds who entered state custody (accounting for 17.5 percent of new inmates) were incarcerated for crimes committed in their younger twenties. California

California, at least 26% of all new felony admissions to the state prison system are of 18 to 24-year-olds.[114] In summary, many individuals are convicted of their first felony as young adults. Young adult offenders are likely to offend again until they reach the age of 25, and incredibly unlikely to offend again once they reach the age of 30. But in California, because of the Three Strikes Law, these individuals do not get the chance to "age out" of crime because they have been sentenced to life in prison for their actions as young adults. So, the Three Strikes Law creates an expensive and aging prison population for practically no benefit.

Also, because many people awaiting Three Strikes sentencing are either unable or ineligible to make bail, and because more of them demand trial considering the high stake of life in prison, jails have become more crowded.[115] Therefore, the costs associated with housing more individuals awaiting trial and providing more staff to manage those individuals have increased.[116] Empirically, California saw an 11% increase in pretrial detention in local jails after the first year of applying the Three Strikes Law.[117]

Many elected leaders and proponents of the Three Strikes Law point to the 100% decrease in violent crime that occurred in California during the two decades after the Law was introduced as evidence of efficacy. [118] They also point to similar downward trends in other states that had enacted some form of Three Strikes Law as evidence that such laws work.[119] The problem with that line of thinking, though, is that there is no statistically significant difference between the declines in crime that happened in Three Strikes states and those that happened in states without Three Strikes Laws.[120] Instead, almost all of the drop in crime since the 1990s is explained by other factors, including the aging population, increased wages, increased employment, increased graduation rates, increased consumer confidence, increased law enforcement personnel, and changes in policing strategies.[121] California dramatically increased the number of people it imprisoned—and thereby the costs to taxpayers—but "obtained roughly the same crime drop at the same time as states . . . that did not pass any laws" aimed at reducing violence through vast increases in the prison

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reports similar proportions in earlier years. *See* Cal. Dep't of Corr. & Rehab, *Characteristics of Felon New Admissions and Parole Violators Returned with a New Term*, https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2021/05/ACHAR_d2013.pdf **[**https://perma.cc/5BRX-9CR3**]**.

114. *Characteristics of Felon Admissions*, *supra* note 112.

115. Schultz, *supra* note 34 at 580.

116. Kelly McMurry, *Three Strikes Law Having More Show than Go*, Trial, Jan.1997, at 13.

117. Dale Parent, *Key Legislative Issues in Criminal Justice: Mandatory Sentencing, National Institute of Justice*, Research in Action 1, 3 (Jan. 1997).

118. Robert Nash Parker, *Why California's* Three Strikes *Fails as Crime and Economic Policy, and What to Do*, 5 CALIF. J. POL. POL'Y 206 (2012), https://escholarship.org/content/qt1n48f1rj/qt1n48f1rj_noSplash_071d0f17fe03ed6f1f47dff0df27139a.pdf?t=nhww9u [https://perma.cc/FSM6-SDYA].

119. *Id.* at 3.

120. *Id.* at 4.

121. Equal Justice Initiative, *Study Finds Increased Incarceration Has Marginal-to-Zero Impact on Crime*, (Aug. 7, 2017), https://eji.org/news/study-finds-increased-incarceration-does-not-reduce-crime/ [https://perma.cc/WK6H-Z6UJ].

population.[122] "Incarceration is . . . [an] expensive way to achieve less public safety . . . [and] policymakers can reduce crime without continuing to increase the social, cultural, and political costs."[123]

D. Undermining the policy decisions of elected prosecutors erodes the rights of voters to self-governance.

Gascón won his election with over 1.5 million votes, in large part because of his stated disapproval of seeking out sentencing enhancements and life sentences.[124] In San Francisco, Chesa Boudin won his election for district attorney in 2019 in large part because of his campaign promises to eliminate cash bail and curb excessive sentences.[125] And in Tampa, Florida's top state attorney, Andrew Warren, won his elections in 2016 and 2020 in large part because of his platform of criminal justice reform: lowering the number of people in jail and reducing racial bias in arrests.[126] A unifying thread between these three prosecutors is the legitimization of their criminal reform policies at the ballot box.

Another unifying thread, though, exists in the destruction of the will of the voters in each of their cases. Frequently false media coverage and shadow money from tech billionaires eroded Boudin's reputation and left him particularly vulnerable to the eventual recall he faced in 2021.[127] Similarly, Andrew Warren's tenure as prosecutor was cut short by political gamesmanship beyond his control and inapposite with the will of the voters.[128] Governor Ron DeSantis suspended

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122. Parker, *supra* note 117, at 7.

123. Equal Justice Initiative, *supra* note 120; *see also* Bryan Lufkin, *The Myth Behind Long Prison Sentences*, BBC (May 15, 2018), bbc.com/future/article/20180514-do-long-prison-sentences-deter-crime [https://perma.cc/BE5D-DMBQ] ("In a 2016 report released by the New York University School of Law…it was estimated that the US could save $200 [billion] if 40% of the country's inmate population was reduced.").

124. *See* Priya Krishnakumer & Iris Lee, *How George Gascón unseated L.A. County Dist. Atty. Jackie Lacey*, L.A. Times (Nov. 6, 2020), https://www.latimes.com/projects/2020-la-da-race-gascon-lacey-vote-analysis/ [https://perma.cc/H2PE-SYFL].

125. *See* Elizabeth Weill-Greenberg, *How Chesa Boudin is Pursuing His Promise to Reduce Incarceration*, THE APPEAL (Mar. 18, 2021), https://theappeal.org/chesa-boudin-san-francisco-district-attorney-reduce-mass-incarceration-criticism/ [https://perma.cc/EJ5X-T6QF].

126. *See* Piper French, *All the Governor's Men*, Bolts (Sep. 22, 2022), https://boltsmag.org/desantis-and-florida-elections-pinellas-pasco/ [https://perma.cc/UL5M-2QS4].

127. *See* Megan Cassidy, *These are the Ultra-Wealthy Donors Pouring Money into the Chesa Boudin Recall*, SF CHRONICLE (April 3, 2022), https://www.sfchronicle.com/sf/article/chesa-boudin-recall-17052312.php [https://perma.cc/7FJC-K57G]; Cyrus Farivar, *Why Silicon Valley Investors are Injecting Millions into San Francisco's DA Recall Election*, FORBES (Jan. 28, 2022), https://www.forbes.com/sites/cyrusfarivar/2022/01/28/chesa-boudin-recall-siliconvalley/?sh=7ba1eb1f6922 [https://perma.cc/5CUC-JE96] ("Chesa is the unfortunate victim, the unfortunate recipient of all of the anger from the investor class and the billionaire class," despite many of his critics not even being affected by Boudin's policies).

128. French, *supra* note 125.

and replaced Warren with a member of the Federalist Society after Warren signaled he would decline to pursue abortion cases should Florida's 15-week abortion ban go into effect.[129] The "energy and outrage" that the Tampa electorate brought to the polls now "is running up against DeSantis's strategy for bulldozing over the authority of locally-elected officials."[130] In undermining Warren, Boudin, and Gascón's policy decisions, mega-rich donors, ultra-conservative politicians, and now the California Court of Appeals have nullified that tenet of meaningful democracy which United States citizens hold so dearly.

Even between prosecutors' offices in the same state, the exercise of prosecutorial discretion empirically results in different criminal justice outcomes.[131] Several studies and interviews with line prosecutors reveal that office-wide policies, "enacted by the elected prosecutor and consistent with public's sense of justice,"[132] play a critical role in communicating and changing the governing culture of an office.[133] Announced office policy priorities, though not always capable of effecting actual change in criminal law, change the norms that define what prosecutors are expected to do.[134] But policy priorities cannot shift norms if courts undercut them. Particularly when a new district attorney is elected to ensure adherence to their, and the electorate's, vision of justice, his ability to do so relies heavily on whether line prosecutors comply with office guidelines.[135] The appellate court in *Gascón* intervened and invalidated the district attorney's efforts to guide the discretion of his deputy district attorneys. This undermined the elected district attorney's ability to manage and bring meaningful change to the office.

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129. *Id.*

130. *Id.*

131. *See*, *e.g.*, Center on Juvenile and Criminal Justice, *Incarceration Trends in Texas*, VERA INST. OF JUST. (Dec. 2019), https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-texas.pdf [https://perma.cc/Q2PU-DLLD] (reporting that "the highest rates of prison admissions [in Texas] are in rural counties, and pretrial detention continues to increase in smaller counties even as it is on the decline in larger counties"); Felicity Rose, *An Examination of Florida's Prison Population Trends*, Crime and Justice Institute (May 2017), at 12, https://www-media.floridabar.org/uploads/2018/04/Criminal-Justice-Data-Study.pdf [https://perma.cc/MJ3A-4M5D] (reporting that trends in prison admissions rates vary widely by jurisdiction in Florida, from a low of 55 per 100,000 residents to a high of 612.7).

132. Incarceration Trends, *supra* note 130.

133. Bruce Frederick & Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making*, VERA INST. OF JUST. (Dec. 2012), at 15, https://www.ojp.gov/pdffiles1/nij/grants/240335.pdf [https://perma.cc/XT6Z-67Z5] (a study of decision-making by line prosecutors revealed that "norms and policies" limiting discretion are the "contextual factor with the most direct impact on prosecutorial decision making.").

134. Marc. L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 148 (2008).

135. Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 371 (2010) (elected prosecutors must "create a culture, structures, and incentives within prosecutors' offices so that prosecutors use their discretion consistently and in accord with the public's sense of justice").

CONCLUSION

George Gascón's vision for justice in the Los Angeles district attorney's office, as manifested in his issuing office-wide special directives, constitutes an electorally-mandated move to combat mass incarceration and the social and economic costs that it brings. The California Court of Appeals erred when it found the special directives improper. Given the judicially-entrenched tradition of prosecutorial discretion, the separation of powers concerns that arise from compelling an executive officer to shirk his discretionary duties, and the overwhelming policy reasons for moving away from the Three Strikes Law, the California Supreme Court should reverse the appellate court's ruling.