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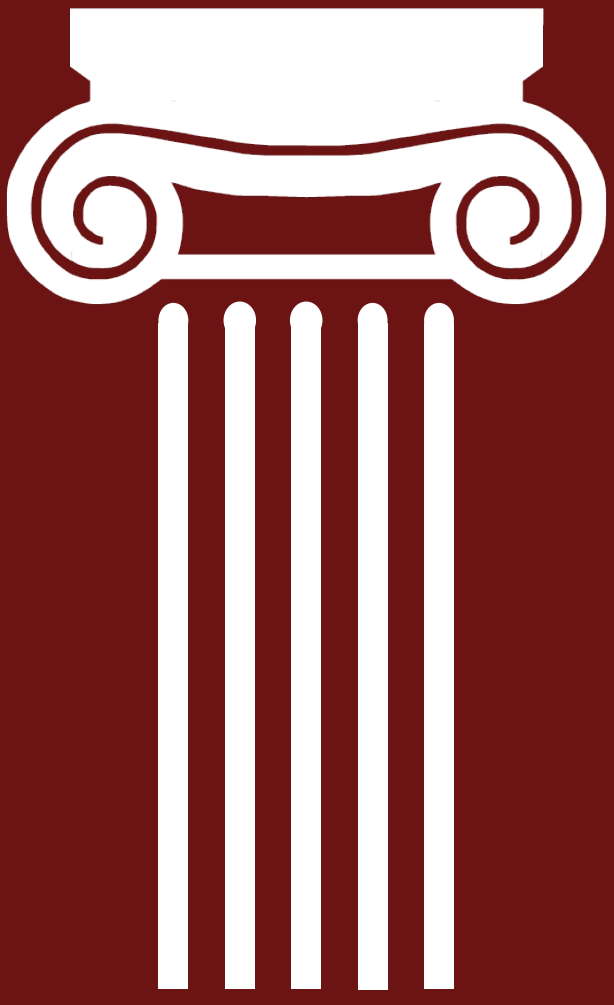

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Letter from the Editors

Dear Reader,

We are thrilled to welcome you to Volume 8, Number 1 of the *Claremont Journal of Law and Public Policy*! The publication of this edition marks the eighth year of the *CJLPP*. As the coronavirus pandemic continues to surge worldwide, this issue once again represents the culmination of a months-long process adjusted to the circumstances of our time. It includes thoughtful and timely analyses on contact tracing in South Korea, police reform and racial inequities in healthcare in the United States, and so much more. We are also excited, as always, about the ongoing digital content pieces found on our website, www.5clpp.com.

Our work would not be possible without the diligence and resilience of our wonderful team. This includes our many talented writers — both staff and digital content; our Print Edition Editors Frankie Konner, Haley Parsley, Katya Pollock, Sean Volke, Scott Shepetin, Calla Li, Ciara Chow, Chris Murdy, Ethan Widlanski, and Olivia Varones; Design Editor Sofia Muñoz; Webmaster Aden Siebel; Interview Editor Lauren Rodrigeuz; Digital Content Editors Chris Tan, Izzy Davis, Kelsey Braford, and Rya Jetha; and our dedicated business team, led by Directors Kayla Solomon and Adeena Liang. Our appreciation goes also to Isabelle Blaha, our former Copyeditor who has since left us in pursuit of new endeavors. Finally, we want to extend a sincere thank you (and a very warm welcome!) to the more than thirty new members of the Journal this year who, despite the newfound challenges facing our communities, dedicated some of their time to joining a new one.

Amid a curtailed semester this past spring, we had to say a hasty goodbye to several graduating members of the *CJLPP*. Despite unexpected hardships, these individuals continued their steady work with the Journal through the spring and summer. In particular, we are exceedingly grateful to Isaac Cui, outgoing Editor-in-Chief, for his guidance and dedication to the Journal during his four years at Pomona College. Thanks also to Print Editor Talia Bromberg, Campus Policy Editor Alison Jue, Business Director Ali Kapadia, and the many other now-graduated alumni who contributed during their time in Claremont.

In this first letter as the new Editor-in-Chief and Managing Editor, we also want to take a brief moment to lay out our hopes for the Journal in this coming year. First and foremost: we reaffirm our commitments made this summer to become a more conscientious organization that welcomes students of all backgrounds and highlights inequality and inequity.[1] To this end, you can find our digital content writers' insightful work on our online racial justice series; our second annual symposium, coming in the spring, will also center around issues related to race and racism. It is our overall goal to encourage continued civic engagement and critical analyses of the world around us. Secondly, we hope to continue to adapt and innovate in the face of challenges posed by the ongoing pandemic. This semester has virtualized our community and operations, and we have been pushed to learn new ways of communicating and working together. Although much remains unknown about the coming year for both the Claremont Colleges and the world, we remain steadfast in our mission to produce incisive legal and policy analysis and to foster a mindful community.

Finally, we are grateful for our advisor, Professor Amanda Hollis-Brusky, for her continued sponsorship. We also thank the student governments of the Claremont Colleges and the Salvatori Center whose support enables us to produce our work. And, of course, thanks to you — our readers — who make this work worthwhile.

Be well and happy reading!

Best,
Bryce Wachtell & Daisy Ni
Editor-in-Chief and *Managing Editor*

1 The Claremont Journal of Law and Public Policy, *CJLPP Statement on Black Lives Matter*, Claremont J.L. & Pub. Pol'y (June 5, 2020), https://5clpp.com/2020/06/05/cjlpp-statement-on-black-lives-matter/ (last visited Dec. 4, 2020).

About

The Claremont Journal of Law and Public Policy is an undergraduate journal published by students of the Claremont Colleges. Student writers and editorial staff work together to produce substantive legal and policy analysis that is accessible to audiences at the five colleges and beyond. Together, we intend to build a community of students passionately engaged in learning and debate about the critical issues of our time!

Submissions

We are looking for papers ranging from 4 to 8 single-spaced pages in length. Our journal is especially receptive to research papers, senior theses, and independent studies or final papers written for classes. Papers need not be on American law or public policy. Students in any field of study are encouraged to submit their work, so long as their piece relates to the law or public policy.

Please submit your work (Word documents only) and direct questions or concerns by email to info.5clpp@gmail.com. We use *Bluebook* citations. Include your email address on the cover page.

Selected pieces will be published in the print edition of the *Claremont Journal of Law and Public Policy*. Other pieces may be selected for online publication only. Due to the volume of submissions that we receive, we will only get in touch with writers whose work has been selected for publication.

Executive Board

In This Issue

Note: Due to delays in our publication process caused by the ongoing pandemic, pieces included in this issue were written in the spring and summer of 2020, and therefore reflect the circumstances of those periods.

Cracking the Grass Ceiling: How Sectoral Divisions Dictate Marijuana Public Policy

Ciara Chow (PO '22)
Print Edition Editor

Disapproval of marijuana is going up in smoke. In 2019, sixty-two percent of Americans supported the legalization of marijuana compared to merely thirty-one percent in 2000.[1] As Americans become accepting of marijuana, the business world has become infatuated with the cannabis industry's high potential. Although citizens, businesses, and many states have been changing their stance on cannabis for the past two decades, the position of the federal government has not evolved alongside that of the public. While officially an adamant opponent of marijuana legalization, the federal response to state cannabis legalization for many years has been characterized by ambiguity. Despite recent changes in federal policy regarding hemp, which enabled the sale of some non-psychoactive cannabis products like CBD, the U.S. government's approach to cannabis continues to be largely inconsistent with developments in state policy and public opinion. This precarious discrepancy between unenforced federal law and the reality of state policies is the result of a unique conversion of sectoral business interests.

In this paper, I first offer a brief background of the marijuana policy environment since 1937. In the second section, I delineate lobbying efforts by sector to demonstrate the business community's highly fractured sectoral response to marijuana regulation. I argue that this fractured response contributed to the federal government's contradictory and stagnated stance. Next, I show that the introduction of a new business actor, the agricultural sector, shifted the balance of power between sectors. Although this shift ended decades of complete policy stagnation by legalizing hemp in the 2018 Farm Bill, significant policy contradictions remain. In the fourth section, I discuss why recent developments in the pharmaceutical industry's stance on legalization suggest that another shift in the sectoral balance of power will further soften federal marijuana policy in terms of research restrictions. Finally, I conclude by warning that a possible Big Cannabis lobby could soon overpower social justice activists in the marijuana policy debate.

I. Background on Federal and State Marijuana Policy: 1937-2018

The United States has wrestled with conflicting federal and state cannabis policies for nearly twenty-five years. Although marijuana was used medicinally in the United States until the early 20th century, Congress passed the Marihuana Tax Act in 1937 which began the trend of tightening federal restrictions on marijuana.[2] Over the next four decades, federal legislation both criminalized marijuana and prevented research on the substance, and state policies largely aligned with the federal stance.[3] However, California passed the Compassionate Use Act in 1996 and became the first state to legalize medical marijuana; Colorado and Washington became the first states to legalize recreational marijuana in 2012.[4] As more states continued to implement cannabis policies that contradicted federal law, the Obama administration solidified its non-interventionist approach. The Obama administration's policy was to avoid federally prosecuting marijuana-related offenses in states which had legalized the substance, effectively turning a blind eye without changing official laws.[5]

Under the Trump administration, policy continued to be contradictory and inconsistent. In January 2018, Jeff Sessions, who was Attorney General at the time, reversed Obama-era policy and indicated his objective to again pursue federal prosecutions in states where marijuana was legal.[6] In September 2019, however, Trump aligned his stance with his current Attorney General William Barr and expressed his intentions to let states decide individually: "We're going to see what's going on. It's a very big subject and right now we are allowing states to make that decision."[7]

Clashing federal and state laws have led to a host of problems for the cannabis industry that prevent its expansion, including an inability to access banking and difficulties convincing potential stakeholders that the industry is safe for investment.[8] Nevertheless, thirty-three states had legalized marijuana for

1 Hannah Hartig & A.W. Geiger, A*bout Six-in-Ten Americans Support Marijuana Legalization*, Pew Research Center (Nov. 14, 2019), http://pewrsr.ch/2E9u3hd.

2 Mary Barna Bridgeman & Daniel T. Abazia, *Medicinal Cannabis: History, Pharmacology, And Implications for the Acute Care Setting*, 42 Pharmacy and Therapeutics 180 (Mar. 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5312634/.

3 *Id*.

4 Marijuana Overview, National Conference of State Legislatures, http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx (last visited July 22, 2020).

5 Sarah Lynch, *Trump Administration Drops Obama-Era Easing of Marijuana Prosecutions*, Reuters (Jan. 5, 2018), https://www.reuters.com/article/us-usa-justice-marijuana-idUSKBN1ET1MU.

6 *Id*.

7 *President Trump Reiterates His Administration Will Let States Legalize Marijuana*, The Bos. Globe (Sept. 3, 2019), https://www.bostonglobe.com/news/marijuana/2019/09/03/president-trump-reiterates-his-administration-will-let-states-legalize-marijuana/q3O3QE1SZLO8o3u3XwoZKN/story.html.

8 Peter Conti-Brown, *The Policy Barriers to Marijuana Banking*, 6 Wharton Pub. Policy Initiative (Feb. 2018), https://publicpolicy.wharton.upenn.edu/issue-brief/v6n2.php.

medical use[9] and eleven states had legalized recreational use by 2018.[10] Experts predicted the global cannabis industry's sales could hit fifteen billion dollars in 2019.[11] Despite the escalating tension between federal regulations, state policies, and private sector interests, marijuana policy remained relatively stagnated as federal standards ignored state cannabis industries and neither punished firms nor gave legal approval.

II. Lobbying Efforts by Sector

With a profitable new industry on the horizon, business sectors began working to shape public policy in their respective favors. Lobbying efforts at the state level vary wildly but have all intensified over the years, especially when several states voted on legalization in 2016. During the 2016 election year, actors on both sides spent a combined total of forty million dollars in their attempts to influence the outcome across the five states with legalization on the ballot.[12] Although the amount of money spent lobbying marijuana legalization at the federal level is still low compared to other issues, it is increasing rapidly. Spending on federal marijuana lobbying saw a 7100% increase between 2014 and 2019.[13] The business world, however, has not been united in its stance on legalization. Rather, each business sector's specific set of interests influences its position on the issue and thus determines the direction of its lobbying.

A. Cannabis Industry

The cannabis industry is the clearest stakeholder in the legalization debate. Every firm in this sector shares the same interest — that is, legally sanctioned marijuana sales — because the foundation of the industry depends on the substance's legal status and how this status is enforced. Moreover, as the market for cannabis products grows, firms must be able to access tools such as financing and insurance to facilitate expansion. The government's non-intervention is no longer satisfactory for cannabis companies because they need explicit legal approval to apply for loans and insurance.

On the state level, the marijuana sector is heavily involved in efforts to shape public policy via campaign spending, collaborating with former elected officials, and forming regional lobbying associations. In 2016, contributions from medical marijuana companies comprised over forty percent of the money spent campaigning for recreational legalization in Nevada and approximately sixty percent in Arizona.[14] In addition to campaign spending, firms began working with former members of state government as lobbyists and investors. In California, over two dozen former government officials, including attorney general Bill Lockyer, have entered the industry since legalization.[15] California State Assemblywoman Melissa Melendez, an active advocate against revolving door politics, was unsurprised about the cooperation between the marijuana sector and former lawmakers: "No one should be naive enough to think that industries like the cannabis industry are not closely watching to see which legislators are inclined to support bills that favor their particular industry, and which legislators seem to have the most influence. This is all helpful information when trying to court future lobbyists to strengthen your political power."[16]

Cannabis firms are also developing sectoral associations at the state level to lobby directly. In 2018, Ohio officials and dispensaries faced accusations of favoritism regarding which dispensaries received operating licenses. The dispensaries which were initially awarded the licenses formed the Ohio Medical Marijuana License Holder Coalition to lobby on behalf of their interests and keep out competition.[17] Similar associations such as the California Cannabis Industry Association[18] and Washington CannaBusiness Association[19] have been created to express their concerns about tax rates and regulation to state representatives. By utilizing these methods, the marijuana sector became active in seeking to influence state policy.

The cannabis industry recently began directing greater attention to the federal level. In 2014, the cannabis industry spent a modest $80,000 on the issue and hired only one lobbyist, compared to $2.78 million in 2018 and $5.66 million in 2019.[20] Put differently, spending grew by over one hundred percent between 2018 and 2019 alone. The 2019 spending increase may be related to the cannabis industry's support of two new bills in the House: the STATES Act,[21] which would protect states

9 State Medical Marijuana Laws, National Conference of State Legislatures, http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last visited July 23, 2020).

10 Marijuana Overview, National Conference of State Legislatures, http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx (last visited July 22, 2020).

11 Alicia Wallace, *Cannabis Sales Could Hit $15 Billion Globally This Year*, CNN Bus. (June 20, 2019), https://www.cnn.com/2019/06/20/tech/cannabis-industry-15-billion/index.html.

12 Christopher Ingraham, *A Casino Magnate Is Spending Millions to Fight Legal Marijuana in Three States*, The Wash. Post (October 26, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/10/26/a-casino-magnate-is-spending-millions-to-fight-legal-marijuana-in-three-states/.

13 Industry Profile: Marijuana, The Center for Responsive Politics, https://www.opensecrets.org/federal-lobbying/industries/summary?cycle=2019&id=N09 (last visited July 23, 2020). Healthcare lobbying, for comparison, has received a steadily high influx of resources for years and saw only a 23.8% increase during the same time period. *See* Sector Profile: Health, The Center for Responsive Politics, https://www.opensecrets.org/federal-lobbying/sectors/summary?id=H (last visited August 6, 2020).

14 Ingraham, *supra* note 12.

15 Patrick McGreevy, *These California Politicians Once Helped Regulate Legal Marijuana. Now They're Working for the Industry*, L.A. Times (September 30, 2019), https://www.latimes.com/california/story/2019-09-29/california-politicians-bureaucrats-pot-marijuana-industry.

16 *Id*.

17 Jackie Borchardt, *Ohio Medical Marijuana Growers Form Coalition to Lobby on Behalf of License Winners*, Cleveland.com (Jan. 30, 2019), https://www.cleveland.com/metro/2018/03/ohio_medical_marijuana_grower.html.

18 *California Cannabis Industry Sending SOS To State Leaders As Black Market Continues To Thrive*, CBS Sacramento (Nov. 27, 2019), https://sacramento.cbslocal.com/2019/11/27/california-cannabis-industry-sos-black-market-thrives/.

19 Jake Thomas, *Marijuana Regulation Sparks Debate*, The Columbian (March 26, 2019), https://www.columbian.com/news/2019/mar/26/marijuana-regulation-sparks-debate/.

20 Industry Profile: Marijuana, The Center for Responsive Politics, https://www.opensecrets.org/federal-lobbying/industries/summary?cycle=2019&id=N09 (last visited July 23, 2020).

21 The Strengthening of the Tenth Amendment Through Entrusting States

where marijuana is legal, and the SAFE Banking Act, which seeks to "increase public safety by ensuring access to financial services to cannabis-related legitimate businesses and service providers and reducing the amount of cash at such businesses."[22] Moreover, over seventy percent of these lobbyists in 2019 were former government officials and members of Congress, indicating the industry's growing interest in serious Washington lobbying as it seeks to model the strategies of other successful special interest groups.[23] Notably, former Speaker of the House John Boehner, who claimed to be "unalterably opposed to the legalization of marijuana or any other FDA Schedule I drug" in 2011, is now a board member of Acreage Holdings and lobbies Congress in support of legalization.[24] As the industry expands, there has been sector-wide advancement in the intensity of federal lobbying investments as firms seek the legal approval necessary for serious expansion.

B. Big Tobacco

Tobacco companies also support cannabis legalization because of their own investment interests. Although the tobacco industry initially held reservations about cannabis as a competing product against tobacco, it began seeing cannabis as a potential investment as early as the 1970s. Tobacco company Brown and Williamson's research reports from 1976 demonstrate the shift in strategy: "This trend in liberalization of drug laws reflects the overall change in our value system. It also has important implications for the tobacco industry in terms of an alternative product line."[25] As cigarette consumption decreased nationally, tobacco companies sought to protect their profits by diversifying into products like cannabis. Nearly fifty years later, tobacco companies indeed followed through on their commitment to invest in cannabis as an alternative product line. Rob Kampia, the director of the prominent pro-legalization organization Marijuana Policy Project, admitted to taking money and lobbying advice from tobacco industry experts in 2017.[26] In 2018, tobacco giant Altria Group invested $1.8 billion into Cronos Group in exchange for a forty-five percent stake in the cannabis company. Cronos CEO Mike Gorenstein told reporters that working with Altria Group had a number of advantages, including "mak[ing] sure we're getting in front of regulators."[27] In light of the tobacco industry's embeddedness with the cannabis industry, National Cancer Institute researchers cautioned, "Legislators, regulators, and members of the public considering the legalization of marijuana must take into account that multinational tobacco companies are prepared to enter the market with incentives to increase the use of the drug."[28] The tobacco sector has simultaneously been investing in cannabis firms while utilizing their lobbying experience to advise the burgeoning industry in order to ensure their own profits as tobacco usage decreases.

C. Financial Services

Although the marijuana market provides incentives for banks to participate in loans and investment opportunities with cannabis companies, federal regulations prevent banks from involvement in the cannabis industry. Widener University Professor of Law Luke Scheuer illustrates the dilemma of legal and financial security for cannabis companies:

> Many standard business entity law protections. . . are not available for marijuana business stakeholders because of the exception to these rules that there not be intentional violations of the law. This, in combination with the fact that marijuana businesses have increased criminal liability, a difficult tax situation, a difficult if not impossible time accessing federal courts, and other unique legal challenges means that this industry has not been able to attract professional stakeholders such as venture capitalists, bankers, and professional managers that would normally flock to a growing and highly profitable industry.[29]

American Bankers Association executive Megan Michiels summarized the banking community's view in a 2014 publication: "As long as federal statute classifies marijuana as a controlled substance, the risk of criminal charges and seizure of assets associated with these businesses is a significant deterrent to the banking industry to take on, as clients, those in the budding market."[30] Bankers and legal experts agree that current federal policy deters banks from participation in the cannabis industry because marijuana's illicit status prevents marijuana companies from accessing standard business protections and heightens liabilities. Because of the current federal position on marijuana, the legal risk of working with cannabis companies is too high for banks. The potential profits, however, are also too high for the financial sector to overlook. As a result, financial companies have joined tobacco and cannabis companies to lobby Congress for policy reform that would allow banks to finance the cannabis industry. Financial companies were instrumental in supporting the SAFE Banking Act; when the House voted on the bill in the first quarter of 2019, eighty-four business groups disclosed lobbying regarding cannabis including American Bankers Association, Mastercard, and National Association of

Act, H.R. 2093, 119th Cong. (2019).

22 Secure And Fair Enforcement Banking Act of 2019, H.R. 1595, 116th Cong. (2019).

23 Industry Profile: Marijuana, *supra* note 20.

24 Elizabeth Williamson, *John Boehner: From Speaker of the House to Cannabis Pitchman*, N.Y. Times (June 6, 2019), http://search.proquest.com/docview/2244148156/abstract/42150D323F5C4C6EPQ/1.

25 Rachel Ann Barry, Heikki Hiilamo & Stanton A. Glantz, *Waiting for the Opportune Moment: The Tobacco Industry and Marijuana Legalization*, 92 The Milbank Quarterly 207, 218 (2014), https://doi.org/10.1111/1468-0009.12055.

26 Kevin A. Sabet, *Marijuana Lobby Admits Tobacco Industry Executives Pay-to-Play*, Huffington Post (June 7, 2017), https://www.huffpost.com/entry/marijuana-lobby-admits-tobacco-industry-executives_b_59382c9de4b014ae8c69dced.

27 Lauren Hirsch, *Altria to Invest $1.8 Billion in Cannabis Company Cronos Group, Exits Some e-Cig Brands*, CNBC, (Dec. 7, 2018), https://www.cnbc.com/2018/12/07/altria-to-invest-1point8-billion-in-cannabis-company-cronos-group.html.

28 Barry, Hiilamo & Glantz, *supra* note 25, at 231-232.

29 Luke Scheuer, *The Worst of Both Worlds: The Wild West of the Legal Marijuana Industry Symposium: Medical Marijuana Legalization, a Growing Trend: Social, Economic, and Legal Implications*, 35 N. Ill. Univ. L. Rev. 557, 558-559 (2014), https://heinonline.org/HOL/P?h=hein.journals/niulr35&i=592.

30 Megan Michiels, *The Cannabis Conundrum*, 106 ABA Banking Journal 32, 35 (Feb. 2014) https://search.proquest.com/docview/1506129446/abstract/6467F8F6EC9846D2PQ/1.

Federally-Insured Credit Unions.[31] The financial sector's support for the bill demonstrates its ambitions to conduct business with cannabis companies, solidifying the sector's pro-legalization lobbying stance.[32]

D. Big Pharma

By contrast, the pharmaceutical industry had historically been an adamant opponent of all forms of marijuana legalization due to the fear that widespread access to cannabis-based medicine could hurt pharmaceutical sales. Unless pharmaceutical companies can offer a more appealing alternative drug, "patients may leave the drug market when cannabis is more accessible, and drug companies would lose profits."[33] With the current climate around opioids, the pharmaceutical industry certainly would not want to give consumers a way to avoid opioids by allowing another pain-relief market to open before firms can develop a competitive alternative. The industry's concern is warranted; researchers at the University of Georgia discovered that doctors were less likely to prescribe drugs like opioids in states where medical marijuana was a legal alternative.[34] Furthermore, a study by the National Bureau of Economic Research showed a fifteen to thirty-five percent decrease in substance-abuse-related hospitalizations and overdoses in areas with access to medical dispensaries.[35] The pharmaceutical sector therefore perceives that it would lose its domination of the pain relief market if marijuana were legalized, especially considering the current backlash against the industry for its involvement in the opioid crisis.

In order to protect its interests in the legalization debate, the industry engages in campaign spending, funds biased research, and directly lobbies federal agencies. Anti-drug war lobbyists have emphasized since 2012 that the sector's trade association, Pharmaceutical Research and Manufacturers of America, is one of the most prominent opponents of legalization in Washington.[36] In preparation for 2016 state elections, pharmaceutical companies funded anti-legalization campaign groups like Community Anti-Drug Coalitions of America and academics who conduct research biased against marijuana.[37] The pharmaceutical industry maintains extensive financial relationships with prominent anti-marijuana academics, often by hiring them as consultants on the opioid market, who in turn criticize cannabis in the media.[38] Additionally, pharmaceutical companies also lobby[39] agencies like the Drug Enforcement Agency (DEA) and the U.S. Department of Health and Human Services (HHS) directly to prevent the government from demoting marijuana to Schedule III.[40] For the pharmaceutical industry, fighting marijuana legalization is rewarding and low-cost relative to its other efforts on issues like healthcare,[41] since cannabis companies do not yet have the power to pose a severe threat. As such, the pharmaceutical sector has been a staunch and active opponent of legalization.

E. Private Prisons

As a sector that depends on consistently high incarceration rates, private prisons are invested in maintaining strict cannabis laws. To ensure profits, private prisons impose lockup quotas on the state and force the state to pay if it fails to meet the quota. As a result, "one might imagine that an effective way to guarantee occupancy requirements is to increase incarceration for drug-related offenses."[42] Indeed, approximately nine hundred thousand people are annually arrested for marijuana-related offenses.[43] Thus, private prison corporations benefit from marijuana criminalization because it guarantees a high inflow of prisoners.

Like pharmaceutical companies, private prisons expanded their Washington presence to lobby against legalization to protect their sector's interests. For-profit prisons are experienced with influencing public policy. The three largest firms of the multi-billion-dollar prison labor industry spent forty-five bil-

31 Paul Demko, *Beer and Cigarette Makers Join the Pot Lobbying Parade*, Politico (Apr. 23, 2019), https://politi.co/2vk80C0.

32 Andrew Ackerman, *Mainstream Companies Back Marijuana Banking*, Wall Street Journal (Mar. 26, 2019), https://www.wsj.com/articles/mainstream-companies-back-marijuana-banking-11553608802.

33 Ryan Freer, Beyond the Legalization of Marijuana: Economics of Marijuana as a Drug and Herbal Supplement 4 (2017), https://digitalcommons.du.edu/etd/1274.

34 Ashley C. Bradford & W. David Bradford, *Medical Marijuana Laws Reduce Prescription Medication Use In Medicare Part D*, 35 Health Affairs 1230 (July 1, 2016), https://doi.org/10.1377/hlthaff.2015.1661.

35 David Powell, Rosalie Liccardo Pacula & Mireille Jacobson, Do Medical Marijuana Laws Reduce Addictions and Deaths Related to Pain Killers? 14 (July 2015), https://doi.org/10.3386/w21345.

36 The Center for Responsive Politics, *Money, Not Morals, Drives Marijuana Prohibition Movement*, OpenSecrets News (Aug. 5, 2014), https://www.opensecrets.org/news/2014/08/money-not-morals-drives-marijuana-prohibition-movement/.

37 Christopher Ingraham, *One Striking Chart Shows Why Pharma Companies Are Fighting Legal Marijuana*, The Washington Post (July 13, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/07/13/one-striking-chart-shows-why-pharma-companies-are-fighting-legal-marijuana/.

38 Lee Fang, *Leading Anti-Marijuana Academics Are Paid By Painkiller Drug Companies*, Vice (Sept. 7, 2014), https://www.vice.com/en_us/article/xwppyk/leading-anti-marijuana-academics-are-paid-by-painkiller-drug-companies.

39 Ingraham, *supra* note 37.

40 *See generally* Rebecca L. Haffajee, Robert J. MacCoun & Michelle M. Mello, *Behind Schedule — Reconciling Federal and State Marijuana Policy*, 379 The New England Journal of Medicine 501 (Aug. 9, 2018), https://law.stanford.edu/wp-content/uploads/2018/07/nejmp1804408.pdf. ("Controversy over marijuana policy originates from the 1970 federal decision to classify marijuana as a Schedule I substance under the CSA [Controlled Substances Act]. Schedule I drugs are deemed to have high potential for abuse and no accepted medical use. Crimes involving such drugs can result in penalties of thousands to millions of dollars and substantial prison time . . .. Furthermore, marijuana's Schedule I status is a known hindrance to conducting the research required to secure FDA approval of medical marijuana products; federal funding for such research has been meager, and the federal government has a monopoly on supplying marijuana for clinical trials.")

41 The Center for Responsive Politics, *Pharmaceuticals/Health Products Lobbying Profile*, OpenSecrets (October 23, 2019), https://www.opensecrets.org/federal-lobbying/industries/summary?cycle=2019&id=h04.

42 Steven A. Vitale, *Dope Dilemmas in a Budding Future Industry: An Examination of the Current Status of Marijuana Legalization in the United States Comments*, 23 University of Miami Business Law Review 131, 158 (2014), https://heinonline.org/HOL/P?h=hein.journals/umblr23&i=166.

43 Silvia Irimescu, *Marijuana Legalization: How Government Stagnation Hinders Legal Evolution and Harms a Nation*, 50 Gonz. L. Rev. 241(2014-2015), https://heinonline.org/HOL/Page?handle=hein.journals/gonlr50&id=273&div=&collection=journals.

lion dollars on lobbying between 2003 and 2013.[44] In 2014, Corrections Corporation of America (CCA) transferred this experience to marijuana policy. The firm spent at least one million dollars lobbying against marijuana policy reform and reported, "[A]ny changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional facilities to house them."[45] The for-profit prison sector's stake in marijuana criminalization consequently motivates the industry to lobby in favor of restrictive policy.

F. Law Enforcement

Although police unions benefit from the current laws against marijuana because government funding for the War on Drugs increases local law enforcement budgets,[46] the sector's oppositional power is ambiguous. Despite their stake in marijuana criminalization, the small size and local nature of law enforcement groups prevent them from exerting statewide or nationwide power. The four major police unions have each spent between $80,000 and $220,000 annually since 2009 to lobby on several issues, nearly all of which relate to increasing their budgets, including via War on Drugs bills.[47] Deputy Director of the National Organization for the Reform of Marijuana Laws (NORML) Paul Armentano argued that law enforcement is a prominent actor on the local level because of their societal position: "Most people seeking local or state political office seek the endorsements of the local sheriffs, of the local DAs, of the judges. They're not going to tick off that constituency that they need for election by opposing them on drug policy reform."[48] Although law enforcement officials can influence local politicians' stances on legislation indirectly with their political endorsements, other research contends that their efforts are largely inconsequential to the outcome of medical marijuana laws.[49] Law enforcement indirectly and directly advocates for its sectoral interest in marijuana criminalization, but its small size relative to other actors may render its activity insignificant.

G. Alcohol Industry

The alcohol industry is an anomaly as the sector is internally divided on the legalization issue based on the firm's investment position in the cannabis industry. Many firms are opposed to legalization because they view marijuana as a potential competitor for alcohol in the legal intoxicant market. Alcohol consumption is consistently about fifteen percent less in counties where medical marijuana is legal, demonstrating that marijuana may be a substitute for alcohol.[50] This trend is alarming for alcohol companies who risk losing customers and profits wherever marijuana is legalized.[51] On the state level, alcohol business associations have engaged in lobbying against legalization. For example, in 2010, a PAC called Public Safety First received funding from California Beer and Liquor Distributors to oppose Proposition 19, which sought but failed to legalize recreational marijuana at the time.[52]

Some companies, however, followed the tobacco industry's lead and opted to join the marijuana industry instead of opposing them, citing a belief in the industry's long-term potential.[53] The corporation that produces Corona beer, Constellation Brands, began lobbying for legalization after investing in a Canadian cannabis company called Canopy Growth. In fact, Constellation Brands was one of the firms lobbying in the first quarter of 2019, likely on the SAFE Banking Act.[54] Though the alcohol sector is certainly involved with the legalization issue, the sector itself is inconsistent in its stances.

H. U.S. Chamber of Commerce

The U.S. Chamber of Commerce's relative silence on the profitable and highly regulated cannabis industry is indicative of the sectoral split. The U.S. Chamber of Commerce is a powerful lobbying group that pushes pro-business policies on behalf of the three million businesses in its organization, including some of the world's largest corporations.[55] Since associations like the Chamber have long claimed to pursue anti-regulation, free-market agendas,[56] it may be surprising that the Chamber has failed to capitalize on the opportunity to criticize the government's restrictive marijuana policies. Considering the projections for marijuana sales,[57] one may expect the Chamber to be especially incentivized to lobby for deregulation so member firms, like finance companies, could participate in the market. However, certain crucial members of the Chamber whose prof-

44 Nyle Fort, *Prisons, Pot, and Profit: The Plight of Post-Emancipation*, Harvard Journal of African American Public Policy 47 (Jan. 2013), http://search.ebscohost.com/login.aspx?direct=true&AuthType=sso&db=aph&AN=98919563&site=ehost-live&scope=site&custid=s8438901.

45 Lexi Mealey, *Pot and Politics: Investigating Barriers to Medical Marijuana Legalization*, Harv. Pol. Rev. (March 27, 2018), https://harvardpolitics.com/covers/pot-and-politics-investigating-barriers-to-medical-marijuana-legalization/.

46 Brianna Gurciullo, The Money in Marijuana, OpenSecrets, http://www.opensecrets.org/news/issues/marijuana/ (last visited July 23, 2020).

47 *Id*.

48 Mealey, *supra* note 45.

49 David Darlington Elsea, The Political Economy of Medical Marijuana 52 (2014), https://scholarworks.montana.edu/xmlui/bitstream/handle/1/8775/ElseaD1214.pdf?sequence=1.

50 Michele Baggio, Alberto Chong & Sungoh Kwon, *Helping Settle the Marijuana and Alcohol Debate: Evidence from Scanner Data*, SSRN Electronic Journal (2017), https://doi.org/10.2139/ssrn.3063288.

51 Don Stacy, Joshua Nguyen & Walter E. Block, *Drinking Smoke*, 23 Journal Jurisprudence 243 (2014), https://heinonline.org/HOL/P?h=hein.journals/jnljur23&i=55.

52 Philip Ross, *Marijuana Legalization: Pharmaceuticals, Alcohol Industry Among Biggest Opponents Of Legal Weed*, Int'l Bus. Times (August 6, 2014), https://www.ibtimes.com/marijuana-legalization-pharmaceuticals-alcohol-industry-among-biggest-opponents-legal-weed-1651166.

53 *See, e.g., Constellation Brands exercises Canopy Growth warrants*, Reuters (May 1, 2020), https://reut.rs/2Wh0GUR. (CEO of Constellation Brands Bill Newlands defended the firm's investment in Canopy Growth: "While global legalization of cannabis is still in its infancy, we continue to believe the long-term opportunity in this evolving market is substantial.")

54 Paul Demko, *Beer and Cigarette Makers Join the Pot Lobbying Parade*, Politico (Apr. 23, 2019), https://politi.co/2vk80C0.

55 About the U.S. Chamber of Commerce, U.S. Chamber of Commerce, https://www.uschamber.com/about/about-the-us-chamber-of-commerce (last visited July 23, 2020).

56 Benjamin Waterhouse, Lobbying America: The Politics of Business From Nixon to NAFTA (2014).

57 Alicia Wallace, *Cannabis Sales Could Hit $15 Billion Globally This Year*, CNN Bus. (June 20, 2019), https://www.cnn.com/2019/06/20/tech/cannabis-industry-15-billion/index.html.

its would suffer from legalization, such as pharmaceutical companies,[58] likely also prompt the Chamber to act in favor of marijuana regulation, thus creating conflicting interests within the Chamber itself. Dr. Seth Crawford illustrated in his research that though Chamber-funded organizations like the Heritage Foundation develop reports that seek to lead readers to oppose legalization, others like the American Enterprise Institute view legal reform in a more positive light.[59] He adds, however, that "local affiliates of the US Chamber of Commerce (particularly in California) have spent considerable amounts of money fighting against proposed legalization voter initiatives."[60] The conflicting interests of sectors within the Chamber, in addition to its prioritization of issues like healthcare, contribute to inconsistent and weak stances on cannabis policy. Like the alcohol industry, the Chamber of Commerce's internal divisions prevent the organization from pushing a cohesive agenda.

I. Sectoral Divisions Stagnate Public Policy

These fractures among and within business sectors created an inconsistent and conflicting marijuana policy environment which was ultimately unsustainable. Although no individual sector invested as heavily and consistently in efforts to influence public policy as the cannabis industry, there were many actors on both sides of the issue spending significant amounts of money at the state and federal level. As a result, business interests pushed policymakers in conflicting directions,[61] leading to a frozen federal policy on marijuana while states implemented their own policies in obvious defiance of federal standards. As a product of divided business interests, the non-interventionist federal stance sought to appease pro-legalization businesses by allowing cannabis businesses to exist unpunished in states where cannabis was legal. The federal position also sought to appease anti-legalization businesses, however, by depriving the cannabis industry of the federal approval essential to its growth. In practice, this contradictory policy satisfied none of the sectors and thus could not be sustained as pressure from new business interests grew alongside the growth of the cannabis market.

Figure 1 approximates the balance of stakeholders and depicts the disagreements between business sectors on legalization. Each industry is categorized as low, medium, or high involvement depending on the level of resources, like the amount of money and number of lobbyists it allocates to marijuana legalization as well as the extent of its efforts across different states and government bodies. Each industry is also categorized by its position on legalization based on its sectoral interests.

III. Agricultural Sector and the 2018 Farm Bill

Figure 1: Analysis of Stakeholder Balance

	Low Involvement	Medium Involvement	High Involvement
Strong support for legalization			Cannabis Industry
Moderate/conditional support for legalization		Financial Services Big Tobacco	
Neutral/Inconsistent	Alcohol U.S. Chamber of Commerce		
Moderate/conditional opposition to legalization			
Strong opposition to legalization	Law Enforcement	Private Prisons	Big Pharma

The recent shift in federal policy regarding hemp demonstrated that a shift in the balance of power among business interests can alter the cannabis policy landscape. Hemp plants, defined as cannabis plants with no more than 0.3% tetrahydrocannabinol (THC),[62] are an attractive option for farmers due to hemp's quick growth period and versatility.[63] Before 2014, growing hemp was strictly illegal,[64] despite its negligible THC content and advantages for farmers. Although pressure from farmers pushed Congress to pass legislation in 2014 that allowed controlled hemp farming for research purposes, hemp business leaders and farmers in 2015 still saw widespread hemp farming as a relatively distant dream.[65]

Trump's trade war with China, however, created economic difficulties for farmers. China's tariffs on U.S. agricultural imports hurt crop sales with major products like soybeans hitting record low exports.[66] Congress thus received increased pressure from farmers to provide some relief in the 2018 Agriculture Improvement Act, also known as the Farm Bill, which Congress passes every five years to address agricultural concerns.[67] Senate Majority Leader Mitch McConnell in particular faced significant frustrations from Kentucky farmers who were struggling economically and banned from cultivating hemp on the

58 Waterhouse, *supra* note 56.

59 Seth S. Crawford, The Political Economy of Medical Marijuana 17 (2013), https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/12986/Crawford_oregon_0171A_10611.pdf?sequence=1&isAllowed=y.

60 *Id.*

61 *Cf.* Jeff Frieden, *Sectoral Conflict and Foreign Economic Policy*, 1914-1940, 42 Int'l Org. 59, 88 (1988), https://doi.org/10.1017/S002081830000713X (In his analysis of foreign economic policy during the interwar period, Jeff Frieden concluded that "the state was unable to derive and implement a unitary foreign economic policy; faced with a fundamentally divided set of domestic economic interests in foreign economic policy, the state and its policies were also divided… As socioeconomic interests were split, so too were policymakers and foreign economic policy itself." Frieden's analysis can be readily applied to the domestic policy issue of marijuana legalization. Whereas Frieden considered the opposing foreign economic policy interests of the financial sector and export-reliant sectors versus the domestic manufacturing sector, one can consider the opposing marijuana policy interests of the various sectors.)

62 *See generally* Marijuana and Public Health, Centers for Disease Control, https://www.cdc.gov/marijuana/faqs/what-is-marijuana.html (last visited July 23, 2020) (explaining that tetrahydrocannabinol is a psychoactive compound found in marijuana plants).

63 Adam Hinterthuer, *The Emerging [Re] Interest in Industrial Hemp*, 60 Crops, Soils, Agronomy News 4, 5 (June 1, 2015), https://doi.org/10.2134/csa2015-60-6-1.

64 USDA Releases Long-Awaited Industrial Hemp Regulations, Farm Bureau, https://www.fb.org/market-intel/usda-releases-long-awaited-industrial-hemp-regulations (last visited July 23, 2020).

65 Hinterthuer, *supra* note 63.

66 *Factbox: From phone makers to farmers, the toll of Trump's trade wars*, Reuters (Aug. 23, 2019), https://reut.rs/2L7aBql.

67 Jeff Stein, *Congress Just Passed an $867 Billion Farm Bill. Here's What's in It.,* The Washington Post (Dec. 12, 2018), https://www.washingtonpost.com/business/2018/12/11/congresss-billion-farm-bill-is-out-heres-whats-it/.

state's naturally hemp-conducive land.[68] In response to mounting pressure, the 2018 Farm Bill sought to help farmers by legalizing the production of industrial hemp. Hemp legalization allowed farmers to profit from a fast-growing cash crop with high market demand. The law also opened loopholes for cannabidiol (CBD) sales because CBD is non-psychoactive and can be extracted from hemp. Since 2018, CBD sales have exploded across the country,[69] adding to the profits and legitimacy of the cannabis industry.

For many years, the agricultural sector saw hemp as a profitable opportunity but stayed out of the debate because they did not have enough incentive to pursue such a longshot political victory. When the trade war disrupted conventional crop markets, however, the agricultural lobby gained an incentive to join the fray and found receptive politicians like Senator McConnell. The introduction of a new, powerful[70] player in the legalization debate recalibrated the former balance of business interests, nudging the federal stance out of stagnation and into the cannabis industry's favor.

IV. Big Pharma and Potential Changes in R&D Regulations

Just as the shift in the agricultural sector's position on legalization impacted federal hemp policy, recent changes in the pharmaceutical sector's approach to legalization signal further policy developments ahead. Formerly a staunch opponent of all forms of marijuana legalization, the pharmaceutical industry is now carefully positioning itself to corner the medical cannabis market as the marijuana industry's momentum increasingly appears irreversible. There are a number of pharmaceuticals on the market, such as Sativex and Marinol, that are considered synthetic marijuana because the THC and CBD in the products are derived chemically instead of botanically. Synthetic marijuana products sold by pharmaceutical companies are Schedule II and III whereas botanical marijuana is Schedule I.[71] Because synthetic marijuana products are generally more expensive and less effective for patients than botanical marijuana, pharmaceutical companies have an interest in blocking outright legalization of botanical marijuana to prevent competition while easing restrictions on research until they can ensure their own products will outperform natural alternatives.[72] The pharmaceutical company Insys Therapeutics, for example, has pushed the DEA to both maintain strict restrictions on botanically-sourced THC and soften restrictions on synthetic CBD.[73] In 2016, Insys spent five hundred thousand dollars successfully campaigning against legalization in Arizona; in March 2017, the DEA approved the company's drug Syndros, which contains chemically created THC.[74]

When Congress legalized hemp production through the 2018 Farm Bill, CBD products flooded the market. The prospect of unregulated CBD sales in CVS and Walgreens signaled high profits for hemp farmers and sellers alike. However, the biotechnology trade organization Biotechnology Innovation Organization (BIO) complained to the FDA that the sale of unregulated CBD products may discourage its pharmaceutical companies from researching their own CBD-based drugs[75] like Epidiolex, the first CBD-based pharmaceutical to receive FDA approval just months before the Farm Bill.[76] BIO's criticism of CBD deregulation illustrates the pharmaceutical industry's hypocrisy: it wants enough deregulation of marijuana research to develop its own drugs while maintaining strict regulation of the natural marijuana market to prevent competition. As cannabis policy researcher Ryan Freer notes, "As Big Pharma lobbies against marijuana's legalization, under the DEA's guidance to ease access to the plant, they could presumably . . . simultaneously do R&D to create a viable cannabinoid [synthetic marijuana]. Marijuana would not become fully legalized until drug companies are able to successfully launch a product that can compete internationally."[77] Given the pharmaceutical sector's recent experimentation with cannabinoids in combination with their targeted opposition at botanical marijuana specifically, one may posit that the industry's shifting interests may cause the federal government to soften research and development regulations on cannabis while upholding strict restrictions on natural use.

V. Conclusion

Opposing sectoral interests regarding marijuana legalization pushed federal and state governments toward contradictory policies that failed to adapt to a changing environment. Although federal policy continues to lag behind the reality of the marijuana industry in many states, the agricultural sector's re-

68 John Hudak, *The Farm Bill, Hemp Legalization and the Status of CBD: An Explainer*, Brookings, (Dec. 14, 2018), https://www.brookings.edu/blog/fixgov/2018/12/14/the-farm-bill-hemp-and-cbd-explainer/.
69 Sarah Owermohle, *CBD Needs Standards, Fast, Say Industry and Retailers*, Politico (July 19, 2019), https://politi.co/2JEJ93O.
70 *See generally* Robbie Feinberg, *Special Interests Heavily Involved in Farm Bill Maneuvering*, OpenSecrets News (Jan. 30, 2014), https://www.opensecrets.org/news/2014/01/special-interests-heavily-involved/ (discussing lobbying from the agribusiness sector and noting that the 2013 Farm Bill was the sixth-most heavily lobbied measure on Capitol Hill that year); Alphabetical List of Industries, The Center for Responsive Politics, https://www.opensecrets.org/federal-lobbying/alphabetical-list?type=s, (last visited Aug. 9, 2020) (demonstrating that the agribusiness and farming sectors collectively spent over $163.62 million on overall lobbying in 2019).
71 Katharine Pickle, *Big Pharma Takes On Marijuana Legalization: The Synthetic Marijuana vs. Botanical Marijuana Paradox*, 5 Emory Corp. Governance and Accountability Rev. 127 (2018), http://law.emory.edu/ecgar/perspectives/volume-5/perspectives/big-pharma-marijuana-legalization-paradox.html.
72 *Id.*
73 Christopher Ingraham, *A Pharma Company That Spent $500,000 Trying to Keep Pot Illegal Just Got DEA Approval for Synthetic Marijuana*, The Washington Post (Mar. 24, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/03/24/a-pharma-company-that-spent-500000-trying-to-keep-pot-illegal-just-got-dea-approval-for-synthetic-marijuana/.
74 Pickle, *supra* note 71.
75 Owermohle, *supra* note 69.
76 Office of the Commissioner, *FDA Approves First Drug Comprised of an Active Ingredient Derived from Marijuana to Treat Rare, Severe Forms of Epilepsy*, Food and Drug Administration (June 25, 2018), http://www.fda.gov/news-events/press-announcements/fda-approves-first-drug-comprised-active-ingredient-derived-marijuana-treat-rare-severe-forms.
77 Ryan Freer, Beyond the Legalization of Marijuana: Economics of Marijuana as a Drug and Herbal Supplement 4 (2017), https://digitalcommons.du.edu/etd/1274.

cent stake in lobbying the issue has shifted federal policy in the cannabis industry's favor. Likewise, the pharmaceutical sector's evolving approach to legalization will again alter the policy landscape, likely in terms of research restrictions. Big Pharma was previously one of the most powerful opponents of legalization efforts. If Big Pharma indeed shifts from complete opposition to targeted opposition against botanical marijuana, then the legalization landscape will surely evolve again.

Figure 2 offers an updated stakeholder analysis that summarizes this paper's predictions. The future pharmaceutical industry is now categorized as conditionally opposed to legalization because it will oppose outright legalization but will ease its opposition to certain reforms that could benefit it. Post-2018 agriculture is categorized as high involvement because the sector is traditionally an active lobbying player[78] on issues that affect it, so I expect continued involvement in the legalization debate now that hemp is legal.

Figure 2: Potential Changes to Stakeholder Balance

	Low Involvement	Medium Involvement	High Involvement
Strong support for legalization			Cannabis Industry
Moderate/conditional support for legalization		Financial Services Big Tobacco	Agriculture (post-2018)
Neutral/Inconsistent	Alcohol U.S. Chamber of Commerce Agriculture (pre-2018)		
Moderate/conditional opposition to legalization			Big Pharma (in the future)
Strong opposition to legalization	Law Enforcement	Private Prisons	Big Pharma (traditionally)

Despite the need for policy reform to address state and federal inconsistencies, Americans should be wary of the means by which federal deregulation occurs and consider who these policies will benefit. Americans cannot trust any sector to prioritize public interest over profit. Many racial justice organizations have advocated legalization and decriminalization for years to attain justice for Black Americans who are disproportionately arrested for marijuana offenses.[79] Even though both races use marijuana at a similar rate, Black Americans are almost four times as likely to be arrested for it than White Americans.[80] Activists also emphasize the injustice of legalizing marijuana without expunging nonviolent marijuana offenses. While White people now dominate the legal cannabis market,[81] people of color continue to serve sentences and face lifelong barriers because of their criminal status. Activists can point to recent victories like the introduction of the MORE Act which would reschedule cannabis, invest in communities of color, and expunge cannabis violations.[82] With a majority of Americans now expressing concern about racial inequality,[83] many advocates hope to channel momentum into action.

Although these organizations currently wield influence at the federal legislative level,[84] the growing number of other powerful players may mean industry priorities will eclipse social justice concerns soon. Big Cannabis[85] and its allies could become a dangerous, powerful lobby if left unchecked. Fortunately, activist organizations will not let Big Cannabis grow without a fight. In the words of Shanita Penny, the president of the Minority Cannabis Business Association: "We can't trust that if we just push things through that at some point in the future we'll come back and do all this equity stuff. It ain't happening."[86]

78 *See generally* Robbie Feinberg, *Special Interests Heavily Involved in Farm Bill Maneuvering*, OpenSecrets News (Jan. 30, 2014), https://www.opensecrets.org/news/2014/01/special-interests-heavily-involved/; Alphabetical List of Industries, The Center for Responsive Politics, https://www.opensecrets.org/federal-lobbying/alphabetical-list?type=s, (last visited Aug. 9, 2020) (demonstrating that the agribusiness and farming sectors collectively spent over $163.62 million on overall lobbying in 2019).

79 Elizabeth Danquah-Brobby, *Prison for You: Profit for Me: Systemic Racism Effectively Bars Blacks from Participation in Newly-Legal Marijuana Industry Comments*, 46 U. Balt. L. Rev. 523, 523 (2017), https://heinonline.org/HOL/P?h=hein.journals/ublr46&i=544.

80 A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform, ACLU, https://www.aclu.org/news/criminal-law-reform/a-tale-of-two-countries-racially-targeted-arrests-in-the-era-of-marijuana-reform/ (last visited Aug. 6, 2020).

81 Chris Roberts, *Legal Cannabis Is Almost Entirely White. Here's How To Buy Weed From Black And Brown People (And Why It Matters)*, Forbes (June 29, 2020), https://www.forbes.com/sites/chrisroberts/2020/06/29/legal-cannabis-is-almost-entirely-white-heres-how-to-buy-weed-from-black-and-brown-people-and-why-it-matters/.

82 MORE Act of 2019, S. 2227, 116th Cong. (2019).

83 Kim Parker, Juliana Menasce Horowitz & Monica Anderson, *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, Pew Research Center, (June 12, 2020), https://www.pewsocialtrends.org/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/.

84 Chris Roberts, *The Weed Industry Is Burning Millions on DC Lobbyists and Getting Nowhere*, Vice (April 24, 2019), https://www.vice.com/en_us/article/pajbqy/cannabis-lobbying-in-washington-dc-isnt-working.

85 Kimber Richter & Sharon Levy, *Big Marijuana — Lessons from Big Tobacco*, 371 The New England Journal of Medicine 399 (July 31, 2014).

86 Paul Demko, *Beer and Cigarette Makers Join the Pot Lobbying Parade*, Politico (Apr. 23, 2019), https://politi.co/2vk80C0.

Paying for Racial Health Equity: The Need for Medicaid and Medicare Pay-For-Performance Models that Address Racial Disparities in Health

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Guest Contributer

The healthcare sector in the United States accounts for around twenty-four percent of government spending,[1] but the United States continues to spend more than other developed countries without obtaining better health outcomes.[2] Additionally, the U.S. healthcare system is notoriously one of the most inequitable healthcare systems in the world.[3] In spite of the progress made by the Affordable Care Act (2010) to expand access to health insurance, nearly 27.5 million people were still uninsured in 2018.[4] Overwhelming racial disparities in health insurance coverage persist: in 2018, 5.4% of the non-Hispanic White population lacked medical insurance, compared to 9.7% of Black Americans and 17.8% of individuals of Hispanic origin (of all races).[5] These disparities are once again illuminated as a result of the COVID-19 pandemic: Black and Latinx communities have disproportionately high rates of infection and deaths attributable to COVID-19.[6]

Racial inequities in disease burden, health outcomes, patterns of healthcare utilization,[7] and healthcare costs are all deeply connected to structural racism in the United States. This is largely unsurprising; disproportionate exposure to pollutants due to redlining, restricted access to medical education, and innumerable other inequitable policies and practices have widened racial *wealth* gaps and, consequently, racial *health* gaps.

Yet, in spite of the plethora of evidence proving that racial inequity has a clear negative impact on the health outcomes of millions of Americans, the U.S. healthcare system is not built to structurally incentivize health equity. Today, Medicare and Medicaid cover over 110 million adults, and a large portion of the country's people of color; Black individuals make up around thirteen percent of the country's population and thirty-four percent of Medicaid enrollees.[8] As it stands, reimbursement payments to healthcare facilities and providers from Medicare and Medicaid have started to shift toward paying for value (i.e., overall improvement in health outcomes and cost reduction) rather than volume (i.e., number of healthcare visits), but they have yet to start paying for equity of outcomes. Thus, the task of making health equitable for all is relegated to individual physicians and a few morally conscientious and financially savvy hospitals, rather than existing as a fundamental tenet of the national healthcare system.

This paper will critique current value-based hospital reimbursement policies — primarily pay-for-performance models — enacted by the National Centers for Medicare and Medicaid Services[9] (CMS), and suggest ways in which policies can be reformed to reward the elimination of racial health disparities. Part I provides an overview of racism as a social determinant of health outcomes, healthcare utilization, and healthcare costs. Next, Part II gives a brief overview of prior payment models, primarily fee-for-service models, and explains the more recent shift towards value-based payment models. Finally, Part III offers critique and suggestions on ways in which value-based payment models should more directly address institutional racism in the healthcare industry.

I. Racism as a Social Determinant of Health

Structural racism has caused inequalities in wealth, employment, and education,[10] which are all contributors to overall healthcare,[11] making race an important predictor of health status and healthcare utilization. Race has also been shown to be

1 Ryan Nunn, Jana Parsons & Jay Shambaugh, A Dozen Facts about the Economics of the U.S. Health-Care System 28 (2020).
2 *See, e.g.,* Irene Papanicolas, Liana R. Woskie & Ashish K. Jha, *Health Care Spending in the United States and Other High-Income Countries*, 319 JAMA 1024–1039 (2018). (In 2016 the U.S. spent a larger portion of its GDP on health care than 10 other high-income countries, but has higher rates of smoking, obesity, and infant mortality, and lower life expectancy compared to other countries)
3 Samuel L. Dickman, David U. Himmelstein & Steffie Woolhandler, *Inequality and the Health-Care System in the USA*, 389 The Lancet 1431–1441 (2017).
4 Edward R. Berchick, Jessica C. Barnett & Rachel D. Upton, *Health Insurance Coverage in the United States: 2018*, U.S. Census Bureau (2019) 14.
5 *Id*.
6 *See generally, Health Equity Considerations & Racial & Ethnic Minority Groups*, Ctrs for Disease Control and Prevention (2020), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html.
7 "Utilization" refers to the frequency with which individuals access healthcare, and the types of healthcare sources they use. Healthcare utilization includes the frequency of emergency department (ED) visits & readmissions, inpatient visits, primary care physician visits, and more.
8 Medicaid Coverage Rates for the Nonelderly by Race/Ethnicity, Kaiser Family Foundation (2019), https://www.kff.org/medicaid/state-indicator/rate-by-raceethnicity-3/ (last visited Jul 3, 2020).
9 *See generally*. The Centers for Medicare & Medicaid Services is part of the Department of Health and Human Services (HHS), https://www.cms.gov/About-CMS/About-CMS.
10 Thomas Shapiro, Tatjana Meschede & Sam Osoro, The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide 8 (Institu 2013).
11 *See generally*. American Public Health Association, https://www.apha.org/topics-and-issues/health-equity/racism-and-health (last visited Aug. 28, 2020).

a key determinant of health outcomes independent of other socioeconomic indicators such as wealth, employment, and education, due to racism at the doctor-patient level that leads to discriminatory practices.[12] Equalizing mortality rates between Black and White individuals would have averted 886,202 deaths of Black individuals between 1991 and 2000 alone.[13]

At the structural level, policies such as redlining,[14] discriminatory zoning, the prison-industrial complex, and the school-to-prison pipeline have caused enormous disparities in access to healthy food, secure housing, clean air, wealth, and safety.[15] For example, non-Hispanic Black individuals are three times more likely to die of asthma — a condition that is highly dependent on the lived environment — than non-Hispanic White individuals.[16] This is in no small part due to the fact that historically redlined areas have significantly higher diesel particulate emissions than other areas, due to the construction of factories and freeways in close proximity to these areas.[17] A recent study published in *The Lancet*, a leading medical journal, found that redlining continues to have a lasting effect on asthma prevalence amongst racial minorities ninety years later.[18] Furthermore, Americans (largely non-Hispanic Black Americans and Hispanic Americans of various races) who lived in redlined neighborhoods lost out on millions of dollars of intergenerational wealth due to their inability to purchase homes and have their home values appreciate over time. Consequently, generational economic insecurity has allowed poor living conditions to persist disproportionately in areas that were previously redlined. This study encapsulates the inexorable link between structures of racism in seemingly unrelated fields such as housing, and the health of BIPOC[19] individuals. Mold in poorly constructed homes, pollutant-ridden air, and insufficient access to healthcare all exacerbate conditions such as asthma. Given this context, the study's finding that asthma-related emergency department visits were 2.4 times more frequent in historically redlined areas than in "A-grade" areas is disheartening, but ultimately unsurprising.

Racism continues to pervade the medical field at an interpersonal level as well, causing explicit and implicit biases amongst healthcare providers that lead to differential treatment based on race. In fact, persistent racism in the healthcare system leads twenty-two percent of African Americans to avoid seeking health care; an even larger thirty-two percent have reported being personally discriminated against when going to a physician or health clinic,[20] a percentage which could be even larger when accounting for unreported discrimination. In addition to experiencing explicit discrimination, racial minorities are often subject to implicit physician biases, which have led to well-documented differences in the ordering of tests, diagnoses, and general treatment of patients of color. Literature has shown that physicians provide less comprehensive treatment to Black Medicare patients than to White patients, resulting in Black patients having fewer physician visits, mammograms, and immunizations for influenza, and more hospitalizations and higher mortality rates.[21] Studies analyzing racial prejudice amongst cardiologists found that misogynoir[22] doubly jeopardizes the health of Black women; Black patients are generally less likely to be referred for cardiac catheterization than White patients, and Black women were less likely to be referred for cardiac catheterization compared to Black men.[23]

The moral imperative to eliminate racial disparities is clear, but there is a clear financial incentive for healthcare reform to address racial disparities in health, too. Poor health as a result of structural barriers results in greater utilization of care, and often greater utilization of more expensive care, such as emergency room visits. An analysis by the Urban Institute estimated that disparities among Black individuals, Hispanic individuals, and non-Hispanic Whites cost the U.S. government $23.9 billion through Medicaid and Medicare spending in 2009 alone.[24] Over the ten-year period from 2009 to 2018, it would total to an estimated $337 billion. It is therefore imperative for the U.S. healthcare system to recognize racism as a root cause and key determinant of healthcare outcomes, and to ameliorate racial disparities in health through payment reform.

II. An Overview of Medicare and Medicaid Reimbursement

Medicare is the U.S. government's national health insurance program for individuals above the age of sixty-five and for individuals under the age of sixty-five who have disabilities.[25]

12 David R. Williams & Toni D. Rucker, *Understanding and Addressing Racial Disparities in Health Care*, 21 Health Care Fin. Rev. 75–90 (2000).
13 Steven H. Woolf et al., *The Health Impact of Resolving Racial Disparities: An Analysis of U.S. Mortality Data*, 94 Am. J. Public Health 2078–2081 (2004).
14 *See, e.g.,* Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America. (Discusses redlining as a discriminatory home loan lending policy enacted in the 1930's. Although it is now illegal, it continues to have ramifications for neighborhood-level segregation).
15 Ichiro Kawachi, Norman Daniels & Dean E. Robinson, *Health Disparities by Race and Class: Why Both Matter*, 24 Health Affairs 343–352 (2005).
16 *Most Recent National Asthma Data*, Ctrs. for Disease Control & Prevention (2020), https://www.cdc.gov/asthma/most_recent_national_asthma_data.htm (last visited Jun 24, 2020).
17 Juliana Maantay, *Zoning, Equity, and Public Health*, 91 Am. J. Pub. Health 9 (2001).
18 Anthony Nardone et al., *Associations between historical residential redlining and current age-adjusted rates of emergency department visits due to asthma across eight cities in California: an ecological study*, 4 Lancet Planetary Health e24–e31 (2020).
19 BIPOC refers to "Black, Indigenous, and People of Color." See Sandra E. Garcia, *Where Did BIPOC Come From?*, The New York Times, June 17, 2020, https://www.nytimes.com/article/what-is-bipoc.html
20 Ruqaiijah Yearby, *Racial Disparities in Health Status and Access to Healthcare: The Continuation of Inequality in the United States Due to Structural Racism*, 77 Am. J. Econ. & Soc. 1113–1152 (2018).
21 Marian E. Gornick et al., *Effects of Race and Income on Mortality and Use of Services among Medicare Beneficiaries*, 335 New Eng. J. Med. 791–799 (1996).
22 "Misogynoir" is a term coined by Ms. Moya Bailey that encapsulates the anti-Black racist misogyny that Black women experience. *See* Moya Bailey, *Misogynoir in Medical Media: On Caster Semenya and R. Kelly*, 2 Catalyst: Feminism, Theory, Technoscience 1–31 (2016).
23 K. A. Schulman et al., *The effect of race and sex on physicians' recommendations for cardiac catheterization*, 340 N. Engl. J. Med. 618–626 (1999).
24 Timothy Waidmann, Estimating the Cost of Racial and Ethnic Health Disparities, Urban Institute (2009).
25 *What's Medicare?* Medicare.Gov, https://www.medicare.gov/what-medicare-covers/your-medicare-coverage-choices/whats-medicare (last visited Jun 25, 2020).

Medicare is managed at the federal level, meaning that nationally, anyone who is enrolled is entitled to the same benefits. It has changed significantly since its establishment in 1965 and now has four "Parts": Part A covers hospital care, Part B covers outpatient and preventative care, and Part D covers prescription drugs. Part C, also known as "Medicare Advantage," is a bundled plan that includes Part A, Part B, and usually Part D. As of June 2020, Medicare covers approximately 62.5 million people.[26]

Medicaid is the national health insurance plan for low-income individuals, and covered around sixty-seven million people as of May 2020.[27] In contrast to Medicare, it is jointly funded by state and federal governments and is administered through the state government in accordance with federal requirements. For example, federal law mandates that all state Medicaid programs must cover certain groups of individuals, including low-income families, qualified pregnant women and children, and individuals receiving Supplemental Security Income, but states may go beyond these federal guidelines to cover other groups.[28] The Affordable Care Act expanded Medicaid eligibility to adults with incomes up to 133% of the federal poverty level. Originally a requirement in order for states to receive federal Medicaid funding, this eligibility expansion was made optional through the Supreme Court's ruling in *National Federation of Independent Business v. Sebelius*, which deemed the expansion requirement unconstitutionally coercive.[29] Chief Justice John Roberts, joined by Justice Breyer and Justice Kagan, argued that "Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system."[30] To date, thirty-seven states and the District of Columbia have adopted the Medicaid expansion, while thirteen states have not.[31] As a result, Medicaid eligibility, coverage, and reimbursement rates for hospitals vary drastically across state lines.

Traditionally, both Medicare and Medicaid operated primarily on fee-for-service (FFS) payment models.[32] Under these models, doctors and other health care providers are paid for each service performed, such as tests and office visits.[33] Therefore, providers are paid for seeing patients and ordering tests regardless of the patient's final outcome, and few incentives exist to provide preventative care that would decrease the need to visit a healthcare provider in the future. This model of payment drives unnecessary healthcare utilization and consequently increases healthcare costs that are borne by private and public payers[34] as quantity of care is incentivized over quality of care.

Starting in around 2010, health care reform measures started a push toward "value-based" or "alternative" payment approaches. In these models, healthcare providers are incentivized to improve clinical outcomes while reducing costs. There is a range of value-based payment models and new models are constantly being developed, but the most common include pay-for-performance models, bundled/episode-of-care models, accountable care organization (ACO) models, patient-centered medical homes models, and capitation models.[35] A significant portion of value-based programming is typically concerned with organizational aspects of healthcare — for example, ACOs are established partnerships between doctors, hospitals, and other health care providers that collectively aim to provide more coordinated care for Medicare patients and to ultimately decrease healthcare expenditures.[36] On the other hand, pay-for-performance (P4P) programs, which are the focus of this paper, are less concerned with the organizational structure of healthcare, and are more directed toward improving provider-level patient interactions. Under P4P programs, providers are offered bonuses for exceeding certain quality benchmarks and are penalized for failing to meet certain thresholds.

The Centers for Medicare and Medicaid Services defines P4P as "the use of payment methods and other incentives to encourage quality improvement and patient-focused high-value care."[37] Pay-for-performance encompasses a number of programs that reward hospitals and physicians for improvements in clinical outcomes, cost savings, and patient satisfaction. In contrast to other value-based programs, P4P programs are uniquely able to incentivize changes in healthcare at the micro-level, directly incentivizing healthcare practitioners and hospitals to provide better and more effective patient care. Consequently, P4P programs are especially well-positioned to enact racial health equity-related reform at the provider level.

One such program is the Hospital Readmissions Reduction Program, which authorizes Medicare to reduce payments to acute care hospitals with excess readmissions for high-cost conditions such as heart attacks, heart failure, pneumonia, and chronic obstructive pulmonary disease (COPD).[38] CMS has

26 *Id*.
27 *Medicaid*, Medicaid.gov, https://www.medicaid.gov/medicaid/index.html (last visited Jun 25, 2020).
28 *Eligibility*, Medicaid.gov, https://www.medicaid.gov/medicaid/eligibility/index.html (last visited Jul 26, 2020).
29 *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 2602, 183 L. Ed. 2d 450 (2012)
30 *Id*. 577-578.
31 *Status of State Medicaid Expansion Decisions: Interactive Map*, Kaiser Family Foundation (2020), https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/ (last visited Jun 25, 2020).
32 Edward Berkowitz, *Medicare and Medicaid: The Past as Prologue*, 27 Health Care Fin. Rev. 11–23 (2005).
33 *Fee for Service -HealthCare.gov Glossary*, HealthCare.gov , https://www.healthcare.gov/glossary/fee-for-service/ (last visited Jun 25, 2020).
34 "Payers" is another term used to describe insurance companies/entities. Payers include private insurers as well as Medicaid and Medicare.
35 *See, e.g.,* Anne M. Locker & Chelsea A. Walcker, *INSIGHT: The Healthcare Industry's Shift from Fee-for-Service to Value-Based Reimbursement*, Bloomberg Law, https://news.bloomberglaw.com/health-law-and-business/insight-the-healthcare-industrys-shift-from-fee-for-service-to-value-based-reimbursement (last visited Jun 26, 2020).
36 *Accountable Care Organizations (ACOs)*, Ctrs. for Medicaid and Medicare Services https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ACO (last visited Jul 26, 2020).
37 Center for Medicaid and State Operations, *State Health Official Letter #06-003* (2006), https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SHO040606.pdf (last visited July 27, 2020).
38 *Linking quality to payment*, Medicare.gov, https://www.medicare.gov/hospitalcompare/linking-quality-to-payment.html (last visited Jun 27, 2020).

also recently implemented star ratings for Medicare Advantage plans to allow beneficiaries to compare plans to choose from with greater ease.[39] The ratings are based on a host of clinical outcomes and customer service measures.[40] Four- and five-star plans receive bonus payments from Medicare, and five-star plans can also enroll new members throughout the year, not only during open enrollment or special enrollment periods, giving these plans an advantage in increasing their enrollment. The Kaiser Family Foundation reports that since the start of bonus payments in 2012, the percent of MA plans receiving four or more stars has doubled, from twenty percent in 2012 to forty percent in 2016,[41] indicating that financial incentives are indeed an effective way of improving the quality of care.

It is crucial to note that no comparable star rating plan exists for Medicaid. While seniors and disabled adults have experienced improvements in the quality of their healthcare options because of the incentives provided by star ratings, low-income individuals and predominantly people of color do not experience the same benefits at a national level. Instead, state Medicaid agencies nationwide have implemented other P4P models to various degrees. New York State's P4P program, "The Quality Incentive," was established in 2002 and provides monetary bonuses and other incentives to health plans contracting with Medicaid based on patient satisfaction levels and clinical measures. These include breast cancer screening, postpartum visits, diabetes and high blood pressure control, use of appropriate medication for persons with asthma, and follow-up after hospitalization for mental illness.[42] Initial evaluations of the program show that it has led to an increase in the quality of care; for example, the percent of women who had appropriate postpartum care increased from forty-nine percent before the program was established to sixty-eight percent afterward.[43]

III. The Road to Equity-Minded Reform

While Medicaid and Medicare P4P programs are generally linked to clinical outcomes (e.g., successful control of high blood pressure), utilization outcomes (e.g., decrease in readmission rates), and patient satisfaction outcomes, none are tied to equity measures. Therefore, while healthcare providers and health plans may be improving their aggregate numbers for quality of care because they are rewarded financially for doing so, there is little incentive for them to meticulously track and address racial disparities in the same way. Consequently, while overall population health has been improving, minority groups are not experiencing the same rate of improvement, and alarming disparities persist.[44]

The CMS Office of Minority Health started reporting racial, ethnic, and gender disparities in health outcomes for MA plans in 2014, but these findings are not tied to payment. The most recent report revealed that "(1) Black and Hispanic beneficiaries received worse clinical care than White beneficiaries on a large portion of the clinical care measures examined and (2) AI/AN [American Indian or Alaskan Native] and API [Asian or Pacific Islander] beneficiaries reported worse patient experiences than White beneficiaries on a majority of the measures of patient experience."[45] It also suggested that quality improvement measures should be focused on "enhancing clinical care for Black and Hispanic beneficiaries and investigating differences between the experiences of AI/AN and API beneficiaries as compared with those of White beneficiaries."[46]

Some hospitals and health plans have noticed[47] that major improvements in quality scores can be derived from providing better structural support to individuals in marginalized communities because they tend to account for a significant portion of "high-need, high-cost" patients.[48] These patients usually have complex medical conditions such as multiple chronic illnesses, and communities of color bear a disproportionate disease burden of chronic illness due to structural issues like food insecurity and housing insecurity.[49] A few financially prudent hospitals have turned to supporting patients' nonmedical needs through partnerships with local food banks, supportive housing organizations, and even ridesharing companies because they have recognized the immense cost savings and quality improvements that can come with addressing the social determinants of health.[50]

39 Synonymous with Medicare Part C. MA plans allow individuals to choose private health plans which contract with Medicare in order to receive health insurance.

40 *How to compare plans using the Medicare Star Rating System*, Medicare Interactive, https://www.medicareinteractive.org/get-answers/medicare-health-coverage-options/changing-medicare-coverage/how-to-compare-plans-using-the-medicare-star-rating-system (last visited Jun 27, 2020).

41 Gretchen Jacobson et al., Medicare Advantage 2016 Data Spotlight: Overview of Plan Changes, Kaiser Family Foundation 20 (2016).

42 2017 Quality Incentive for Medicaid Managed Care Plans, NY State Dept. of Health 13 https://www.health.ny.gov/health_care/managed_care/reports/docs/quality_incentive/quality_incentive_2017.

43 *Medicaid Pay-for-Performance: Ongoing Challenges, New Opportunities*, Commonwealth Fund, https://www.commonwealthfund.org/publications/newsletter-article/medicaid-pay-performance-ongoing-challenges-new-opportunities (last visited Jun 27, 2020).

44 Frederick J. Zimmerman & Nathaniel W. Anderson, T*rends in Health Equity in the United States by Race/Ethnicity, Sex, and Income*, 1993-2017, 2 JAMA Network Open e196386–e196386 (2019).

45 CMS Office of Minority Health, *Racial, Ethnic, and Gender Disparities in Health Care in Medicare Advantage* (2020), https://www.cms.gov/files/document/2020-national-level-results-race-ethnicity-and-gender-pdf.pdf (last visited Jun 25, 2020), viii.

46 *Id*.

47 Josh Lee & Casey Korba, Social Determinants of Health: How are Hospital and Health Systems Investing in and Addressing Social Needs?, Deloitte (2017), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/life-sciences-health-care/us-lshc-addressing-social-determinants-of-health.pdf (last visited Jul 24, 2020).

48 "High-Need, High-Cost" refers to the five percent of patients who account for nearly fifty percent of health expenditures.

49 Kenneth E. Thorpe et al., *The United States Can Reduce Socioeconomic Disparities by Focusing On Chronic Diseases*, Health Affairs (2017), https://www.healthaffairs.org/do/10.1377/hblog20170817.061561/full/ (last visited Jun 27, 2020).

50 Mekdes Tsega, Tanya Shah & Corinne Lewis, *The Importance of Sustainable Partnerships for Meeting the Needs of Complex Patients: Introducing the Return-on-Investment Calculator*, The Commonwealth Fund (2019), https://www.commonwealthfund.org/blog/2019/importance-sustainable-partnerships-meeting-needs-complex-patients-introducing-return (last visited Jun 27, 2020).

Still, while some hospitals have actively sought to provide sup port for social determinants, few have actually tackled structural racism directly, largely because they lack the motivation and the direct financial imperative to do so. This paper offers four preliminary policy recommendations that would offer financial incentives for hospitals and health plans to 1) report race-stratified health data and reduce racial gaps in clinical outcomes; 2) invest in a more diverse workforce; 3) invest in local minority-owned businesses for hospital goods and services; and 4) provide training for employees on the history and health effects of structural and interpersonal racism.

As a first step, CMS should incentivize race-stratified reporting of health-related data, and should reward hospitals that show marked improvements in closing racial health disparities. In order for hospitals to know whether or not they are improving patient care for marginalized racial groups, they must first develop the infrastructure to track clinical outcomes that are disaggregated by race. Yet, tracking and reporting stratified data alone would do little to change the status quo unless financial rewards and penalties exist to reward hospitals that have markedly reduced racial disparities in clinical outcomes. Therefore, CMS must also start to incorporate financial penalties for hospitals where racial health disparities have failed to improve.

Next, CMS should start to include quality measures for hospital diversity in their pay-for-performance reimbursement models. Studies show that Black patients are more likely to trust Black physicians; in fact, one study found that meeting patient demand for Black doctors could lead to a 19% reduction in the cardiovascular mortality gap and an 8% reduction in the life expectancy gap between Black and White males.[51] In 2018, Black doctors made up only 5% of the physician workforce and Hispanic doctors only 5.8% of the physician workforce.[52] Furthermore, in spite of gains in diversity generally, the growth of Black and Latinx medical school applicants, matriculants, and graduates is still lagging behind other groups.[53] Hospital and health care systems are often the largest employers in the communities which they serve, but the health care workforce is still predominantly White. Incentivizing a more diverse, community-led workforce through reward and penalty-based payment reform would not only improve health outcomes for patients of color, but would also "extend the employer-based insurance pool, raise the median wage, support the local tax base, and counter the gentrification and residential segregation that often surrounds major medical centers."[54]

Third, CMS should also incentivize non-medical hospital spending on goods in services that are generated by minority-owned and/or locally-staffed businesses. Nationally, health systems spend more than $340 billion every year on goods and services, but less than two percent of those dollars go to minority or women-owned businesses.[55] Divesting from food and laundry vendors that are involved in the prison-industrial complex (like Sodexo, which generates thirty-three percent of its global revenue from hospitals[56]) and investing in local and minority-owned businesses would have a multiplier effect that revitalizes historically disinvested communities and ultimately leads to better health outcomes.

Lastly, CMS must recognize and reward hospitals and health plans that actively engage their workforce in anti-racist education. Teaching healthcare workers about the health effects of racism at structural and interpersonal levels will urge practitioners to recognize their own biases, introduce them to evidence-based frameworks of inclusivity and equity such as narrative humility[57] and structural competence,[58] and ultimately improve patient outcomes. Medical schools across the nation have started to incorporate bias trainings into their curriculum[59] in line with the Association for American Medical Colleges' (AAMC) "Tools for Assessing Cultural Competence Training,"[60] but those who have already graduated medical school are not held to any such standard. California is an exception; the recent passage of SB 464, the California Dignity in Pregnancy and Childbirth Act, requires hospitals and birth facilities to implement evidence-based implicit bias programs for all perinatal healthcare providers in an effort to reduce the

51 Grant Graziani, Marcella Alsan & Owen Garrick, *Does Diversity Matter for Health? Experimental Evidence from Oakland* (2019), https://academyhealth.confex.com/academyhealth/2019nhpc/meetingapp.cgi/Paper/29586 (last visited Jun 27, 2020).

52 *Figure 18. Percentage of all active physicians by race/ethnicity 2018*, American Academy of Medical Colleges (2018), https://www.aamc.org/data-reports/workforce/interactive-data/figure-18-percentage-all-active-physicians-race/ethnicity-2018 (last visited Jun 27, 2020).

53 *Diversity in Medicine: Facts and Figures 2019*, Am. Acad. Med. C. (2019), https://www.aamc.org/data-reports/workforce/report/diversity-medicine-facts-and-figures-2019 (last visited Jun 27, 2020).

54 Rachel R. Hardeman, Eduardo M. Medina & Rhea W. Boyd, *Stolen Breaths*, New Eng. J. Med. (2020), https://doi.org/10.1056/NEJMp2021072 (last visited Jun 27, 2020).

55 *Toolkit for Transformation*, The Democracy Collaborative, https://democracycollaborative.org/learn/blogpost/toolkit-transformation (last visited Jun 27, 2020).

56 *Sodexo: revenue worldwide 2019*, Statistica, https://www.statista.com/statistics/223839/sodexo-worldwide-revenue/ (last visited Jun 27, 2020).

57 "Narrative humility" refers to the physicians' understanding that they will never fully understand the patient's lived experience. Rather than making assumptions about their patients, physicians are encouraged to "approach and engage with [patients' stories] while simultaneously remaining open to their ambiguity and contradiction, and engaging in constant self-evaluation and self-critique about issues such as our own role in the story, our expectations of the story, our responsibilities to the story, and our identifications with the story." *See* Sayantani DasGupta, *Whose Story is it? Narrative Humility in Medicine and Literature*, FORUM: University of Edinburgh Postgraduate Journal of Culture & the Arts (2018), http://www.forumjournal.org/article/view/2904 (last visited Jun 28, 2020).

58 "Structural competence" moves the focus away from "mastering cultures" and instead encourages health care practitioners to understand the larger structural forces that shape individuals' health. See Jonathan M. Metzl & Helena Hansen, *Structural Competency: Theorizing a New Medical Engagement with Stigma and Inequality*, 103 Soc. Sci. Med. 126–133 (2014).

59 Swapna Reddy et al., *Implicit Bias Curricula In Medical School: Student And Faculty Perspectives*, Health Affairs (2020), https://www.healthaffairs.org/do/10.1377/hblog20200110.360375/full/ (last visited Jun 28, 2020).

60 This tool is a comprehensive survey that allows medical schools to assess how comprehensive their cultural competence education curriculums are, and to identify strengths and weaknesses. *See Tool for Assessing Cultural Competence Training (TACCT)*, Am. Assn. Med. C., https://www.aamc.org/what-we-do/mission-areas/diversity-inclusion/tool-for-assessing-cultural-competence-training (last visited Jul 24, 2020).

astounding racial disparities in maternal mortality.[61] California is the first of its kind to mandate such a training, so data is not yet available at the state-level to know the impact of anti-racist training on health outcomes for marginalized racial groups. However, a study conducted by the Greensboro Health Disparities Collaborative found that offering all staff members at the two cancer centers an interactive anti-racism training by the Racial Equity Institute actually eliminated disparities in cancer treatment completion between Black and White patients.[62] Hospital staff better understood the systemic barriers that Black patients experience in healthcare, and nurse navigators were able to better communicate with Black patients, discuss medical mistrust, and support them to reach their treatment milestones. The link between anti-racist education for healthcare providers and the positive health outcomes for marginalized racial groups is becoming increasingly clear. To continue to incentivize these trainings, CMS should provide bonus payments for hospitals that regularly provide anti-racist training in order to improve the national standard of provider knowledge on health equity.

Procedurally, it is far more likely that these reforms will occur at the state level through Medicaid programs before they occur at the national level for Medicare. State Medicaid programs have the authority to amend their Medicaid financing schemes through a variety of programs. These include through Delivery System Reform Incentive Programs (DSRIP),[63] which fall under the larger umbrella of Section 1115 Waiver programs,[64] as well as through the Medicaid Innovation Accelerator Program and the State Innovation Models initiatives that are offered by CMS.[65] While the framework is in place, states wishing to implement racial equity payment reforms may experience difficulties in assessing the effectiveness of these programs. For example, in 2006 the Massachusetts Medicaid program launched an experimental program to create financial incentives to reduce racial disparities, but faced roadblocks and eventually halted the program for a number of reasons.[66] Legislators found that patients of color often sought care at only a few hospitals, so most hospitals were treating a rather racially homogenous patient population with few racial disparities to begin with. Additionally, measurement and statistical challenges to calculate and score "disparity" posed additional barriers. Still, the landscape of Medicaid and Medicare payment reform has changed drastically since 2006, with improved quality metrics, improved data to more accurately target at-risk populations, improved statistical measures of disparity, and an overall greater nationwide imperative to make healthcare more affordable and equitable, especially following the passage of the ACA.[67]

IV. Conclusion

Decades of evidence have proven that racism, both structural and interpersonal, plays a significant role in predetermining the health outcomes of minority groups. Medicaid and Medicare, which collectively provide health insurance for around thirty-five percent of the U.S. population,[68] have significant influence over the practices of healthcare providers. While both have started to shift to value-based payment structures that prioritize improvement in clinical outcomes over quantity of medical services provided, neither have pursued payment reform that underscores equity. Therefore, while hospitals are rewarded for improving aggregate clinical outcomes for the patients they serve, patients of color are still disproportionately experiencing poor health.

Current pay-for-performance metrics must therefore be expanded at state and federal levels to include metrics that track hospitals and health plans' efforts to eliminate racial inequity. This paper provides four initial suggestions, namely the establishment of rewards for 1) reporting race-stratified clinical outcomes, 2) diversifying the healthcare provider workforce, 3) divesting from the prison-industrial complex and investing in local, minority-owned businesses, and 4) providing regular provider training on racism and racial bias. The U.S. healthcare system as it currently stands is driven by profit. Even under universal healthcare, which would vastly improve access to care, racial inequities will continue to exist because of racism that has permeated every level of society and medical care. While the ethical necessity to eliminate racial bias should ideally suffice to spur systemic change, the unfortunate reality is that sustainable structural change in the healthcare industry is often driven by financial incentive above all else. In response, CMS must act on the fact that structural issues require structural solutions by integrating racial equity measures into payment models. The goal is to not only improve the health of the population as a whole, but to also intentionally ameliorate the health of marginalized racial groups that have been left behind for centuries.

61 Bill Text - SB-464 California Dignity in Pregnancy and Childbirth Act., http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB464 (last visited Jul 29, 2020).

62 Martha Hostetter & Sarah Klein, *In Focus: Reducing Racial Disparities in Health Care by Confronting Racism*, Commonwealth Fund (2018), https://www.commonwealthfund.org/publications/newsletter-article/2018/sep/focus-reducing-racial-disparities-health-care-confronting (last visited Jul 5, 2020).

63 Alex et al., *An Overview of Delivery System Reform Incentive Payment (DSRIP) Waivers*, KFF (2014), https://www.kff.org/medicaid/issue-brief/an-overview-of-delivery-system-reform-incentive-payment-waivers/ (last visited Jul 29, 2020).

64 Section 1115 Waiver Programs allow states to implement Medicaid programs that differ from or go beyond federal Medicaid statutes. These waivers have been used for states to pay for a variety of experimental programs, including Medicaid coverage for substance use treatment, as well as for modifying Medicaid eligibility (through work requirements, for example). *See* Elizabeth Hinton et al., *Section 1115 Medicaid Demonstration Waivers: The Current Landscape of Approved and Pending Waivers*, KFF 111 (2019), https://www.kff.org/medicaid/issue-brief/section-1115-medicaid-demonstration-waivers-the-current-landscape-of-approved-and-pending-waivers/ (last visited Jul 29, 2020).

65 Alex et al., *supra* note 63.

66 Jan Blustein et al., *Analysis Raises Questions on Whether Pay-For-Performance In Medicaid Can Efficiently Reduce Racial And Ethnic Disparities*, 30 Health Affairs 1165–1175 (2011).

67 *See, e.g.,* Gerard Anderson et al., *Medicare Payment Reform: Aligning Incentives for Better Care*, Commonwealth Fund (2015) https://www.commonwealthfund.org/publications/issue-briefs/2015/jun/medicare-payment-reform-aligning-incentives-better-care

68 Berchick, Barnett & Upton, *supra* note 4.

The Power, Immunity, and Impunity of the American Police

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The summer of 2020 saw the largest demonstrations in American history as tens of millions of people protested police brutality[1] in more than two thousand cities nationwide.[2] Around the world, protesters braved a global pandemic[3] and one of the hottest summers on record[4] to mourn George Floyd, Breonna Taylor, and hundreds of others killed by police officers,[5] and to express outrage at an American system that enables police officers to kill without cause,[6] to use cruel and excessive force,[7] and to use misconduct and violence with impunity in their department[8] and immunity in court.[9] Death and brutality at the hands of police officers have spurred grief, anger, and urgent advocacy to scrutinize and reform law enforcement in the United States.

In this paper, I argue that targeted patrolling, qualified immunity, indemnification, and internal regulations all fail to meet the mandate of police to provide effective government functions that serve public interests. Part I traces the history of American police forces and analyzes their motivations, practices, and independence from the expectations set for them by the federal government. Part II explores the Civil Rights Act of 1871 and its provisions that aim to ensure officers are liable for depriving constitutional rights, and also discusses how the doctrine of qualified immunity allows officers to evade this liability. Part III evaluates the role of the Fraternal Order of Police (FOP) in maintaining internal regulations and investigations of officer misconduct within police departments, as well as the role of department administrations in indemnifying officers, finding that these processes lack transparency, accountability, and community oversight. Part IV concludes with policy recommendations of emerging models of law enforcement.

I. Early American Police Power

A. Police Power in Action

In the American South, policing first manifested in the early 1700s as slave patrols made up of White volunteers to suppress insurrections and track runaways.[10] These patrols were present in every slave state by the end of Washington's presidency,[11] even after the Fourth Amendment was ratified in response to British soldiers' unwarranted searches and seizures.[12] White Southerners were encouraged (sometimes by law[13]) to participate in the chasing, beating, and killing of runaway slaves. The militia-like patrols also attacked, enslaved, and stole land from indigenous peoples during this time.[14] Meanwhile, from the early 1600s through the 1800s, larger northeastern cities employed either private for-profit police or watchmen, forming an informal and largely ineffective warning system of volunteers who were often evading military service, serving a sentence as punishment for a crime, or drunk on the job.[15] For vulnerable citizens, police did not serve to relieve fears of crime. Rather,

1 Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. Times, July 3, 2020. (estimating between 15 million and 26 million protesters)

2 Audra D. Burch et. al., *How Black Lives Matter Reached Every Corner of America*, N.Y. Times (June 13, 2020), https://www.nytimes.com/interactive/2020/06/13/us/george-floyd-protests-cities-photos.html.

3 *See, e.g.,* COVIDView Summary ending on June 27, 2020, Centers for Disease Control and Prevention (last visited July 2, 2020).

4 June 2020 tied as Earth's 3rd hottest on record, Nat'l Oceanic and Atmospheric Admin. (last visited July 13, 2020).

5 *See generally, Fatal Force: 2019 police shootings database*, Wash Post (last updated Aug. 10, 2020), https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/; *The Counted*, The Guardian, https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database.

6 *See generally Prosecutors say officer had knee on George Floyd's neck for 7:46 rather than 8:46*, L.A. Times (June 18, 2020), https://www.latimes.com/world-nation/story/2020-06-18/derek-chauvin-had-knee-george-floyd-neck-746-rather-than-846; *George Floyd: What happened in the final moments of his life*, BBC News, (May 30, 2020), https://www.bbc.com/news/world-us-canada-52861726#:~:text=George%20Floyd%20dies%20after%20being,pronounced%20dead%20later%20in%20hospital. (George Floyd was arrested for allegedly trying to use a counterfeit bill, then killed by Derek Chauvin, who knelt on his neck for almost eight minutes, as three other officers looked on while Floyd pleaded for air.)

7 *Id.*

8 *See generally* Catherine Kim, *What we know about the officers involved in George Floyd's death*, Vox (May 31, 2020), https://www.vox.com/2020/5/31/21276049/derek-chauvin-tou-thao-kueng-lane-officers-george-floyd-what-we-know. (Derek Chauvin had seventeen complaints filed against him with the Minneapolis Police Department. Only one was "closed with discipline." Chauvin had also been involved in three police shootings. Six complaints had been filed against Tou Thao, another officer who was involved, and none resulted disciplinary action. In 2014, a man claimed Thao handcuffed him without cause, threw him to the ground, and punched, kicked, and kneed him; the man's teeth were broken, and he was hospitalized.)

9 *See e.g.* Jay Schweikert, *Police immunity highlighted by George Floyd protesters must end, and officers must pay*, NBC (June 15, 2020), https://www.nbcnews.com/think/opinion/police-immunity-highlighted-george-floyd-protesters-must-end-officers-must-ncna1225281.

10 K. B. Turner et al. *Ignoring the Past: Coverage of Slavery and Slave Patrols in Criminal Justice Texts*, J. Crim. Just. Educ.. 17:1, 181-195 (2006).

11 Michael Robinson, *Black Bodies on the Ground: Policing Disparities in the African American Community—An Analysis of Newsprint From January 1, 2015, Through December 31, 2015*, J. Black Stud. 48, 551-571 (Apr. 7, 207).

12 *Supra* note 10.

13 *E.g.,* "A 1705 act in Virginia made it legal "for any person or persons whatsoever, to kill or destroy such slaves (i.e. runaways) . . . without accusation or impeachment of any crime for the same." Sage Publications, The History of the Police (quoting Foner, 1975: 195).

14 *See* Gary Potter, *History of Policing in the United States,* EKU School Just. Stud. (accessed Aug. 25, 2020).

15 *Id.*

they often acted as a force to carry out discriminatory laws, such as curfews against Black and Indigenous people.[16]

By the 1880s, all major U.S. cities had adopted centralized police forces, usually publicly funded, accountable to local governments and consisting of full-time employees following fixed rules and procedures.[17] Their authorized uses of force, surveillance, and observation marked a shift away from reactive community policing in favor of preventive patrolling that normalized police in daily life.[18] This preventative policing was often brutal, corrupt, discriminatory, and, at first, strongly-resisted and considered anti-American.[19]

Criminal justice historian Gary Potter finds that early police officers had few qualifications and little training, and they often took bribes to allow theft, drinking, gambling, and prostitution. Many officers were active participants or leaders in these activities, and some were directed by local politicians to buy votes and violently intimidate opposition.[20] During the nineteenth century, Texas Rangers — mostly hired vigilantes and guerillas — attacked Comanche and Mexican communities.[21] All-White policemen in Pennsylvania suppressed coal field strikes and attacked community events of predominantly Catholic, Irish, German, and Eastern European immigrant towns.[22] In cities from Chicago to New York, policemen made targeted "public order" arrests, created special alarms to protect company leaders, and violently broke up thousands of labor strikes.[23] In the era of political machines, party leaders bribed police officers for physical protection, a blind eye to illegal activities, and campaigns in homeless shelters and health centers.[24] During Prohibition, organized crime leaders who had become wealthy from the illicit alcohol trade hired police officers to suppress their competitors.[25] Law enforcement's crime-fighting image was invented by policymakers after World War II, when American police abuses, reminiscent of the totalitarian regimes defeated in the war, spurred public fear and opposition.[26] This branding was politically successful, and in 1967 the President's Commission on Law Enforcement and Administration of Justice asserted that police tactics, including patrolling targeted communities, were not merely the tools of urban government bodies but rather fixed parts of the American criminal justice system.[27] However, this notion was not readily accepted by the public, especially youth and people of color.[28] According to many scholars, policing originated not to fight crime but to suppress so-called "dangerous classes,"[29] a term coined[30] in 1872 by a man who argued that Catholic and German immigrants, Jews, prostitutes, and the homeless comprised a "stupid, foreign criminal class" and the "scum and refuse of ill-formed civilization."[31] This idea has embedded itself in police tactics, which continue to target the modern "dangerous classes" of women, youth, drug users, and people of color.[32]

Today, the majority of police officers' routines and resources are unrelated to interacting with criminals[33] or enforcing spe-

16 *See* Richard Archer, Jim Crow North: The Struggle for Equal Rights in Antebellum New England (2017); George Williams, History of the Negro Race in America from 1619 to 1880 (2016); Wendy Warren, New England Bound: Slavery and Colonization in Early America (2016).

17 Gary Potter, *History of Policing in the United States*, EKU School Just. Stud. (accessed Aug. 25, 2020).

18 Evelyn Parks, From Constabulary to Police Society: Implications for Social Control (William Chambliss & Michael Mankoff eds. 1976).

19 *See generally*, Jeremy Skahill, *Interview with Simon Balto*, The Intercept (June 4, 2020) ("[When people first founded these police departments, they were not designed to promote some sort of public safety. They were designed with very specific political repressions in mind . . . in a lot of places they were seen as anti-American. The case of New York is actually really instructive here. So, when the New York police department is first implemented in, I believe it's the 1840s when New York first gets its force. Chicago's not until 1853. But in the 1840s, New Yorkers actively resisted the implementation of a New York police department and the reason that they did so was that the generational memory of having the city be occupied by British forces during the Revolutionary War, the police department reminded people of those occupying forces. And so people decried the implementation of a police department as antithetical to the American vision of independence and liberty. And so it's interesting to think about in 2020, how the police really originated in order to protect hierarchy and were actively resisted by people when they were first being put into place.").

20 *Supra* note 17.

21 *Id*.

22 *Id*.

23 *Id*.

24 *See* Robert m. Fogelson, Big-City Police (1979).

25 *Supra* note 17.

26 *See* Nirej Sekhon, *Police and the Limit of Law*, Colum. L.R. 119, 6 (last accessed Aug. 25, 2020) quoting David A. Sklansky, *Police and Democracy*, 103 Mich. L. Rev. 1699 (2005) at 18 ("Contrasting democracy with the 'police state' therefore placed at the heart of pluralism certain ideas about the police, and certain implications about how the police should be 'reconciled' with democracy").

27 *See* President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, 1967 ("The criminal justice system has three separately organized parts-the police, the courts, and corrections-and each has distinct tasks;" "Measures such as preventive police patrol and installation of burglar alarms and special locks could then be pursued more efficiently and effectively").

28 *See* Egon Bittner, Nat'l Inst. of Mental Health Ctr. for Stud. of Crime and Delinq., The Functions of the Police in Modern Society (1970) ("Despite these widely acknowledged advances, however, the police continue to project as bad an image today as they have in the past. In fact, the voices of criticism seem to have increased. The traditional critics have been joined by academic scholars and by some highly placed judges. Certain segments of American society, notably the ethnic minorities and the young people, who have only recently acquired a voice in public debate, express generally hostile attitudes toward the police. At the same time, news about rising crime rates and widely disseminated accounts about public disorders-ranging from peaceful protest to violent rebellion contribute to the feeling that the police are not adequately prepared to face the tasks that confront them").

29 *E.g.*, Randall G. Shelden & Pavel V. Vasiliev, Controlling the Dangerous Classes: A History of Criminal Justice in America, (3d ed. 2001) (Arguing generally that laws are enforced less against those with power and influence and more against those without).

30 *See generally* Charles L. Brace, The dangerous classes of New York and twenty years' work among them (1872).

31 *Id*; Milton Gaither, Homeschool: An America History, pg. 82, (2017).

32 *Supra* note 29.

33 *Id*. John Van Maanen, A Developmental view of Police Behavior, 42–43 (describing how patrolmen spend "little of [their] time on the street" performing crime control functions); *Cf. supra* note 28 ("approximately one-third of available manpower resources of the police are at any time committed to dealing with crimes and criminals").

cific provisions of criminal law.[34] Much of policing that does aim to control crime relies on the preventative patrolling and surveillance techniques invented by southern slave patrols and early northeastern municipal departments.[35] Like their predecessors through the 1800s, these activities have proven violent, discriminatory, and unreliable at preventing crime.[36] "Broken windows" policing has imposed huge numbers of stops, arrests, and punishments on young people of color perceived as disorderly, while not showing significant crime reduction;[37] anti-gang units have authorized unregulated surveillance and racially-biased misidentification of gang members;[38] plainclothes policing has allowed "zealous officers" to commit crimes while undercover,[39] often inflicting unfair injury on civilians and minority groups in particular.[40] Studies show police visibility may temporarily decrease crime specifically in and around crime "hot spots,"[41] but fail to yield long-term crime reduction unless coupled with tactics such as allocating community resources and treating civilians fairly and respectfully.[42] Indeed, when asking police officers how to best reduce crime, the 1967 President's Commission recommended funding community projects and developing clear police policies with community input.[43]

Despite these failures, preventative policing has been normalized by unprecedented access to surveillance technology[44] (which has shown to be racially biased[45]) and through funding for increasingly militarized vehicles and gear that reinforce police superiority over ordinary citizens.[46] In addition to targeted patrolling of youth and people of color, officers continue to engage in illegal activities such as political corruption,[47] intimidation at protests,[48] sexual assaults,[49] racial profiling,[50] embezzlement,[51] and excessive force.[52]

B. Where Police Derive Their Power

Regular citizens are prohibited from engaging in explicit invasions of privacy or identity-based discrimination,[53] they cannot

34 *Supra* note 28, ("the police have always been forced to justify activities that did not involve law enforcement in the direct sense . . . .").

35 *See generally, id* Manuel A. Utset, *Digital Surveillance and Preventive Policing*, 49 Conn. L. Rev. 1453, 1457 (2017) (describing how digital policing allows for more preventive policing).

36 *See, e.g.,* Jordi Blanes et. al., *Police Patrols and Crime*, Cato Inst., 2018 ("We fail to find a decrease in crime that corresponds to the increase in police patrolling induced by the policy."); *See also* David H. Bayley, Police for the Future Oxford Univ. Press (1994) ("The police do not prevent crime. This is one of the best kept secrets of modern life").

37 *See* Nirej S. Sekhon, *Redistributive Policing*, 101 J. Crim. L. & Criminology 1171 (2011).

38 *Id*. ("Once identified, gang members are subject to stricter surveillance and enforcement of all criminal laws on the premise that this preempts serious crimes later on. The problem is that such units may well be created in the absence of an actual gang problem…. Once created, the unit generated self-reinforcing "intelligence," tagging minority youth as gang members not because they were gang members but because they looked the part").

39 *Id*. quoting Gary Marx, *Undercover: Police Surveillance in America,* 126–27(1988); Elizabeth Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 Stan. L. Rev. 155, 165–68 (2009) (discussing how undercover officers may engage in crime to avoid suspicion and how some "'rogue cops' leave the bounds of authorized criminality and become mere criminals themselves").

40 *Id*. quoting J. Kelly Strader & Lindsey Hay, *Lewd Stings: Extending* Lawrence v. Texas *to Discriminatory Enforcement*, 56 Am. Crim. L. Rev. 465, 469–70 (2019) (describing police stings and decoys used against LGBTQ persons); Jason Meisner, *Federal Judge Finds ATF Drug Stash House Stings Distasteful but Not Racially Biased*, Chicago Tribune (Mar. 13, 2018), (explaining how a court ruled that the ATF's sting operations had "an ugly racial component and should be discontinued").

41 *See generally* Targeted Approaches to Crime and Disorder Reduction, Coll. Policing ("Overall, there is good evidence to suggest that targeted and proactive policing, with an emphasis on preventive problem-solving, can lead to sustained reductions in crime and anti-social behaviour").

42 *See What works in policing to reduce crime*, Coll. of Policing (2012) ("In summary, the best thing that police can do to reduce crime is to target resources based on analysis of the problem and at the same time ensure the fair treatment of all those they have contact with").

43 *See* President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967) ("Most people feel that the effort to reduce crime is a responsibility of the police, the courts and perhaps other public agencies. This was even true to some extent of administrators and officials of public agencies and utilities who were interviewed in the three city precinct surveys. However, when these officials were pressed they were able to think of many ways in which their organizations might help reduce crime, such as cooperating to make law enforcement easier, donating and helping in neighborhood programs, providing more and better street lighting, creating more parks with recreational programs, furnishing more youth programs and adult education, and promoting integration of work crews and better community relations programs.").

44 *See* Kevin Strom et al, Bureau of Justice Statistics, Research on the Impact of Technology on Policing Strategy in the 21st Century (2017), https://www.ncjrs.gov/pdffiles1/nij/grants/251140.pdf.

45 *See* Claire Garvie and Jonathan Frankle, *Facial-Recognition Software Might Have a Racial Bias Problem*, The Atlantic (Apr. 7, 2016), https://www.theatlantic.com/technology/archive/2016/04/the-underlying-bias-of-facial-recognition-systems/476991/.

46 *See generally*, Police Militarization, ACLU, ("The change in equipment is too often paralleled by a corresponding change in attitude whereby police conceive of themselves as "at war" with communities rather than as public servants concerned with keeping their communities safe."). *See generally also*, Philip G. Zimbardo et. al., *Stanford Prison Experiment* (1971) ("[I]t was no longer an experiment. We had indeed created a prison in which people were suffering, in which … some of the guards were behaving sadistically, delighting in what could be called the "ultimate aphrodisiac of power," and many of the guards who were not behaving that way felt helpless to do anything about it.).

47 *See e.g., Police Corruption: A Look at History,* N. Y. Times (Sep. 24 1986), https://www.nytimes.com/1986/09/24/nyregion/police-corruption-a-look-at-history.html.

48 *See generally The Long, Painful History of Police Brutality in the U.S.,* Smithsonian Magazine, (updated May 29, 2020), https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/.

49 *See Police Sexual Abuse isn't Just the Case of A 'Few Bad Apples'— it's Systemic,* Thinkprogress, (Dec. 4, 2017), https://archive.thinkprogress.org/police-abuse-systemic-24d7bed99605.

50 *E.g.,* David Harris, *Racial Profiling: Past, Present, and Future?* 34 Criminal Justice 10 (February 24, 2020).

51 *E.g., "Former cop arrested for embezzlement, grand theft,"* Colusa County Sun-Herald, (Feb. 5, 2020), https://www.appeal-democrat.com/colusa_sun_herald/former-cop-arrested-for-embezzlement-grand-theft/article_70fc24b8-47a5-11ea-8bcc-7bd5652556f2.html.

52 The History of Police Brutality, and What it Means for You, HG.org, https://www.hg.org/legal-articles/the-history-of-police-brutality-and-what-it-means-for-you-40344 (accessed May 29, 2020).

53 *See, e.g.,* Students: Your Right to Privacy, ACLU Dep't of Pub. Educ., https://www.aclu.org/other/students-your-right-privacy (accessed May 29, 2020).

legally engage in harassment or assault,[54] and in most cities, they cannot stalk other citizens in the street[55] or run red stoplights.[56] Police officers, however, often do these things as part of their work, even when they are ineffective in crime-prevention or in enforcing explicit criminal laws. Where do they derive their power to engage in such activities?

In 1851, a Massachusetts Supreme Court case held that American police power was "the power vested in the legislature by the constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinance, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."[57] This police power, Justice Lemuel Shaw wrote, is meant not only to protect the public welfare but to also do so by a "definite, known and authoritative rule which all can understand and obey."[58] Later, in 1905, the U.S. Supreme Court held that officers can encroach on individual liberties when reasonably enforcing legislation to protect public health and safety.[59]

In 1949, as municipalities began to normalize search-and-seize policing,[60] the Supreme Court had the opportunity in *Wolf v. Colorado* to decide whether these non-federal functions were a violation of citizens' Fourth Amendment rights. It held that "[t]he security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society." But what constituted "arbitrary intrusion" or "oppressive conduct," the Court found, cannot be subjected to judicial review; rather, it should be decided and regulated by "the public opinion of a community."[61] The Court reaffirmed this federal hands-off approach in *Terry v. Ohio* (1968), holding that there could be no broad prohibition of mundane police activities[62] and that police officers should follow their own experience to make reasonable judgments to prevent crime and protect their own safety.[63] This judicial approach translates, in practice, to allowing police to decide generally when and how to deviate from lawful activity rather than granting them authority to deviate from specific laws on a case-by-case basis.[64]

Guided by the continued fear of "dangerous classes," police have enjoyed unique independence in directing themselves. Justice Felix Frankfurter, commenting on police entrapment power, summarized the Court's notion "that when dealing with the criminal classes, anything goes."[65] Legal scholar Nirej Sekhon has called the unique authority held by police over these classes to direct, operate, and regulate themselves a de-facto "sovereignty."[66] In some states, this sovereignty is explicitly endowed to cities and their agencies.[67] In practice, this sovereignty explains the ability of police to decide if an emergency situation exists and how to address it, regardless of legal basis,[68] akin to scaled-down presidential executive orders.[69] But, unlike presidential executive orders, police agencies are not regulated by congressional veto.[70] However, as government officials, they are liable to lawsuits brought by private citizens — except when they are granted immunity.

II. Police Immunity in Court

A. The Framework to Police the Police

In 1871, American legislators compiled a six hundred-page report documenting a climactic period of Ku Klux Klan activity that had rendered state and local public authorities unwilling

54 *See, e.g.,* Understanding Abuse & Harassment Laws, California Courts: The Judicial Branch of California (accessed May 29, 2020).
55 *See e.g.* Criminal Stalking Laws, National Center for Victims of Crime (2011).
56 *See, e.g.,* Ariz. statute 28-101; 28-624.
57 Commonwealth v. Alger, 7 Cush. 53, 61 Mass. 53 (1851).
58 *See* Dr. Benjamin Barros, *Police Power and the Takings Clause*, Vol. 58 No. 2 Univ. Miami Law. Rev. (Jan. 2004).
59 Jacobson v. Mass., 197 U.S. 11 (1905).
60 *See* Part 2.
61 Wolf v. Colorado 338 U.S. 25 (1949).
62 *See* Terry v. Ohio, 392 U.S. 1, 12 (1968) ("No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us." *See also* the court's mindfulness of "the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street.").
63 *Id.* ("We merely hold today that, where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where, in the course of investigating this behavior, he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.").
64 Radical police reforms in the Republic of Georgia offer an alternate perspective on police authority to choose whether or not to adhere to laws. In 2004, following a period of widespread police bribery and corruption, Georgian leaders fired their entire police force of over 30,000 officers, hired new and specially-trained units, and enacted a new Police Law. Rather than giving police autonomous discretion to diverge from laws, the new Georgian code authorizes police action only in accordance with the Georgian constitution, national and international law, and an extensive Criminal Procedure Code. *See* Police Law of Georgia (2013); *see generally* Yasmeen Serhan, *What the World Could Teach America about Policing*, The Atlantic (June 10, 2020), https://www.theatlantic.com/international/archive/2020/06/america-police-violence-germany-georgia-britain/612820/.
65 Sherman v. United States, 356 U.S. 369, 383 (1958) (Frankfurter, J., concurring).
66 *See* Sekhon *supra* note 26.
67 In Texas, sovereign immunity protects the state against lawsuits for damages unless the state has consented to suit. Tex. Dep t of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 224 (Tex. 2004); Cities, as political subdivisions of the state, are entitled to immunity unless it has been waived. San Antonio Indep. Sch. Dist. v. McKinney, 936 S.W.2d 279, 283 (Tex. 1996).
68 *Id.* ("The sovereign is the actor who decides when such an emergency exists, how to address it, and when the emergency is over. These decisions cannot be predetermined by law in any specific way. Law might, for example, identify who has the power to declare a state of emergency, but emergencies are by definition situational, unexpected, and therefore not amenable to prespecified rules.").
69 *See generally* Executive Orders 101: What are they and how do Presidents use them?, National Constitution Center, https://constitutioncenter.org/blog/executive-orders-101-what-are-they-and-how-do-presidents-use-them/.
70 *Id.* ("While an executive order can have the same effect as a federal law under certain circumstances, Congress can pass a new law to override an executive order, subject to a presidential veto.").

or unable to enforce equal protection under law.[71] Soon after, Congress enacted the Civil Rights Act of 1871 to explicitly reaffirm Black Americans' Fourteenth Amendment rights.[72] The Act took issue not with specific discriminatory laws, but rather with "outrages committed upon loyal men . . . under the forms of law."[73] Section 1983, as later codified in the U.S. Code,[74] authorizes anyone in U.S. territory to sue for redress in situations where their "rights, privileges, or immunities secured by the Constitution and laws" are violated by persons operating "under color of" governmental protocol or law.[75]

B. Immunity for Government Officials and their "Sensitive Duties"

The statute's "under color of" phrase has implications for a broad range of acts to be held liable in court. Legal scholar Will Baude, among others, has pointed out that the phrase was intentionally chosen through drafts of the statute to follow the English definition of *colore officii sui*: "extortion."[76] He reasons that this should include misuse of title or privileges through acts that officers were not commanded — when they, one could say, go rogue.[77] Baude assumes that, in addition to including rogue activities, "under the color of law" "obviously applies to action that is authorized by state law."[78] Indeed, on multiple occasions prior to 1961, the Supreme Court imposed liability on persons acting "under the color of" government authority without excluding cases that either followed or violated that authority.[79] This interpretation, if applied under § 1983, suggests the power of courts to convict officers for deprivations of constitutional rights both when going rogue and when following department protocols or training. Indeed, congressional deliberation prior to passing the 1871 Act shows no intent to limit it either authorized or unauthorized acts.[80]

In 1945, the Court similarly held that "under 'color' of law means under 'pretense' of law. . . Acts of officers who undertake *to perform their official duties* are included whether they hew to the line of their authority or overstep it."[81] The Court acknowledged that limiting acts "under color of" law to official duties may be "undesirable," but if so, "Congress can change it."[82] Congress did subsequently enact several pieces of civil rights legislation through the 1950s, but did so without critiquing "under the color of" as interpreted by the Court.[83] Since then,

71 *See generally* Monroe v. Pape, 365 U.S. 167 (1961) quoting congressional findings referenced by the Act, ("Mr. Lowe of Kansas said: 'While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.' Mr. Beatty of Ohio summarized in the House the case for the bill when he said: '. . . certain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable. . . . [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down, and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.]' While one main scourge of the evil -- perhaps the leading one -- was the Ku Klux Klan, the remedy created was not a remedy against it or its members, but against those who representing a State in some capacity were unable or *unwilling* to enforce a state law. Senator Osborn of Florida put the problem in these terms: "That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and, in fact, that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress should, so far as they have authority under the Constitution, enact the laws necessary for the protection of citizens of the United States. The question of the constitutional authority for the requisite legislation has been sufficiently discussed.").

72 *See* Civil Rights Act of 1871 ("An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.").

73 Monroe (quoting the report, "There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty. Speaking of conditions in Virginia, Mr. Porter of that State said, 'The outrages committed upon loyal men there are under the forms of law.'").

74 42 U.S. Code § 1983.

75 *See also* Monroe v. Pape, *supra* note 71; (extending liability under 1893 to local officers and entities).

76 *E.g.* William Baude, *Is Qualified Immunity Unlawful?* 106 Cal. L. Rev. 45 (2018) quoting Steven L. Winter, *The Meaning of "Under Color of" Law*, (1992) (Specifically, 'The phrase "signifies an act badly done under countenance of an office, and it bears a dissembling visage of duty, and is properly called *extortion* [*sic*].")

77 *Id*. ("As Steven Winter has recounted, the usage goes back more than 500 years, when an English bail bond statute voided obligations taken by sheriffs "by colour of their offices" without complying with a statutory procedure. The English court concluded that to act "by colour of" one's office (or "*colore officii sui*") included an illegal act. The phrase "signifies an act badly done under countenance of an office, and it bears a dissembling visage of duty, and is properly called *extortion* [*sic*].").

78 *See id*.

79 *See* Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941) ("The action of election official who conducted a primary election to nominate a party candidate for Representative in Congress in willfully altering and falsely counting and certifying the ballots, were acts under color of state law depriving the voter of constitutional rights within the meaning of the section."

80 *See generally, Monroe, supra* note 70, (Justices Harlan and Steward concurring, stating the legislative history of the 1871 statute cast "serious doubt the conclusion that § 1983 was limited to state-authorized unconstitutional acts.").

81 *See Screws supra* note 78 (emphasis added).

82 *See Monroe, supra* note 70. ("The meaning which the *Classic* case gave to the phrase 'under color of any law' involved only a construction of the statute. Hence, if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of § 20 [18 U.S.C. § 242] to meet the exigencies of each case coming before us.").

83 *See id*. ('Since the *Screws* and *Williams* decisions, Congress has had several pieces of civil rights legislation before it. In 1956, one bill reached the floor of the House. This measure had at least one provision in it penalizing actions taken "under color of law or otherwise." A vigorous minority report was filed attacking, *inter alia*, the words "or otherwise." But not a word of criticism of the phrase "under color of" state law, as previously construed by the Court, is to be found in that report…. Once again, no one challenged the scope given by our prior decisions to the phrase "under color of" law. If the results of our construction of "under color of" law were as horrendous as now claimed, if they were as disruptive of our federal scheme as now urged, if they were such an unwarranted invasion of States' rights as pretended, surely the voice of the opposition would have been heard in those Committee reports. Their silence and the new uses to which "under color of" law have recently been given reinforce our conclusion that our prior

the Supreme Court has maintained this interpretation.[84]

Suing police under § 1983 was not common practice at first, and the statute was largely obscure for nearly a century after it was written.[85] Then, in *Monroe v. Pape* (1961), the Supreme Court held that the scope of § 1983 lawsuits included ones against local government officials and police — definitely when they are following legal authority and potentially when not — so long as there was a deprivation of constitutional rights.[86] However courts soon began granting police officers immunity from § 1983 charges. Following *Monroe*, some dropped charges against officers when they showed "good faith" that their actions were legally and constitutionally authorized.[87] The court streamlined this immunity in *Pierson v. Ray* (1967),[88] essentially holding that immunity had been doled out to government officials under decades of common law for the public good. A judge, for example, had immunity from § 1983 liability "not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."[89] Similarly, the Court reasoned, police officers could obtain qualified immunity if they could show "good faith and probable cause" that their actions were authorized.[90] Following *Pierson*, the Court continued to shape immunity doctrine with the primary concern that private lawsuits would "raise unique risks to the effective functioning of government" in civil cases.[91] *Nixon v. Fitzgerald* (1982) held that certain officials — including judges, prosecutors, and the president — have "especially sensitive duties" requiring "the continued recognition of absolute immunity."[92] Other government officers (such as police), the Court reasoned, have *some* sensitive duties that, in order to be functionally effective, required a qualified immunity proportionate to those duties.[93]

In shaping this new qualified immunity, the Court had to determine under what circumstances victims could get relief under § 1983, while balancing the goal of immunity doctrine to prevent interference with government functions.[94] *Adickes* (1970) overruled *Pierson's* "good faith" immunity, holding that requiring officers to prove a subjective "good faith" that their actions were lawful against "insubstantial claims" hindered them from effectively doing their job.[95] This diverged from earlier criticism of the subjective "good faith" test giving too much discretion to police to interpret the Fourth Amendment.[96] Nevertheless, *Harlow* followed in 1982; again aiming to be the "best attainable accommodation of competing values," the Court held that officers can only be denied this qualified immunity if they violate a statutory or constitutional right *and* if a "reasonable person" would have known the right to be "clearly established."[97] In *Saucier v. Katz* (2001), the Court reinforced qualified immunity in an excessive force case to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."[98] In 2009, the Court held that qualified immunity could be granted regardless of whether rights were violated;[99] even when Fourth Amendment rights are explicitly violated, the officer can prove that there was no clearly established law against it.[100] Finally, in *Pauly v. White* (2016), the Court affirmed the qualified immunity test as it currently stands: § 1983 lawsuits may be summarily dismissed unless the plaintiff can prove *both* that 1) the constitutional right in question was clearly established to be unacceptable by police codes and judicial precedent and 2) the right was indeed violated.[101] In summary, the qualified immunity we see today is the product of a long history of the Court's previous holdings: the risk of wasted police resources on insubstantial lawsuits is greater than the risk of leaving plaintiffs without relief, even for excessive force; officers should be able to violate constitutional rights unless explicitly prohibited by established law, protocol

decisions were correct on this matter of construction. We conclude that the meaning given "under color of" law in the *Classic* case and in the *Screws* and *Williams* cases was the correct one, and we adhere to it.").

84 *See id*.

85 *See generally*, A Section 1983 Primer (2): The Seminal Decision of Monroe v. Pape, Nahmod Law, Nov. 29, 2009.

86 *See supra* note 70. ("Congress intended to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." (a) The statutory words "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" do not exclude acts of an official or policeman who can show no authority under state law, custom or usage to do what he did, or even who violated the state constitution and laws… Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken "under color of" state law within the meaning of § 1979").

87 *See e.g. id*; Thomas v. Mississippi 380 U.S. 524 (1965).

88 Pierson v. Ray, 386 U.S. 547 (1967) (stating that the burden of proof had been too "stern" on officers).

89 *See* Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868).

90 *See* Pierson v. Ray, 386 U.S. 547 (1967) (The defense of good faith and probable cause which is available to police officers in a common law action for false arrest and imprisonment is also available in an action under § 1983.)

91 *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982) (Private lawsuits — not only convictions or damages, but the mere time and energy drained by the judicial process itself , and that "diversion of his [the President's] energies by concern with private lawsuits would raise unique risks to the effective functioning of government.").

92 *See id*. quoting Scheuer v. Rhodes, 416 U. S. 232 (1974).

93 *Id*. ("As construed by subsequent cases, *Scheuer* established a two-tiered division of immunity defenses in § 1983 suits. To most executive officers, *Scheuer* accorded qualified immunity. For them the scope of the defense varied in proportion to the nature of their official functions and the range of decisions that conceivably might be taken in 'good faith.'").

94 *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982), ("The recognition of a qualified immunity defense for high executives reflects an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority.").

95 Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) (The court held that plaintiffs must prove that the officers' conduct violated a legal or constitutional right, and second that the conduct was "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.").

96 *See* Terry v. Ohio 392 U.S. 1 (1968) ("If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police.").

97 *See* Harlow v. Fitzgerald, 457 U.S. 800, 813-814 (1982).

98 Saucier v. Katz, 533 US 194 (2001).

99 *See* Pearson v. Callahan, 555 U.S. 223 (2009).

100 *See* Safford Unified School Dist. #1 v. Redding, 129 S.Ct. 2633 (2009).

101 Pauly v. White, 874 F.3d 1197 (2017).

or precedent; courts are not obligated to rule on police protocol; and effective police functions fundamentally benefit public interest.

C. The Applications of Qualified Immunity

In *Pauly v. White*, three officers shot and killed an innocent man named Samuel Pauly at his home in the middle of the night.[102] They lacked a warrant or probable cause, surrounded Pauly's house with guns drawn, and did not identify themselves as police when Pauly and his brother drew their own guns thinking they were being attacked. The court granted all three officers qualified immunity, citing that even though they had violated Pauly's rights against excessive force, there was no case similar enough to *clearly establish* judicial precedent.

Qualified immunity has been granted in thousands of cases, including to an officer who strip-searched a thirteen-year-old schoolgirl suspected of carrying ibuprofen in 2009,[103] officers who stole $225,000 during a home invasion and then perjured documents about it in 2019,[104] and an officer who slammed a swimsuit-clad woman head-first onto a sidewalk in 2019[105] — all because there was no judicial precedent, police protocol, or policy that had "clearly established" disapproval of these acts.

The Supreme Court reviews five to six qualified immunity cases annually, making it the most closely-overseen doctrine besides *habeas*.[106] These reviews tend to favor granting qualified immunity by dismissing writs to appeal grants of qualified immunity and summarily reversing lower courts' decisions to hold officers liable.[107] This trend, Baude explains, "signals to lower courts that they should drift toward [granting] immunity"[108] and, increasingly, courts do. Officers were granted qualified immunity in fifty-seven percent of § 1983 cases from 2017 to 2019, a percentage that has been on the rise since 2005.[109] Following the 2009 standard, an increasing fraction of these cases has been decided without identifying or even *addressing* whether there was excessive force.[110] Lower courts are also given numerous chances to grant immunity; though the Supreme Court has encouraged officers to request qualified immunity before cases begin,[111] it can be invoked during the trial and even in appeals immediately afterward.[112] The prevalence of qualified immunity also gives officers an advantage when settling outside of court. If an officer is displeased with negotiations, they can threaten to take the case to court, request qualified immunity, and, if granted, pay nothing at all. Further, as the Supreme Court has noted, the 2009 standard can lead to "constitutional stagnation": as courts grant immunity for a potentially unlawful act without ruling it unlawful (but rather ruling it as not "clearly established"), the courts could effectively allow it to be repeated indefinitely.[113]

D. The Implications of Qualified Immunity

The Court's adherence to qualified immunity is built on the pretense that officers are performing "effective functionings of government,"[114] especially to control the "criminal classes"[115] — functions the Court has only stated, but never proven, to be beneficial, constitutional, or effective. Nonetheless, victims of police abuses, even when they have been subjected to force so excessive it may be unconstitutional, are barred from securing damages, holding the offender accountable, or even getting time in court. Qualified immunity has rendered their suffering a casualty of the greater function of police and made it out to be so unimportant that reviewing it in court is not worth the officers' time and energy. This is wrong.

Some legal scholars have argued that qualified immunity deviates so far from any other judicial precedent or legal backing that it is only justified by *stare decisis*,[116] or else it is flat-out unlawful.[117] A 2020 Reuters report concluded that qualified immunity "has become a nearly failsafe tool to let police brutality go unpunished and deny victims their constitutional rights."[118] Three hundred law professors have called upon Congress to abolish it.[119] Justice Clarence Thomas has expressed "growing concern with our qualified immunity jurisprudence," and Justice Sonia Sotomayor has called it a "disturbing trend" that is disproportionately used to intervene when officers are denied immunity than when wrongly granted it.[120] However, the Supreme Court continues to summarily dismiss qualified immunity claims, including one 2020 case involving officers unleashing dogs to attack a homeless man with his hands raised.[121] Their stance, as some scholars have reasoned, seems to be that "if the United States as a society does not want qualified immunity, Congress should enact new legislation."[122]

Congressional legislation may indeed follow.[123] House Democrats passed a bill in June 2020 to ban chokeholds, prohibit

102 *id.*
103 Safford Unified School Dist. #1 v. Redding, 557 U.S. 364 (2009).
104 Jessop v. City of Fresno, No. 17-16756 (9th Cir. 2019).
105 Kelsay v. Ernst, No. 17-2181 (8th Cir. 2019).
106 William Baude, *Foreword: The Supreme Court's Shadow Docket*, Univ. of Chicago Pub. L. & L. Theory Working Paper. No. 508, (2015).
107 *Supra* note 75, ("In 35 years since [the Supreme Court] announced the objective-reasonableness standard in Harlow v. Fitzgerald, the Court has applied it in thirty qualified immunity cases. Only twice has the Court actually found official conduct to violate clearly established law.").
108 *Supra* note 75.
109 For Cops Who Kill, Special Supreme Court Protection, Reuters, May 2020.
110 *Id.*
111 Hunter v. Bryant, 502 U.S. 224, 228 (1991) ("immunity ordinarily should be decided by the court long before trial.").
112 *See* Strict Scrutiny, Made-up Immunities at 8:12, June 8, 2020.
113 Aaron Nielson & Christopher Jay Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev., 2018.
114 *See supra* note 90.
115 *See* Sherman v. United States 356 U.S. 369, 78 S. Ct. 819 (1958).
116 *Supra* note 112.
117 *See supra* note 75.
118 Reuters, For Cops Who Kill, Special Supreme Court Protection, May 2020.
119 Joanna Schwartz et. al "Law Professors' Letter Calling on Congress to Hold Police Accountable," July 2020.
120 *See* Robert Barnes, *Sotomayor sees 'disturbing trend' of unequal treatment regarding police, alleged victims*, Washington Post, March 24, 2017.
121 *See* Summary Dispositions, Order List: 590 U.S., June 15, 2020.
122 *See supra* note 112.
123 *See Colorado among first in U.S. to pass historic police reforms following protests*, Denver Post, June 13 2020; *Cities across US announce police reform following mass protests against brutality*, ABC News, June 12, 2020; *DC Council Unanimously Passes Police Reform Legislation Amid Ongoing Protests*, NBC Wash, June 9 2020

no-knock warrants in federal drug cases, support "policies and procedures designed to eliminate racial profiling," and eliminate any that allow or encourage it.[124] The bill also limits qualified immunity, banning courts from granting it solely on the basis of the officer's "good faith" that it was within protocol or — more importantly — on the basis of the "clearly established" protocol. This would mean that if any § 1983 suit finds evidence of a constitutional violation, it cannot be dismissed, guaranteeing victims a chance at redress and potentially stopping the problem of "constitutional stagnation."

Limiting qualified immunity would appear to be a win for transparency, due process, and individual citizens suffering from police abuses. However, some scholars have argued that overhauling qualified immunity through judicial doctrine is not likely to alter police behavior.[125] Indeed, ending qualified immunity would not cut off officers from violence or corruption; it would only offer a stronger means to oversee it in court. Qualified immunity is not only dependent on judicial review. It relates to how police develop and communicate their protocols, as well.

Qualified immunity is so easily granted in part due to the fact that police departments operate without explicit parameters for their work. If police were indeed held to explicit laws, codes, and handbooks, it would be harder for courts to use the "clearly established" test to dismiss § 1983 cases. But frequent grants of qualified immunity show that too often departments fail to write, follow, or regulate "clearly established" protocols.[126] Where qualified immunity offered them a specific way to participate in judicial oversight, police departments continue to avoid checks on their power. This extraordinary independence from external regulation, Sekhon writes, leads most attempts at police reform to ". . . inevitably crash on the same rocky shoals: [t]here is no state actor available to police the police, other than the police themselves."[127]

III. Impunity and Autonomy in Police Departments

To improve inclusivity, reduce bias, and better represent community needs, public and private organizations nationwide are advocating for leadership that is less hierarchical, more diverse, and properly trained.[128] These efforts are perhaps most imperative in the enforcement of laws that are supposed to guarantee equal protection to all citizens. However, police departments operate with minimal training,[129] proven biases,[130] severely hierarchical structure,[131] and overwhelmingly White and male personnel.[132] Importantly, most of the daily activities of police departments have limited federal oversight; the Supreme Court has repeatedly expressed concerns of federal intrusion against regulating police departments' activities and training,[133] and it has ruled that congressional budgetary oversight of law enforcement may undermine the principle of federalism.[134] Thus, when most police misconduct occurs, it is handled outside the scope of federal regulation.

A. Police Departments' Internal Regulation: Covering Up Misconduct

Complaints submitted to local police departments are, by far, the most common action taken by victims of police misconduct. In the last decade, over 12,000 local police agencies throughout the country,[135] 85,000 officers were investigated for over 200,000 cases of recorded misconduct.[136] However, fewer than one in twelve complaints result in disciplinary action,[137] and over ninety percent are dismissed, sometimes without justification.[138] Some are silenced before they are even submitted.[139] Moreover, these dismissals can be racially biased; while most complaints are filed from non-White men, police departments are less likely to sustain complaints when the person who filed it is Black.[140] What happens to these complaints — sustained or not —afterward? Over half of police departments' collective bargaining rights authorize them to be destroyed[141]

124 See Justice in Policing Act of 2020, H.R. 7120, 116 Cong. 2020.
125 Daniel Epps, *Abolishing Qualified Immunity Is Unlikely to Alter Police Behavior*, NY Times, June 16 2020
126 Police officers widely acknowledge this vagueness as well, *see e.g.* Grand Rapids Police Chief Scott Johnson, *Navigating the 'Gray Area*, Grand Rapids Herald Rev. Sep. 2018.
127 *See supra* note 26.
128 *See e.g., The Time is Now*, American Institute of Physics TEAM-UP, 2020 (finding holistic benefits of diverse staff, inclusion and anti-racism training and dialogue, resources for underserved demographics, etc.); Kevin Johnson, Diversity and Inclusion at Starbucks, Starbucks.com ("We aspire to be a place of inclusion, diversity, equity, and accessibility. Diversity makes us stronger, and the creation of a deeply inclusive culture allows us to succeed and grow together.").
129 *See e.g.* Holly Yan, *States require more training time to become a barber than a police officer*, CNN, Sep. 28, 2016.
130 Justin Nix et. al, *A Bird's Eye View of Civilians Killed by Police in 2015*, 16 Criminology and Pub. Pol. Feb. 8, 2017.
131 Beyond the Badge: Inside America's Police Departments, Pew Res. Center, 2017.
132 Police, Data USA, (accessed July 2020).
133 *See e.g.* City of Canton, Ohio v. Harris, 489 U.S. 378 (1989), ("Thus, permitting cases against cities for their "failure to train" employees to go forward under § 1983 on a lesser standard of fault would result in de facto respondeat superior liability on municipalities -- a result we rejected in *Monell*, 436 U.S. at 436 U. S. 693-694. It would also engage the federal courts in an endless exercise of second-guessing municipal employee training programs. This is an exercise we believe the federal courts are ill-suited to undertake, as well as one that would implicate serious questions of federalism.").
134 *See e.g.* Screws v. United States 325 U.S. 91 (1945), ("It surely is casting an impossible burden upon Congress to expect it to police the propriety of prosecutions by the Department of Justice. Nor would such detailed oversight by Congress make for the effective administration of the criminal law.").
135 *Local Police*, Bureau of Justice Statistics, accessed August 2020.
136 *See Here are the stories about police misconduct uncovered so far*, LA Times, March 2019.
137 Mathew Hickman, *Citizen Complaints about Police Use of Force*, BJS, 2006.
138 *Id.*
139 Through the early 1990s, when aggrieved citizens appeared at Los Angeles police stations to lodge complaints, they were frequently turned away or even threatened with arrest. *See* Report of the Independent Commission, Indep. Commission on the L. A. Police Department 1991.
140 *See* William Terrill, Jason R. Ingram, *Citizen Complaints Against the Police: An Eight City Examination*, 2016
141 Reade Levinson, "Protecting the Blue: Across the U.S., police contracts shield officers from scrutiny and discipline," Reuters, Jan 2017.

or otherwise barred from consideration in repeat cases.[142] Chicago police unions, for example, secured contracts that, until a recent state Supreme Court decision,[143] guaranteed that their misconduct records would be destroyed after five years.[144]

Indeed, most of the opposition to policies promoting transparency and accountability in law enforcement comes not from civilians but rather from the police themselves.[145] Many of these policies are negotiated in collective bargaining agreements, statewide "law enforcement bill of rights," or independent legislation by the Fraternal Order of the Police (FOP).[146] The FOP is an organization made up of 351,000 members of local police unions known as "labor lodges,"[147] comprising an equivalent to over 40% of current U.S. law enforcement officers.[148] In the past decade, the FOP and police unions spent millions of dollars on campaign contributions and lobbying,[149] including for a bill to let police take unlimited budget surpluses,[150] against a bill to counter racial profiling,[151] and endorsing both of Donald Trump's presidential campaigns.[152] FOP members are vocal outside of lobbying, too; they condemned Nike's ad featuring Colin Kaepernick,[153] and they once declared "war" on Bill de Blasio for suggesting that shootings against police officers were an attack not only on police but "on ALL New Yorkers and everything we believe in."[154]

The FOP has been particularly vocal when it comes to internal investigations into police misconduct. It lobbied for a bill mandating "effective procedures for receipt, review, and investigation of complaints against officers, fair to both officers and complainants."[155] The bill, however, would let the FOP define "fair" investigations: by restricting how and when victims of misconduct can make complaints, limiting the severity of officers' punishments, and granting officers even more advantages during investigations.[156] The bill never made it to a vote, but the FOP has nonetheless secured similar privileges in local departments nationwide. One report of police departments' collective bargaining contracts found that nearly every city grants police advantages in internal investigations of misconduct[157] — including disqualifying complaints which exceed a time limit, giving officers access to case information and other privileges during questioning, requiring that cities grant officers paid leave during investigations, preventing past records of an officer's misconduct from influencing how new ones are handled, and limiting the scope of discipline received by officers.[158] Usually, unions use collective bargaining agreements to secure rights, safety, and benefits for their workers.[159] But police negotiate contracts that minimize transparency, accountability, and procedural justice. Police unions operate to protect their *officers* by blocking reforms that increase transparency and accountability, as well as weakening disciplinary procedures.[160] Several former police chiefs, as well as former FBI Assistant Director Kevin Brock,[161] have criticized these protections as "corrosive" and police unions as "far too powerful."[162] An AFL-CIO board has also condemned police for misusing their unions as a "shield from criminal conduct."[163] Decreased discipline and transparency directly correlate with increased police abuse.[164] As police unions lobby to handle complaints without civilian oversight, some scholars have argued that the complaints process fails to serve the public interest.[165]

Beyond codified collective bargaining agreements, police department culture is clouded by a "code of silence." Especially in departments with police unions, officers allow their peers to continue working, unpunished, through complaints of misconduct.[166] In the last decade, over 2,500 officers were

142 *See* CheckThePolice, accessed July 2020, checkthepolice.org.
143 City of Chicago v. Fraternal Order of Police, 2019 IL App (1st) 172907.
144 Illinois Supreme Court rejects request by Chicago police union to destroy police misconduct records at 0:30, WGN News, June 19, 2020 (The police chief explains that records had been protocol for forty years ,even explicitly violating a public records bill, and thus was far more justified than the "will of current sentiment").
145 Kevin Keenan & Samuel Walker, *An impediment to police accountability? An analysis of statutory law enforcement officers' bills of rights*, 14 B.U. Pub. Int. L.J. 185, 200-01 (2005).
146 Due Process Rights for Law Enforcement Officers, FOP.org, accessed July 2020. ("The adoption of legislation creating a "bill of rights" for law enforcement officers has long been a top priority for the Grand Lodge."). *See also*, FAQ, FOP.org, accessed May 9, 2008 (via web.archive.org).
147 *See* Patrick Yoes, *National FOP Statement on Police Reform Legislative Efforts*, Fraternal Order of Police, June 25, 2020.
148 "Facts and Figures," Law Enforcement Officers Memorial Fund, accessed June 2020.
149 *id*.
150 *See* Clients Lobbying on H.R.426: Protecting Lives Using Surplus Equipment Act of 2017, Open Secrets.
151 *See* S. 989/H.R. 2074, the "End Racial Profiling Act": Analysis by Grand Lodge, Fraternal Order of Police, FOP.org, accessed August 2020.
152 *See* Chuck Canterbury, *Fraternal Order of Police Endorses Trump!!! Nominee has the "full support" of the nation's largest police labor organization*, Fraternal Order of Police, September 16, 2016; *Jack Rodgers, Police Union Backs Trump for Re-Election in 2020*, Courthouse News Service, September 9, 2020.
153 Saja Hindi, *Fraternal Order of Police denounces Nike advertisement but opts out of official boycott*, The Coloradoan, 2018.
154 *See* Zak Cheney-Rice, *NYC's Police-Union Leaders Are Unhinged*, The Intellegencer, 2020.
155 *See* State and Local Law Enforcement Discipline, Accountability, and Due Process Act of 2007, 110 Cong. H.R. 688, 2007.
156 *Id*.
157 Summary Report, Check the Police, June 2020.
158 *Id*.
159 *See* "What Unions Do: Collective Bargaining," AFL-CIO, accessed July 1, 2020.
160 *Supra* note 144.
161 *See* Kevin Brock, *Police reform: If you want it bad, you'll get it bad*, The Hill, June 21, 2020 ("Real reform might include ways to make it easier for police departments to get rid of poor performing, high-complaint officers who, at times, are inordinately protected by police unions.").
162 *See Police unions dig in as calls for reform grow*, CNN, June 8, 2020.
163 *See "The AFL-CIO's Police Union Problem is Bigger than You Think,"* The Intercept, June 18, 2020.
164 *See Police Institutions and Police Abuse: Evidence from the US*, University of Oxford, 2018.
165 *"Police Institutions and Police Abuse: Evidence from the US,"* Department of Politics and International Relations at the University of Oxford, Trinity, 2018.
166 *See* Marcia McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?* St. Louis Univ. PUB. L. Rev., 2020.

working with over ten complaints made against them.[167] One report found over 2,200 instances of dishonesty or false evidence through police investigations or trials, with 5,000 officers placed on Brady lists for lying or falsifying evidence.[168] The recent killing of George Floyd exposed the scale of this code of silence in the Minneapolis Police Department,[169] in which officer Derek Chauvin was dealt a total of two letters of reprimand for at least seventeen complaints of misconduct, including fatal force.[170]

Though police have long operated under a largely unchecked veil of sovereignty,[171] national attention has increasingly called for civilian involvement in the complaints process.[172] The Department of Justice has endorsed in-person mediation during complaint evaluations and police-community interactions.[173] Recent public activism has called for investigation and review that is independent from police altogether.[174] Some police officers agree. As a former New York Police Department (NYPD) deputy commissioner explains: "only an independent investigative body can allay public suspicions of the police and render a convincing exoneration of police who have been accused of misconduct."[175]

What would such a process look like? Take Claremont, California. Between 2015 and 2018, the Claremont Police Department recorded nine complaints,[176] after which all related officers were exonerated.[177] In 2019, of five total recorded complaints, two were exonerated, and the rest remain pending.[178] No disciplinary action has been taken in specific response to any of them.[179] If you submit a complaint, it is investigated by the police chief. You might be invited to join three police commissioners on the Police Review Ad Hoc Committee to review whether the investigation was comprehensive (though not necessarily whether its outcome was fair).[180] Any statements from this committee, however — even objections to the investigation — are "specifically excluded from the Public Records Act," so no one else will ever know.[181] Likewise, your complaint and any future one, by default, "cannot be disclosed to the public."[182] So, when all is said and done, there is no guarantee that records will be kept, trends monitored, and repeat offenders stopped from doing further harm. One would hope that there would be no evidence-tampering, records-purging, or undeserved leniency, but it would be much easier to trust eleven exonerations in a row if the source was an objective and well-reasoned external party. A reliable complaint process requires unbiased investigations that are not led by the police. Reliable departments need well-kept conduct records, as well as an auditing team to analyze and address areas of improvement. Unreliable officers deserve impartial, comprehensive discipline. For example, imagine that the complaint is reviewed by a team of trained police and non-police investigators with access to all necessary evidence. Then, the findings are reviewed by an independent and nonpartisan committee who, with a well-reasoned explanation, exonerate the complaint or impose punishment on the officer. Finally, all records of the complaint process are monitored by a designated or perhaps elected auditor, who analyzes the reports as trends of the department's successes and failures.

These musings of civilian oversight have tangible benefits, with the potential to sustain seventy-eight percent more complaints than internal investigations.[183] Further, independent investigation, review, and auditing can improve mutual trust between civilians and police, improve the quality of investigations, and handle complaints with more trust, from both officers and civilians, in the results.[184] Historically, however, they have been unpopular and have lacked power. Early civilian review boards, emerging in the 1960s, were polarized by anti-crime and anti-police sentiments, and garnered opposition from police unions and local officials (including then-New-York-mayoral-candidate Rudy Giuliani, who called the concept "bullshit"[185]). Through the 90s, the FOP continued to push back — once by screaming "kangaroo" to disrupt a review board meeting.[186] A nationwide 2016 report found that only 144 po-

167 And, following a 2019 CA act promoting public access to police records, a coalition of news outlets and citizens are finding a similar pattern are compiling databases of the emerging data of internal investigations. *See e.g. Here are the stories about police misconduct uncovered so far by a new media partnership*, L.A. Times, March 9, 2019.

168 John Kelley & Mark Nichols, *We found 85,000 cops who've been investigated for misconduct. Now you can read their records.,* U.S.A. Today, April 24, 2019.

169 Jennifer Bjorhus & Liz Sawyer, *Minneapolis police officers disciplined in fraction of cases*, Star Tribune, June 9, 2020.

170 Derek Hawkins, *Officer charged in George Floyd's death used fatal force before and had history of complaints*, Wash. Post, May 29, 2020.

171 *See Sekhon supra* note 26.

172 *See e.g.* Community Oversight, Campaign Zero, accessed August 30, 2020.

173 Samuel Walker et. al, *Mediating Citizen Complaints Against Police Officers: A Guide For Police and Community Leaders*, U.S. Dept. of Justice, 2002.

174 *See e.g.,* Olugbenga Ajilore, *How Civilian Review Boards Can Further Police Accountability And Improve Community Relations*, Scholars.org, June 2018; *See also,* Partners, National Association for Civilian Oversight of Law Enforcement: Building Public Trust Through Law Enforcement Accountability and Transparency, 2016 (https://www.nacole.org/partners).

175 City of Tracy public record, April 1, 2014, (https://www.ci.tracy.ca.us/documents/20140401_Handouts.pdf)

176 Interview with Shelly Vander Veen, Police Chief, Claremont, CA. March 17, 2020.

177 *Id*.

178 *Id*.

179 However, these complaints only include cases of misconduct claimed by citizens. Internally to the department, all known policy violations are investigated and often disciplined by the Police Department Supervisory staff. *Supra* note 175.

180 Citizen Complaints Against Sworn Members of the Claremont Police Department, City of Claremont, Calif., accessed July 3, 2020, (ci.claremont.ca.us).

181 *id*.

182 Filing Complaints, Commendations & Suggestions, City of Claremont, Calif., accessed July 3, 2020, (ci.claremont.ca.us).

183 See Oversight, Campaign Zero, accessed July 3, 2020.

184 *See* FAQ, National Association for Civilian Oversight of Law Enforcement: Building Public Trust Through Law Enforcement Accountability and Transparency, 2016, (https://www.nacole.org/faqs).

185 Kim Hendrikson, *The Conservative Case for Civilian Review*, The American, October 15, 2013.

186 Allyson Collins, *Shielded from Justice: Police Brutality and Accountability in the United States* at 57, Human Rights Watch, 1998.

lice departments (of over 15,000 that existed at that time[187]) had external oversight boards.[188] Of these boards, only thirty-five percent were involved in investigations, only six percent could impose direct disciplinary action, and most had limited access to police records to begin with.[189] Those authorized to conduct investigations were only able to subpoena witnesses in fifty-six percent of cases and records in fifty-nine percent of cases. In California, for example, external review boards couldn't even access police complaints or internal affairs records for most of the last two decades.[190] In New York, an American Civil Liberties Union report found a review board to be "a formality, at best," usually ignored or corrupted by the NYPD.[191]

Nonetheless, external oversight boards are gaining traction. Cities without these boards have begun to adopt them,[192] sometimes redirecting funds from internal investigations, and cities with weak ones are strengthening them.[193] For example, Californians passed a bill to make police records more accessible in 2018[194] and a measure giving subpoena power to a Los Angeles external review board in 2020.[195] Cities are finding success through a plethora of oversight options including auditors, investigators, and review boards.[196] Though often met with resistance from the police,[197] community oversight shows improvements in trust, respect, and accountability of police and ensures that, like the Supreme Court mandated, police are guided and limited by the "public opinion of a community."[198]

B. Police Departments' Internal Regulation: Covering Court Costs

Police departments are empowered through publicly-funded budgets, which in the ten largest U.S. cities has averaged $464.1 per capita and up to 17% of total public expenditures in 2020.[199] Total nationwide police expenditures amount to one hundred billion dollars yearly.[200] These massive cash flows have been strongly defended by police officers as well as the vice president of the FOP, who said that defunding efforts were "insane" and that "the only people that are going to suffer are hardworking, law-abiding people of our community."[201] But millions of police budget dollars are spent indemnifying officers facing hefty fees after being convicted in court for activity that is *not* lawful, constitutional, or under "clearly established" authority.

Police indemnification traces back to the 1800s. Then, federal officials were sued not only when acting maliciously on their own, but also as a proxy to hold their agencies accountable for unlawful policies. Otherwise, federal agencies couldn't be sued by private citizens under sovereign immunity doctrine.[202] Those suits deliberated on the objective legality of the officer's actions to secure redress for victims.[203] If there was indeed a violation of rights, the courts would identify it and impose liability.[204] The judiciary was accustomed to holding law enforcement officials strictly accountable for any illegal or unconstitutional behavior, just like it would for other citizens. Even when expressing sympathy for order-following officers, the Supreme Court asserted in 1804 the "necessarily strict role the federal courts must place in enforcing official liability"[205] and then reaffirmed this principle later that year.[206] However, federal officers were distinguished from ordinary citizens outside of the court through qualified access to indemnification; if they could show that they were just following orders, Congress would cover the fine.[207] This legislative indemnification made the Court's strictness more palatable to judges, who could rule against officers and not worry about unfairly burdening the individual officer when they were simply following orders.[208] At the end of the day, officers following clear commands would face no monetary burden; officers that broke orders would have to pay for it.[209]

Reconstruction-era practices dealing with indemnity honored sovereign immunity within a structure of checks and balances.[210]

187 Sarah Hyland, *Local Police Departments, 2016: Personnel,* U.S. Bur. Of Jus. Statistics, 2016.
188 Joseph Angelis et. al, *Civilian Oversight of Law Enforcement*, Assessing the Evidence, 2016.
189 *id*; (More than half of the auditor/ monitor agencies in a 2011 survey reported access to all police databases. In contrast, 38 percent of review-focused agencies had access to all internal affairs records, 30 percent reported access to internal affairs databases and 19 percent reported access to all police databases).
190 *See* Copley Press, Inc. v. Superior Court, 141 P. 3d 288 - Cal: Supreme Court, 2006.
191 Civilian review board is failing, NYCLU, September 2007.
192 *See* Amir Khafagy, *Amid Calls to Reform Police, New York Activists and Lawmakers Demand An Elected Civilian Complaint Review Board,* The Appeal, June 29, 2020.
193 *See* Justin Fenton, *Baltimore Police Civilian Review Board calls for more authority as activist legal group sues over transparency*, Baltimore Sun, June 23, 2020.
194 *See* Calif. Pen. Code § 832.7(b) (1)(A)-(C), Jan. 1 2019 (Formerly Calif.; Peace Officers: release of records, Calif. Cong. SB 1421).
195 *See* L.A. County, Calif., Measure R, Civilian Police Oversight Commission and Jail Plan Initiative, March 2020.
196 See Peter Flinn, *Citizen Review of Police: Approaches and Implementation*, U.S. Dept. of Just., Nat'l. Inst. Of Just. March 2001.
197 *But see e.g., In NC, a sneaky step in the wrong direction on police reform*, The Charlotte Observer, June 30, 2020.
198 *See* Wolf v. Colorado 338 U.S. 25 (1949).
199 Deirdre McPhillips, *Police Spending in America's Largest Cities*, U.S. News, June 11, 2020.
200 Spending on Police by State, Cato Institute, accessed June 5, 2020.
201 Julia Musto, *Fraternal Order of Police VP: Defunding police departments is 'completely ridiculous'*, Fox News, June 5, 2020.
202 *See* Pfander and Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, N. Y. Univ. L. Rev. Dec. 2010.
203 *See id*.
204 *See id*.
205 *See* Little v. Barreme, 6 US 170 (1804).
206 *See* Murray v. The Charming Betsey, 6 U.S. 64 (1804).
207 *Supra* note 201.
208 *See* Tracy v. Swartwout, 35 U.S. 80 (1836) ("as the government in such cases is bound to indemnify the officer, there can be eventual hardship.").
209 *Supra* note 201.
210 *id*. ("The doctrine generally barred private individuals from suing the United States directly, but it did not bar suits against government officials. Following the imposition of liability on a government officer, Congress would decide whether to make good the officer's loss in the exercise of its legislative control of the appropriation process. Indemnifying legislation thus preserved the formal doctrine of sovereign immunity while assigning the ultimate loss associated with wrongful conduct to the government. In contrast to its operation today, when the doctrine applies to bar relief

For the victim, the process first dealt with judicial redress and thus prioritized the need to provide payment for the damages and condemn any similar rights violations in the future. For the officer, it would encourage close understanding and obedience to the laws they were supposed to enforce. For the agency, illicit activities would be clearly prohibited and lawful activities would be upheld. Courts, as judicial oversight bodies, had the power to determine the constitutionality and legality of police actions. Congress, the branch tasked with budget appropriations, had the power to indemnify monetary damages, even steep ones.[211] Modern indemnification for police officers is much less a question than it is a right; it is extremely rare for individual officers to be held financially accountable in misconduct claims, even though some large municipalities' police departments resolve several claims weekly, on average.[212] Individual officers paid a fraction of a percent of these settlements' total award damages in large cities, and they paid even less in smaller cities and towns.[213] A survey of settlements from 44 of the largest U.S. municipalities between 2006 and 2011 found that "officers financially contributed to settlements and judgments in just 0.41% of the approximately 9,225 civil rights damages actions resolved in plaintiffs' favor, and their contributions amounted to just 0.02% of the over $730 million spent by cities, counties, and states in these cases."[214] Not a single officer was required to contribute to non-civil rights cases (such as motor vehicle crashes or employment discrimination). Los Angeles is especially guided by this doctrine of indemnification of police officers. Of over ninety million dollars paid out by the Los Angeles Police Department and the Los Angeles County Sheriff's Department between 2006 and 2011, it charged officers a total of three hundred dollars — which was awarded in a single punitive damages case against an officer who, due to a complication, never paid it. In that six-year period, no officer in America paid any of the damages awarded in §1983 cases. Officers who are denied qualified immunity, and thus found to have deviated from the clearly established rules of their job, are still virtually guaranteed indemnity to relieve them of individual liability. Rather than burdening officers with any financial liability, these cases burden citizens who not only are subjected to misconduct, but who also pay the taxes that fund their opponents in court.[215]

The practice of indemnification itself is not unique to policing.[216] Any government contractor may be indemnified by law, so long as they submit timely and relevant proof of the claims to indemnification, plus any other records if asked.[217] Historically, law enforcement had to jump through the same paperwork and oversight; for nineteenth-century federal officials, indemnification was granted sixty percent of the time, based on well-reasoned petitions brought by the officer through appropriations bills that explicitly explained why the officer's conduct was in lawful obedience to their government agency.[218]

Modern police officers, however, have diverged from this federal indemnification doctrine of procedure and oversight. Treated as a de facto judicial or administrative right, indemnification across the nation's individual municipalities can vary from being hotly contested in court, decided by the department before trial, or left unresolved for police agencies to interpret even after the juries' final verdicts.[219] The practice for police officers also diverges from state doctrine. Indemnification, as authorized by some state codes, may be granted to any government employee acting "without actual malice and in the apparent best interests of the public," as well as "within the course and scope of [their] employment."[220] But in § 1983 cases, officers are assumed to have both violated the constitutional rights of the public *and* their "clearly established" authority; otherwise, they would have been granted qualified immunity. Police officer indemnification further contradicts Supreme Court doctrine, which has consistently assumed that officers *themselves* are held financially responsible in many kinds of misconduct cases[221] and that "that the framers of the Civil Rights Act of 1871 did not intend that municipal governments be held vicariously liable for the constitutional torts of their employees."[222] Despite diverging from so many existing federal and state norms, police indemnification continues to reinforce sovereignty used to run police departments, oversee their officers, and grant their officers impunity.

IV. Conclusion

On my honor, I will never betray my badge, my integrity, my character or the public trust. I will always have the courage to hold myself and others accountable for our actions. I will always uphold the constitution, my community, and the agency I serve.[223]

altogether, sovereign immunity in the early republic served less to authorize lawless conduct on the part of the federal government than to allocate responsibility for appropriations and adjudication as between the legislative and judicial branches of government.").

211 *Id*. ("Perhaps most strikingly, we find evidence that nineteenth-century legislators viewed reimbursement of a well-founded claim more as a matter of right than as a matter of legislative grace. Indeed, our study suggests that government officers succeeded in securing indemnifying private legislation in roughly sixty percent of cases in which they petitioned for such relief.").

212 Citizens Police Data Project, accessed July 2, 2020, (cpdp.co).

213 Joanna Schwartz, *Police Indemnification*, N. Y. Univ. L. Rev. Vol. 83 NO. 3, 2015.

214 *id*.

215 *Id*. For example, in 2012 (the end of Schwartz' study period), the Los Angeles city budget primary source of income was tax revenue. Though that year's city budget report highlights measures to cut spending — including cutting the Environmental Affairs Department — the billion-dollar police department budget increased from the previous year. And indeed, tax-funded police departments have continued to rise nationwide to a sum total of over $100 billion in 2017). S*ee also, How Cities Offload the Cost of Police Brutality*, Bloomberg CityLab, June 2020.

216 Take, for example, a federally-employed delivery person of elemental mercury — federal codes promise to "hold harmless, defend, and indemnify [them] in full" if they are sued for causing property damage, personal injury, or even death. To secure the indemnification funds, they are obligated to notify the Secretary of Energy within thirty days with the relevant records and proof of damages. 42 U.S. Code Chapter 82, Subchapter III, § 6939f.

217 50 U.S.C. 1431-1435 and Executive Order 10789 (as amended), via Aquisition.gov.

218 *Supra* note 201.

219 *Supra* note 212.

220 *See e.g.* California Code, Title 1, Division 3.6, Part 2, Chapter 1, §825 - 825.6.

221 *See* Monell v. Department of Social Services, 436 U.S. 658 (1978), Briscoe v. LaHue, 460 U.S. 325 (1983), Heck v. Humphrey, 512 U.S. 477 (1994).

222 *See* City of Canton, Ohio v. Harris, 489 U.S. 378 (1989).

223 Oath of Honor, Intl. As. Chiefs of Police, accessed June 4, 2020,

It's hard to find a single phrase in this widely-used police oath that justifies having internal investigations closed from oversight, the FOP's aggressive lobbying, qualified immunity that authorizes continued constitutional violations, or indemnification that allows officers to disobey their orders with impunity. To never betray integrity or character, oath-abiding officers should actively prevent and punish Brady violations, purged or hidden records, and mismanaged complaints of misconduct. To fulfill the promise of public trust and accountability, officers should encourage external oversight boards to investigate complaints and audit department activity as well as restrictions on how and in what circumstances indemnification may be granted. To always uphold their police agency and the constitution, police should advocate for department protocols that clearly spell out when and to what extent aggression can be used and a qualified immunity test that never lets courts ignore violations of constitutional rights.

These regulations improve police-community trust, offer victims of police misconduct fair investigation and review, and increase civilians' access to redress when police violate their rights. But these regulations alone, though they could minimize police harm and neglect, will not ensure that police actually better communities or reduce crime. Enforcing criminal law and fighting crime are minimal components of American policing today and rely on patrolling and surveillance techniques. Historically, police used these techniques not to target crime, but instead to target countless "criminal" groups — people of color, youth, drug addicts, political dissenters, union members, women, LGBT communities, houseless people, indigenous people, and more — rather than allocating them resources, which has greater promise for long-term crime reduction.[224] When officers misstep, they usually deal with it through internal investigations that prioritize officers' jobs over the safety and interests of the public. When they misstep so far it crosses constitutional lines, it's extraordinarily difficult for courts to hold them accountable — and even when they are, taxpayers almost always pay for it.

Though police have long enjoyed independence to decide what their badge stands for and how to use it,[225] they are nonetheless a public service paid one hundred billion dollars annually[226] and expected to protect and serve America's communities. This responsibility is rooted in the expectations that they hold sincere regard for clearly established protocols, act under public authority, promise reliable accountability, effectively prevent and ameliorate crime (instead of suppressing marginalized classes), and enforce laws within constitutional rights to equal treatment, privacy, and due process. Until these expectations are met, we must stop granting indemnification, qualified immunity, internal investigations, autonomous operations, and unregulated funding to police forces that have not earned them. Perhaps police officers should break the promise to "never betray my badge" when that badge carries a history of violence, corruption, and ineffective crime prevention; or when it comes at the expense of internal transparency, community oversight, and constitutional rights; or when it is invoked as a license to use chemical agents that propagate coronavirus and are internationally banned in war[227]; or when it faces nearly three months of protests amidst a global pandemic and looming recession.

FOP lobbying, political rhetoric, and Supreme Court assumptions have made it easy to pretend that police are always performing "effective functions of government." Although this assumption allows police operations to hide far beyond our systems of checks and balances, we have not always taken it on its face. For example, for most of the twentieth century, police assumed the task of transporting injured people to hospitals, usually in small police cars with no attendant.[228] In Pittsburgh, this function was so ineffective that, after many community members and even the mayor died without care en route, community members decided to create their own emergency medical service.[229] Guided by a leading local physician, newly trained paramedics — many of whom were Black men out of work — built a successful service with trainings, protocols, and equipment soon replicated in cities across the nation.[230] Today, Americans needing emergency medical attention can place a call and expect a swift, sophisticated, and skillful team to arrive at their aid. This is because people did not merely assume that medical service was an "effective function" of the police. Instead, they created a team to effectively provide it. Cities across America are beginning to build similar programs to divert some emergency calls from police to mental health advocates[231] and de-escalation teams.[232] So far, these teams have rarely needed police backup.[233] These programs are not radical in their ends; like police, they aim to protect and serve community members in need. Instead, they are radical in their means; by abiding by explicit, specific, and community-driven regulations,[234] these teams reject the notion that police officers should be given sovereignty to direct themselves.

There are clear measures that can prevent the corruption that stems from granting police unchecked sovereignty. Police

(https://www.theiacp.org/resources/the-oath-of-honor).

224 *See* What works in policing to reduce crime, College of policing, 2012 ("In summary, the best thing that police can do to reduce crime is to target resources based on analysis of the problem and at the same time ensure the fair treatment of all those they have contact with.").

225 *Supra* note 26.

226 Spending on Police by Sate, Cato Institute, June 5, 2020.

227 *See* Harmeet Kaur, *The military is banned from using tear gas on the battlefield, but police can use it on crowds at home. Here's why*, CNN, June 8, 2020 ("Top health experts have warned that using the chemical agent could help the coronavirus spread because it irritates the lungs and makes people cough. And organizations such as the American Civil Liberties Union have pointed out that the chemical agent is banned in war."); *See also*, Claire Lampen, *Protesters say Aurora PD used force at Elijah McClain Vigil*, The Cut, June 2020.

228 *See* Erika Beras, *How Pittsburgh's Freedom House Pioneered Paramedic Treatment*, Nat'l. Pub. Radio, March 2015.

229 *Id.*

230 *See* Valerie Amato, *The Forgotten Legacy of Freedom House*, EMS World, May 2019.

231 *See* Sigal Samuel, *Calling the cops on someone with mental illness can go terribly wrong. Here's a better idea.*, Vox, July 1, 2020.

232 *See* Ari Shapiro, *'CAHOOTS': How Social Workers and Police Share Responsibilities in Eugene, Oregon*, Nat'l. Pub. Radio June 10, 2020.

233 *See id*, ("So last year, out of a total of about 24,000 calls, 150 times we called for police backup for some reason, so not very often.").

234 *See id.*

should adhere to proven, clearly written methods for responding to crime rather than assuming autonomous discretion of their conduct or continuing discriminatory and outdated practice of patrolling "dangerous classes."[235] Police should rely on community involvement and oversight in shaping these protocols and in reviewing general trends and individual cases of misconduct. Police should never leave victims of constitutional violations without relief in § 1983 cases, and courts should use these cases to condemn future abuses. Police should give and receive indemnification only when it is documented and justified. But this is only the start. We can do more than punish police actions when they harm the public enough to merit a complaint or lawsuit. We should look to new programs and models of police functions that are not only limited by community oversight, but that are fundamentally motivated by community needs from the moment officers begin training.

235 *See* note 64. The Republic of Georgia's success in police reform further requires that police not only act in accordance to the Constitution and laws, but further specifies permissible measures they may take in a wide range of interactions and encounters. Camden, New Jersey, adopted a similar model after disbanding and rebuilding their police in 2013; since, violent rime has fallen by 42%; murder rates have fallen by more than half. *See* Yasmeen Serhan, *What the World Could Teach America about Policing*, The Atlantic, June 10, 2020.

A Balancing Act: Contact Tracing in the Digital Age

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After receiving worldwide acclaim for quickly identifying and isolating those infected with COVID-19, South Korea experienced the first test of its ability to prevent a second wave of infections when a man unknowingly spread the virus while visiting several nightclubs in Itaewon one night in early May.[1] Health officials managed to contact and test over 110,000 people who may have interacted with the man.[2] This aggressive approach allowed authorities to prevent the outbreak in Itaewon from becoming the source of a second wave.[3]

However, this method of contact tracing has raised valid privacy concerns. South Korea has combined location data from cell phones, credit card records, medical records, immigration history, and surveillance footage in its contact tracing protocols, and details about the age, sex, employment, contacts, and location history of those who test positive are often published in a public database.[4] Seoul's LGBT community frequents the nightclubs in Itaewon, and media reports initially emphasized this connection.[5] Fearful of testing positive and thereby being outed to their friends and family as having attended these nightclubs, some potential contacts resisted testing, forcing the government to implement new privacy measures.[6] Similar issues existed during the peak in early March when, for example, people used the information published online to identify people suspected of engaging in extra-marital affairs. [7]

This is the first deployment of these contact tracing measures after the mismanagement of a MERS outbreak in 2015 prompted a new law granting public health officials extensive powers in South Korea.[8] Recent examples, however, demonstrate that these intrusive contact tracing efforts may discourage cooperation and reduce trust in the government over time. The South Korean model illustrates important lessons for the United States as it continues to build an effective contract tracing system that protects privacy and maintains public trust.

In the first section, I will address how contact tracing fits within the three-step process of testing, tracing, and isolating, and how technology has reshaped the process during recent epidemics. Next, I will present the factors that drove the South Korean government to revise its law on contact tracing and how the government has utilized it thus far in the COVID-19 pandemic. Third, I will present the limitations in the United States that necessitate a contact tracing policy that accounts for privacy concerns and argue why state public health officials in the United States ought to recognize the benefits that such a policy can nevertheless provide.

I. Background

A. Test, Trace, and Isolate

No one strategy alone will halt the spread of COVID-19. Identifying the known contacts of somebody infected with the virus only works if those with the virus can first be identified. This requires extensive testing. South Korea stood out from much of the rest of the world in February and early March for precisely this reason. Getting tested for the virus at that time in the United States was a near impossibility if one had not recently traveled to China, Italy, or other known hotspots.[9] That was a fatal error, and the lack of testing in the United States and other countries concealed evidence of sustained community spread.[10] As a result, testing and tracing individual cases was infeasible during March and April. Instead, as Duke's Margolis Center for Health Policy notes, "suppressing chains of transmission [required] community-wide measures like stay-in-place orders."[11] South Korea, on the other hand, had not been forced

1 Jaeyeon Woo, *Coronavirus patient found to have visited 5 clubs in Seoul's Itaewon*, Yonhap News Agency (May 7, 2020, 6:17 PM), https://en.yna.co.kr/view/AEN20200507010500315.

2 Justin Fendos, *South Korea's Itaewon Club Incident Illustrates How Easily the Coronavirus Can Spread*, Nat'l Interest (June 23, 2020), https://nationalinterest.org/blog/korea-watch/south-koreas-itaewon-club-incident-illustrates-how-easily-coronavirus-can-spread.

3 Kim Arin, *S. Korea to alter reopening plan after nightclub outbreak*, Korea Herald (May 18, 2020, 6:30 PM), http://www.koreaherald.com/view.php?ud=20200518000901.

4 Max S. Kim, *Seoul's Radical Experiment in Digital Contact Tracing*, New Yorker (Apr. 17, 2020), https://www.newyorker.com/news/news-desk/seouls-radical-experiment-in-digital-contact-tracing.

5 Ock Hyun-ju, *Korean media's focus on 'gay' club in COVID-19 case further stigmatizes LGBT people*, Korea Herald (May 8, 2020, 6:46 PM), http://www.koreaherald.com/view.php?ud=20200508000751.

6 Dasl Yoon & Timothy W. Martin, *'What If My Family Found Out?': Korea's Coronavirus Tracking Unnerves Gay Community*, Wall St. J. (May 12, 2020, 2:04 PM), https://www.wsj.com/articles/south-koreas-coronavirus-efforts-spark-privacy-concerns-in-gay-community-11589306659.

7 Justin Fendos, *How surveillance technology powered South Korea's COVID-19 response*, Brookings (Apr. 29, 2020), https://www.brookings.edu/techstream/how-surveillance-technology-powered-south-koreas-covid-19-response/.

8 Brian Kim, *Lessons for America: How South Korean Authorities Used Law to Fight the Coronavirus*, Lawfare (Mar. 16, 2020), https://www.lawfareblog.com/lessons-america-how-south-korean-authorities-used-law-fight-coronavirus.

9 Joe Sexton & Joaquin Sapien, *Two Coasts. One Virus. How New York Suffered Nearly 10 Times the Number of Deaths as California.*, ProPublica (May 16, 2020, 5:00 AM), https://www.propublica.org/article/two-coasts-one-virus-how-new-york-suffered-nearly-10-times-the-number-of-deaths-as-california.

10 *New Case of COVID-19 in Summit County Signals Community Spread*, Utah Dep't of Health (Mar. 14, 2020), https://health.utah.gov/featured-news/new-case-of-covid-19-in-summit-county-signals-community-spread.

11 Mark McClellan, Scott Gottlieb, Farzad Mostashari, Caitlin Rivers & Lauren Silvis, *A National Covid-19 Surveillance System: Achieving Containment*, Duke Margolis Center for Health Pol'y (Apr. 7, 2020), https://

to implement such orders because of widespread testing.[12]

Although many health experts warned of a second wave hitting the United States in the fall, the country as a whole never fully suppressed the first wave of infections from the spring.[13] Certain areas, including California and the South, also experienced a rapid increase in the number of infections during the summer. During the fall and winter, however, hospitals will also have to treat patients suffering from seasonal flu. This impending challenge demonstrates the necessity of fortifying the three-step plan to test, trace, and isolate. This will hopefully decrease the likelihood of needing a full-scale lockdown in the fall.

Contact tracing requires the close contacts of infected individuals to be tested immediately even if they do not have symptoms. These contacts then self-quarantine during the fourteen-day incubation period of the virus.[14] Together, these three steps — test, trace, and isolate — form the backbone of the public health strategy to contain the virus. The lack of this strategy in early March forced the United States, and most of the world, to shut down, and a robust and effective strategy offers the only path towards safely reopening, according to Dr. Ashish Jha, the director of Harvard's Global Health Institute.[15]

While experts disagree on the precise number of additional weekly tests needed, an analysis using Harvard Global Health Institute's methodology found that only twelve states are meeting minimum testing thresholds as of early September.[16] Without adequate and speedy testing, contact tracing programs could be rendered useless, demonstrating the need to continue expanding testing capacity. The development of an effective contact tracing policy is thus a very different challenge, one that requires recruiting a vast network of human contact tracers and appropriately incorporating technology into the process.

II. Contact Tracing in South Korea

A. MERS Outbreak in 2015

Middle Eastern Respiratory Syndrome (MERS), a coronavirus with a much higher mortality rate than COVID-19, first arose in 2012. A 2015 outbreak in South Korea and the government's mismanagement in containing the outbreak served as the catalyst for the implementation of laws used today by public health officials in containing COVID-19.

MERS spreads most easily in hospital settings, where close contact between infected and healthy individuals facilitates transmission.[17] The source of the outbreak was a man who had recently traveled to the Middle East and contracted MERS while there. When the man provided his travel itinerary, he accidentally left out two countries where MERS is more prevalent, and as a result, his doctors did not suspect that he had MERS. He went nine days before receiving a diagnosis. In that time, it is expected that he may have infected thirty people at hospitals.[18] A desire to visit more prestigious doctors and a shortage of MERS testing kits in South Korea led "infected patients [to go] from hospital to hospital seeking help," aiding the spread of the virus to 186 people.[19]

The government initially withheld the names of hospitals that had treated MERS patients, fearing that releasing them would lead to public panic, but that decision resulted in widespread criticism.[20] South Korea's current president, Moon Jae-in, said of the government at the time, "The government has failed, and the people have lost their trust."[21] Limited communication between the national government, municipal authorities, and health officials further contributed to feelings of mistrust.[22] Additionally, enforcing quarantine orders for the man's close contacts proved to be difficult in some instances, as at least one contact ignored the quarantine order and traveled to China, where he later tested positive for MERS.[23]

The MERS outbreak in South Korea had two implications for contact tracing. First, it revealed that the government's efforts to withhold information about the spread of the virus from the public fostered both fear and mistrust. Second, information about the first patient's location history and subsequent contacts' willingness to abide by quarantine orders proved to be unreliable. Despite these missteps, however, South Korea was able to identify more than 16,000 possibly exposed contacts

healthpolicy.duke.edu/sites/default/files/2020-06/a_national_covid_surveillance_system.pdf.

12 Jason Beaubien, *How South Korea Reined In The Outbreak Without Shutting Everything Down*, Nat'l Pub. Radio (Mar. 26, 2020, 2:41 PM), https://www.npr.org/sections/goatsandsoda/2020/03/26/821688981/how-south-korea-reigned-in-the-outbreak-without-shutting-everything-down.

13 Melissa Hawkins, *The US isn't in a second wave of coronavirus – the first wave never ended*, Conversation (June 30, 2020, 8:19 AM), https://theconversation.com/the-us-isnt-in-a-second-wave-of-coronavirus-the-first-wave-never-ended-141032.

14 Scott Gottlieb, *National coronavirus response: A road map to reopening*, Am. Enterprise Inst. (Mar. 29, 2020), https://www.aei.org/research-products/report/national-coronavirus-response-a-road-map-to-reopening/.

15 Ashish K. Jha, Benjamin Jacobson, Stefanie Friedhoff & Thomas Tsai, *HGHI and NPR publish new state testing targets*, Yonhap News Agency (May 7, 2020), https://globalepidemics.org/2020/05/07/hghi-projected-tests-needed-may15/.

16 Keith Collins, *Is Your State Doing Enough Coronavirus Testing?*, N.Y. Times (Aug. 17, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-testing.html.

17 Lisa Schnirring, *MERS analysis highlights concerns over healthcare spread*, Center for Infectious Disease Research and Policy (Aug. 7, 2019), https://www.cidrap.umn.edu/news-perspective/2019/08/mers-analysis-highlights-concerns-over-healthcare-spread.

18 Jeyup S. Kwaak, *South Korea MERS Outbreak Began With a Cough*, Wall St. J. (June 2, 2015, 2:00 PM), https://www.wsj.com/articles/south-korea-mers-outbreak-began-with-a-cough-1433755555?mod=article_inline.

19 Heejin Kim, Sohee Kim & Claire Che, *Virus Testing Blitz Appears to Keep Korea Death Rate Low*, Bloomberg Businessweek (Mar. 5, 2020, 1:18 AM), https://www.bloomberg.com/news/articles/2020-03-04/south-korea-tests-hundreds-of-thousands-to-fight-virus-outbreak?sref=S1sm3cTr

20 Jaeyeon Woo, *S. Korea identifies 24 MERS-affected hospitals*, Korea Herald (June 7, 2015, 11:35 PM), http://www.koreaherald.com/view.php?ud=20150607000157.

21 *id*.

22 Kyungwoo Kim & Kyujin Jung, *Dynamics of Interorganizational Public Health Emergency Management Networks: Following the 2015 MERS Response in South Korea*, 30 Asia Pacific J. of Pub. Health 207 (2018).

23 Kai Kupferschmidt, *'Superspreading event' triggers MERS explosion in South Korea*, Science (June 8, 2020, 9:07 PM), https://www.sciencemag.org/news/2015/06/superspreading-event-triggers-mers-explosion-south-korea.

and halt the spread of the virus within two and a half months.[24] This serves as the backdrop to subsequent revisions to the Infectious Disease Prevention and Control Act (IDPCA), legislation aimed at "preventing the occurrence and prevalence of infectious diseases and prescribing the necessary measures for their prevention and control."[25] These revisions would allow health officials to override South Korea's otherwise strong Personal Information Protection Act (PIPA), which "bans the collection, use, and disclosure of personal data without prior informed consent of the individual whose data are involved."[26]

B. Infectious Disease Prevention and Control Act Revisions[27]

The post-MERS revisions to the IDPCA were significant because they restructured the chains of command that had stifled collaboration between government and health officials during the MERS outbreak[28] and allowed health officials to collect new forms of information about infected individuals and their contacts.[29]

During the MERS outbreak, a system of "five competing and overlapping chains of command" left the Korea Center for Disease Control and Prevention (KCDCP) "[spending] more time explaining situations to bureaucrats than actually using its resources to confront MERS."[30] The revisions place the KCDCP as the country's "primary epidemic control center,"[31] yet they still give local governments the authority to independently implement "preventive and quarantine measures" that best match local conditions.[32] Additionally, amendments to the Medical Devices Act allow the KCDCP to request that the Ministry of Food and Drug Safety approve the manufacture and distribution of otherwise unapproved testing kits in emergency situations.[33] These decisions would be instrumental in South Korea's early efforts at containing COVID-19.

Other amendments to the IDPCA granted public health officials new authority to collect data in their contact tracing efforts. Seven types of data can be collected: personal identification information; prescription and medical records; transit pass records; CCTV footage; credit, debit, and prepaid card transactions; immigration records; and location data.[34] The Minister of Health and Welfare and the Director of the Korea Centers for Disease Control and Prevention are authorized to compel the respective holders of this information, such as credit card companies and cell-phone providers, to provide it without a warrant.[35] The information must pertain to "patients…of infectious diseases and persons suspected of contracting infectious diseases."[36]

The law requires that anyone in possession of the information collected "shall [not] use such information for any purpose, other than conducting tasks related to infectious diseases." Those who gather this data must also "destroy all information after completing the relevant affairs."[37] In response to information being withheld from the public during the MERS outbreak, the amendment asserts that the general public has "the right to know information on the situation of the outbreak of infectious diseases and the prevention and control of infectious diseases."[38] The law elaborates that the public's "right to know" applies to "the movement paths, transportation means, medical treatment institutions, and contacts of patients of the infectious disease."[39]

C. Response to the COVID-19 Pandemic

The aforementioned amendments to South Korea's Infectious Disease Prevention and Control Act have shaped the government's response to the pandemic. In line with the clear chain of command that the amendments established, public health officials have taken the lead, and the Director of the KCDC, Jung Eun-kyeong, leads the country's daily briefings. At the beginning of the outbreak, the country raised its national alert level, which "[activated the Central Disaster and Safety Countermeasure Headquarters] to coordinate response efforts, with the Prime Minister as its top commander."[40] South Korea's experience during the MERS outbreak also revealed the importance of testing availability, and the KCDC granted early emergency authorization for four different types of testing kits, allowing the country to administer an average of 20,000 tests per day.[41] These early measures set South Korea apart from the rest of the world, but the invasive nature of the country's other main tool, contact tracing, has had negative consequences.

South Korea's efforts at contact tracing have been likened to police investigations. Contact tracers first interview those infected with COVID-19 to identify the patient's movements. In some cases, healthcare workers and family members are also interviewed.[42] Then, "more objective data" can be collected by officials without the need for warrants,[43] such as personal identification information; prescription and medical records; transit pass records; CCTV footage; credit, debit, and prepaid

24 Alastair Gale, *South Korea MERS Outbreak Is Over, Government Says*, Wall St. J. (July 27, 2015, 11:07 PM), https://www.wsj.com/articles/south-korea-mers-outbreak-is-over-government-says-1438052856?mod=article_inline.
25 *South Korea: Legal Responses to Health Emergencies*, 19, Library of Congress, https://www.loc.gov/law/help/health-emergencies/southkorea.php.
26 Sangchul Park, Gina Jeehyun Choi & Haksoo Ko, *Information Technology–Based Tracing Strategy in Response to COVID-19 in South Korea—Privacy Controversies*, 323 JAMA 2129 (2020).
27 [Infectious Disease Control and Prevention Act], (S. Kor.).
28 Seung-Youn Oh, *South Korea's Success Against COVID-19*, Reg. Rev. (May 14, 2020), https://www.theregreview.org/2020/05/14/oh-south-korea-success-against-covid-19/.
29 Sangchul Park et, al., *supra* note 26
30 Seung-Youn Oh, *supra* note 28
31 Seung-Youn Oh, *supra* note 28
32 [Infectious Disease Control and Prevention Act], Art. 4 (R.O.Korea).
33 [Medical Devices Act], Art. 46 (R.O.Korea).
34 [Infectious Disease Control and Prevention Act], *supra* note 32, at Art. 76-2.
35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.* at Art. 34-2
39 *Id.*
40 Seung-Youn Oh, *supra* note 28
41 *Id.*
42 *COVID-19 Response: Korean government's response system*, Cent. Disease Control Headquarters (Feb. 25, 2020), http://ncov.mohw.go.kr/en/baroView.do?brdId=11&brdGubun=111&dataGubun=&ncvCont Seq=&contSeq=&board_id=.
43 *Id.*

card transactions; immigration records; and location data.[44] After identifying possible contacts of the infected individual using this information, contact tracers inform the contacts that they are "required to attend healthcare education, have their symptoms monitored, and go into self-quarantine [for the maximum incubation period (14 days)]," and any "violation of self-quarantine regulations will result in up to a 10-million won fine or one year in prison."[45] The IDCPA requires the Ministry of Health and Welfare to publish "the path and means of transportation of infected persons; the medical institutions that treated infected persons; and the health status of those in contact with an infected person," yet the MOHW also includes the age, sex, and nationality of COVID-19 patients.[46] Local governments also have the authority to release more information about infected patients, and some have chosen to provide "highly detailed routes as well as the names of restaurants, shops, and other business premises that infected persons visited."[47]

The high transmissibility of COVID-19 has forced contact tracers to monitor large numbers of people, and in order to cope with this strain, the government created the "COVID-19 Smart Management System."[48] This system automated much of the investigative work for contact tracers, as it is able to collect information from the National Police Agency, three telecommunications firms, and twenty-two credit card companies in less than ten minutes.[49] The government also mandates that everyone arriving in the country from abroad must abide by a fourteen-day quarantine, which is enforced by a mobile app that monitors their location. [50]

South Korea held parliamentary elections in the middle of April. At the time, daily infections had fallen from the peak of 909 in late February to below 30.[51] Before COVID-19 took hold in the country, many projected the ruling left-wing government to lose seats, but with the public largely approving of the government's response to the virus, President Moon's party won in a landslide.[52] This "overwhelming, history-making [victory]" can be interpreted as a show of support for the government's policies, including its contact tracing policy.[53] A survey found that 68.2% of respondents approved of the sharing of infected individual's information online.[54] However, privacy concerns have continued to grow, potentially hampering the policy's effectiveness in the future.

D. Privacy Concerns

During the first several months of the pandemic, two groups of people have received outsized attention from the public and the media in South Korea: members of the Shincheonji Church of Jesus and the LGBT community. Both groups are not regarded well. The church, widely considered a cult, is led by a man who claims to be the messiah and says he will bring 144,000 of his followers to heaven on the Day of the Judgement.[55] Although many more South Koreans have come to accept members of the LGBT community over the last decade, a 2018 survey found that forty-nine percent of Koreans "cannot accept homosexuals."[56]

In the middle of February, a 61-year-old woman attended services at one of Shincheonji's location while she had a sore throat and fever (the church required that its members attend services even if they are sick). Three days later she received a positive diagnosis for COVID-19.[57] After the public disclosure of the outbreak at Shincheonji and extensive media reporting, politicians and members of the public directed their ire at the church and its members and blamed them for causing the pandemic. Seoul's mayor at the time, Park Won-soon, called for the church's leader to be investigated for "murder through willful negligence" because many of the members had "remained incommunicado."[58] Fearful of being associated with the church by coming forward to get tested, some members refused.[59] Nearly 1.5 million people signed a petition for the church to be disbanded, and there was widespread support for an investigation into the church's membership.[60]

The accuracy of these allegations is disputed. The Vice Minister of Health affirmed that the church had been forthcom-

44 Sangchul Park, Gina Jeehyun Choi & Haksoo Ko, *Information Technology–Based Tracing Strategy in Response to COVID-19 in South Korea—Privacy Controversies*, 323 JAMA 2129 (2020).
45 *Id*.
46 *Id*.
47 *Id*.
48 David Lee & Jaehong Lee, *Testing on the Move: South Korea's Rapid Response to the COVID-19 Pandemic*, 5 Transp. Res. Interdisc. Persp. (2020).
49 Park Han-na, *Seoul to launch 10-minute contact tracing program*, Korea Herald (Mar. 26, 2020, 5:38 PM), http://www.koreaherald.com/view.php?ud=20200326000987.
50 Cent. Disease Control Headquarters, *Supra* note 42
51 *S. Korea reports 19 new coronavirus cases, fewest in a week*, Yonhap News Agency (May 16, 2020, 10:36 AM), https://en.yna.co.kr/view/AEN20200516001100315.
52 Choe Sang-Hun, *In South Korea Vote, Virus Delivers Landslide Win to Governing Party*, N.Y. Times (Apr. 15, 2020), https://www.nytimes.com/2020/04/15/world/asia/south-korea-election.html.
53 S. Nathan Park, *South Korea Is a Liberal Country Now*, Foreign Pol'y (Apr. 16, 2020, 5:45 PM), https://foreignpolicy.com/2020/04/16/south-korea-is-a-liberal-country-now/.
54 David Cox, *Alarm bells ring for patient data and privacy in the covid-19 goldrush*, B.M.J. (May 18, 2020), https://www.bmj.com/content/bmj/369/bmj.m1925.full.pdf.
55 *Coronavirus: South Korea sect leader to face probe over deaths*, BBC (Mar. 2, 2020), https://www.bbc.com/news/world-asia-51695649.
56 *Portion of S. Koreans opposed to homosexuality dips below 50 pct for the first time*, Yonhap News Agency (Feb. 17, 2020, 10:23 PM), https://en.yna.co.kr/view/AEN20190217000500315.
57 Dasl Yoon and Timothy W. Martin, *Why a South Korean Church Was the Perfect Petri Dish for Coronavirus*, Wall St. J. (Mar. 2, 2020, 8:09 AM), https://www.wsj.com/articles/why-a-south-korean-church-was-the-perfect-petri-dish-for-coronavirus-11583082110.
58 Choe Sang-Hun, *He Blames 'Evil' for South Korea's Coronavirus Surge. Officials Blame Him.*, N.Y. Times (Mar. 2, 2020), https://www.nytimes.com/2020/03/02/world/asia/coronavirus-south-korea-shincheonji.html.
59 Kim Tong-Hyung, *Controversial church at center of S Korean outbreak*, Associated Press (Feb. 21, 2020), https://apnews.com/63a268bbd6390d52db0415a66cff24ef.
60 Raphael Rashid, *Being Called a Cult Is One Thing, Being Blamed for an Epidemic Is Quite Another*, The New York Times (Mar. 9, 2020), https://www.nytimes.com/2020/03/09/opinion/coronavirus-south-korea-church.html.

ing about its membership,[61] yet the church's controversial leader has since been arrested on charges that he obstructed the initial investigation.[62] The church's spokesman had earlier claimed, "Many church members were afraid to come out and reveal their church membership, given the overwhelming blaming coming from politicians and news media that called Shincheonji the originator of the virus outbreak… Shincheonji did not make the coronavirus."[63] Police have also waited outside the homes of church members, and the government in one province asked the public to report anyone they suspected of belonging to the church.[64] Support for such intrusive contact tracing was especially strong because the first major outbreak occurred among a group that faces widespread condemnation from the general public in South Korea.[65]

A couple of months later, the LGBT community came under similar scrutiny for being associated with a different outbreak. In early May, a 29-year-old man visited five nightclubs in Seoul on the first night that bars reopened and unknowingly spread the virus to about 200 people before he began experiencing symptoms.[66] Some media outlets focused on the fact that the nightclubs were frequented by the gay community, leading to homophobic vitriol spreading online.[67] Reports have found that "gay coronavirus" and "gay club" were among the most popular searches after the news broke.[68] Outlets "[revealed] not only the identity of clientele but also some of their ages and the names of their workplaces."[69]

The nightclubs collected the full names and phone numbers of attendees, but government officials say more than half of the 5,500 patrons provided fake information and that 3,112 "were currently not contactable."[70] Because of widespread tying the outbreak to a gay nightclub, patrons felt that if they were to submit to testing and self-quarantine, they would be immediately outed. Even if they managed to keep their self-quarantine a secret from friends and family, detailed information about their age, sex, and location history would be published online if they tested positive. People could likely discern their identities using this information. The deputy director of the KCDC, Kwon Jun-wook, conceded that "stigma and discrimination will only hide patients,"[71] and the Prime Minister, Chung Sye-kyun, said, "If contacts avoid diagnostic tests in fear of criticism, our society has to shoulder its entire consequences."[72]

Other less notable examples reveal that the government's contact tracing policy in South Korea has led to the public identification of certain patients, demonstrating that fear of social stigma extends beyond marginalized groups. In a recent survey by Seoul National University's School of Public Health, sixty-two percent of respondents stated that "they were more afraid of the social consequences of getting the virus than they were of the potential health risks."[73] After an infected person is identified, the government sends their information in text alerts to all phones in the vicinity, and the information is also available on the website of the Ministry of Health and Wellness. However, Oh Byoung-il, the head of a privacy advocacy organization, noted that these disclosures often include unnecessary information about the nature of individuals' contacts. For example, he notes that one patient was identified as having eaten a meal with his sister-in-law, and online speculation pointed to them having an affair. He concludes, "The fear is that what are supposed to be neutral data points about infected persons becomes speculation about motives and morals."[74]

Recognizing the serious issue that privacy concerns pose, the government implemented anonymous testing less than two weeks after the outbreak at the nightclubs. After the decision was made, daily tests administered in Seoul rose to 8,000 from only about 1,000 the prior week.[75] Seoul's mayor at the time, Park Won-soon, concluded, "This is proof that ensuring anonymity encourages voluntary tests."[76] Furthermore, one day after publicizing the anonymous testing, the Vice Health Minister announced, "[We] plan to revise the guidelines to prevent excessive disclosure of a patient's travel itinerary."[77] The gov-

61 *Id*.
62 Dasl Yoon, *Leader of Secretive Church at Center of South Korea's Virus Outbreak Is Arrested*, Wall St. J. (Aug. 1, 2020, 1:28 AM), https://www.wsj.com/articles/leader-of-secretive-church-at-center-of-south-koreas-virus-outbreak-is-arrested-11596259711.
63 Choe Sang-Hun, *He Blames 'Evil' for South Korea's Coronavirus Surge. Officials Blame Him.*, N.Y. Times (Mar. 2, 2020), https://www.nytimes.com/2020/03/02/world/asia/coronavirus-south-korea-shincheonji.html.
64 *Id*.
65 *Id*.
66 Jaeyeon Woo, *Coronavirus patient found to have visited 5 clubs in Seoul's Itaewon*, Yonhap News Agency (May 7, 2020, 6:17 PM), https://en.yna.co.kr/view/AEN20200507010500315.
67 Dasl Yoon & Timothy W. Martin, *'What If My Family Found Out?': Korea's Coronavirus Tracking Unnerves Gay Community*, Wall St. J. (May 12, 2020, 2:04 PM), https://www.wsj.com/articles/south-koreas-coronavirus-efforts-spark-privacy-concerns-in-gay-community-11589306659.
68 Min Joo Kim, *Tracing South Korea's latest virus outbreak shoves LGBTQ community into unwelcome spotlight*, Wash. Post (May 11, 2020, 8:05 PM), https://www.washingtonpost.com/world/asia_pacific/tracing-south-koreas-latest-virus-outbreak-shoves-lgbtq-community-into-unwelcome-spotlight/2020/05/11/0da09036-9343-11ea-87a3-22d324235636_story.html.
69 Nemo Kim, *South Korea struggles to contain new outbreak amid anti-gay backlash*, Guardian (May 11, 2020, 9:06 AM), https://www.theguardian.com/world/2020/may/11/south-korea-struggles-to-contain-new-outbreak-amid-anti-lgbt-backlash.
70 Michelle Kim, *Gay Men Outed in South Korea After COVID-19 Outbreak in LGBTQ+ Bars*, Them (May 11, 2020), https://www.them.us/story/gay-men-outed-in-south-korea-after-covid-19-outbreak-in-lgbtq-bars.
71 Keith Park, *South Korea nightclub coronavirus outbreak shines light on LGBT+ protection*, Center (May 15, 2020, 9:30 PM), https://www.reuters.com/article/us-health-coronavirus-southkorea-lgbt-tr/south-korea-night-club-coronavirus-outbreak-shines-light-on-lgbt-protection-idUSKBN-22R23L.
72 Hyung-Jin Kim, *Homophobia threatens to hamper South Korea's virus campaign*, Associated Press (May 12, 2020), https://apnews.com/57e1d-facd00ab3d113a77f724b5afb41.
73 Jihye Lee & Saritha Rai, *'No One Wants to Be Tested': How Social Stigma Hurts Containment*, Bloomberg (May 12, 2020, 5:00 PM), https://www.bloomberg.com/news/articles/2020-05-12/social-stigma-harassment-undermine-testing-efforts-across-asia?sref=S1sm3cTr.
74 Anthony Kuhn, South Korea's Tracking Of COVID-19 Patients Raises Privacy Concerns, NAT'L PUB. RADIO (May 2, 2020, 8:02 AM).
75 *Seoul Sees Virus Tests Surge After Promising Anonymity*, Barron's (May 13, 2020), https://www.barrons.com/news/seoul-sees-virus-tests-surge-after-promising-anonymity-01589345707.
76 *Id*.
77 Sangmi Cha & Josh Smith, *South Korea to boost coronavirus tracing privacy amid fears of backlash*, Reuters (May 14, 2020, 12:51 AM), https://

ernment had to adopt this position because of the widespread vigilantism that had hindered the effort to trace contacts and secure cooperation. The intrusive nature of South Korea's contact tracing policy and the public disclosure of personal information left many patrons hesitant to get tested, demonstrating that the most intrusive policies can hinder the objective for implementing them in the first place.

III. Responses in the United States

A. The Legality of Digital Contact Tracing

In contrast to South Korea, much of the public health response to COVID-19 in the United States has been coordinated and directed by the state governments, as it has during previous outbreaks of disease under the country's federalist system. This includes contact tracing, and as many state governors have now largely reopened their economies, addressing the efficacy of digital contact tracing is essential. The example from South Korea demonstrates that the use of location data can aid contact tracers, but the excessive disclosure of personal information can not only lead to the identification of individual patients but also undermine efforts to communicate with those exposed to the virus and administer tests.

Unlike in South Korea, there is no clear guidance on what specific authorities are granted to states in the efforts to contain the spread of an outbreak in the United States. The clearest articulation, however, comes from *Jacobson v Massachusetts*, a 1905 Supreme Court case concerning mandatory vaccinations, in which the Court held that states have broad police powers "to protect… against an epidemic threatening the safety of all."[78] However, two important limitations are provided by the Court. First, the measures taken by states must not go "beyond the necessity of the case… under the guise of exerting a police power." Second, the measures implemented by the state must not go "beyond what was reasonably required for the safety of the public." It is unlikely that courts would consider collecting and publishing individuals' location data as necessary for public health, in light of the availability of less intrusive contact tracing methods.

Furthermore, there is an important political dimension to consider. If states implement compulsory contact tracing policies that utilize location data, protests against public health measures could gain further traction. Polling has found that only between forty and fifty percent of Americans approve of digital contact tracing apps. In April, half of smartphone-using respondents in a *Washington Post*-University of Maryland poll indicated that they would download such apps.[79] From a June poll, researchers at Cornell and MIT estimate that "[forty-two percent] of respondents indicate that they would download and use such an app."[80] People could also engage in a "virtual protest," where they turn off their cell phones or leave them at home.[81] Requiring the use of these apps can undermine the motivation behind implementing the mandate in the first place. Additionally, most governments around the world have developed contact tracing apps using a framework provided by Apple and Google, and both companies have prohibited governments from mandating that the general public download these apps.[82] Repairing and building further public support for digital contact tracing would require open communication from public health officials.

B. Bluetooth Tracking

Digital contact tracing can become a valuable tool in efforts to contain the spread of the virus, but overly intrusive methods can undermine public support. Mandated participation could greatly exacerbate these concerns. A June poll found that three-quarters of Americans believe that their "digital privacy is at risk if the information…is stored centrally so governments and authorities can access it."[83] Recognizing the concerns about governments gaining access to location data, Apple and Google have instead developed software that relies on anonymous Bluetooth signals to determine when smartphone users may have been in close proximity to one another. This offers the right balance between effective contact tracing and protecting privacy.

A comprehensive and centralized database of civilian movements could be misused by governments, and the potential for unauthorized access to this information can be even more detrimental. Bobby Chesney, a law professor at the University of Texas, writes, "The fact that someone went somewhere, or did something, or was with someone else (or just that they plausibly *appeared* to have done so) could, in theory, be abused [by hackers] to compromise, embarrass, extort or otherwise cause harm."[84]

Apple and Google have each released an application programming interface (API), which is then used by individual governments to develop their own apps. After a user downloads the app, the user's phone will use Bluetooth to send out an "anonymous identifier beacon," which Apple describes as "a string of random numbers that aren't tied to a user's identity and change every 10-20 minutes for additional protection."[85] If the user

www.reuters.com/article/us-health-coronavirus-southkorea/south-korea-to-boost-coronavirus-tracing-privacy-amid-fears-of-backlash-idUSKBN-22Q0GD.

78 Jacobson v. Massachusetts, 25 S. Ct. 358 (1905)

79 *Washington Post-University of Maryland national poll*, April 21-26, 2020, Wash. Post (May 21, 2020, 11:26 AM), https://www.washingtonpost.com/context/washington-post-university-of-maryland-national-poll-april-21-26-2020/3583b4e9-66be-4ed6-a457-f6630a550ddf/?itid=lk_inline_manual_3.

80 Baobao Zhang, Sarah Kreps, Nina McMurry & Miles McCain. *American's perceptions of privacy and surveillance in the COVID-19 Pandemic*, OSF Preprints (2020). Bz377@cornell.edu.

81 Theo Wilson, *Compulsory Digital Contact Tracing Is Probably Legal, but Still Sub-Optimal*, JURIST (Apr. 26, 2020, 3:13 AM), https://www.jurist.org/commentary/2020/04/theo-wilson-compulsory-contact-tracing/.

82 Kif Leswing, *Government can't force people to use tech Google and Apple created to trace coronavirus cases*, Lawfare (Apr. 13, 2020, 7:10 PM), https://www.cnbc.com/2020/04/13/apple-and-google-contact-tracing-technology-cannot-be-mandatory.html.

83 *Majority of Americans Say They Won't Use COVID Contact Tracing Apps*, Avira (June 15, 2020), https://www.avira.com/en/covid-contact-tracing-app-report.

84 Robert Chesney, *COVID-19 Contact Tracing We Can Live With: A Roadmap and Recommendations*, Lawfare (Apr. 14, 2020, 12:29 PM), https://www.lawfareblog.com/covid-19-contact-tracing-we-can-live-roadmap-and-recommendations.

85 *Exposure Notification Frequently Asked Questions*, Apple & Google (May

spends more than a certain amount of time (public health officials in a particular state or country set the duration) in close proximity with another user of the app, their two phones will exchange the random identifier beacons. The beacons are then stored on a user's phone.

Then, if one of the users later tests positive for COVID-19, the user can choose to work with public health authorities to add their unique beacons to a positive diagnosis list. At least once a day, all phones using the technology will automatically compare the list of stored beacons with the positive diagnosis list. Users will then be notified if there is a match. The contacts will not learn the identity of the person who tested positive. They will only know "the day the contact occurred, how long it lasted and the Bluetooth signal strength of that contact."[86] Because public health officials will not be provided information on the infected patient's contacts, Apple and Google have rebranded this as an "Exposure Notification," rather than contact tracing.[87]

Google announced at the end of July that "public health authorities…in 16 countries and regions across Africa, Asia, Europe, North America and South America" have launched apps using the Exposure Notification System (ENS). In the United States, each state handles contact tracing individually, and the decision to adopt the technology would be made at the state level. Only Virginia,[88] Arizona, Nevada, Alabama,[89] North Dakota,[90] and Wyoming[91] have launched apps using Apple and Google's Exposure Notification API.[92] Since its launch in early August, the Virginia Department of Health reported that 500,000 people, or about eight percent of the state's adult population, downloaded the app.[93]

On September 1, Google and Apple announced the second phase of their initiative, "Exposure Notifications Express," which will allow public health officials to use the technology without making the significant investment necessary to develop an app using the API. Virginia, for example, had spent $230,000 to develop the app, and with massive budget shortfalls, states could have found such costs prohibitive.[94] Instead, the officials now only have to provide "their name, logo, criteria for triggering an exposure notification, and information and protocol that is displayed to users following an exposure."[95] Additionally, the ENS will now be directly integrated into the operating system of iPhones.

The companies expect that this will significantly increase participation rates both by governments and individuals. While announcing Exposure Notification Express, the companies claimed "that 25 states and territories, representing more than 55% of the population, are exploring Exposure Notifications System solutions."[96]

Reports from Ireland, where the app has been available since early July, show strong results. In less than a month, about thirty-seven percent of the population over the age of fifteen in the Republic of Ireland downloaded the app.[97] Since the app's launch, close contact alerts have been sent to 137 phones, and of those, 129 people chose to follow up with health officials.[98] Public health officials noted that manual contact tracers could have already reached the eight remaining people, so it does not mean that they ignored the notification.[99]

There are two main limitations of this type of contact tracing. First, the app would not be able to identify mitigating factors, such as mask-wearing or talking through a door, which may have decreased the likelihood of transmission. An example of this occurred in Israel when a woman received an automated and mandatory quarantine order from the government after her phone was recorded as being near that of her infected boyfriend.[100] However, they had merely waved to each from a window. For this reason, Chesney notes that the notifications from the apps affiliated with Google and Apple should not be accompanied by mandatory quarantine orders because of the risk of false-positive notifications.

Second, the app is only able to identify infections that are transmitted through close proximity. If an infected individual touches a surface and someone later touches that same surface after the infected individual has already left the area,

2020), https://covid19-static.cdn-apple.com/applications/covid19/current/static/contact-tracing/pdf/ExposureNotification-FAQv1.1.pdf.
86 *Id*.
87 *Id*.
88 *Use your phone to fight COVID-19!*, Virginia Department of Health, https://www.vdh.virginia.gov/covidwise/.
89 Benjamin Freed, *Alabama launches contact tracing app based on Google-Apple API*, StateScoop (Aug. 3, 2020), https://statescoop.com/alabama-launches-contact-tracing-app-based-on-google-apple-api/.
90 *North Dakota announces launch of Care19 Alert app to help reduce spread of COVID-19 as students return*, N. Dakota Dep't Health (August 13, 2020), https://www.health.nd.gov/news/north-dakota-announces-launch-care19-alert-app-help-reduce-spread-covid-19-students-return.
91 *Care19 Contact Tracing Apps*, Wyoming COVID-19 Information, https://covid19.wyo.gov/care19-app.
92 Chance Miller, *Apple releases iOS 13.7 with new built-in COVID-19 Exposure Notifications Express system*, 9TO5MAC (Sept. 1, 2020, 10:00 AM), https://9to5mac.com/2020/05/21/covid-19-exposure-notification-api-states/.
93 Sara Morrison, *The new Apple-Google contact tracing tool finally seems useful*, Vox (Sept. 1, 2020, 2:25 PM), https://www.vox.com/recode/2020/9/1/21410291/apple-google-exposure-notification-express-coronavirus-covid-contact-tracing.
94 *Id*.
95 Chance Miller, *supra* note 92
96 Dave Burke, *An update on Exposure Notifications*, Google (July 31, 2020), https://blog.google/inside-google/company-announcements/update-exposure-notifications.
97 Padraic Halpin, *Northern Ireland launches UK's first COVID-19 tracker app*, Reuters (July 31, 2020), https://www.reuters.com/article/us-health-coronavirus-nireland-app/northern-ireland-launches-uks-first-covid-19-tracker-app-idUSKCN24W1UX.
98 Marese McDonagh, *Covid tracker app alerts for close contacts issued to 137 people so far*, Irish Times (Aug. 3, 2020), https://www.irishtimes.com/news/health/covid-tracker-app-alerts-for-close-contacts-issued-to-137-people-so-far-1.4318902.
99 *Id*.
100 Ronny Linder, *Quarantined After Waving at Coronavirus Patient: How Accurate Is Israel's 'Terrorist-tracking' Tech?*, Center (May 7, 2020, 6:17 PM), https://www.haaretz.com/israel-news/.premium-isolated-after-waving-at-corona-patient-is-israeli-phone-tracking-tech-accurate-1.8698946?v=1590424418285.

the app would not recognize that interaction. (CDC officials note, though, that surface transmission is "not thought to be the main way the virus spreads."[101]) More recently, researchers around the world have begun to focus on the possibility of transmission by inhaling aerosols from infected individuals, which are lighter and float in the air longer.[102] If people can become infected even without close contact with an infected individual, this could pose a challenge to the accuracy of exposure notifications.

Jason Bay, a Senior Director at Singapore's Government Technology Agency, has spearheaded his government's efforts in developing a similar app, TraceTogether. It records interactions using Bluetooth and sends the information to a centralized database.[103] Because Apple opposes the use of a centralized database for privacy concerns, the company prohibits the app from running in the background. As a result, iPhone users must have their phones open to the app at all times, and this mechanism presents a fatal flaw because it would not only drain battery life but also prevent people from using any other apps on their phones.[104]

Several European countries intensely lobbied Google and Apple to support a centralized database similar to TraceTogether's, but the tech companies' opposition remained firm.[105] In fact, the UK recently abandoned its heavily publicized maverick approach in support of a centralized database[106] after officials there identified "a number of technical challenges" that could not be resolved without switching to the API put forth by Apple and Google.[107] Just as it does in Singapore, Apple would prevent the apps from running in the background. This demonstrates that cooperation with tech companies is essential to ensuring widespread implementation, and countries thus must work within the framework that these companies have provided.

101 Bill Chappell & Allison Aubrey, *CDC Advice On Surface Spread Of COVID-19 'Has Not Changed,' Agency Says*, Nat'l Pub. Radio (May 22, 2020, 4:22 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/05/22/861193550/advice-on-surface-spread-of-covid-19-has-not-changed-cdc-says.

102 Parham Azimi, Zahra Keshavarz, Jose Guillermo Cedeno Laurent, Brent R. Stephens & Joseph G. Allen, *Mechanistic Transmission Modeling of COVID-19 on the Diamond Princess Cruise Ship Demonstrates the Importance of Aerosol Transmission*, MedRxiv (July 15, 2020), https://www.medrxiv.org/content/10.1101/2020.07.13.20153049v1.

103 Jason Bay, *Automated contact tracing is not a coronavirus panacea*, Gov't Digital Serv. Singapore (Apr. 10, 2020), https://blog.gds-gov.tech/automated-contact-tracing-is-not-a-coronavirus-panacea-57fb3ce61d98.

104 Chris Stokel-Walker, *Can mobile contact-tracing apps help lift lockdown?*, BBC (Apr. 15, 2020), https://www.bbc.com/future/article/20200415-covid-19-could-bluetooth-contact-tracing-end-lockdown-early.

105 Mark Scott, Elisa Braun, Janosch Delcker & Vincent Manancourt, *How Google and Apple outflanked governments in the race to build coronavirus apps*, Politico (May 15, 2020, 11:51 PM), https://www.politico.eu/article/google-apple-coronavirus-app-privacy-uk-france-germany/.

106 James Ball, *The UK's contact tracing app fiasco is a master class in mismanagement*, MIT Tech. Rev. (June 19, 2020), https://www.technologyreview.com/2020/06/19/1004190/uk-covid-contact-tracing-app-fiasco/.

107 Natasha Lomas, *UK gives up on centralized coronavirus contacts-tracing app — will 'likely' switch to model backed by Apple and Google*, TechCrunch (June 18, 2020, 10:39 AM), https://techcrunch.com/2020/06/18/uk-gives-up-on-centralized-coronavirus-contacts-tracing-app-will-switch-to-model-backed-by-apple-and-google/.

C. Exposure Notification Apps as a Viable Option for Contact Tracing in the United States

When considering options for digital contact tracing, it is crucial to strike the right balance between privacy and efficacy. If people do not trust that their data will be secure, they could resort to a "virtual protest" by refusing to download the apps or disabling Bluetooth on their phones. The Exposure Notification System developed by Apple and Google took these privacy concerns very seriously, and state governments ought to adopt the ENS technology the companies offered.

In order to mitigate privacy risks, health care officials will not have direct access to the identities of close contacts of those who test positive. Nevertheless, this technology can still have a positive impact. People who receive exposure notifications can voluntarily report their exposure to public health officials, as the vast majority of those who received notifications in Ireland have done.

If someone receives a notification that they have been in close contact with someone who has since tested positive for COVID-19 but does not report their exposure, this person can still take steps independently to avoid transmitting the virus to others. First, if testing capacity continues to improve, the contact can get tested for the virus. Second, the contact can independently take steps to limit interactions with the public. Ideally, they would choose to enter a self-quarantine. Even if the contact does not self-quarantine, the contact could avoid crowded places, always wear a mask, and take other similar measures to limit the possibility of transmitting the virus to others. Third, the contact would know to closely watch for a fever or cough and quickly get a test if any symptoms begin to develop.

However, for any of this to happen, public health officials must first adopt the technology and then inform the public about the steps that they should take if they receive an exposure notification. More than three quarters of Americans trust "local health officials and healthcare workers," according to a late-July poll by Ipsos.[108] State governments still have the trust of a majority of Americans, while only thirty percent trust the federal government. For this reason, state and local public health officials ought to take the lead in introducing this technology to the public. Cornell and MIT researchers argue that a public-messaging campaign must stress three facts about the technology. It must explain that "Bluetooth proximity tracing does not record location data, [that] the individual identities of users are never collected, and [that] decentralization means that contact data is not transmitted to a central server. "[109]

These apps will not and should not replace manual contact tracing. While eighty-one percent of all American adults use smartphones, only fifty-three percent of those over the age of

108 Chris Jackson & Mallory Newall, *Most Americans hopeful COVID-19 will be under control in six months, yet see federal government as making things worse*, Ipsos (Sept. 1, 2020), https://www.ipsos.com/en-us/news-polls/axios-ipsos-coronavirus-index.

109 Baobao Zhang, Sarah Kreps, Nina McMurry & R. MCain, Americans' perceptions of privacy and surveillance in the COVID-19 Pandemic, OSF Preprints (May 13, 2020), https://osf.io/9wz3y/.

sixty-five, who are among the most vulnerable to COVID-19, use them.[110] Not everyone with smartphones will use the technology, as well. Manual contact tracing will be essential in reaching these Americans.

Nevertheless, this technology can augment the process of contact tracing. In an interview with a contact tracer, an individual with COVID-19 should be able to provide the information of people with whom they knowingly had close contact. However, if this person had prolonged contact with a stranger, for example on a train or bus, the technology could notify this contact who would not otherwise have known that they had been exposed to the virus. Additionally, the manual contact tracing process is time consuming, and people would likely receive a digital exposure notification faster than they would receive a call from a manual contact tracer. It is essential that those exposed to the virus be contacted as soon as possible to stop the chain of transmission, and exposure notification technology can aid in that effort.

If public health officials take responsibility for launching the apps and carefully explain the privacy protections, polling suggests that about half of Americans would be willing to use the technology.[111] Universal adoption is not necessary for digital contact tracing to have an impact on reducing the spread of COVID-19. A University of Cambridge study concluded that sixty percent of a population needs to use a contact tracing app for it to be most effective.[112] However, even with fewer downloads the spread of the virus can be partially mitigated. Christophe Fraser, an infectious disease dynamics specialist on the Cambridge study, concedes, "With 10 percent, 20 percent, 30 percent uptake of the app, you get a progressive reduction in the size of the epidemic."[113] The study modeled a scenario where just fifteen percent of a population adopted the app and estimated that it would reduce infections by eight percent and deaths by six percent.[114]

IV. Conclusion

As people move back inside during the fall and winter, a new wave of COVID-19 infections will likely coincide with the normal influenza season. Public health officials will need all the help they can get, including as many hospital beds as possible. Exposure notification technology can reduce the spread of COVID-19 by aiding the process of contact tracing in a way that protects privacy.

At the same time, limited testing availability and delayed test results can significantly reduce the effectiveness of contact tracing. Researchers at Utrecht University found that "even the most efficient [contact tracing] strategy cannot" reduce the spread of the virus when there are testing delays of three or more days.[115] Testing turnaround times have fallen since the beginning of the summer, but the wait was still three or more days for about twenty percent of U.S. tests in August.[116] For contact tracing to be effective, this speed must continue to improve.

Americans continue to strongly trust public health officials to provide accurate information about the pandemic.[117] These officials ought to lead the effort in introducing digital contact tracing to Americans and explaining the technology's privacy protections. Digital contact tracing will likely prove to be a worthwhile investment, but people must also resist the urge to view privacy concerns as an unnecessary luxury while the virus causes widespread loss of life. In the wake of past tragedies, including the September 11 attacks, many pushed privacy concerns aside, and it took years to ascertain the true extent of measures that had been authorized.

The pandemic has already provided authoritarian leaders around the world "a dangerous combination of public distraction and reduced oversight."[118] Overly intrusive forms of digital contact tracing would also allow these leaders to further compromise the privacy and safety of their own citizens. These factors, combined with the lessons learned from South Korea's experience with digital contact tracing, demonstrate the importance of the privacy protections offered by Apple and Google's Exposure Notification System. More state officials ought to take advantage of this technology, emphasize its privacy protections, and convince their residents of its potential benefits.

110 *Mobile Fact Sheet*, Pew Res. Center (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/mobile.a

111 Margaret Talev, *Axios-Ipsos Coronavirus Index Week 9: Americans hate contact tracing*, Axios (May 12, 2020), https://www.axios.com/axios-ipsos-coronavirus-week-9-contact-tracing-bd747eaa-8fa1-4822-89bc-4e214c44a44d.html.

112 Jennifer Valentino-DeVries, Natasha Singer & Aaron Krolik, *A Scramble for Virus Apps That Do No Harm*, N.Y. Times (Apr. 29, 2020), https://www.nytimes.com/2020/04/29/business/coronavirus-cellphone-apps-contact-tracing.html?action=click&module=Top%20Stories&pgtype=Homepage.

113 *Id*.

114 Matthew Abueg et al., *Modeling the combined effect of digital exposure notification and non-pharmaceutical interventions on the COVID-19 epidemic in Washington state*, MedRvix (Sept. 2, 2020), https://www.medrxiv.org/content/10.1101/2020.08.29.20184135v1.article-metrics.

115 Mirjam E Kretzschmar, Ganna Rozhnova, Martin C J Bootsma, Michiel van Boven, Janneke H H M van de Wijgert & Marc J M Bonten, *Impact of delays on effectiveness of contact tracing strategies for COVID-19: a modelling study*, 5 Lancet Public Health 452 (July 16, 2020).

116 Rachel Weiner, Steven Mufson & Laurie McGinley, *Months into the pandemic, still no easy answers on coronavirus testing*, Wash. Post (Aug. 29, 2020, 12:00 PM), https://www.washingtonpost.com/climate-environment/months-into-the-pandemic-still-no-easy-answers-on-coronavirus-testing/2020/08/29/93517978-de3b-11ea-b205-ff838e15a9a6_story.html.

117 Margot Sanger-Katz, *On Coronavirus, Americans Still Trust the Experts*, N.Y. Times (June 27, 2020), https://www.nytimes.com/2020/06/27/upshot/coronavirus-americans-trust-experts.html.

118 *Will the legacy of COVID-19 include increased authoritarianism?*, Transparency Int'l (May 29, 2020), https://www.transparency.org/en/news/will-the-legacy-of-covid-19-include-increased-authoritarianism.

Judicial Power to Spark Reform (And Maybe Cool the Planet)

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The five warmest years from 1880 to 2019 have all occurred since 2015. The year 2019 was the second warmest year in that same 140-year period. New research suggests that carbon cycle feedback loops could spin temperature increases out of control, rendering past predictions of an already "inhospitable future"[1] as underestimates.[2] And human-induced carbon dioxide emissions are responsible.[3] Statistics about the climate are staggering, and without substantial intervention, a sustainable future for our planet is increasingly challenging to imagine. In this paper, I argue that the comparisons between *Brown v. Board of Education*[4] and *Juliana v. United States*[5] inform our approach to precedent and standing, as well as climate litigation more broadly. Despite the cases' different constitutional focuses and the distinctions between the issues of school segregation and climate change, their similarities have significant implications for understanding the power of courts to initiate reform.

I. Comparing Two Seemingly Disparate Cases

A. Juliana v. United States

In *Juliana*, a group of twenty-one young people, a nonprofit association, and a representative of "future generations"[6] brought a suit against the United States government in the United States District Court for the District of Oregon, seeking to compel the federal government to take action against climate change. The plaintiffs claimed that the defendants "continued to permit, authorize, and subsidize fossil fuel extraction, development, consumption and exportation – activities... that have substantially caused the rise in the atmospheric concentration of CO2."[7] These actions, they asserted, constitute "violations of substantive due process, equal protection, the Ninth Amendment, and the public trust doctrine."[8]

Throughout the court proceedings, federal defendants took the position that the plaintiff's case was misguided, maintaining that "no fundamental right to a climate system capable of sustaining human life"[9] exists. The government sought summary judgment[10] and certification for interlocutory appeal for lack of subject matter jurisdiction and for failure to state a claim.[11] State Court Judge Ann Aiken denied all motions to dismiss the case, writing that she has "no doubt [] the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."[12] With that ruling, she adopted the recommendation of Thomas M. Coffin, United States Magistrate Judge.[13]

In January 2020, the United States Court of Appeals for the Ninth Circuit issued a decision on an interlocutory appeal by the government, ruling two to one that the plaintiffs did not have standing to bring their claims because the federal judiciary lacks the power to effectively address climate change. In both the majority opinion and the dissent, the arguments hinged on the redressability prong of standing doctrine.

Ninth Circuit Judge Andrew D. Hurwitz wrote the majority opinion. He began by acknowledging that "[c]opious expert evidence establishes" that the rise in carbon levels "stems from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked."[14] He goes on to state that "the federal government has long understood the risks of fossil fuel use" and that "the government's contribution to climate change is not simply a result of inaction" because "the government affirmatively promotes fossil fuel use in a host of ways."[15]

Next, Judge Hurwitz turns to standing. He sees no conflict with the injury requirement or the causation requirement

1 *See* Juliana v. United States, 947 F.3d 1159, 1176 (9th Cir. 2020) (Staton, J., dissenting) ("According to one of plaintiffs' experts, the inevitable result, absent immediate action, is 'an inhospitable future marked by rising seas, coastal city functionality loss, mass migrations, resource wars, food shortages, heat waves, mega-storms, soil depletion and desiccation, freshwater shortage, public health system collapse, and the extinction of increasing numbers of species.' Even government scientists 2 project that, given current warming trends, sea levels will rise two feet by 2050, nearly four feet by 2070, over eight feet by 2100, 18 feet by 2150, and over 31 feet by 2200. To put that in perspective, a three-foot sea level rise will make two million American homes uninhabitable; a rise of approximately 20 feet will result in the total loss of Miami, New Orleans, and other coastal cities.").
2 *E.g.,* Fred Pearce, *Why 'Carbon-Cycle Feedbacks' Could Drive Temperatures Even Higher*, Yale Environment 360 (2020), https://e360.yale.edu/features/why-carbon-cycle-feedbacks-could-drive-temperatures-even-higher (Last visited 20 May 2020).
3 *E.g.,* NOAA National Centers for Environmental Information, *State of the Climate: Global Climate Report Annual 2019* (2020).
4 Brown v. Board of Education, 347 U.S. 483 (1954).
5 Juliana, 947 F.3d 1159 (9th Cir. 2020).
6 Juliana v. United States, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016).
7 Complaint for Declaratory and Injunctive Relief par. 7 (Aug. 12, 2015), Juliana v. United States, No. 6:15-cv-01517-TC. (D. Or.)
8 947 F.3d 1160 (9th Cir. 2020).
9 Juliana v. United States, 339 F.3d 1062, 1086 (D. Or. 2018).
10 *See* Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law").
11 Industry associations intervened as defendants and 15 amicus briefs were filed. *See id.* at 1160, 1163.
12 Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016).
13 *See Id.* at 1234.
14 Juliana, 947 F.3d at 1166.
15 *Id.*

of standing, but he considers redressability a "more difficult question."[16] Because he determines climate change to be a political question, he finds that the case lacks redressability and is, therefore, not eligible for court-ordered relief. In the end, Judge Hurwitz decides that even if the relief plaintiffs requested were to redress their injury, the plaintiffs do not "establish [] that the specific relief they seek is within the power of an Article III court."[17]

District Court Judge Lauren Staton, sitting by designation, responded with a fierce dissent that was longer than the majority opinion. She argued that "the United States has reached a tipping point" and that "seeking to squash this suit, the government bluntly insists that it has the absolute and unreviewable power to destroy the Nation."[18] She reiterates the harm of carbon dioxide and other greenhouse gasses and points out their irreversibility, arguing that such environmental damage threatens the very preservation of the country.[19] Staton thus invokes the perpetuity principle, asserting that the plaintiffs "bring suit to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation's willful destruction."[20] She writes, "[t]hat the principle is structural and implicit in our constitutional system does not render it any less enforceable… Nor can the perpetuity principle be rejected simply because the Court has not yet had occasion to enforce it as a limitation on government conduct."[21]

Next, she breaks her argument that "plaintiffs' legal stake in this action suffices to invoke the adjudicative powers of the federal bench"[22] into three components. One, she is not "skeptical," like her colleagues, "that curtailing the government's facilitation of fossil-fuel extraction and combustion will ameliorate the plaintiffs' harms."[23]

Two, she argues that the judiciary should not hesitate to embrace judicial review. To defend this point, she writes, "Judicial review compels federal courts to fashion and effectuate relief to right legal wrongs, even when—as frequently happens—it requires that we instruct the other branches as to the constitutional limitations on their power."[24] She also suggests that the majority consigns climate change to the other branches for a poor reason: "There is no justiciability exception for cases of great complexity and magnitude."[25]

Three, she "vehemently disagrees"[26] that climate change is too political for the judiciary. She writes, "Obviously, the Constitution does not explicitly address climate change. But neither does climate change *implicitly* fall within a recognized political-question area."[27] She also argues that "the majority reaches the opposite conclusion not by marching purposefully through the *Baker* factors, which carve out a narrow set of nonjusticiable *political* cases," but by invoking broad precedent that would serve to eliminate from their dockets "any case that presents administrative issues 'too difficult for the judiciary to manage.'"[28]

Judge Staton finishes her dissent by suggesting that in issues of social injustice, courts should step in to protect fundamental rights.[29] In doing so, she cites *Brown*. She describes "Court mandated [] racial integration of every public school" as the court's "finest hour."[30] Then, at the end of her dissent, she notes, "While all would now readily agree that the 91 years between the Emancipation Proclamation and the decision in *Brown v. Board* was too long, determining when a court must step in to protect fundamental rights is not an exact science. In this case, my colleagues say that time is 'never'; I say it is now."[31]

B. Brown v. Board of Education

The plaintiffs in *Brown*[32] sued the Kansas Board of Education when their children were barred from attending white elementary schools. They argued that school segregation violated the equal protection clause of the Fourteenth Amendment. The Supreme Court agreed unanimously, ruling that the plaintiffs were being "deprived of equal protection of the laws."[33] After *Brown* set the stage for reform, school desegregation faced "massive resistance"[34] and the "Southern Manifesto."[35] According to one estimate, ninety-nine percent of Black students in the South attended majority Black schools in 1964.[36] In other words, *Brown* was not successful on its own.[37]

The ruling did, however, mobilize a larger coalition of desegregation supporters and catalyze advancement in racial equality.

16 *Id* at 1169.
17 *Id* at 1171.
18 *Id* at 1175.
19 *See Id* at 1176.
20 *Id* at 1175.
21 *Id* at 1179-1180.
22 *Id* at 1181.
23 *Id*.
24 *Id* at 1184.
25 *Id* at 1185.
26 *Id* at 1186.
27 *Id* at 1187.
28 *Id* at 1189.
29 *See Id* at 1191.
30 *Id* at 1188. *See* Brown v. Board of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).
31 Juliana, 947 F.3d at 1191 (Staton. J., dissenting).
32 *See* Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 42 (2d ed. 2008) ("*Brown* was actually four consolidated cases coming from the states of Kansas (*Brown v. Board of Education of Topeka, Kansas* 1951), South Carolina (*Briggs v. Elliott* 1952), Virginia (*Davis v. County School Board of Prince Edward County, Virginia* 1952), and Delaware (*Gebhardt v. Belton* 1952).").
33 Brown, 347 U.S. at 488.
34 In 1954, Senator Harry Flood Byrd began the "massive resistance" campaign. *See* The Southern Manifesto And 'Massive Resistance' To Brown, NAACP Legal Defense and Educational Fund (July. 28, 2020), https://www.naacpldf.org/ldf-celebrates-60th-anniversary-brown-v-board-education/southern-manifesto-massive-resistance-brown/. ("If we can organize the Southern States for massive resistance to this order I think that, in time, the rest of the country will realize that racial integration is not going to be accepted in the South").
35 "Southern Manifesto on Integration," Congressional Record, 84 Cong., 2 sess., vol. 102, part 4, (1956), 4459–60. Primary source materials from the Supreme Court, PBS.org (2008), http://www.pbs.org/wnet/supreme-court/rights/sources_document2.html.
36 Sean Reardon & Ann Owens, Annual Review of Sociology, *60 Years After Brown: Trends and Consequences of School Segregation* (2014), https://www.annualreviews.org/doi/10.1146/annurev-soc-071913-043152.
37 *See generally* Rosenberg, supra note 32, at 42.

The Atlantic proclaimed *Brown* "the belated mid-course correction that began America's transformation into a truly multiracial world nation."[38] The decision overturned nearly sixty years of Court-sanctioned segregation, reversed the separate-but-equal doctrine,[39] and established a precedent for future decisions[40] that "separate-but-equal" is "inherently unequal."[41] The ruling in *Brown* prompted other branches to take action, too, with the passage of the Civil Rights Act of 1964, the Elementary and Secondary Schools Act of 1965, and the Voting Rights Act of 1965. After court rulings based on *Brown*'s precedent and the acts of 1964 and 1965, school segregation significantly decreased.[42] Even if the follow-through has not always been adequate, *Brown* led the way to reform. Courts may be incapable of engaging in direct action, but *Brown* sets a firm example of the courts at their most powerful, as the prompters of action.[43]

Looking to *Brown* as a precedent for necessary but radical change reveals the potential power of the judicial branch while providing the precautionary lesson that the timing of political reform predicts a long-winded trajectory to climate justice. As a matter of substantive legal doctrine, climate change and school segregation present fundamentally different issues, but they may require overlapping solutions in the form of a strong judiciary, creative precedent, and a more flexible approach to standing. These characteristics are all evident in *Brown* and could eventually be applied to climate cases like *Juliana*.

C. Assessing Similarities and Differences

My argument focuses on similarities between *Brown* and *Juliana*, but it is important to acknowledge key differences between the two cases as well. Climate change and school segregation differ in the impacted population and range. While climate change disproportionately affects minorities,[44] it harms universally in comparison to the more targeted nature of school segregation. This difference means it may be even harder for a single ruling to address climate change than to abolish school segregation. Also, while segregation and climate change are both caused by humans, climate change is connected to a non-human environmental system, a much less manageable presence.

The two cases also require different kinds of legal analysis. The Fourteenth Amendment's equal protection clause provides a clear textual reference to school segregation. In *Brown*, the Supreme Court sought to prove segregation unequal, not to prove the constitutionality of equality. Chief Justice Warren used textual analysis to develop the meaning of "equal" in reference to school segregation. Conversely, there is no textual reference for climate change in the Constitution. In *Juliana*, the plaintiffs asserted their rights to a "climate system [that] remains stable enough to secure their constitutional rights to life, liberty, and property."[45] In the dissent, Judge Staton furthers this notion that a healthy climate system is implicitly a constitutional protection by invoking the perpetuity principle. By inferring and expanding upon the intentions of the framers to include a right to a healthy, sustainable climate, she took a purposive, as opposed to a textual approach.

Due to these distinctions, Judge Staton's analogy to *Brown* in the *Juliana* dissent may initially seem surprising, yet the cases' similarities outweigh their differences. School segregation and climate change may not be similar, and the specifics of *Brown* and *Juliana*'s legal claims may differ. But these general differences and legal intricacies can be overlooked for the purposes of this paper, as I am not concerned with comparing the cases' precise legal arguments so much as their large-scale future implications and relationships with precedent and standing.

Julia Olsen, the environmental attorney involved in the *Juliana* lawsuit, claims "This case is this generation's *Brown vs Board of Education*."[46] And the similarities between *Brown* and *Juliana* are abundant. The plaintiffs in both cases accused a government defendant of egregious wrongdoing and called for drastic remediation. In both cases, litigants asked the judicial branch to instigate political change against precedent and against a policy supported by the United States government. Beyond the surface-level similarities, the cases are related on a deeper level: both involve pivotal topics of a time-sensitive nature, the scope of a federal obligation to take on private matters, and a strong judiciary forging paths to reform.[47]

38 *See* Ronald Brownstein, *How* Brown v. Board of Education *Changed—and Didn't Change—American Education*, The Atlantic, Apr. 25, 2014, available at https://www.theatlantic.com/education/archive/2014/04/two-milestones-in-education/361222/ (last visited Apr. 19, 2020).

39 *See* Rosenberg, *supra* note 32, at 39.

40 *E.g.,* Green v. County School Bd. of New Kent County, Va. 391 U.S. 430 (1968), Alexander v. Holmes County Bd. of Ed. 396 U.S. 19 (1969), Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973), and others.

41 Brown, 347 U.S. at 495.

42 *See* Sean Reardon & Ann Owens, Annual Review of Sociology, *60 Years After Brown: Trends and Consequences of School Segregation* (2014) ("The evidence is generally clear that school segregation between blacks and whites declined substantially from 1968 to the mid-1970s and continued to modestly decline into the 1980s; this is true whether one relies on measures of unevenness or exposure."), https://www.annualreviews.org/doi/10.1146/annurev-soc-071913-043152.

43 Some scholars doubt whether *Brown* was the driving source force for school desegregation. Justin Driver even wonders "whether the twentieth century's most widely admired decision actually merits any admiration at all." Justin Driver, *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind* 243 (2018). Rosenberg notes that "proponents of the Dynamic Court view claim that both *Brown* and *Roe* produced significant social reform," and "*Brown* has been the 'symbol' of the courts' ability to produce significant social reform, the 'principal inspiration to others who seek change through litigation.'" Rosenberg, *supra* note 32, at 6, 40. Rosenberg believes, however, that "the Dynamic Court" view is misguided.

44 *See, e.g.,* Phillip Brown and Nathaniel Williams, *The Fossil Fuel Industry and Racial Injustice*, Better Future Project, https://www.betterfutureproject.org/fossil_fuel_industry_racist (last visited Apr. 19, 2020).

45 Complaint for Declaratory and Injunctive Relief par. 96 (Aug. 12, 2015); Juliana v. United States, No. 6:15-cv-01517-TC. (D. Or.).

46 *See* https://citizensclimatelobby.org/generations-brown-vs-board-education-climate-kids-appear-court/ (last visited Jul. 23, 2020).

47 Another potential similarity arises from representation reinforcement. John Hart Ely, an American constitutional law scholar who best articulated this idea, contends that "at least in some situations judicial intervention becomes appropriate when the existing processes of representation seem inadequately fitted to the representation of minority interests, even minority interests that are not voteless." John Hart Ely, *Democracy and Distrust* 86 (1981). Representation reinforcement fits into *Brown* because the judiciary

Climate justice is one of today's defining issues in the way that the fight against segregation consumed the 1960s. As the decision that "began America's transformation into a truly multiracial world nation,"[48] *Brown* continues to be a vital reference point at a time when we are trying to begin America's transformation into a sustainable and antiracist nation. If the *Juliana* dissent had instead been the majority opinion, the decision could have achieved landmark status. Given the outcome, the decision instead represents a missed opportunity for environmental progress.

Systematic infringement of basic rights cannot be remedied overnight, and because injuries sustained by children have the longest-lasting effects, they demand urgent attention. Both *Brown* and *Juliana* deal with minors and consequently the timing of reform. In *Brown*, Chief Justice Warren states that "education is perhaps the most important function of state and local governments" because "equal educational opportunities" set a child up for the future.[49] Similarly, Julia Olsen chose plaintiffs aged eleven to twenty-two because climate change "will most determine the quality of their lives and the well-being of all future generations."[50] Minors will be the ones left to deal with climate change's most alarming effects. As Staton asserts, the "Preamble declares that the Constitution is intended to secure 'the Blessings of Liberty' not just for one generation, but for all future generations — our 'Posterity.'"[51] Through education and perpetuity, the cases share an emphasis on securing rights for minors and future generations.

Furthermore, the claims that the courts addressed in *Brown* and *Juliana* are both enmeshed in broader issues. *Brown* rectified lawful segregation in public schools but could not fully address the issue of segregation or institutional racism without significant changes in residential segregation and public attitudes. *Juliana* homes in on the government's contribution to fossil fuels, but the issue that the case combats, climate change, is largely due to the decisions of private actors such as investors, agriculture and forestry firms,[52] and the fossil fuel companies themselves. *Brown* and *Juliana* also arise from the United States' history of exploitation first with slavery and Jim Crow and now with industrialization and reliance on fossil fuels. Suffice to say, both cases confront problems that are vast in time and scope.

Lastly, *Brown* and *Juliana* present the case for a powerful judiciary to expand rights and propel other branches into greater action. In a contemporary examination of climate lawsuits, Nathan Chael cites *Brown* with *Juliana* as "instances of expanding rights in American legal history."[53] Judge Staton argues for putting "the government on a path to constitutional compliance."[54] And in the majority opinion, Judge Hurwitz does not "dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action."[55] Similarly, *Brown* shows that large changes will only come about once other branches act on the judiciary's rulings.[56] From the standpoint of *Brown*, it is hard for the courts to be too powerful in situations of social injustice and climate change.

Brown and *Juliana* are similar in respect to defining issues, minors, private matters, and powerful court actions. *Brown* informs *Juliana* through these connections along with the cases' approach to questions of precedent and standing. The rest of this paper discusses how a strong judiciary can initiate reform with creative precedent and standing. This parallel between the *Brown* majority opinion and the *Juliana* dissent is the most consequential similarity between the two cases.

II. The Search for Precedent

In reference to precedent, Judge Hurwitz quotes Judge Benjamin Cardozo's statement that judges are "bound to 'exercise a discretion informed by tradition, methodized by analogy, disciplined by system.'"[57] Custom may be central to the court's job, but courts do not always adhere to precedent. In Juliana, Judge Staton approaches precedent creatively by considering a broad range of decisions and in Brown, Chief Justice Warren separates the case from the past and proclaims it a statement unique to its time.

Chief Justice Warren overruled *Plessy v. Ferguson*, the most apparent source of precedent. In the opinion, Warren defended his choice:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[58]

intervened to stop lawful segregation in public schools. The term is generally reserved for minorities who are shut out of the political process, but it could be extended to efforts to preserve a functioning political system. It could be argued that our current political system is broken; one of the problems with our system is that in the face of climate change, the government willfully "presses ahead toward calamity." Juliana, 947 F.3d at 1175 (Staton, J., dissenting). Politicians in both parties aren't acting to stop climate change, which makes the issue virtually impossible to address through any normal political procedure. Applying representation reinforcement to *Juliana* may push Ely's theory too far, however, which is why I hesitate to put it in the body of my text.

48 *See* Brownstein, *supra* note 38.

49 Brown v. Board of Education, 347 U.S. 483, 493 (1954).

50 *See* Our Team, The Children's Trust, https://www.ourchildrenstrust.org/our-team (last visited Apr. 19, 2020).

51 Juliana, 947 F.3d at 1178.

52 *See* United Nations Intergovernmental Panel on Climate Change, *IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse gas fluxes in Terrestrial Ecosystems* (2019), https://www.ipcc.ch/srccl-report-download-page/.

53 Nathan Chael, *Two Environments of Rights: A Comparative Examination of Contemporary Rights-Based Climate Lawsuits in the Netherlands and the United States*, 15 Journal of Sci. Policy and Governance (2019), https://pdfs.semanticscholar.org/c08b/79262ca1d50481c-3ca4f6315755b39db255b.pdf.

54 *Id*. at 1189 (Staton, J., dissenting).

55 *Id*. at 1175.

56 See the discussion at the beginning of this section.

57 *See* Juliana v. United States, 947 F.3d 1159, 1174 (9th Cir. 2020) (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921)).

58 Brown v. Board of Education, 347 U.S. 483, 492-93 (1954).

Here, Chief Justice Warren argued that no precedent could suitably guide the decision in Brown because previous decisions were not sensitive to the unique position of the nation in the 1950s. By overruling *Plessy v. Ferguson*, *Brown* joins a group of historically important cases that treat precedent fluidly.[59]

Judge Staton also relies on a fluid concept of precedent when she refers to *Brown*. As I established in section I, *Brown* and *Juliana* deal with different subject matters, yet Judge Staton invokes *Brown* as precedent nonetheless:

> "Plaintiffs' request for a 'plan' is neither novel nor judicially incognizable. Rather, consistent with our historical practices, their request is a recognition that remedying decades of institutionalized violations may take some time.'"

She refers to *Brown* as a past decision that is connected to *Juliana* through the magnitude of the "plan" set in place and not the subject matter.

By prioritizing *Brown*'s status as a germinal precedent above its category as a case about school segregation, Judge Staton shows how present landmark cases can rely on past landmark cases as precedent for understanding the reaches of judicial power. *Juliana* and *Brown* both belong to a class of foundational cases that have the potential to jumpstart essential change. Staton outlines this group of cases as dealing with "imposing conundrums" such as "diversity in higher education, the intersection between prenatal life and maternal health, the role of religion in civic society, and many other social concerns."[60] If the courts recognized this grouping of foundational cases more frequently, present cases could look back to past landmark decisions to glean information about new "imposing conundrums"[61] and, more generally, about the judicial branch's ability to tackle new legal principles.

It is, therefore, crucial to think creatively and expansively about cases that could serve as precedent for future climate change disputes. Past climate decisions should be included for reference in current opinions, but their inclusion should not preclude advocates and courts from relying on other pivotal decisions that showcase solutions to country-defining issues. In fact, when writing about *Massachusetts v. EPA*,[62] former EPA General Counsel Jonathan Cannon also referenced *Brown*. He wrote, "I am not suggesting this is *Brown v. Board of Education* for the environment, but it may be as close as we will come."[63] Even though he highlights *Massachusetts v. EPA*, and not *Juliana*, his assertion expresses how courts can look for guidance in climate cases that are not related in terms of the issue at hand but in a broader sense. Brown was the case Judge Staton and General Counsel Cannon chose, but other landmark decisions such as *Obergefell v. Hodges*[64] and *Roe v. Wade*[65] might be applicable for their foundational wisdom in climate change cases as well.

III. Varying Interpretations of Standing

The court dismissed *Juliana* on the basis of Article III standing, which requires that the plaintiff must personally have suffered an actual or threatened injury, that the injury can fairly be traced to the challenged action of the defendant, and that the injury is likely to be redressed by a favorable decision.[66] However, constitutional standards are historically inconsistent (standing was not solidified until 1984),[67] and the notion of Article III standing is itself ambiguous[68]: Even Tsen Lee and Josephine Mason Ellis conclude that "the Case or Controversy Clause [the textual source of standing] of Article III means different things in different types of litigation."[69]

Conceptual murkiness in the standing doctrine exists on multiple levels, and *Juliana* and *Brown* illuminate the inconsistencies. First, injury can take multiple forms and lacks a clear-cut definition. Judges may not always consider intangible injuries, which means they may not always recognize a denied constitutional right. Second, it is hard to know just how much relief satisfies the redressability requirement. Third, adhering to standing doctrine and protecting constitutional rights are both fundamental duties of the judicial branch, but when they are at odds, confusion results.

A. Multiple Forms of Injury

Brown hinged on a question of "intangible factors."[70] The Court found separate institutions equal in "respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors,"[71] but not with respect to "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn [a] profession."[72] Furthermore, Justice Warren wrote, "A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."[73]

59 *Citizens United v. Federal Election Commission* is another well-known example where the majority overturned precedent: "We [] hold that stare decisis does not compel the continued acceptance of *Austin*." Citizens United v. Federal Election Commission, 558 U.S. 310 (2010). *See also*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937), *Mapp v. Ohio*, 367 U.S. 643 (1961), Lawrence v. Texas, 539 U.S. 558 (2003).

60 *Id.*

61 Juliana, 947 F.3d at 1190 (Staton, J., dissenting).

62 Massachusetts v. EPA, 549 U.S. 497 (2007).

63 Jonathan Z. Cannon, *The Significance of Massachusetts v. EPA*, 93 Va. L. Rev. In Brief 53, 62 (2007).

64 See the discussion about State Court Judge Ann Aiken and her reference of *Obergefell v. Hodges* in section I. 676 U.S. 644 (2015).

65 410 U.S. 113 (1973).

66 Allen v. Wright, 468 U.S. 737, 751 (1984).

67 Allen, 468 U.S. 737; see also Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 3531.1, 3531.2 (3d ed. 2008 & Supp.) (discussing the history of standing).

68 *See id.*, § 3531 (noting "[t]he uncertainty of standing principles").

69 Even Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 Northwestern University L. Rev. 169 (2012), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1084&context=nulr.

70 "We come then to the question presented: does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does." Brown v. Board of Education, 347 U.S. 483, 493 (1954).

71 *Id* at 492.

72 *Id* at 493 (citing McLaurin v. Oklahoma State Regents, 339 U.S. 641 (1950)).

73 *Id* at 494.

Scientific research on climate change uncovers the tangibility of government subsidization of fossil fuels and their effect.[74] The majority in *Juliana* acknowledged climate-caused injuries, and found that the injury requirement of standing was satisfied: "These injuries are not simply ""'conjectural' or 'hypothetical;'"' at least some of the plaintiffs have presented evidence that climate change is affecting them now in concrete ways and will continue to do so unless checked."[75] The opinion dismisses the efficacy of "conjectural" and "hypothetical" injuries and supports "concrete" ones, but it does not fully consider the host of intangible injuries. By contrast, plaintiffs used their testimony to raise issues of "psychological harms" and "impairment to recreational interests,"[76] both less tangible injuries.

Subtler factors such as "impairment to recreational interests" do not infringe on constitutional rights as blatantly as segregation, but they do add to an atmosphere of inequality and suppression in the United States. For instance, Black and low-income neighborhoods are disproportionately affected by the growing fossil fuel industry.[77] Although the majority acknowledged climate-caused injuries, more extensive injury can sometimes sway the courts to relax the redressability requirement. I will further discuss this point in Section C. Without the inclusion of intangible injuries, Juliana undersells the government's breach of plaintiffs' "unalienable" rights.

B. The Amount of Relief Needed to Satisfy Redressability

Redressability means different things to different judges.[78] On the one hand, Judge Hurwitz remarks, "Not every problem posing a threat — even a clear and present danger — to the American Experiment can be solved by federal judges."[79] He also finds that slow or reduced emissions are not necessarily enough to meet standards of redressability and he dismisses the conclusions from *Massachusetts v. EPA*[80] as "involv[ing] a procedural right."[81] In other words, Judge Hurwitz's interpretation of standing requires the problem to be "*solved* by federal judges" and minimizes incomplete remedies. On the other hand, Judge Staton stipulates that "For purposes of standing, we need hold only that the trial court could fashion some sort of meaningful relief."[82] Hurwitz's notion that standing requires a full solution differs drastically from Judge Staton's requisite of "meaningful relief." These inconsistencies reveal that no precise and agreed-upon standard for redressability exists.

By using the word "solved," Judge Hurwitz dismisses the potential of the *Juliana* decision to provide partial relief.[83] Conversely, Judge Staton acknowledges that even if relief comes slowly and is not fully realized, it can still be meaningful and provide redress. *Juliana* reflects the fact that standing can be used in a judge's or court's own interest. When a court desires to evade a certain topic or even shut out a whole category of cases, it can construe standing narrowly, and when a court decides to tackle a landmark decision, it can work around standing.[84]

Judge Staton references *Brown* to support her flexible interpretation of standing. She reminds us that in *Brown* "the Supreme Court was explicitly unconcerned with the fact that crafting relief would require individualized review of thousands of state and local policies."[85] Judge Staton also writes "the slow churn of constitutional vindication did not dissuade the *Brown* court, and it should not dissuade us here."[86]

Brown did not fully redress school segregation, but over time it did provide the basis for "meaningful relief." Similarly, climate change will not be solved by one court decision. Finding a remedy for climate change will no doubt require the review of numerous policies, too. A favorable decision could have initiated that process and set the country on the road to incomplete but widespread relief. *Brown*'s eventual positive effect demonstrates that despite varying interpretations of redressability, some response to injustice is better than no response and that "meaningful relief" is better than no relief.

C. Protecting Standing Doctrine or Constitutional Rights?

Redressability is important — without enforceability, rights serve little purpose and pose a risk to our faith in the Constitution. In *Brown*, however, "the consideration of appropri-

74 See Juliana, 947 F.3d at 1166-1167.
75 *Id* at 1168.
76 *Id* at 1165.
77 *See, e.g.*, Phillip Brown and Nathaniel Williams, *The Fossil Fuel Industry and Racial Injustice*, Better Future Project, https://www.betterfutureproject.org/fossil_fuel_industry_racist (last visited Apr. 19, 2020).
78 This problem exists apart from *Juliana*. *See, e.g.*, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) citing the widely accepted interpretation of redressability from Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976), *Compare*, "the type of redress that we think cuts through the problem." Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 170 (1972), and, "[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury." Larson v. Valente 456 U.S. 228, 243 n.15 (1982), *and*, "When dealing with legal doctrine phrased in terms of what is "fairly" traceable or "likely" to be redressed, it is perhaps not surprising that the matter is subject to some debate. But in considering how loosely or rigorously to define those adverbs, it is vital to keep in mind the purpose of the inquiry." Massachusetts v. E.P.A. 549 U.S. 497, 547 (2007) (Roberts, J., dissenting), *and* "When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id* at 518 (Stevens, J., dissenting).
79 Juliana, 947 F.3d at 1174.
80 Massachusetts v. E.P.A. 549 U.S. 497 (2007).
81 Juliana, 947 F.3d at 1171
82 *Id*. at 1188 (Staton, J., dissenting). *See also*, "'something' is all that standing requires." (This quote represents another instance of Staton's more relaxed view of standing) *Id*. at 1182.
83 *Compare* Allen v. Wright, 468 U.S. 737, 787-88 (1984) (Stevens, J., dissenting) ("We have held that, when a subsidy makes a given activity more or less expensive, injury can be fairly traced to the subsidy for purposes of standing analysis because of the resulting increase or decrease in the ability to engage in the activity. . . . Thus, the laws of economics . . . compel the conclusion that the injury respondents have alleged—the increased segregation of their children's schools because of the ready availability of private schools that admit whites only—will be redressed if these schools' operations are inhibited through the denial of preferential tax treatment.").
84 *See* Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 197 (2d. Ed. 1986).
85 *Id*. at 1188.
86 Juliana, 947 F.3d at 1189 (Staton, J., dissenting).

ate relief was necessarily subordinated to the primary question — the constitutionality of segregation in public education."[87] The infringement of equal protection was so apparent that it outweighed the fact that the redressability prong of standing was incomplete. Judge Staton argues that the government's authorization and subsidization of fossil fuels is glaringly unconstitutional too. She also argues that the plaintiffs have standing by pointing to the perpetuity principle, the Fifth Amendment, the Declaration of Independence's protection of "unalienable rights," and *Brown*'s reliance on "all deliberate speed."[88] In *Juliana*, there is evidence for the infringement of rights and for the courts' ability to provide partial remediation. This position left the judges who ruled on *Juliana* in a predicament: it is unclear how unconstitutional or how redressable a case must be for one factor to outweigh the other.

Juliana and *Brown* highlight the many ambiguities within standing doctrine, including, how tangible a plaintiff's injury needs to be to warrant special consideration, if incomplete remediation qualifies for redressability, and whether gross constitutional infringement overrides disputes of standing. These ambiguities in standing doctrine produce a large range of possible interpretations permitting courts' discretion in how to proceed with cases — whether to fully take advantage of the court's power, as in the case of *Brown*, or to shy away from the opportunity, like in *Juliana*.

IV. Conclusion

Judge Staton chose to invoke *Brown* in the impassioned end remarks of her dissent because she too recognized the importance of *Brown* to her argument. She invoked the possibility of a strong judiciary using its power for informed decisions about precedent and standing. In the end however, the *Juliana* plaintiffs were thrown out of court, so the case will not achieve *Brown*'s landmark status. Nevertheless, comparing *Brown* and Juliana highlights the potential of creative precedent and the malleability of standing doctrine. Hopefully, these mechanisms will become solutions for initiating climate change reform going forward.

Drawing comparisons between *Brown* and *Juliana* is now more relevant than ever. As Bill Mckibben puts it, we have come to an intersection where "Having a racist and violent police force in your neighborhood is a lot like having a coal-fired power plant in your neighborhood. And having both?"[89] The Black Americans who suffered from segregation are too often part of the communities that face the worst of climate change. Judge Staton may not have considered this factor when she wrote about *Brown* in her dissent, but environmental justice *requires* antiracism. Significant change requires considering these issues together, not separately. And progress requires a judiciary that does not step aside from the burning issues of our time but instead plays a strong role in the search for solutions.

87 Brown v. Board of Education, 347 U.S. 484, 495 (1954); *see* Juliana, 947 F.3d at 1188-89 (Staton, J., dissenting).
88 Juliana, 947 F.3d at 1189 (Staton, J., dissenting); *accord* Brown v. Board of Education, 349 U.S. 294, 301 (1955).
89 Bill McKibben, *Racism, Police Violence, and the Climate Are Not Separate Issues*, New Yorker (June 4, 2020), https://www.newyorker.com/news/annals-of-a-warming-planet/racism-police-violence-and-the-climate-are-not-separate-issues.

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