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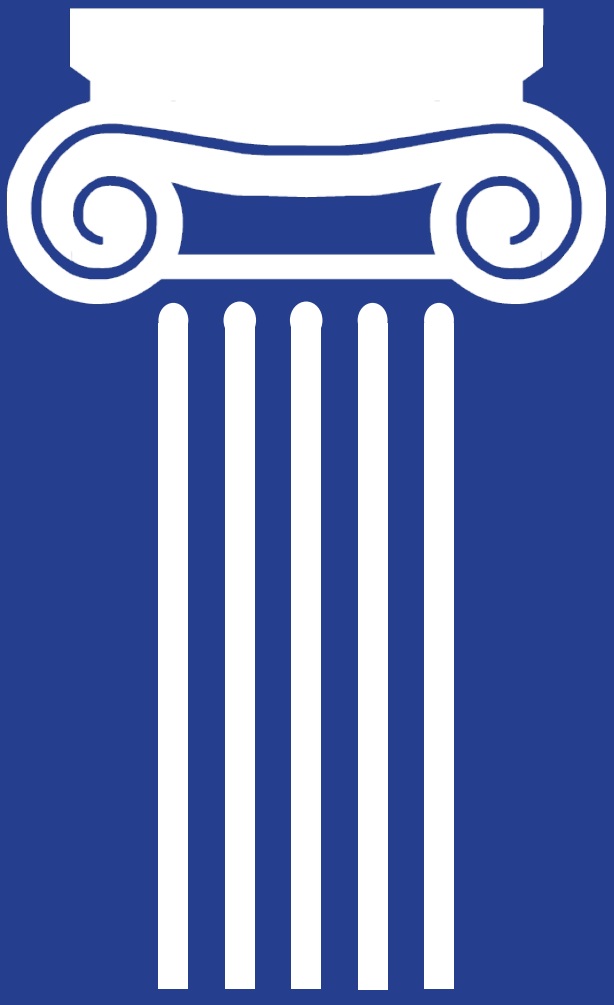

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Letter from the Editors

Dear Reader,

Welcome to Volume 8, Number 2 of the *Claremont Journal of Law and Public Policy*! Despite being scattered across the world and the continuing pandemic, our writers have been busy at work producing stimulating pieces across an array of issues. We are excited to present this culminating edition, which includes insightful and diverse analyses on the vaccine distribution, compassionate release and COVID-19 in the prison population, Georgia run-off election laws, international "climate clubs," and more.

Of course, this edition would not be possible without the hard work and collaboration of our entire team. Print Edition Editors for this edition include Frankie Konner, Haley Parsley, Katya Pollock, Sean Volke, Scott Shepetin, Calla Li, Ciara Chow, Chris Murdy, Ethan Widlanski, and Olivia Varones. Credits for adapting these texts into this edition you now read go to our Design Editor, Sofia Muñoz. Working tirelessly alongside the print edition staff, we also thank our Digital Content Editors Chris Tan, Kelsey Braford, and Rya Jetha, and our Interview Editor Lauren Rodrigeuz. In addition, we want to extend a tremendous thanks to Aden Siebel, our Webmaster, who has recently developed a new site for the *CJLPP* that we hope makes the work of our writers more accessible and (perhaps) also a bit easier on the eyes. Finally, as fall transitioned into spring, we have already had to say goodbye to two of our very dedicated editors on the print and digital content teams respectively—Scott Shepatin and Izzy Davis—who have long been fixtures of the *CJLPP* team. You will both be dearly missed.

In addition to the written work of the Journal, we've been busy with several other initiatives spearheaded by our dedicated business team led by Kayla Soloman and Adeena Liang. These initiatives include the launch of a new Instagram page for the Journal (follow us @ClaremontJLPP); the development of a new series titled *The Peer Review*, which spotlights our members and how they became involved in the Journal; the development of several career-oriented events (including one which recently featured two Claremont alumni now attending law school!); and much more. As always, the best way to stay connected to the CJLPP and all that is happening is through our social media and website.

Finally, we want to extend a special thanks to our faculty advisor, Professor Amanda Hollis-Brusky, for her sponsorship. And, of course, the *CJLPP* would not be possible without the generous backing of 5C student governments and the Salvatori Center. Thank you all for your continued support.

As always, we welcome any outside submissions or questions. Please reach out at info.5clpp@gmail.com, and we look forward to connecting.

Stay safe, and happy reading!

Kind regards,

Bryce Wachtell & Daisy Ni
Editor-in-Chief and Managing Editor

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 of 2021, and therefore reflect the circumstances of those periods.

A Prioritarian Framework to Inform the Ethical Distribution of Scarce COVID-19 Vaccines[1]

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Staff Writer

1 This piece was last updated in January 2021.

A decade ago, in the midst of the 2009 influenza pandemic, the National Academy of Medicine offered the following guidance to the federal disaster response: "When resource scarcity reaches catastrophic levels, clinicians are ethically justified—and indeed are ethically obligated—to use the available resources to sustain life and well-being to the greatest extent possible."[1] When public health crises strike, moral imperatives demand a concerted effort to strategically allocate life-saving resources and minimize preventable casualties. Moreover, because the order in which scarce medical resources are distributed can be the difference between life and death for many, officials must articulate consistent and transparent rationales for their actions. Public trust may deteriorate in the absence of ethical decision making amid public health disasters.[2]

The Centers for Disease Control and Prevention (CDC) were fully aware of these hazards when the COVID-19 pandemic struck U.S. soil. Nearly six months before initial doses of the first COVID-19 vaccine were ready to ship, an advisory panel to the CDC, the Advisory Committee on Immunization Practices (ACIP), began outlining a set of ethical principles for allocating scarce COVID-19 vaccines in the early phases of the program.[3] The CDC has since provided extensive recommendations to state, territorial, tribal, and local public health programs on how to plan their vaccination responses.[4]

Yet, in the days leading up to the first nationwide shipment of Pfizer-BioNTech vaccines, one hospital system executive described the process of creating a local rollout plan as "building the plane and flying it at the same time."[5] One month into the vaccine program, then-President-elect Joseph R. Biden called the rollout a "dismal failure."[6] In addition to unanticipated technical challenges, lingering questions about whom to assign priority and how to reconcile moral and practical imperatives in the allocation of vaccines drove widespread confusion and distress. At the root of these uncertainties lay inadequate federal guidance, as ACIP's ethical principles fail to truly reconcile the moral conflicts at stake in scarce vaccine distribution.

This paper begins by examining why public health authorities require extensive guidance from ACIP about the ethics of vaccine allocation and highlighting the fallout that has resulted from inadequacies in ACIP's principles. It then illuminates the problems with ACIP's framework and explains how the panel's failure to clearly reconcile competing goals within the vaccine program lies at the root of widespread confusion surrounding vaccine prioritization. Finally, this paper outlines recommendations for harmonizing ACIP's competing objectives and fixing the panel's ethical framework. A consistent ethical basis must undergird any strategy for allocating COVID-19 vaccines if officials are to mitigate further suffering, secure the public's trust, and ensure an expeditious end to this pandemic.

I. The Limits of Federal Guidance

Federal guidance currently offers public health authorities only a barebones framework for allocating scarce early doses of the COVID-19 vaccine, leaving key decisions to officials at the lower levels.[7] As the pandemic continues to unfold, officials are discovering that this process is increasingly fraught with challenges.

Though ACIP outlines broad recommendations for the order in which critical populations should receive the vaccine, it remains states' prerogative to accept or reject these recommenda-

1 Clare Stroud et al., Crisis Standards of Care: Summary of a Workshop Series 76 (2010), https://www.ncbi.nlm.nih.gov/books/NBK32753/pdf/Bookshelf_NBK32753.pdf. (At the time, the National Academy of Medicine was instead called the Institute of Medicine.)
2 Don Hanfling et al., Crisis Standards of Care: A Systems Framework for Catastrophic disaster response 1–3 (2012), https://www.ncbi.nlm.nih.gov/books/NBK201063/pdf/Bookshelf_NBK201063.pdf; *see also* Alexander T. M. Cheung & Brendan Parent, *Mistrust and inconsistency during COVID-19: considerations for resource allocation guidelines that prioritise healthcare workers*, 47 J. Med. Ethics 73 (Oct. 26, 2020), http://dx.doi.org/10.1136/medethics-2020-106801 (arguing that many ventilator triage policies used in the COVID-19 pandemic adhere inconsistently to ethics frameworks in order to prioritize healthcare workers, and that the appearance of favoritism in healthcare worker prioritization may exacerbate public mistrust).
3 *See* Sarah Mbaeyi, *Considerations for COVID-19 Vaccine Prioritization* (June 24, 2020), https://www.cdc.gov/vaccines/acip/meetings/downloads/slides-2020-06/COVID-08-Mbaey-508.pdf.
4 Ctrs. for Disease Control & Prevention, COVID-19 Vaccination Program Interim Playbook for Jurisdiction Operations 5 (Oct. 29, 2020), https://www.cdc.gov/vaccines/imz-managers/downloads/COVID-19-Vaccination-Program-Interim_Playbook.pdf [hereinafter COVID-19 *Interim Playbook*].
5 Dan Frosch et al., *As Covid-19 Vaccines Roll Out, States to Determine Who Gets Shots First*, Wall St. J. (Dec. 9, 2020, 5:03 PM), https://www.wsj.com/articles/as-covid-19-vaccines-roll-out-states-to-determine-who-gets-shots-first-11607509801?st=vkuptdrestw1qt2&reflink=article_email_share.
6 Sheryl Gay Stolberg & Katie Thomas, *Joe Biden plans a vaccination blitz, but supplies are scarce*, N.Y. Times (Jan. 15, 2021), https://www.nytimes.com/2021/01/15/world/joe-biden-covid-coronavirus-vaccine.html.
7 Ctrs. for Disease Control & Prevention, *supra* note 4, at 8.

tions.[8] At the dawn of the national vaccine rollout, nearly all states followed ACIP's recommendation to prioritize frontline healthcare personnel (HCP) and long-term care facility (LTCF) residents as Phase 1a recipients of the vaccine.[9] But Floridians ages 65 and older were able to schedule vaccine appointments as early as late December, after Governor Ron DeSantis signed an executive order mandating that they be placed among Florida's highest priority candidates.[10]

In addition, ACIP leaves decisions pertaining to the appropriate prioritization of population subsets within each phase of the program to local officials.[11] Because the number of available doses in the first waves of the vaccine rollout fell far short of the total number of HCP and LTCF residents nationwide,[12] authorities across the country faced tough decisions and occasional backlash as they sought to determine who among the proposed Phase 1a recipients to vaccinate ahead of the rest.[13]

The complexity of these questions has compelled most states to rely heavily on ACIP's guidance concerning the ethics of vaccine allocation.[14] The COVID-19 vaccine program must navigate multiple competing objectives, among which the panel particularly emphasizes "the reduction of morbidity and mortality and the minimization of disruption to society and the economy."[15] Sometimes, these objectives align. Prioritizing frontline HCP as the first vaccine recipients minimizes disruption to our society's healthcare delivery system and, by extension, reduces deaths.[16] On the flip side, the debate over whether to favor adults over 65 or essential workers pits these goals against one another. To help officials draw clear and consistent distinctions between the populations that merit priority, ACIP sought to develop a set of publicly acceptable and easily applicable ethical principles through which these goals could be "clearly articulated and prioritized."[17]

The immediate and tangible impact of allocation decisions on constituents' lives demands not only that public health authorities make ethically responsible choices, but also that they clearly articulate their justifications for these choices. An interim framework for allocating COVID-19 vaccines, written by the National Academies (NASEM) and commissioned by the CDC, explains that a "clear articulation and explanation of the allocation criteria" through "simple, clearly defined, and comprehensibly communicated rules" is critical to preserving public trust and appeasing concerns over why some populations are prioritized over others.[18] Transparency in allocation guidelines respects people's desires to be protected against COVID-19 and ensures that people do not feel, in the words of one medical director at Boston's Mass General Brigham hospital, "disenfranchised or devalued if they are not first in line."[19]

The legitimacy, and consequently the success, of the vaccine distribution program also depends on jurisdiction officials' ability to articulate their priority decisions with certainty and reliably communicate the ethical basis on which they rest. During the 2009 influenza pandemic, the National Academy of Medicine warned that when the public does not perceive the government's response to a public health crisis as ethical, "trust—in professionals, institutions, government, and leadership—is quickly lost."[20] For this reason, plans based on the Crisis Standards of Care—which guided the 2009 pandemic response and informed NASEM's framework for COVID-19 vaccine allocation[21]—are required to rest on "a strong ethical grounding that enables a process deemed equitable based on its transparency, consistency, proportionality, and accountability."[22] Due to the politicized process through which COVID-19 vaccines were approved, the efficacy of COVID-19 vaccines already faces heightened distrust.[23] Failing to establish a consistent ethical grounding for allocation decisions risks further weakening public confidence in the vaccine program and may consequently reduce public willingness to vaccinate, hinder efforts to achieve herd immunity, and prolong the pandemic.

8 *Id*. at 11–14.

9 Will Feuer, *Texas Breaks from CDC in Vaccinating elderly over police and teachers as states set own priorities for rationing Covid shots*, CNBC (Dec. 23, 2020, 6:13 AM), https://www.cnbc.com/2020/12/23/covid-vaccine-texas-other-states-break-from-cdc-in-prioritizing-who-gets-next-round-of-shots.html.

10 Andrew Soergel, *The COVID-19 Vaccine Distribution Plan in Florida*, AARP (Jan. 13, 2021, 3:12 PM), https://states.aarp.org/florida/covid-19-vaccine-distribution.

11 Ctrs. for Disease Control & Prevention, *supra* note 4, at 16.

12 Melanie Evans, *Who Gets COVID-19 Vaccine First? Hospitals Assess How to Divvy Up Shots*, Wall St. J. (Dec. 7, 2020, 8:16 AM), https://www.wsj.com/articles/who-gets-covid-19-vaccine-first-hospitals-assess-how-to-divvy-up-shots-11607357465?st=i61jnihbxbbmdiu&reflink=article_email_share.

13 *See* Nanette Asimov, *Stanford apologizes after doctors protest vaccine plan that put frontline workers at back of line*, S.F. Chron. (Dec. 18, 2020, 2:36 PM), https://www.sfchronicle.com/health/article/Stanford-doctors-protest-vaccine-plan-saying-15814502.php; *see also* Christine Byers & Rhyan Henson, *Doctors say BJC prioritizing older employees for COVID-19 vaccine, not frontline workers*, KSDK (Dec. 19, 2020, 5:28 PM), https://www.ksdk.com/article/news/health/coronavirus/barnes-jewish-bjc-vaccine-frontline-workers/63-6e107e69-67e2-46be-a216-424df8604285.

14 Josh Michaud et al., *States Are Getting Ready to Distribute COVID-19 Vaccines. What Do Their Plans Tell Us So Far?*, Kaiser Fam. Found. (Nov. 18, 2020), https://www.kff.org/coronavirus-covid-19/issue-brief/states-are-getting-ready-to-distribute-covid-19-vaccines-what-do-their-plans-tell-us-so-far/.

15 Nancy McClung et al., *The Advisory Committee on Immunization Practices' Ethical Principles for Allocating Initial Supplies of COVID-19 Vaccine — United States*, 2020, 69 Morbidity and Mortality Wkly. Rep. 1782, 1785 (Nov. 27, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6947e3-H.pdf.

16 Kathleen Dooling et al., *The Advisory Committee on Immunization Practices' Interim Recommendation for Allocating Initial Supplies of COVID-19 Vaccine — United States*, 2020, 69 Morbidity and Mortality Wkly. Rep. 1857, 1857 (Dec. 11, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6949e1-H.pdf.

17 McClung et al., *supra* note 15, at 1785.

18 Nat'l Acads. of Scis., Eng'g, and Med., Framework for Equitable Allocation of COVID-19 Vaccine, 2–8 (Helene Gayle et al. ed., 2020), https://doi.org/10.17226/25917.

19 Evans, *supra* note 12.

20 Hanfling et al., *supra* note 2, at 1–3.

21 *See generally* Nat'l Acads. of Scis., Eng'g, and Med., *supra* note 18.

22 Hanfling et al., *supra* note 2, at 1–16.

23 Sarah Kreps & Douglas L. Kriner, *Will Americans trust a COVID-19 vaccine? Not if politicians tell them to.*, Brookings Inst. (Oct. 30, 2020), https://www.brookings.edu/techstream/will-americans-trust-a-covid-19-vaccine-not-if-politicians-tell-them-to/.

ACIP's principles should have armed officials with the necessary framework to reconcile moral conflicts, articulate clear rationales for their decisions, and appease widespread confusion and distress. But almost as soon as the first doses of the Pfizer-BioNTech vaccine were rolled out, authorities nationwide began to face immense backlash from constituents over their distribution decisions. Over one hundred doctors at Stanford Medical Center protested when remote doctors and administrators were prioritized over frontline health workers to receive initial doses of the vaccine, rallying and writing in a letter to top Stanford officials that residents "feel a deep sense of distrust towards the hospital administration."[24] A similar scenario unfolded in St. Louis at Barnes Jewish Hospital, where secretaries and support staff were prioritized ahead of frontline health workers on the basis of age.[25] Frontline essential workers expressed outrage online that federal legislators received vaccines ahead of them.[26]

By mid-January, the nation's daily death rate hit record highs[27] and impatience was growing over a slow start to the vaccine rollout.[28] Amid the chaos, as state officials were forced to adapt their carefully laid plans to unanticipated technical challenges, they struggled to balance the imperatives of vaccinating as quickly as possible and prioritizing those most at risk.[29]

What happened? Despite the panel's best efforts to help officials navigate the complexities of the vaccine rollout, ACIP's ethical principles remain conspicuously silent on key questions, such as how to properly weigh competing moral concerns and how to reconcile those concerns against the practical limitations of vaccine distribution. In order to steer public health authorities through this chaos and appease public anxiety about the progress of vaccine allocation, the panel needs to disambiguate its guidance now more than ever.

II. ACIP's Ethical Principles

ACIP's guidance consists of three principles: maximize benefits and minimize harms, promote justice, and mitigate health inequities.[30] The first principle is utilitarian in that it advocates choices that produce the most good.[31] It measures the success of a distribution strategy by how much it contributes to societal welfare—or, more specifically, by how much it reduces infections, illnesses, and deaths and how well it preserves overall societal functioning.[32]

What complicates the debate over vaccine allocation is the concurrence of a competing moral interest, which ACIP contains within its second and third principles. The panel suggests that the inability of many workers to work remotely and the high risk for COVID-19 exposure that accompanies many essential job conditions—whether necessitated by close interaction with the public or an inability to control social distancing in the workplace—justify prioritizing essential workers for vaccination.[33] For example, workers in meat and poultry processing plants, which are essential to U.S. food infrastructure, faced disproportionate rates of infection at the start of the pandemic as a result of shoulder-to-shoulder assembly lines.[34] ACIP additionally cites that eighty-three percent of manufacturing, food, and agriculture workers infected with COVID-19 between March and May 2020 were from racial or ethnic minority groups, evidencing the disproportionate burden of COVID-19 among minorities that are overrepresented in essential industries. As a result, ACIP advocates favoring essential workers to promote justice and mitigate health inequities.[35] This rationale resembles those of moral theories which favor the worst off members of society in the distribution of scarce resources.[36]

Put succinctly, ACIP's principles prescribe two overreaching goals for vaccine prioritization: maximizing overall societal

24 Asimov, *supra* note 13.
25 Byers & Henson, *supra* note 13.
26 Fenit Nirappil et al., *Politicians get vaccinated early to build public trust, while furious health workers wait*, Wash. Post (Dec. 23, 2020, 3:30 PM), https://www.washingtonpost.com/health/2020/12/23/covid-vaccine-priority-congress/.
27 Karen Zraick & Rebecca Robbins, *As U.S. tops 4,000 deaths in a day, a record, Fauci warns that January will get harder*, N.Y. Times (JAN. 19, 2021), https://www.nytimes.com/2021/01/07/world/fauci-coronavirus-january.html.
28 Rachel Sandler, *CDC Expands Vaccine Eligibility To Everyone 65 And Older, Anyone With An Underlying Health Condition*, Forbes (Jan. 15, 2021, 9:54 AM), https://www.forbes.com/sites/rachelsandler/2021/01/12/cdc-expands-vaccine-eligibility-to-everyone-65-and-older-anyone-with-an-underlying-health-condition/?sh=41756c22247e.
29 Jill Cowan, *California just made it easier for people to get vaccinated. For many, it feels harder than ever.*, N.Y. Times (Jan. 15, 2021, 7:59 PM), https://www.nytimes.com/live/2021/01/14/world/covid19-coronavirus/california-just-made-it-easier-for-people-to-get-vaccinated-for-many-it-feels-harder-than-ever.
30 McClung et al., *supra* note 15, at 1782.
31 Julia Driver, *The History of Utilitarianism*, The Stanford Encyclopedia of Philosophy (Sept. 22, 2014), https://plato.stanford.edu/entries/utilitarianism-history/#IdeUti.
32 McClung et al., *supra* note 15, at 1782.
33 *Evidence Table for COVID-19 Vaccines Allocation in Phases 1b and 1c of the Vaccination Program*, Ctrs. for Disease Control & Prevention (Dec. 22, 2020), https://www.cdc.gov/vaccines/hcp/acip-recs/vacc-specific/covid-19/evidence-table-phase-1b-1c.html [hereinafter Evidence Table].
34 Yuliya Parshina-Kottas et al., *Take a Look at How Covid-19 Is Changing Meatpacking Plants*, N.Y. Times (June 8, 2020), https://www.nytimes.com/interactive/2020/06/08/us/meat-processing-plants-coronavirus.html.
35 *Evidence Table*, *supra* note 33.
36 ACIP suggests that prioritizing essential workers would mitigate health inequities better than prioritizing older adults due to racial and ethnic minorities' overrepresentation among the former group and underrepresentation among the latter group. But racial and ethnic minorities' disproportionate risk of contracting COVID-19 serves as further evidence of the disproportionate occupational risk already borne by essential workers, and thus derives from essential workers' existing claim to being worse off than other groups. Indeed, the NASEM interim framework which informed ACIP's own framework also contains a "mitigation of health inequities" principle and states that the allocation criteria derived from this principle identify the "worst off." *See* Kathleen Dooling, *Phased Allocation of COVID-19 Vaccines*, Ctrs. for Disease Control & Prevention 31 (Nov. 23, 2020), https://www.cdc.gov/vaccines/acip/meetings/downloads/slides-2020-11/COVID-04-Dooling.pdf; Nat'l Acads. of Scis., Eng'g, and Med., *supra* note 18, at 3–7. (This paper borrows the term "worst off" from NASEM's report. However, NASEM's report falsely claims that prioritizing the worst off is "prioritarian." Prioritarianism is only one of several theories that are guided by the principle of allocating resources to benefit the worst off. John Rawls's "difference principle," for instance, takes a different approach to this concept.) *See* John Rawls, A Theory of Justice 42–43 (1971).

welfare and saving the worst off. But these objectives often conflict, and ACIP has yet to articulate a method for balancing the two. When members of Congress were vaccinated first under the utilitarian rationales of instilling public trust in the vaccine and preserving smooth government operations, frontline healthcare workers who had yet to receive the vaccine were unconvinced and expressed outrage that the worst off had not been prioritized.[37] Scientists seeking to model the optimal distribution strategy also have yet to reach a consensus about which principle to use. Whereas Stanford Medical Center's now-infamous algorithm approximated who was worst off by summing together each employee's risk factors,[38] other models have sought to minimize transmission and deaths across society as a whole.[39]

In January, the conflict between maximizing societal welfare and saving the worst off reached the forefront of national debate, though it had yet to be identified as such. As public health figures blamed delays in the vaccine rollout on a rigid adherence to earlier distribution plans,[40] lawmakers across the country scrambled to decide if they should forego their original timelines in favor of accelerating vaccinations for adults ages 65 and older, a plan which might minimize further casualties and curb the ever-rising daily death toll.[41] For many states, this involved abandoning plans to prioritize teachers, emergency responders, and other essential workers, groups whom ACIP implies may be worse off than older adults.[42] The same moral conflict complicated then-President-elect Biden's goal to simultaneously ramp up vaccinations and prioritize equity by focusing efforts on hard-to-reach and underserved communities.[43]

Thus, implementation challenges have forced officials to reevaluate their priorities and reconcile their concerns for favoring the worst off with growing calls to prioritize maximum societal welfare. A well-defined ethical principle would have informed state officials precisely under what conditions the utility of a strategy must outweigh competing concerns for the worst off. It would have enabled authorities to make decisions with clarity and with confidence that they have done all in their power to balance moral obligations with practical limitations. But ACIP has yet to articulate a method for handling the tension between maximizing welfare and saving the worst off.

The second pressing flaw in ACIP's ethical framework is that it offers no method for prioritizing between the numerous factors that bear on the two objectives. To justify its decision about how to prioritize between adults 65 and over and essential workers, the panel cited that prioritizing the former appeals to the maximum benefit principle because older adults face a "high risk of COVID-19 associated morbidity and mortality and experience the highest burden of COVID-19 hospitalization."[44] ACIP provided evidence that essential workers merit early vaccination because doing so benefits both individual workers and society at large, simultaneously reducing infections and protecting societal functioning.[45] Weighing the merits of these two populations pits the subgoals of minimizing severe illnesses, hospitalizations, and deaths against those of minimizing infections and societal disruption. Before public health authorities can explain which of these two prioritization strategies achieves a higher value of societal welfare, they must first explain how significantly each subgoal bears on societal welfare.

Likewise, to ascertain which populations are worst off requires health officials to consider individuals' risk of acquiring infection, risk of severe morbidity and mortality,[46] and ability to mitigate risk of exposure, among other factors.[47] Priority for the vaccine increases as these factors compound; LTCF residents, for example, were vaccinated first because their "age, high rates of underlying medical condition, and congregate living situation" renders them at high risk for infection and severe illness.[48] But contrasting the merits of populations experiencing different types of risks requires weighting each factor. Authorities in different jurisdictions differ widely on whether to prioritize essential workers, on account of their irreducibly high risk of exposure, or older adults, who face a higher risk of severe illness and death.[49] Drawing meaningful distinctions between these populations requires officials to articulate a consistent method for prioritizing between these risk factors.

ACIP's principles, however, overlook this step. Without addressing what strategy would maximize societal well-being, which risk factors it considered most critical to mitigate, or how to reconcile the two moral interests, the panel recommended in late December that states designate non-healthcare frontline essential workers and adults 75 and over as Phase 1b vaccine recipients.[50] This placed them ahead of adults ages 65 to 74, adults ages 16 to 64 with high-risk medical conditions, and non-frontline essential workers.[51] Though ACIP claimed its ethical principles support this allocation scheme,[52] it also

37 Nirappil et al., *supra* note 26.
38 Eileen Guo & Karen Hao, *This is the Stanford vaccine algorithm that left out frontline doctors*, MIT Tech. Rev. (Dec. 21, 2020), https://www.technologyreview.com/2020/12/21/1015303/stanford-vaccine-algorithm/.
39 Joe Palca, *Math Problem: What's The Best Strategy For COVID-19 Vaccination?*, NPR (Jan. 11, 2021, 9:59 AM), https://www.npr.org/sections/health-shots/2021/01/11/955659213/math-problem-whats-the-best-strategy-for-covid-19-vaccination.
40 Sandler, *supra* note 28.
41 Sheryl Gay Stolberg & Abby Goodnough, *States Told to Vaccinate Everyone 65 and Over as Deaths Surge*, N.Y. Times (Jan. 12, 2021), https://www.nytimes.com/2021/01/12/us/politics/vaccine-states.html.
42 Dooling, *supra* note 36. (ACIP suggests that the principles of promoting justice and mitigating health inequities favor prioritizing essential workers but not prioritizing older adults.)
43 Stolberg & Thomas, *supra* note 6.
44 *Evidence Table*, *supra* note 33.
45 *Id.*
46 Nat'l Acads. of Scis., Eng'g, and Med., *supra* note 18, at 3–12.
47 *Id.* at 3–16.
48 Dooling et al, *supra* note 16, at 1857.
49 *See* Feuer, *supra* note 9.
50 Kathleen Dooling et al., *The Advisory Committee on Immunization Practices' Updated Interim Recommendation for Allocating Initial Supplies of COVID-19 Vaccine — United States, December 2020*, 69 Morbidity and Mortality Wkly. Rep. 1657, 1657–1658 (Dec. 22, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm695152e2-H.pdf
51 *Id.* at 1658–1659.
52 *Id.* at 1659.

claimed less than a month prior that the same ethical principles supported a different allocation scheme: placing all essential workers in Phase 1b and relegating all high-risk adults, including all those ages 65 and older, to Phase 1c.[53] All the while, the panel only divulged how each distribution strategy would benefit society and favor those experiencing disproportionate risks, without so much as explaining how it weighted each consideration or justifying how the plans it selected would maximize benefits or favor the worst off in particular.

To some extent, ACIP's oversight is a symptom of long-standing issues in public health policy. In a 2012 article on the allocation of limited resources for HIV prevention, Ruth Macklin and Ethan Cowan wrote that the spectrum of ethical principles used in public health policy includes utilitarianism, equity, urgent need, prioritarianism, rule of rescue, and equal worth. However, as they write, "there is no consensus on how the different principles ought to be weighted, or on what weight should be given to the goal of maximizing health compared to other social goods such as education or environmental protection."[54] This analysis might help to explain ACIP's failure to reconcile competing principles and the conflicts between their utilitarian subgoals. Johri and Norheim note the same lack of consensus in their systematic review of efforts to reconcile cost-effectiveness analysis with equity concerns.[55]

However, unlike ethical frameworks used in other cases of medical resource allocation, ACIP's framework for COVID-19 vaccine prioritization experiences an additional third flaw: it lacks any clear method for measuring the value of an allocation strategy. When resources are constrained, public health officials consistently employ quantitative instruments to translate ethical principles into decisions about prioritization. Health economists measure the economic efficiency of distribution strategies via cost-effectiveness (CEA) and cost-benefit analyses (CBA), both of which are founded on the principle of utilitarianism.[56] Amid the COVID-19 pandemic in particular, critical care physicians have used a scoring system known as the Sequential Organ Failure Assessment (SOFA) to predict patients' morbidity and mortality so that those most likely to survive can be prioritized for scarce ventilators.[57] SOFA assesses the functioning of each organ system in a patient on a scale between zero and four, then sums individual SOFA scores to a total between zero and twenty-four.[58] Quantifying patients' priority through this measurement enables ICU doctors to make informed calls about tough moral decisions and ensure that they maximize lives saved. It is peculiar, then, that ACIP's decision making about COVID-19 vaccine prioritization has not relied on any numeric indicator of societal or individual welfare.

The lack of concrete federal guidance about how to meaningfully quantify the value of each distribution strategy has had real consequences. Without a proper explanation as to why ACIP's Phase 1b order would best reconcile the vaccine program's competing goals, many states dismissed the panel's recommendation.[59] And when Stanford Medical Center's algorithm notoriously supplied initial vaccine doses to administrators working remotely rather than frontline resident physicians, critics were quick to point out that hospital leadership failed to assign weights to the algorithm's various risk variables in a manner that was clearly rationalized or easy to understand.[60]

ACIP's ethical principles are at best unhelpful. By skirting the responsibility of thoughtfully reconciling the prevailing moral conflicts in COVID-19 vaccine prioritization, ACIP has failed to offer easily applicable ethical principles and has left public health authorities ill-equipped to make justified and transparent distribution decisions through the ups and downs of this vaccine program.

III. Fixing ACIP's Framework

What public health authorities require is a framework that can reliably adjudicate between competing populations, reconcile moral and practical concerns, and ground decisions in a consistent ethical foundation. To do so, such a framework must 1) reconcile the objectives of maximizing societal welfare and favoring the worst off in a consistent manner, even if neither can be perfectly satisfied; 2) weight the utilitarian subgoals and risk factors in a manner that transparently communicates public health officials' priorities; and 3) quantify the value of each allocation strategy in maximizing benefits and prioritizing the worst off. This section offers insight on how to address the gaps in ACIP's principles.

The first step is to establish a means of reconciling utilitarianism and priority for the worst off. A natural method of doing so may be to adopt a version of prioritarianism, the view within moral philosophy that, as defined by Derek Parfit, "benefiting people matters more the worse off these people are."[61] While

53 Dooling, *supra* note 36, 31–34.

54 Ruth Macklin & Ethan Cowan, *Given Resource Constraints, It Would Be Unethical To Divert Antiretroviral Drugs From Treatment To Prevention*, NIH Pub. Access 1, 2–3 (July 1, 2012), https://dx.doi.org/10.1016%2Fj.ajem.2020.07.019.

55 *See* Mira Johri & Ole Frithjof Norheim, *Can cost-effectiveness analysis integrate concerns for equity? Systematic review*, 28 Int. J. Technol. Assess. Health Care 125 (Apr. 12, 2012), https://pubmed.ncbi.nlm.nih.gov/22494637/.

56 Elliot Marseille & James G. Kahn, *Utilitarianism and the ethical foundations of cost-effectiveness analysis in resource allocation for global health*, 14 Phil., Ethics, and Human. in Med. 1, 1 (Apr. 3, 2019), https://peh-med.biomedcentral.com/articles/10.1186/s13010-019-0074-7#citeas.

57 Mike Baker & Sheri Fink, *At the Top of the Covid-19 Curve, How Do Hospitals Decide Who Gets Treatment?*, N.Y. Times (Mar. 31, 2020), https://www.nytimes.com/2020/03/31/us/coronavirus-covid-triage-rationing-ventilators.html. (As of May 10, 2020, SOFA was recommended for use in ventilator distribution in fifteen states' ventilator guidelines.) *See also* Gina M. Piscitello et al., *Variation in Ventilator Allocation Guidelines by US State During the Coronavirus Disease 2019 Pandemic: A Systematic Review*, JAMA Network Open 1 (June 19, 2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2767360.

58 Sijia Liu et al., *Predictive performance of SOFA and qSOFA for in-hospital mortality in severe novel coronavirus disease*, 38 AM. J. Emerg. Med. 2074, 2074 (July 5, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7354270/.

59 Stolberg & Goodnough, *supra* note 41.

60 Guo & Hao, *supra* note 38.

61 Derek Parfit, *Equality and Priority*, 10 Ratio 202, 213 (1997), https://doi.org/10.1111/1467-9329.00041.

public health ethicists recognize this principle, they seem to consistently misinterpret it as *solely* favoring the worst off.[62] Though prioritarians assign greater weight to benefits felt by the worse off, this priority is not absolute, as benefits to the worse off may be "morally outweighed by sufficiently great benefits to the better off."[63] A prioritarian decision model for allocating scarce COVID-19 vaccines may therefore resemble a utilitarian function that sums the benefits received across all individuals but assigns weights to each benefit commensurate to the severity of the recipient's circumstances. This principle typically maximizes societal welfare but may, on occasion, favor a strategy that significantly ameliorates hardships borne by the worse off despite not maximizing benefits.

Before defining the conditions under which saving the worst off should outweigh maximizing welfare, ACIP must articulate methods for quantifying societal welfare and the well-being of priority groups. Because multiple considerations bear on each principle, quantifying them requires establishing common units of measurement. For instance, quantifying who is worse off among competing populations first requires combining multiple indicators of individual risk for COVID-19 transmission and serious illness, then weighting the factors according to relative importance. Factors bearing on individuals' well-being in this context include, but are not limited to, the aforementioned risk of acquiring infection, risk of severe morbidity and mortality, and ability to mitigate risk of exposure.[64]

The following framework employs a composite indicator of an individual's wellness as a weighted arithmetic mean,[65] enabling public health authorities to quantify the compounded effect of multiple factors and be fully transparent about how they assign priority to these factors when they compete. The "Risk Index" for population p, based upon the aforementioned factors, is visualized below:

$$Risk\ Index_p = \frac{w_1 \text{Risk of Infection}_p + w_2 \text{Risk of Severe Illness}_p + w_3 \text{Risk of Death}_p + \cdots}{\sum_{i=1}^{n} w_i}$$
$$= \frac{w_1}{\sum_{i=1}^{n} w_i} \text{Risk of Infection}_p + \frac{w_2}{\sum_{i=1}^{n} w_i} \text{Risk of Severe Illness}_p + \frac{w_3}{\sum_{i=1}^{n} w_i} \text{Risk of Death}_p + \cdots$$

Risk variables can be calculated based on health statistics for population p.[66] Since each variable is measured as a fraction, the Risk Index has a range between 0 and 1. The worse off a population is, the higher the value of their Risk Index. If risk of exposure can be mitigated (for example, if healthcare workers can don personal protective equipment or older adults can isolate),[67] then the fraction likelihood of mitigating the risk is subtracted from that risk value. It should be the responsibility of public health authorities, with aid from ACIP, to set the values of each w_i coefficient. These will determine the relative weight of each factor in a given jurisdiction's distribution strategy. Identifying the worst-off groups in this manner avoids a key error in the development of Stanford's algorithm: a lack of transparency about the relative weights of various factors and the role of human input in assigning these weights.[68]

Quantifying societal well-being demands its own function and requires again that differences in units be mitigated. Numerically weighing ACIP's concurrent objectives of minimizing casualties and minimizing societal and economic fallout, for example, is impossible without first reconciling the units of human lives and dollars. Manually assigning a "well-being" score to each benefit of the vaccine and summing these scores to measure the total change in societal well-being may be most true to the principle of utilitarianism; in practice, however, quantifying benefits by intangible measures of value is laden with challenges.[69] Cost-effectiveness analyses offer another solution by representing human life in dollar terms, enabling comparisons between a distribution strategy's benefits toward human life and the cost of limited resources.[70]

Under its maximize benefits principle, ACIP defines societal benefits of COVID-19 vaccination to include "the reduction of SARS-CoV-2 infections and COVID-19-associated morbidity and mortality, which in turn reduces the burden on strained healthcare capacity and facilities; preservation of services essential to the COVID-19 response; and maintenance of overall societal functioning."[71] In order to conceptualize how ACIP's utilitarian principle might be translated into a workable model, the defined benefits are distilled into a highly simplified function below, where n = *Illnesses Averted* and $0 \geq$ *Severity of Illness Averted*$_i \geq 1$:

$$\Delta\, Welfare_p = \sum_{i=1}^{n} Severity\ of\ Illness\ Averted_i + \frac{Value\ of\ Societal\ Recovery_p}{Value\ of\ a\ Statistical\ Life}$$

This function measures the change in welfare for population p resulting from each distribution strategy in units of human lives saved. Under this model, the allocation strategy that returns the highest value of $\Delta Welfare_{Society}$ is, generally speaking, the most desirable strategy. Here, "illnesses" refer to those related and unrelated to COVID-19, since relieving the burden on healthcare facilities can help prevent casualties from causes other than the virus. Therefore, n approximates the total number of people to receive improvements to their health outcomes as a result of a vaccine distribution plan. How much each individual's improvement contributes to overall societal welfare is

62 *See* Macklin & Cowan, *supra* note 54, at 4. (Macklin and Cowan define the prioritarian principle as: "Ensure that resources are provided to the least advantaged members or groups in society.") *See also* Nat'l Acads. of Scis., Eng'g, and Med., *supra* note 18, at 3–7. (NASEM commits the same error, claiming that favoring the worst off is prioritarianism.)

63 Parfit, *supra* note 61, at 213.

64 Nat'l Acads. of Scis., Eng'g, and Med., *supra* note 18, at 3–7.

65 While weighted arithmetic means are commonly used in composite indicators, a much more nuanced process is necessary to weight each variable in a manner that accurately corresponds to the variable's relative importance. *See* William Becker et al., *Weights and importance in composite indicators: Closing the gap*, 80 Ecological Indicators 12 (May 2, 2017), http://dx.doi.org/10.1016/j.ecolind.2017.03.056.

66 *See, e.g.*, *Evidence Table*, *supra* note 33.

67 Nat'l Acads. of Scis., Eng'g, and Med., *supra* note 18, at 3-16.

68 Guo & Hao, *supra* note 38.

69 *See Calculating Consequences: The Utilitarian Approach to Ethics*, Markkula Ctr. for Applied Ethics (Aug. 1, 2014), https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/calculating-consequences-the-utilitarian-approach/#:~:text=If%20you%20answered%20yes%2C%20you,benefits%20over%20harms%20for%20everyone.

70 Marseille & Kahn, *supra* note 56, at 1.

71 McClung et al., *supra* note 15, at 1782.

modified according to the *Severity of Illness Averted*$_i$. For each death averted, $\Delta Welfare_p$ increases by 1. For other averted illnesses, $\Delta Welfare_p$ increases by some amount between 0 and 1, dependent on the severity. Because vaccinations avert infections and deaths not only for those who receive the vaccine, but also for the people with whom they come into contact, determining which plan maximizes societal welfare requires predictive data about the downstream effects of each vaccination strategy. ACIP's recommendations already rely upon data models that predict the percent deaths and infections averted by each strategy in the six months following the vaccine's introduction.[72]

To consolidate the competing subgoals of the vaccine program, reducing the burden on healthcare delivery and the COVID-19 response are treated as instrumental for maximizing deaths averted. The function estimates the effect of the vaccine program in mitigating economic losses for population p as a monetary value, represented by *Value of Societal Recovery*$_p$.[73] It then converts this estimate into units of human lives by dividing it by the value of a statistical life (VSL), thus inverting CEAs' representation of human life in dollar values. Policy analysts have adopted the VSL to approximate how much individuals are willing to pay for small reductions in their risk of death.[74] In 2017 USD, the VSL in the United States is estimated at ten million dollars.[75]

Incorporating the two functions above yields a new, weighted function of the change in societal welfare generated by a given vaccine distribution plan:

$$\Delta Welfare_{Society,Weighted} = \sum_{p=1}^{n} (Risk\ Index_p * \Delta Welfare_p)$$

This function quantifies $\Delta Welfare_{Society,Weighted}$ as the sum of benefits received per population *p* and assigns more weight to those benefits received by the worse off via the Risk Index, which increases the more population *p* is worse off. ACIP can employ this function in tandem with the previous utilitarian function to construct a prioritarian framework and reconcile the moral conflicts in this vaccine program.

If the objectives of maximizing societal welfare and saving the worst off align under a given distribution order, then modeling that plan is most likely to return the maximum possible values for both $\Delta Welfare_{Society}$ and $\Delta Welfare_{Society,Weighted}$. In scenarios where the strategy that maximizes $\Delta Welfare_{Society}$ does not simultaneously favor the worst off, it is public health authorities' responsibility to consider the tradeoff between these values. The optimal distribution plan may warrant a slight reduction in $\Delta Welfare_{Society}$ in exchange for a drastic increase in $\Delta Welfare_{Society,Weighted}$. Though these decisions may be highly specific to the circumstances and to local priorities, ACIP should outline a decision model to steer officials through this process.

To illustrate how the prioritarian principle would apply to a concrete example, consider the following proposal by Drs. Robert Wachter and Ashish Jha: after vaccinating healthcare workers and long-term care residents, states should inoculate all people over 55 from oldest to youngest and then distribute vaccines via lottery for all remaining American adults.[76] Wachter and Jha recognize this might not be a widely popular strategy, as it would largely abandon plans favoring worst off populations such as essential workers and high-risk adults.[77] But, appealing primarily to utilitarian values, they argue that such a strategy would avoid snags in the distributive process and be "easy to implement, transparent, broadly acceptable, generally equitable and resistant to abuse."[78] Calls for creative and efficient distribution strategies of this nature reached a peak in mid-January, as the vaccine rollout faced delays and the pandemic saw no sign of slowing.

If the prioritarian principle supported Dr. Wachter and Dr. Jha's proposal to adopt a lottery over established plans that favor the worst off, then the model above would inform state officials that using a lottery to prioritize individuals for vaccination achieves a greater $\Delta Welfare_{Society}$ than manually selecting prioritizations. The model would also inform officials that any reduction in $\Delta Welfare_{Society}$ resulting from initially vaccinating all adults over 55 is outweighed by a sizable corresponding increase in $\Delta Welfare_{Society,Weighted}$. Thus, the risks of hospitalization and death borne by people over 55 render this group so much worse off than the rest of society that they should be vaccinated before the lottery is implemented.

IV. Conclusion

The purpose of this paper is not to submit a particular principle or set of principles as the most ethical, nor is it to advocate for any specific ordering of vaccine recipients as a national standard. States, territorial, and local governments hold primary authority over routine vaccinations and are better equipped to determine which allocation order best serves local needs.[79] It also remains "the general philosophy in this country" that, as one professor of medical informatics told the *New York Times*, "states manage public health."[80]

72 *See* Matthew Biggerstaff, *Modeling Strategies for the Initial Allocation of SARS-CoV-2 Vaccines* (Oct. 30, 2020), https://www.cdc.gov/vaccines/acip/meetings/downloads/slides-2020-10/COVID-Biggerstaff.pdf.
73 The Centre for Risk Studies at the University of Cambridge Judge Business School projects that the U.S. economy will experience losses between $550 billion and $19.9 trillion over the next five years as a result of COVID-19-related damages. *See* Shalini Narajan, *The coronavirus pandemic could cost the global economy a nightmarish $82 trillion over 5 years, a Cambridge study warns*, Bus. Insider (May 20, 2020, 6:45 AM), https://markets.businessinsider.com/news/stocks/coronavirus-pandemic-cost-global-economy-82-trillion-cambridge-study-2020-5-1029218887.
74 *Mortality Risk Valuation*, U.S. Envtl. Protection Agency, https://www.epa.gov/environmental-economics/mortality-risk-valuation.
75 Thomas J. Kniesner & W. Kip Viscusi, *The Value of a Statistical Life*, Oxford Res. Encyclopedia of Econ. and Fin. (Apr. 10, 2019), http://dx.doi.org/10.2139/ssrn.3379967.
76 Robert M. Wachter & Ashish K. Jha, *Make It a Lottery*, N.Y. Times (Jan. 10, 2021), https://www.nytimes.com/2021/01/07/opinion/coronavirus-vaccine-distribution.html.
77 *Id.*
78 *Id.*
79 Michaud et al., *supra* note 14.
80 Sheryl Gay Stolberg, *Some States Balk After C.D.C. Asks for Personal Data of Those Vaccinated*, N.Y. Times (Dec. 8, 2020), https://www.nytimes.

But it is imperative that vaccination plans in each jurisdiction are ethically consistent within themselves. The chief concern of this paper is that only a well-reasoned ethical framework can prepare public health authorities to reconcile the moral and practical conflicts that complicate COVID-19 vaccine distribution, preserve public trust in the legitimacy of the national vaccine response, and minimize further tragedies in the remaining months of this pandemic. More broadly, it highlights the importance of designing clear tools to translate ethics into action in the allocation of scarce medical resources, a lesson for future pandemic preparedness.

com/2020/12/08/us/politics/cdc-vaccine-data-privacy.html.

Implications of U.S. Policies on the Oppression of Uyghur Minorities in China

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Beginning in 2017, an influx of news reports describing the Chinese government's internment of ethnic minorities swept through the United States, triggering widespread concern for the disregard for human rights. Recent mass protests for racial justice have also focused American public sentiment on the difficulties faced by minority groups. The United States, which is composed of a heterogeneous population, has witnessed a history of conflicts spurred by racism and clashing cultures. In contrast, China is predominantly populated by the Han ethnic group, which makes up more than ninety percent of its total population.[1] Despite the overall homogeneity of China's population, past instances of separatism in outlying provinces have led the Chinese government to view minority populations as a threat to political stability. As seen in Tibet, Inner Mongolia, and Hong Kong, the Chinese Communist Party (CCP) uses great force to subdue any area that poses a threat to the central government's control.[2]

This article focuses on Chinese suppression of the Uyghur population in the Xinjiang Uyghur Autonomous Region (XUAR), which has been an area of concern for the CCP ever since it became a part of the country in 1949.[3] Increasing numbers of separatist protests since 2009 have triggered the Chinese government to renew and amplify its crackdown on Uyghurs and other Muslim minorities across Xinjiang. Investigative journalists have uncovered an extensive policing system, which consolidates facial recognition, artificial intelligence, and data tracking to control the region.[4] The Chinese government uses these methods to determine minorities who practice Islam and adhere to Uyghur cultural practices, labeling them as threatening individuals. As of the spring of 2018, the Chinese government had interned more than one million Uyghurs who were deemed possible risks to security in XUAR.[5] Although the Chinese government initially denied such actions, it can no longer bury the numerous testimonies of internment facilities and suppression methods that have surfaced in the past three years.[6] The rapid escalation of the CCP's force in XUAR has amassed increasing international attention and condemnation.

Americans have learned about the Chinese government's abuses toward Uyghurs, but the impact of U.S. policies on China's actions remains unclear to many. This essay explores and evaluates U.S. policies that affect the well-being of Uyghurs in XUAR. By first examining U.S. security and economic interests in the past three decades, Part I explains the history of American involvement and complicity in China's oppression of Uyghurs. The section reveals how the involvement of American corporate entities in China's surveillance system creates complications for lawmakers in the United States. Part II then discusses ongoing American involvement, looking particularly at how American companies profit from forced Uyghur labor. The section also evaluates U.S. legislation aimed to remedy such exploitation and highlights recent shifts in American approaches toward China. The history of U.S. policies regarding China's Uyghur population demonstrates how American priorities have contributed to the oppression in XUAR; however, the willingness to confront China economically can serve as a vital first step to alleviate the situation for Chinese ethnic minorities.

I. Historical American Interests and Policies Affecting XUAR

A. U.S.-China Joint Counterterrorism Policies

In the 1990s, China witnessed large-scale terrorist activity concentrated in the northwestern part of XUAR.[7] The Chinese government believed that Uyghur separatists became radicalized in Afghanistan and returned to XUAR with terrorism objectives. Although the separatist movement in XUAR stemmed from the increase of Han ethnic nationalism in China and the CCP's religious suppression, the Chinese government depicted Uyghur separatists as externally cultivated threats to peace.[8] Growing levels of unrest in XUAR have provoked the Chinese government's surveillance of the region ever since.

After 9/11, the United States' counterterrorism efforts extended across the globe to impact China's Xinjiang region in

1 Agnieszka Joniak-Lüthi, In the Han: China's Diverse Majority 3 (2015).
2 George Magnus, Red Flags: Why Xi's China Is in Jeopardy 204 (2018).
3 Lars Erslev Andersen & Yang Jiang, Danish Inst. for Int'l Stud., China's Engagement in Pakistan, Afghanistan and Xinjiang 30–39 (2018), https://pure.diis.dk/ws/files/2521474/DIIS_Report_2018_6_FINAL.pdf.
4 Bethany Allen-Ebrahimian, Exposed: China's Operating Manuals for Mass Internment and Arrest by Algorithm, Int'l Consortium of Investigative Journalists (Nov. 24, 2019), https://www.icij.org/investigations/china-cables/exposed-chinas-operating-manuals-for-mass-internment-and-arrest-by-algorithm/.
5 Sean R. Roberts, The War on the Uyghurs: China's Internal Campaign against a Muslim Minority 214 (2020).
6 Nick Cumming-Bruce, *'No Such Thing': China Denies U.N. Reports of Uighur Detention Camps*, N.Y. Times (Aug. 13, 2018), https://www.nytimes.com/2018/08/13/world/asia/china-xinjiang-un.html.
7 Andrew Mumford, *Theory-Testing Uyghur Terrorism in China*, 12 Persp. on Terrorism 18, 21 (Oct. 2018), https://www.jstor.org/stable/26515428?seq=1#metadata_info_tab_contents.
8 *Id.*

unforeseen ways.[9] The United States engaged in international operations to combat terrorism, focusing on militant groups in predominantly Muslim countries. Geographically, XUAR borders many Muslim countries, including Afghanistan, Pakistan, Kazakhstan, Kyrgyzstan, and Tajikistan. Due to similar concerns about terrorism and the proximity of concerning areas, the Chinese government assisted the United States with intelligence on possible threats. A Congressional Research Service report published in 2008 details a history of joint efforts between the two countries in counterterrorism measures, and it sheds light on China's increasing focus on minorities in Xinjiang.[10]

In 2002, Francis Taylor, the U.S. State Department's Coordinator for Counterterrorism, informed the Chinese government that U.S. military personnel had captured citizens from Western China associated with Al Qaeda in Afghanistan.[11] The Eastern Turkistan Islamic Movement (ETIM), originally formed in XUAR, had committed acts of violence limited to Chinese citizens without organizational ties to other terrorist groups; upon finding possible connections between certain of its members and the Taliban, however, the U.S. State Department designated ETIM as a terrorist group in 2002.[12] Despite this news, Taylor emphasized that he disagreed with the classification of Eastern Turkistan forces in XUAR and conveyed to the Chinese government that not all minorities in XUAR pose a terrorist threat. Even so, the Chinese government reaped political benefits from the United States' classification. Executive Order 13224, which strives "to disrupt the financial support network for terrorists and terrorist organizations," labeled ETIM as a terrorist organization, bolstering China's claim for the need to control the XUAR region.[13] Although ETIM genuinely carried out acts of violence in China, the U.S. classification of its danger legitimized Chinese efforts to subdue the region under the name of counterterrorism. Emphasizing the presence of terrorism activity in the region, the Chinese government introduced more intrusive policies in XUAR, initiating mass surveillance and political suppression projects.

B. Growth of U.S. Technology Companies

Beginning in the 1990s, Chinese leader Deng Xiaoping initiated a period of market liberalization, attracting many American companies to China. Technology companies have particularly enjoyed a new market in a country with the world's largest population. The United States initially supported the growth of American companies in China due to mutualistic economic gains for both countries and improvements in political relations after the Cold War era.[14]

As more American companies established a presence in China, however, entanglements began to arise with the Chinese government. Despite adopting more capitalistic policies, China did not become more democratic; instead, the government maintained its authoritarian control of the country. Reaping the benefits of China's economy meant succumbing to the restrictions and requirements of the Chinese government, which could include disclosing private customer information or producing goods for the government exclusively. If a company disobeyed the government, it could lose all assets in China and the ability to conduct business within the country.[15] As a result, many American companies provided services that ended up contributing directly to China's mass surveillance system. In 2005, for example, it was revealed that Yahoo provided information to the Chinese government; when requested, Yahoo informed the Chinese government that Chinese journalist Shi Tao had authored an anonymous post containing state secrets to a New York-based website through his Yahoo email account. This exchange of information resulted in Shi Tao being convicted and sentenced to ten years in prison.[16] Other technology companies like Google, Cisco, and Microsoft contributed to China's authoritarian control as well, censoring online searches to exclude information deemed unfavorable by the Chinese government.[17]

During a congressional hearing in 2006, representatives evaluated the actions of Yahoo, Google, Cisco, and Microsoft, condemning the companies for their role in violating human rights in China. House Representatives from both parties used reproachful language during the hearing. Representative Tom Lantos (D-CA) stated, "I do not understand how your corporate leadership sleeps at night."[18] Representative Christopher Smith (R-NJ), co-chairman of the hearings, also emphasized how the corporations' actions were "decapitating the voices of dissidents."[19] In response to the information disclosed in the hearing, Representative Smith proposed the Global Online Freedom Act "to prevent United States businesses from cooperating with repressive governments in transforming the Internet into a tool of censorship and surveillance."[20] Not only would the legislation prevent American technology companies from operating in China, but it would also prohibit the sale of certain telecommunication equipment to "a government end user

9 *See, e.g.*, Press Statement, U.S. Department of the Treasury, Press Statement on the UN Designation of the Easter Turkistan Islamic Movement (Nov. 11, 2020, 8:54 PM), https://www.treasury.gov/press-center/press-releases/pages/po3415.aspx.

10 Shirley KAN, CONG. RESEARCH SERV., RL33001, U.S.-CHINA COUNTER-TERRORISM COOPERATION: ISSUES FOR U.S. POLICY 2 (2010).

11 *Id.*

12 Richard Bernstein, *When China Convinced the U.S. That Uighurs Were Waging Jihad*, The Atlantic (Mar. 19, 2019), https://www.theatlantic.com/international/archive/2019/03/us-uighurs-guantanamo-china-terror/584107/.

13 Exec. Order No. 13224, 3 C.F.R. § 786 (2001).

14 James Andrew Lewis, Ctr. for Strategic & Int'l Stud., Emerging Technologies and Managing the Risk of Tech Transfer to China 2 (2019), https://www.csis.org/analysis/emerging-technologies-and-managing-risk-tech-transfer-china.

15 Jacob Helbert, *Silicon Valley Can't Be Neutral in the U.S.-China Cold War*, Foreign Pol'y (June 22, 2020), https://foreignpolicy.com/2020/06/22/zoom-china-us-cold-war-unsafe/.

16 Joseph Kahn, *Yahoo Helped Chinese to Prosecute Journalist*, N.Y. Times (Sept. 8, 2005), https://www.nytimes.com/2005/09/08/business/worldbusiness/yahoo-helped-chinese-to-prosecute-journalist.html.

17 Clive Thompson, *Google's China Problem (And China's Google Problem)*, N.Y. Times (Apr. 23, 2006) https://www.nytimes.com/2006/04/23/magazine/googles-china-problem-and-chinas-google-problem.html.

18 Tom Zeller, Jr., *Web Firms are Grilled on Dealings in China*, N.Y. Times (Feb. 16, 2006), https://www.nytimes.com/2006/02/16/technology/web-firms-are-grilled-on-dealings-in-china.html.

19 Jade Miller, *Soft Power and State-Firm Diplomacy: Congress and IT Corporate Activity in China*, 10 Int'l Stud. Persp. 287, 291 (Aug. 3, 2009), https://doi.org/10.1111/j.1528-3585.2009.00377.x.

20 Global Online Freedom Act, H.R. 4780, 109th Cong. § 2(d) (2006).

in any Internet-restricting country."[21] Despite the congressional hearing's blatant denunciation of the four companies, however, the bill did not even pass the introductory period in 2006 or in 2013 when Representative Smith proposed it once more.

The bill's failure revealed legislators' underlying economic concerns. Policies outlined in the bill would devastate a booming American industry with a global presence. American companies continued servicing China's government with technology necessary for advanced surveillance and censorship mechanisms despite the widespread outcry to uphold human rights, and in fact became increasingly reliant on China for business. In 2019, *The Wall Street Journal* uncovered how the American companies Seagate Technology, Western Digital, Intel, and Hewlett Packard Enterprise all flourished in China by supporting the government with products for surveillance projects, including in XUAR.[22] Western Digital, for example, sold hard disk drives designed for surveillance systems to companies controlled by the Chinese government, deriving around twenty percent of its profits from China each year. Similarly, Intel, a company with billions of dollars' worth of investments in China, sold advanced chips that power the computers in police stations throughout China.[23] To access a market that can bring in billions of dollars annually, other American entities chose the same path, providing various types of technology to government-controlled companies leading China's mass surveillance project. Without explicit legal restraints on the services and products provided to foreign entities, many American technology companies grew concomitantly with China's economy and authoritarian control.

C. Congressional Attempts to Address China's Human Rights Abuses

Although Congress failed to pass the Global Online Freedom Act, continued support for human rights extended beyond the congressional hearings of 2006 and helped pave the way for future efforts. By 2007, the Chinese government had fully developed an anti-terrorism narrative surrounding its tight control of Xinjiang. Chinese propaganda depicted the region as a dangerous place that harbored numerous extremists who threatened the entire country's security.[24] With new surveillance methods enabled by foreign technology companies, the government installed cameras all across XUAR and tracked the activity of Xinjiang's residents with scrutiny.[25] Although the American public remained largely unaware of China's suppression of minorities, lawmakers began paying increasing attention to the situation in XUAR. Rebiya Kadeer, a Nobel Peace Prize winner and an exiled Uyghur activist, disclosed to American leaders the horrific abuse she suffered under the Chinese government. Kadeer's public statement led nongovernmental organizations and civic organizations to galvanize to defend her and other Uyghurs.[26]

Recognizing that the United States' terrorist designations of certain Uyghurs gave China an excuse to tighten its grip in XUAR, lawmakers sought to rectify those effects.[27] The House of Representatives passed Resolution 497 to condemn the Chinese government's treatment of Rebiya Kadeer's family and also to highlight China's unlawful detainment of a Canadian Uyghur citizen named Huseyin Celil.[28] In the Senate, Senator Sherrod Brown (D-OH) introduced Resolution 574, which conveyed similar sentiments and also urged China to "immediately cease all Government-sponsored violence and crackdowns against the people throughout the Xinjiang Uyghur Autonomous Region, including those involved in peaceful protests and political expression."[29] These resolutions reveal the eagerness of American lawmakers to signal their support for human rights and affirm their roles as upholders of democratic values.

Ultimately, however, neither resolution contained adequate leverage to pressure action from the Chinese government. China continued its surveillance of XUAR, developing the facial recognition system utilized today. At the same time, the Chinese government restricted Islamic practices and traditions, obliterating the Uyghur population's religious freedoms.[30] Mere condemnations on paper only carry a reputational cost for China, and even then, not many in the international community realized the scale of oppression occurring in XUAR at that time. These resolutions' failures showcase the United States' desire to preserve cooperative relations with the Chinese government. The unpromising results of the Global Online Freedom Act and Resolution 574 revealed, in fact, that the American leadership prioritized national safety and economic prosperity while maintaining the United States' position as a global leader of democratic values. In doing so, however, the United States neglected the effects of its own actions and superficial gestures. The United States handed China a story of Uyghur terrorism to build from, allowed companies to continue bolstering China's surveillance system, and took little action to remedy the human rights abuses reported in China. As a result, the Chinese government's oppression of Uyghurs in XUAR escalated further.

21 *Id*.

22 Lisa Lin & Josh Chin, *U.S. Tech Companies Prop Up China's Vast Surveillance Network*, Wall St. J. (Nov. 26, 2019, 11:47 AM), https://www.wsj.com/articles/u-s-tech-companies-prop-up-chinas-vast-surveillance-network-11574786846.

23 *Id*.

24 Jo Kim, *Why China's Xinjiang Propaganda Fails*, The Diplomat (Dec. 16, 2019), https://thediplomat.com/2019/ 12/why-chinas-xinjiang-propaganda-fails/.

25 Kayden McKenzie, *Lessons from Xinjiang: The Dangers of U.S. Investment in Chinese Surveillance Technology*, New Persp. Foreign Pol'y 8 (Oct. 1, 2019), https://www.csis.org/lessons-xinjiang-dangers-us-investment-chinese-surveillance-technology.

26 Christopher Cunningham, *Counterterrorism in the Xinjiang: The ETIM, China and Uyghurs*, 29 Int'l J. on World Peace 7, 11 (Sept. 2020), https://www.jstor.org/stable/24543768?refreqid=excelsior%3A3c1afa4e-89cb5a11597fa9dff260d67d.

27 Kan, *supra* note 10, at 10.

28 Brigadier General Francis Marion Memorial Act of 2007, H.R. 497, 110th Cong. (2007).

29 S. Res. 574, 110th Cong. (2008).

30 *Annual Report*, Cong.-Executive Commission on China 3 (Nov. 18, 2019), https://www.cecc.gov/sites/chinacommission.house.gov/files/CECC%202019%20Annual%20Report.pdf.

II. Ongoing American Interests and Policies

A. Forced Uyghur Labor Fueling American Companies

In addition to weathering surveillance, torture, and confinement, many Uyghurs in XUAR have also become part of China's "labor exchange programs" after spending time in re-education camps.[31] The growing presence of transnational corporations in developed cities such as Shanghai, Qingdao, and Guangdong has demanded large workforces. To meet this demand, the Chinese government sends residents from developing provinces to work in urban regions, providing companies an influx of labor. Although the Chinese government credits the "labor exchange programs" as opportunities for upward mobility, many Uyghurs in XUAR have no choice but to leave their homes and work in distant cities. Since 2017, China has forcefully transferred at least eighty thousand Uyghurs from camps inside XUAR to work in factories throughout China.[32] These factories impose a military-style life on the Uyghurs, subjecting them to long hours and political indoctrination while prohibiting them from speaking the Uyghur language or practicing Islam.[33]

American companies have used forced Uyghur labor in their supply chains and benefited from the oppression of these minorities. Despite sourcing more labor from Southeast Asian countries in recent years, many American companies continue to regard China as a vital part of their supply chain.[34] Foreign companies often source from China's large workforce, taking advantage of the country's lack of labor protection policies.[35] For example, Nike receives more than seven million pairs of shoes annually from the Taekwong Group, a South Korean conglomerate that mainly operates in China. Taekwong has large manufacturing factories in several major Chinese cities, including one in Qingdao that uses the forced labor of 9,800 Uyghurs from XUAR.[36] Beyond the textile and garment industry, American tech giants also use forced Uyghur labor. One of Apple's contractors, O-Film Technology, makes camera lenses for the American company, using more than one thousand Uyghurs in its Nanchang factory. Another one of Apple's partners, Foxconn Technology, reportedly makes half of the world's iPhones in the Zhengzhou factory, where the Chinese government sent 560 Uyghur laborers in 2019.[37]

These instances represent only a sliver of companies profiting off forced labor. The Uyghur Human Rights Project released a list of over 180 companies using forced Uyghur labor, including Abercrombie and Fitch, Victoria's Secret, Calvin Klein, Gap, and many more popular American clothing brands.[38] Due to the numerous entities involved in complex supply chains, American companies may not have realized the oppressive situation in China. But with increasing disclosure of forced Uyghur labor, these companies' lack of genuine effort to change their supply chains reveals their complicity in human rights abuses for profit. Although many American companies have hired third-party auditors to report cases of forced labor, these auditors often fail to thoroughly examine Chinese factories and merely serve to feign corporate responsibility.[39] Due to the general public's limited awareness of these forced labor programs, American companies do not feel threatened enough by the reputational cost of continued operations in China to make major changes in their supply chains. Even though gradually amounting dissent from human rights groups and non-profit organizations have drawn attention to forced labor, substantive policies are necessary to address the role of American companies in the continued exploitation of Uyghurs.

B. Uyghur Human Rights Act of 2020

Congress passed the Uyghur Human Rights Act of 2020 in June 2020.[40] Instead of mere condemnatory language, the law contains actionable plans to stop human rights abuses in China. In the Act, legislators called upon President Donald J. Trump to publicly condemn China's actions in XUAR and, within 180 days of the enactment of the law, to submit a list that "identifies each foreign person, including any official of the Government of the People's Republic of China" involved in the suppression of Uyghurs and other ethnic minorities in XUAR.[41] The Act also directed Secretary of State Mike Pompeo to institute visa restrictions on Chinese perpetrators and initiate sanctions under the International Religious Freedom Act of 1988, including actions through "diplomatic, political, commercial, charitable, educational, and cultural channels."[42] The law also directed the President to seize all assets in the United States belonging to Chinese officials listed in the aforementioned report. It further mandated the Secretary of State to work with federal agencies to produce a comprehensive report of all human rights violations occurring in XUAR, and to send it to congressional committees within 180 days.[43]

Unlike previous policies, the Uyghur Human Rights Act emphasizes tangible consequences for the Chinese government.

31 Vicky Xiuzhong Xu et al., Australian Strategic Pol'y Inst., Uyghurs for Sale: 'Re-education', Forced Labor & Surveillance Beyond Xinjiang 3 (2020), https://www.aspi.org.au/report/uyghurs-sale.
32 *Id*.
33 Roberts, *supra* note 5, at 220.
34 Amy Lehr, Ctr. for Strategic & Int'l Stud., Addressing Forced Labor in the Xinjiang Uyghur Autonomous Region: Toward A Shared Agenda 4 (July 30, 2020), https://www.csis.org/analysis/addressing-forced-labor-xinjiang-uyghur-autonomous-region-toward-shared-agenda.
35 Kenneth Rapoza, *Why American Companies Choose China Over Everyone Else*, Forbes (Sept. 3, 2019), https://www.forbes.com/sites/kenrapoza/2019/09/03/why-american-companies-choose-china-over-everyone-else/?sh=2b273aff71de.
36 Lehr, *supra* note 34, at 8.
37 *Id*. at 23.
38 Press Release, Uyghur Human Rights Project, 180+ Orgs Demand Apparel Brands End Complicity in Uyghur Forced Labor (Jul. 23, 2020, 7:47 AM), https://uhrp.org/press-release/press-release-180-orgs-demand-apparel-brands -end-complicity-uyghur-forced-labour.html.
39 Eva Xiao, *Auditors to Stop Inspecting Factories in China's Xinjiang Despite Forced Labor Concerns*, Wall St. J. (Sept. 21, 2020), https://www.wsj.com/articles/auditors-say-they-no-longer-will-inspect- labor-conditions-at-xinjiang-factories-11600697706.
40 Thomas Lum & Michael A. Weber, Cong. Research Serv., IF10281, Uyghurs in China 2 (2020).
41 Uyghur Human Rights Policy Act of 2020, Pub. L. No. 116-145, 134 Stat. 647, 650 (2020)
42 International Religious Freedom Act of 1988, Pub. L. No. 105-292, 112 Stat. 2787, 2790 (1998)
43 Uyghur Human Rights Policy Act of 2020, *supra* note 41, at 652.

Many high-level Chinese officials, including the Communist Party Secretary of Xinjiang, have holdings in the United States; by denying entry into the United States with visa restrictions, lawmakers have sent a poignant message, deeming individual Chinese officials responsible for human rights violations.[44] President Trump's approval of the Act also signified a turning point from his previous silence regarding China's actions in XUAR. In a statement on June 17, 2020, President Trump announced that he had signed the Act, expressing how the law "holds accountable perpetrators of human rights violations and abuses."[45]

Although President Trump expressed support for the Act, he also cast doubt upon a section that required him to provide advanced notice to Congress before suspending sanctions, stating that he will treat the section as "advisory and non-binding."[46] These reservations indicated his displeasure with losing the ability to unilaterally rectify relations with China if necessary. Beyond the bill's procedural requirements, the longevity and strictness of its sanctions may have concerned President Trump as well, as the sanctions could deteriorate the already fragile trade relationship with China. But despite these concerns, the Act's successful enactment signified American intention to address China's actions with more urgency than before.

C. The Uyghur Forced Labor Prevention Act

Despite economic reservations, the United States' tumultuous year of racial conflict has catalyzed a political environment that focuses on alleviating oppression, promoting ongoing efforts that involve the Uyghur population in China. The Uyghur Forced Labor Prevention Act passed the House at the end of September 2020.[47] Progressing beyond just sanctioning individuals, the proposed legislation will "prohibit the import of all goods, wares, articles, or merchandise mined, produced, or manufactured, wholly or in part, by forced labor from the People's Republic of China and particularly any such goods, wares, articles, or merchandise produced in the Xinjiang Uyghur Autonomous Region of China."[48] The bill not only forbids such imports in the United States, but also highlights partnerships with Mexico and Canada that will prohibit forced labor products from entering all three countries. If passed, this policy will carry severe economic ramifications that could compel China to change its actions towards Uyghurs and other ethnic minorities.

The significant economic impact of this bill may spur extensive debate, including an increase in corporate lobbying. Several American companies, including Apple, Coca-Cola, and Nike, have hired lobbying firms in hopes of altering the bill's strict importing standards, claiming that the legislation's restrictions will excessively disrupt their supply chains.[49] Despite these efforts, many senators have shown support for the bill in its current state. Senator Jim McGovern (D-MA) said, "It is long past time for the Senate to stand up to the Chinese government and stop listening to corporate lobbyists who are working to weaken the legislation."[50] The bill passed the House with a vote of 406-3 on September 22, 2020, indicating bipartisan support that will hopefully lead to similar success in the Senate.

III. Conclusion

Since 2001, American policies have affected the lives of Uyghurs in China. Early policies that classified Muslim minorities in XUAR as terrorists strengthened the Chinese government's rhetoric, pinning a target on the Uyghur population. As China developed an Orwellian surveillance system utilizing American expertise and technology, U.S. lawmakers did little more than verbally condemn these companies. Oppression in XUAR grew without much interference from the international community until 2017, when China's blatant human rights abuses surfaced to the global scene. Beyond stripping Uyghurs of fundamental rights to safety, privacy, and religion, the Chinese government has also profited off the population by forcing them to work as factory laborers. These factories supply numerous American companies that take advantage of the cheap labor force in China. Heightened discussions of minority oppression within the United States have resulted in a renewed sense of urgency to address China's human rights abuses. In a country where the government routinely manipulates its image, China responds to international condemnations with propaganda and Potemkin-style tours of internment facilities. Recognizing the ineffectiveness of past policies and China's focus on economic prosperity, U.S. lawmakers have structured recent legislation to impact the Chinese economy.

The enactment of the Uyghur Forced Labor Prevention Act would clearly illustrate the United States' stance against China's oppression and exploitation of minorities. Lawmakers cannot succumb to ongoing lobbying efforts for looser restrictions if they hope to maintain the integrity of the Act's purpose. Although the Act's prohibition of certain Chinese imports may take a toll on U.S. entities, less stringent restrictions would result in loopholes for companies to continue benefiting from Chinese forced labor. By preventing companies from purchasing products with connections to forced labor, even if only partially, the Act will carry substantive consequences to the Chinese economy. Passing the Act in its current state capitalizes on China's adamance toward maintaining economic prosperity,

44 Daphne Psaledakis et al., *China says it will hit back against new U.S. sanctions over Uighur rights*, Reuters (July 9, 2020), https://www.reuters.com/article/us-usa-china-xinjiang-sanctions/china-says-it-will-hit-back-against-new-u-s-sanctions-over-uighur-rights-idUSKBN24A2GA.

45 Donald J. Trump, Statement on Signing the Uyghur Human Rights Policy Act of 2020 (June 17, 2020), https://www.govinfo.gov/content/pkg/DCPD-202000452/html/DCPD-202000452.htm.

46 *Id.*

47 Juliegrace Brufke, *House Passes Legislation to Crack Down on Businesses with Companies that Utilize China's Forced Labor*, The Hill (Sept. 22, 2020), https://thehill.com/homenews/house/517656-house-passes-legislation-to-crack-down-on-business-with-companies-that-utilize.

48 Uyghur Forced Labor Prevention Act, H.R. 6210, 116th Cong. (2020).

49 Ana Swanson, *Nike and Coca-Cola Lobby Against Xinjiang Forced Labor Bill*, N.Y. Times (Nov. 29, 2020), https://www.nytimes.com/2020/11/29/business/economy/nike-coca-cola-xinjiang-forced-labor-bill.html.

50 Press Release, End Uyghur Forced Labor, End Uyghur Forced Labor Coalition Demands Companies Disclose Corporate Lobbying Against the Uyghur Forced Labor Prevention Act (Dec. 15, 2020), https://enduyghurforcedlabour.org/news/press-release-end-uyghur-forced-labor-coalition- Demands-companies-disclose-corporate-lobbying-against-the-uyghur-forced-labour-prevention-act/.

greatly limiting its ability to conduct business in North America if human rights abuses proceed.

Furthermore, increased attention on XUAR and oppression of minorities in China can generate corporate accountability in the United States. Consumer demand for transparency will encourage American companies to avoid Chinese forced-labor products in their supply chains. With growing public awareness about China's mass surveillance and detainment systems, Americans may refuse to invest in companies that supply surveillance technology to the Chinese government. These shifts in consumer behavior can force corporate entities to alter their transactions in China, weakening the mechanisms that permit ongoing human rights abuses of minorities. Through amounting public demand for corporate responsibility and enacting the Uyghur Forced Labor Prevention Act in its original form, the United States has great potential to change China's treatment of Uyghurs and other minorities.

Inequitable Then and Now: An Examination of Georgia's Majority-Vote Rule

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As Americans shifted their attention toward the two U.S. Senate races in Georgia that ultimately awarded control of the upper chamber to the Democratic Party, many wondered why a winner was not declared on election night. Because of arcane election laws in the State of Georgia, any statewide candidate must collect a majority of the vote to be certified as the winner.[1] If this majority vote share is not reached by either candidate, then the election moves on to a runoff between the two candidates with the largest shares of the vote.[2] Thus, even though incumbent Republican Senator David Perdue amassed a comfortable margin over Democratic challenger Jon Ossoff during this election cycle, his vote share of around 49.7% was not enough to secure a win that night.[3] Similarly, incumbent Republican Senator Kelly Loeffler was forced into a runoff against Democratic challenger Reverend Raphael Warnock, as neither achieved a majority of the vote.[4] In the case of the latter race, however, the election followed a special "jungle primary" format where multiple candidates from the same party could run. The vote share in this race was split between twenty candidates and it was assumed beforehand that no one would achieve a majority.[5]

This paper examines a potential challenge to Georgia's runoff election law on the basis of economic discrimination through an analysis of previous legal challenges to the law and the direct political effects of Georgia's delayed runoff. First, it outlines the history of runoff elections in Georgia and the legal challenges that have followed its codification. Next, it shows the destabilizing effects of delayed runoff elections on statewide races across Georgia, as well as the impact of party interference on the eventual outcome. Finally, this paper will prove the discriminatory impact of *United States v. Georgia*[6] against lower-income voters and cash-strapped candidates, due to its mandate of a period between a general election and runoff.

Georgia's 2020 runoff elections, though not unique, were more closely scrutinized than ever before.[7] Americans, already exhausted from weeks of presidential election results, struggled to understand why they had to wait even longer for an outcome in the Senate. However, to understand the logic of Georgia's election laws, one must contextualize their inception within the artificially homogeneous political climate of the post-Reconstruction South.

I. The History of Georgia Runoff Elections and Subsequent Legal Challenges

As the Civil War came to a close, many Northern politicians felt it would be irresponsible to allow those who had just fought in a rebellion against the Union to return to their former political posts.[8] Thus, in the immediate post-war years, many former Confederate leaders were barred from voting and holding office.[9] However, following numerous compromises by President Andrew Johnson and the removal of federal troops from the South as a part of the infamous Compromise of 1877, former Confederate leaders quickly retook their roles as Congressmen and Senators representing the Democratic Party.[10] This change came at the expense of Republican politicians who were able to maintain power due to the disenfranchisement of those same former Confederates.[11] Democrats' hold on the South only continued to increase after this, as violent voter intimidation against predominantly Republican African Americans all but ensured an uncontested general election in most races.[12]

Nevertheless, Southern Democratic executive committees began to use mandatory runoff systems in their primaries as a means of even further expanding their base, allowing for a more ideologically diverse field of candidates to enter the race

1 Ga. Code Ann. § 21-2-501 (1982).
2 *Id.*
3 *November 3, 2020 General Election Results*, Ga. Sec'y of State (Nov. 20, 2020, 1:37 PM), https://results.enr.clarityelections.com/GA/105369 (showing Sen. Perdue's vote margin at 49.7% and Jon Ossof's at 47.9%, for a lead of 1.8%).
4 *Id.* (showing Sen. Loeffler's vote margin at 25.9% and Rev. Raphael Warnock at 32.9%).
5 *See, e.g.*, Tali Nance, *Who's who: 20 candidates running in special election for US Senate seat in Georgia*, News4JAX (Oct. 17, 2020, 8:36 AM), https://www.news4jax.com/news/georgia/2020/10/17/whos-who-20-candidates-running-in-special-election-for-us-senate-seat-in-georgia/.
6 United States v. Georgia, 952 F. Supp. 2d 1318 (N.D. Ga. 2013).
7 *See, e.g.*, Reid Wilson, *Runoff elections a relic of the Democratic South*, Wash. Post (Jun. 4, 2014, 2:55 AM PDT), https://www.washingtonpost.com/blogs/govbeat/wp/2014/06/04/runoff-elections-a-relic-of-the-democratic-south/.
8 *See The Civil War: The Senate's Story: The "Ironclad Test Oath"*, Senate Hist. Off., U.S. Senate, https://www.senate.gov/artandhistory/history/common/generic/Civil_War_TestOath1863.htm.
9 *Id.*
10 *See, e.g.*, *The Civil War: The Senate's Story*, Senate Hist. Off., U.S. Senate, https://www.senate.gov/artandhistory/history/common/civil_war/VictoryTragedyReconstruction.htm.
11 *Id.*
12 *See* Charles S. Bullock III & Loch K. Johnson, *Runoff Elections in Georgia*, 47 J. Politics 937 (1985), https://www.journals.uchicago.edu/doi/abs/10.2307/2131219.

and abandon the Republican Party.[13] Candidates ranging from populists to vocal supporters of the Ku Klux Klan would all debate under the same Democratic partisan tent. Gradually, any debate or decision over the ideology of a state's government came to be decided in the Democratic primary rather than the general election.[14] With such control over the direction of policy within a state, the runoff election laws within the Democratic primaries became a tool manipulated by candidates and party bosses alike.[15]

The State of Georgia first codified a law requiring all candidates in general elections to receive a majority of the vote in 1964;[16] this law was based on earlier Democratic party policy and was backed by staunch segregationist Denmark Groover, who pushed for the legislative amendment throughout his time in the state House of Representatives.[17] Groover had lost an election in 1958 due to what he described as "Negro bloc voting": he believed that his opponent had been able to coalesce African American support while White voters had remained factionalized and damaged his electoral chances.[18] This came at the same time that Democrats' grip on Georgia politics had been challenged for the first time in decades as a result of the abolition of the White primary system in 1945[19] and the county unit System in 1962.[20] The county unit system had apportioned votes to each county, similar to the national electoral college;[21] however, this practice was biased against urban areas with higher densities of Black voters as their voting power was disproportionately concentrated in a small number of counties.[22] Similarly, White primaries were primaries that excluded Black voters[23] and ensured that candidates who had the support of the African American community would not advance.[24]

With both of these prejudiced systems outlawed, White Democrats in Georgia's House believed that mandatory runoffs were a legislative amendment which would help reassert their own authority while still operating within the bounds of the 1964 Voting Rights Act. As historian Susan Cianci Salvatore describes, the majority-vote mandate "did not remove anyone's right to cast a ballot, but it was commonly regarded as hampering African Americans."[25]

In 1984, however, civil rights activist Jesse Jackson articulated his disagreement with Georgia's runoff elections before the U.S. House Judiciary Subcommittee, arguing that this system was a form of Black vote dilution.[26] Jackson argued that even if an African American candidate received a plurality of the vote initially, the consolidated White support that would come from a runoff would inevitably win. Though Jackson's hopes for a repeal of mandatory runoffs in Georgia were not realized then, his speech exposed a legal pathway for later constitutional scholars to follow. In 1998, twenty-seven African American voters in Georgia filed a suit against Georgia Governor Zell Miller in *Brooks v. Miller*,[27] arguing that the original racist motivations for the runoff law made it unconstitutional under Article 2 of the Voting Rights Act. The plaintiffs asserted that, on account of the likelihood for a longer campaign and an additional election, the mandate for a second election often discouraged more financially-strapped, female, and African American candidates from running for office.[28] Governor Miller, however, pointed to evidence of the positive impact of runoffs as a means of ensuring total popular support and preventing the inclusion of dummy candidates meant to mislead voters, such as a Paul E. Walker instead of a Paul A. Walker.[29]

In the case of *Brooks v. Miller*[30] the Eleventh Circuit Court in Georgia used a test based on *Thornburg v. Gingles*,[31] a case challenging redistricting laws in North Carolina. According to Gingles, challengers must prove that they are either being constrained geographically on account of gerrymandering or redistricting, or they must prove that they, themselves, vote as a collective and demonstrate that the opposing bloc has an insurmountable electoral edge.[32] The Eleventh Circuit Court found that there were no changes to the electoral map or system itself that would result in the election of more diverse candidates and thus ruled against the first prerequisite. Moreover, they did not find that the candidate representing the White voting bloc "usually" defeated the candidate of the African American voting bloc.[33] Thus, the Court found no proof that the majority-vote rule in Georgia had explicit discriminatory results.[34] The failure of this legal challenge to Georgia's majority-vote rule has led some voting rights scholars to assert that "[w]ithout discounting the ingenuity of talented civil rights attorneys,

13 *Id*. at 938.
14 *See* Kayla Goggin, *Arcane Voting Laws May Bar Voters in Georgia Runoff*, Courthouse News Serv. (Apr. 21, 2017), https://www.courthousenews.com/arcane-voting-laws-may-bar-voters-georgia-runoff/
15 *See* Charles S. Bullock III & Loch K. Johnson, Runoff Elections in the United States (2011).
16 *See* Susan C. Salvatore, Nat. Hist. Landmarks Program, Civil Rights in America: Racial Voting Rights 64 (2009), https://www.nps.gov/subjects/tellingallamericansstories/upload/CivilRights_VotingRights.pdf.
17 *Id*. at 63.
18 *Id*.
19 *See* King v. Chapman, 62 F. Supp. 639 (M.D. Ga. 1945) (White primaries were primary elections in both parties exclusive only to White voters, which all but ensured the failure of any African American candidate.).
20 *See* Baker v. Carr, 369 U.S. 186 (1962) (The county unit system in Tennessee, which had allowed for the devaluing of Black votes in urban districts, was ruled unconstitutional under the principle of "one man, one vote.").
21 *See* Albert B. Saye, *Georgia's County Unit System of Election*, 12 J. Politics 93 (1950), https://www.journals.uchicago.edu/doi/abs/10.2307/2126089.
22 *Baker*, 369 U.S. at 207.
23 *See* O. Douglas Weeks, *The White Primary: 1944-1948*, 42 Am. Pol. Sci. Rev. 500 (1948), https://doi.org/10.2307/1949913.
24 *King*, 62 F. Supp. at 639.
25 Salvatore, *supra* note 17, at 65.
26 Bullock & Johnson, *supra* note 13, at 939.
27 *See* Brooks v. Miller, 158 F.3d 1230, 1235 (11th Cir. 1998).
28 *Id*.
29 Graham Paul Goldberg, *Georgia's Runoff Election System Has Run Its Course*, 54 Ga. L. Rev. 1063, 1072 (June 8, 2020), https://www.georgialawreview.org/article/13218-georgia-s-runoff-election-system-has-run-its-course.
30 *Brooks*, 158 F.3d at 1230.
31 *See* Thornburg v. Gingles, 478 U.S. 30 (1986).
32 *Id*.
33 *Id*.
34 *Brooks*, 158 F.3d at 1076.

it seems that the window for a race-based challenge as seen in Brooks has closed for modern Georgia."[35] With each party becoming more diverse, allegations of discriminatory policy against specific racial voting blocs no longer follow partisan lines, and therefore discrimination has become much harder to prove with electoral data.[36]

II. De-Stabilizing Effects of Majority-Vote Rule

With the Democratic Party representing such a dominant portion of the Southern electorate during the early twentieth century, early primary runoffs were a failsafe which protected against candidates who were divisive or supported policies antithetical to the larger party.[37] As Professor Cal Jillson writes, "The [Democratic] primaries were an attempt both to enlarge the group that awarded the nomination, but also to provide an opportunity for Whites if they factionalized to come back during a runoff."[38] As a result of the mandatory runoff, single issue candidates were prevented from winning an election, ensuring that a small, more ideologically radical faction of the Democratic Party could never overtake the dominant, relatively moderate plurality.[39] For example, the Arkansas Democratic Party mandated primary runoffs in the 1930s to prevent members of the Ku Klux Klan from winning primaries with small pluralities of single-issue voters.[40]

The exclusionary effects of Georgia's majority-vote rule in general elections were felt in the immediate aftermath of the law's codification. In the 1966 Georgia gubernatorial general election, the Republican candidate, Howard Callaway, received a plurality of the vote against Democratic candidate Lester Maddox; however, neither achieved a majority.[41] This was due to the inclusion of an independent candidate, former Democratic governor Ellis Arnall, who had lost in the earlier Democratic primary runoff against Maddox.[42] Maddox had run as a staunch segregationist[43] against Governor Arnall, who had been a vocal supporter of African American voter enfranchisement and the abolition of poll taxes.[44] The party had been split almost evenly in its support for either candidate and, in turn, its support for segregation as a whole. In the final gubernatorial general election, Maddox defeated Callaway with the support of a unified Democratic voting bloc.[45] This example, and many others like it, demonstrates the tendency for majority-vote mandates to elect candidates who would not have won in a typical plurality vote. The runoff election hid the rift which had been forming between pro-segregation and anti-segregation Democrats for decades, and it allowed Democrats to elect a candidate with high unfavorability across their own party and the entire state.[46]

The tendency for runoffs to produce a winner different from the initial victor has also become a point of contention for both parties. In terms of primary runoffs, former Georgia Governor Carl Sanders asserted[47] that:

> [T]he person who comes in first initially finds himself the overwhelming favorite to win the office. . . . What often follows is a tendency for the voters to want to help the guy who came in second, whom they perceive to be as good as the guy who came in first: It's not so much that the other candidates gang up on the front-runner, as it is the voters turning toward the underdog.

Something similar to this appeared in the 1992 Senate election between incumbent Democratic Senator Wyche Fowler and Republican Paul Coverdell. Though Senator Fowler had achieved nearly fifty percent of the vote on election night, he ultimately lost in the runoff by a razor thin margin.[48] Democrats in Georgia were so frustrated by the 1992 result that they actually passed an amendment lowering the mandatory vote threshold to forty-five percent, though this was quickly repealed when Republicans gained control of the state House in the late 1990s.[49] According to Professor Richard Engstrom, gubernatorial candidates in primaries and general elections have gone on to lose their runoffs 21.7% of the time after having won a plurality in the first vote; senatorial candidates fare worse at 31%.[50] Though this is by no means a sign that all leaders in a statewide race in Georgia will lose if forced into a runoff, it is indicative of the potential for runoffs to serve as an impactful political factor.[51]

III. Basis for Discriminatory Bias within Runoffs

On June 27, 2012, Sally Yates, then-U.S. Attorney for the Northern District of Georgia, filed a lawsuit against then-Georgia Secretary of State Brian Kemp.[52] Yates asserted that the window given in between a general election and its runoff was not sufficient for the return of overseas military ballots, and thus was not in compliance with the Uniform Overseas Citizens

35 Goldberg, *supra* note 30, at 1078.
36 *Id.*
37 *See, e.g.*, Richard L. Engstrom and Richard N. Engstrom, *The majority vote rule and runoff primaries in the United States*, 27 Electoral Stud. 407, 408 (2008).
38 Wilson, *supra* note 8.
39 Bullock & Johnson, *supra* note 16, at 159.
40 Wilson, *supra* note 8.
41 *See, e.g.*, Harold Paulk Henderson, *Gubernatorial Election of 1966*, New Ga. Encyclopedia, (Aug. 14, 2002), https://www.georgiaencyclopedia.org/articles/government-politics/gubernatorial-election-1966.
42 *Id.*
43 See, e.g., Former Georgia Gov. Maddox dies, CNN (June 25, 2003), https://web.archive.org/web/20080115140729/http://www.cnn.com/2003/ALLPOLITICS/06/25/maddox.dead/.
44 *See, e.g.,* Harold P. Henderson, The Politics Of Change In Georgia: A Political Biography Of Ellis Arnall (1991).
45 Henderson, *supra* note 42.
46 *See* Billy Hathorn, *The Frustration of Opportunity: Georgia Republicans and the Election of 1966*, 31 Atl. Hist. 43 (1987).
47 Bullock & Johnson, *supra* note 13, at 939.
48 Dallas L. Dendy, Jr., Statistics of the Presidential and Congressional Election of November 3, 1992, (1993), https://clerk.house.gov/member_info/electionInfo/1992election.pdf (showing vote totals for candidates in each statewide election across the country, with data compiled under the supervision of Donnald K. Anderson, clerk of the House of Representatives).
49 *See* Jim Tharpe, *Runoff system a Southern relic*, Atlanta J.-Const. (Nov. 9, 2009), https://www.ajc.com/news/local/runoff-system-southern-relic/Ifbyj1S5WTqsAEpGdQJrqL/.
50 Engstrom & Engstrom, *supra* note 38, at 413.
51 *Id.*
52 *Justice Department sues Georgia over voting*, Atlanta Bus. Chron. (June 27, 2012, 7:23 PM EDT), https://www.bizjournals.com/atlanta/news/2012/06/27/justice-department-sues-georgia-over.html.

Absentee Voting Act,[53] signed by Ronald Reagan in 1986.[54] In *United States v. Georgia*,[55] the Eleventh Circuit Court of Appeals ultimately ruled in favor of the Justice Department and mandated that all statewide elections in Georgia be held to the same standard as any federal election. It thus formally codified a nine-week window between the initial election and the runoff, whereas before there had been no explicit window.[56]

Even before the official codification of the period of time between an election and runoff, the informal window had allowed for the complete reshaping of numerous races. In the 2008 Democratic Senate primary, Vernon Jones won a plurality of the vote but was forced into a runoff against Jim Martin.[57] In the time between the general election and runoff, Martin shifted his campaign toward exploiting Jones' conservative political ideology, such as his votes for George W. Bush in the 2000 and 2004 Presidential elections.[58] Jones would then go on to lose in the runoff election by nearly twenty percentage points, as Martin consolidated nearly all remaining Democratic support.[59] Similarly, in the 2010 Republican gubernatorial primary, the initial vote leader, Karen Handel,[60] was bombarded with negative ads focusing on her support of the Log Cabin Republicans, a conservative political group who supports LGBTQ+ issues.[61] In both instances, the window between the general election and runoff led to a flurry of negative ads which ended with the loss of the initial primary leader.

As Graham Paul Goldberg describes, Georgia's majority-vote rule has led to "[c]ostly, ugly, and flip elections," where candidates must continue to fundraise and campaign for weeks after the initial election and the potential arises for candidates' popularity with voters to shift dramatically.[62] For example, the two 2020 Senate runoff elections raised a combined 646 million dollars following the initial election, with each of the four candidates spending tens of millions of dollars on local television advertisements.[63] In the 2018 Republican gubernatorial primary between then-Secretary of State Brian Kemp and Casey Cagle, there was a similar spree of continued fundraising and also an example of a drop in popularity for the leading candidate. Following the primary election, though Cagle had amassed a plurality of the vote in the primary election, he had not won a majority and had been forced into a runoff against Kemp.[64] In the weeks leading up to the July 24 runoff, Kemp flooded the airways with negative ads focusing on various allegations of incompetence against Cagle and leaked conservations which showed Cagle bemoaning his own party.[65] Furthermore, during this period Secretary Kemp was able to secure an endorsement from President Trump;[66] all of this ultimately resulted in Kemp, the original second place finisher by a fifteen point margin, winning the runoff by thirty-nine percent.[67] The tendency for post-election campaigning to be excessively costly reveals an inherent socioeconomic bias within Georgia's majority-vote mandate.

Additionally, the period between a general election and runoff allows for additional purging of voter rolls that are often discriminatory against young voters, voters of color, and lower income voters.[68] Georgia has a recent history of large scale voter purges leading to the disenfranchisement of hundreds of thousands of voters.[69] In 2018, it was revealed that then-Secretary of State and gubernatorial candidate Brian Kemp oversaw the purge of 1.4 million voter registrations[70] including 340,000 voters who were improperly purged due to a series of incorrect change of address notices.[71] The basis for these purges was a law requiring voters who had been inactive for seven years to be purged on account of a possible death or change of address.[72] On account of this, voters who had skipped a presidential election or had not voted for an entire election cycle would be ineligible for the upcoming election and were not alerted to this ineligibility. Low income voters are the most likely to not vote

53 Goldberg, *supra* note 30, at 1080.
54 *The Uniformed and Overseas Citizens Absentee Voting Act*, U.S. Dep't of Justice (Feb. 18, 2020), https://www.justice.gov/crt/uniformed-and-overseas-citizens-absentee-voting-act.
55 *See* United States v. Georgia, 952 F. Supp. 2d 1318 (N.D. Ga. 2013).
56 *Id*.
57 *See* Wayne Hodgin, *Democrats Vernon Jones, Jim Martin meet in today's runoff*, Savannah Morning News (Aug. 4, 2008, 11:30 PM), https://www.savannahnow.com/article/20080804/NEWS/308049882.
58 *See, e.g.*, Shannon McCaffrey, *Vernon Jones: 'Look at my record'*, Savannah Morning News (Aug. 2, 2008, 11:30 PM), https://www.savannahnow.com/article/20080802/NEWS/308029839.
59 *See* Rachel Kapochunas, *Martin Wins Georgia Dem Runoff, Will Challenge Sen. Chambliss*, CQ Politics (Aug. 5, 2008, 10:26 PM), https://web.archive.org/web/20080918045856/http://www.cqpolitics.com/wmspage.cfm?parm1=5&docID=news-000002934958.
60 *See* Jessica Taylor & Alex Isenstadt, *Handel, Deal face runoff in Georgia*, Politico (Jul. 20, 2010, 10:59 PM EDT), https://www.politico.com/story/2010/07/handel-deal-face-runoff-in-georgia-040001.
61 *See* Jim Tharpe, *Did Handel ever join the Log Cabin Republicans?*, PolitiFact (June 16, 2010), https://www.politifact.com/factchecks/2010/jun/16/karen-handel/did-handel-ever-joing-log-cabin-republicans/
62 Goldberg, *supra* note 30, at 1066.
63 *See* Daniel Newhauser, *Georgia Senate runoffs set fundraising record; Democrats fueled by small-donor dollars*, Savannah Morning News (Dec. 28, 2020, 10:00 AM EST), https://www.savannahnow.com/story/news/2020/12/28/georgia-senate-runoffs-fundraising-kelly-loeffler-raphael-warnock-jon-ossoff-david-perdue/4058929001/.
64 *See* Alan Blinder, *Georgia Primary Election: Brain Kemp and Casey Cagle Fight to a Bitter Runoff*, N.Y. Times (July 24, 2018), https://www.nytimes.com/2018/07/24/us/georgia-primary-election-runoff.html.
65 *See* Greg Bluestein, *Trumped: How Casey Cagle collapsed in Georgia GOP gov race*, Atlanta J.-Const. (July 24, 2018), https://www.ajc.com/blog/politics/cagle-meltdown-how-the-front-runner-collapsed-georgia-gov-race/z9RgQ8uf1r5iYvpozcyMqK/.
66 *See* Greg Bluestein, *Trump endorses Brian Kemp in Georgia GOP gov race*, Atlanta J.-Const. (July 19, 2018), https://www.ajc.com/news/state--regional-govt--politics/trump-endorses-brian-kemp-georgia-gop-gov-race/tetDfwPkq5Re7FDO4WqOwL/.
67 Bluestein, *supra* note 66.
68 *See* Daniel Weeks, *Why are the Poor and Minorities Less Likely to Vote?*, The Atlantic (Jan. 10, 2014), https://www.theatlantic.com/politics/archive/2014/01/why-are-the-poor-and-minorities-less-likely-to-vote/282896/.
69 *See* Scott Bauer, *Georgia purge removes nearly 309,000 voter registrations*, PBS NewsHour (Dec. 18, 2019, 6:05 PM EST), https://www.pbs.org/newshour/nation/georgia-purge-removes-nearly-309000-voter-registrations.
70 *Id*.
71 *See* Erin Durkin, *GOP candidate improperly purged 340,000 from Georgia voter rolls, investigation claims*, The Guardian (Oct. 19, 2018, 2:45 PM EST), https://www.theguardian.com/us-news/2018/oct/19/georgia-governor-race-voter-suppression-brian-kemp.
72 Bauer, *supra* note 70.

due to work commitments, unstable transportation, or a lack of access to voter registration information.[73] Therefore, if such a voter had been unable to vote in 2016 but was attempting to vote in 2020, they likely would have been unable due to the eight years that had passed since they last voted in 2012. In the most recent election cycle, there were more than 198,000 voters purged in the weeks ahead of the 2020 Senate runoff elections.[74] This codified mandate for routine voter purges disproportionately affects low-income voters, and the period between the general election and runoff only exacerbates this inequitable access.

IV. Conclusion

The majority-vote rule in Georgia is a complicated one. With a harrowing inception, contentious legal history, and questionable political impacts, many wonder why it still remains. As mentioned earlier, many legal scholars believe that the pathway for a challenge to Georgia's election laws on the basis of racial discrimination would not be successful.[75] Thus, an argument about socioeconomic inequity might prove to be more successful. As has been established, the codification of a mandatory nine-week window between the initial election and runoff forces campaigns and fundraising to continue. Similarly, this additional period allows for more potential voters, primarily those who are younger and low-income, to become ineligible due to Georgia's practice of frequent voter roll purges.[76] In the immediate sense, Georgia's best path forward to address these inequities in voting would be a change in the state's entire electoral system.

One alternative to Georgia's current system could be ranked-choice voting, a system in which voters rank candidates from their first choice to their last choice.[77] Maine, along with the State of Alaska and numerous cities across America, utilizes ranked-choice voting, as it allows for a runoff to occur without voters returning to the polls and without campaigns having to continue. Ranked-choice voting is an established practice which achieves Georgia's goal of ensuring that the victor always receives a majority of the vote, but it does not entail any of the socioeconomic inequities found in the current system. During Georgia's first General Assembly session of 2021, Representative Wes Cantrell introduced House Bill 59 which would implement ranked-choice voting for military and overseas ballots.[78] The bill currently has bipartisan support; however, Republican lawmakers, such as House Speaker David Ralston, have been hesitant to say whether they would support ranked-choice voting for all Georgians.

Though the results of the two Georgia Senate runoff elections have been realized and public attention will likely turn away from this strange democratic process, one should not ignore the inequities found historically and currently within Georgia runoff elections. Georgia voters should realize that their government has ignored a viable alternative to their current system, ranked-choice voting, in favor of a Jim Crow electoral relic. In the current system, voters and candidates are being excluded on the basis of income and wealth in each electoral cycle. Votes are no longer being cast *in* the Georgia runoff, so now it's time for Georgians to cast their vote *against* the runoff system itself.

73 Weeks, *supra* note 69.
74 Eileen Sullivan, *A lawsuit in Georgia claims that nearly 200,000 registered voters were improperly purged*, N.Y. Times (Dec. 2, 2020), https://www.nytimes.com/2020/12/02/us/a-lawsuit-in-georgia-claims-that-nearly-200000-registered-voters-were-improperly-purged.html.
75 Goldberg, *supra* note 30, at 1078.
76 Bauer, *supra* note 70.
77 *See Ranked-choice Voting (RCV)*, Bureau of Corp., Elections & Commissions, State of Me., https://www.maine.gov/sos/cec/elec/upcoming/rankedchoicefaq.html (last visited Nov. 22, 2020).
78 Christopher Alston, *Lawmakers Begin Work on Election Laws During First Weeks of Session*, Wabe (Jan. 19, 2021), https://www.wabe.org/lawmakers-begin-work-on-election-laws-during-first-weeks-of-session/.

Climate Clubs: The Path Forward in Solving the Climate Crisis

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When the history books are written about the twenty-first century, climate change will be discussed as one of the gravest threats to human security. Experts predict that as it worsens, climate change will exacerbate poor air quality, disease transmission, strains on national and global food supply chains, and deadly weather patterns.[1] If the world fails to limit warming to two degrees Celsius above pre-industrial levels before 2100, the United Nation's International Panel on Climate Change (IPCC) predicts that many of its effects will become irreversible.[2] According to Stanford University's School of Earth, Energy & Environmental Science, "[s]tabilizing Earth's temperature . . . requires greenhouse gas emissions to reach net zero by 2050. This translates to cutting greenhouse gases by about fifty percent by 2030 alongside significant removal of carbon dioxide from the atmosphere."[3]

Concerned about a climate catastrophe, the international community has forged voluntary agreements with the hope of achieving these reduction targets and limiting the planet's warming to two degrees Celsius above pre-industrial levels. Two flagship agreements—the Kyoto Protocol and the Paris Climate Agreement—have failed to make substantial progress toward limiting climate change. This paper discusses these agreements and argues that they have failed because their voluntary nature assumes that some countries will act against their own national interests to comply with international law. In this sense, these agreements are incompatible with the rules of the international system. To form effective agreements, this voluntary framework should be largely abandoned and replaced by a compulsory one. This paper discusses one promising policy proposed by Yale economist William Nordhaus: *climate clubs*. These arrangements sanction countries who do not participate in or abide by the terms of international agreements while providing benefits to those that do.

I. Past Climate Agreements

Both the Kyoto Protocol and the Paris Climate Agreement are voluntary treaties that largely rely on an "upward spiral" expectation. To incentivize otherwise unmotivated countries to fulfill their commitments, this model promises to augment a country's soft power and improve its relationships within the international community.[4] As the histories of the Kyoto Protocol and the Paris Climate Accord show, however, these benefits are inadequate to create stable coalitions of countries to participate in long-term climate agreements because countries in these arrangements may reap even larger gains by simply *not* honoring their commitments.

On December 11, 1997, the United Nations Framework Convention on Climate Change ratified the first international climate agreement: the Kyoto Protocol.[5] The Kyoto Protocol's opt-in structure was created with the expectation that wealthy countries that could afford to take action on climate change would commit to binding emission reduction targets. For the most part, developing countries would only be expected to commit to *non-binding* targets. For example, while some large carbon emitters like India and China did not commit to binding emission reductions, thirty-nine countries did, including all the countries in the European Union, several nations within the former Soviet bloc, the United States, Canada, and Japan (Russia eventually joined in 2005).[6] With a few exceptions, the Kyoto Protocol initially aimed to reduce greenhouse gas emission levels to five percent below those of 1990 over a four-year period between 2008 and 2012. After this initial commitment period, additional countries would be given the option to adopt binding reduction targets for subsequent commitment periods. While the adoption of new commitment periods has allowed the Protocol to remain in effect today, the agreement lacks concrete enforcement mechanisms. The Protocol features a compliance committee with an enforcement branch that determines whether countries with binding targets have failed to abide by their commitments. However, the committee lacks the ability to assign any type of sanctions to participants aside from restricting the flexibility mechanisms a country can invoke to take advantage of temporary leeway in meeting its binding emission reduction targets.[7]

1 Allison Crimmins et al., U.S. Global Change Res. Program, The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment (2016), http://dx.doi.org/10.7930/J0R49NQX.
2 Valerie Masson-Delmotte et al., Intergovernmental Panel on Climate Change, Global Warming of 1.5°C: An IPCC Special Report (2018).
3 Stanford Woods Inst. for the Env't, A Roadmap to Reducing Greenhouse Gas Emissions 50 Percent by 2030 (Sept. 20, 2019), https://earth.stanford.edu/news/roadmap-reducing-greenhouse-gas-emissions-50-percent-2030#gs.pn8ygu (last visited Jan. 21, 2021).
4 Noah Sachs, *The Paris Agreement in the 2020s: Breakdown or Breakup?*, 46 Ecology L. Q. 865, 869 (2019).
5 *What Is the Kyoto Protocol?*, U.N. Framework Convention on Climate Change, https://unfccc.int/kyoto_protocol (last visited Jan. 21, 2021).
6 Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162, Annex B, https://unfccc.int/sites/default/files/resource/docs/cop3/l07a01.pdf#page=24.
7 *See, e.g.*, Michael Gillenwater, *The Treaty Compliance Challenge: Enforcement Under the Kyoto Protocol*, GHG Mgmt. Inst. (Feb. 10, 2010), https://ghginstitute.org/2010/02/10/the-treaty-compliance-challenge-enforcement-under-the-kyoto-protocol/; *Introduction to the Kyoto Protocol Compliance Mechanism*, U.N. Framework Convention on Climate Change,

However, larger issues lay in the fact that because the enforcement branch can only sanction member states to the Kyoto Protocol, it is unable to levy sanctions against nations who completely pull out of the agreement because, in doing so, those countries relinquish their membership.[8] This limitation jeopardized the Protocol's viability during its first commitment period. While the countries that remained committed to the Kyoto Protocol achieved a hundred percent compliance with its terms, the agreement's inability to levy penalties against signatories who disregard their commitments resulted in the protocol becoming, in effect, a voluntary international agreement that could not prevent intentional noncompliance. Notably, while the United States signed on to the Kyoto Protocol during the Clinton Administration, the treaty failed to be ratified by the American government since it lacked approval by two-thirds of the U.S. Senate.[9] Without ratification, the Kyoto Protocol remained a nonbinding agreement under domestic law. As a result, the transfer of presidential power from one political party to another in 2001 allowed President George W. Bush to prevent the U.S. government from implementing the Kyoto Protocol shortly after taking office.[10] Aside from the United States, Canada also pulled out of the agreement a year before the first commitment period ended.[11] Neither country faced international repercussions.

While the first commitment period revealed the weakness of the Protocol in the face of noncompliance, the chief disappointment of the Kyoto Protocol has been its inability to evolve into a long-term pact that guarantees swift international action on climate change. Since the agreement's first four-year commitment period, the Kyoto Protocol has failed to retain crucial participants and has been unable to win binding reduction commitments from superpowers that had previously disregarded the treaty. As the first commitment period ended, both Japan and Russia—countries that had abided by the Kyoto Protocol during the first commitment period—refused to pledge their countries to binding emission targets for a second commitment period.[12] Meanwhile, countries like China, the United States, and India—superpowers responsible for more than fifty percent of the world's carbon emissions[13]—decided once again not to pledge their countries to binding emissions targets.[14] Without new commitments from the world's largest greenhouse gas emitters or the retention of crucial members, hopes for the Kyoto Protocol to expand into a long-lasting global initiative have been dashed. Ultimately, many analysts believe that the Protocol's voluntary structure resulted in an unambitious agreement that has provided little firepower in the fight against climate change.[15]

Perhaps convinced that increasing global anxiety about climate change would compensate for the fragility of voluntary treaties, the international community attempted to form another non-compulsory agreement. In 2015, more than 180 nations voluntarily pledged themselves to the Paris Agreement. Previously intransigent superpowers, like China, India, and the United States (the first, second, and fourth largest greenhouse gas emitters, respectively)[16] finally positioned themselves to take part in their first binding climate change treaty. Unlike the Kyoto Protocol, the Paris Agreement allows countries to set their own emission targets; it additionally requires that participants review their progress every five years and increase their emission-reduction targets for the following assessment period. Despite the fact that, like Kyoto, the Paris Agreement is completely voluntary and was formed without clear enforcement mechanisms for noncompliance,[17] at the time of its creation, the international community projected optimism that the Paris Agreement could break new ground in the realm of international climate agreements.

But soon after the agreement was formed, Paris's shortcomings began to surface. For one, the lack of a unified strategy among signatories has resulted in greenhouse gas emissions being reduced at a snail's pace: the Climate Action Tracker—a nonprofit organization that compares the carbon-reduction commitments that governments make with the Paris Agreement's objective of limiting warming to two degrees Celsius—estimates that emission pledges and targets submitted by members of the Paris Climate Agreement will still result in a three-degree Celsius rise in the global temperature from the pre-industrial average: a one-degree Celsius overshoot of the two-degree limit[18] that experts believe will result in irreversible natural and economic damage if exceeded.[19]

https://unfccc.int/process/the-kyoto-protocol/compliance-under-the-kyoto-protocol/introduction (last visited Jan. 18, 2021).

8 Id.

9 *See, e.g.*, Martin Phillipson, *The United States Withdrawal from the Kyoto Protocol*, 36 Irish Jurist 288, 295 (2001), http://www.jstor.org/stable/44013850; William Nordhaus, *The Climate Club: How to Fix a Failing Global Effort*, 99 Foreign Aff. 10, 13 (2020).

10 Phillipson, *supra* note 9, at 288.

11 *Canada to Withdraw from Kyoto Protocol*, BBC News (Dec. 13, 2011), https://www.bbc.com/news/world-us-canada-16151310.

12 Nastassia Astrasheuskaya, Russia Will Not Cut Emissions Under Extended Kyoto Climate Pact, Reuters (Sept. 13, 2012), https://www.reuters.com/article/us-russia-kyoto/russia-will-not-cut-emissions-under-extended-kyoto-climate-pact-idUSBRE88C0QZ20120913; Andrew Light, Has Japan Killed the Kyoto Protocol?, Ctr. for Am. Progress (Dec. 8, 2010), https://www.americanprogress.org/issues/green/news/2010/12/08/8733/has-japan-killed-the-kyoto-protocol/.

13 Johannes Fredrich et al., *This Interactive Chart Shows Changes in the World's Top 10 Emitters*, World Resources INST. (Dec. 10, 2020), https://www.wri.org/blog/2020/12/interactive-chart-top-emitters.

14 Nina Chestney & Barbara Lewis, *"Big Three" Polluters Oppose Binding Climate Deal*, Reuters (Dec. 6, 2011) https://www.reuters.com/article/us-climate/big-three-polluters-oppose-binding-climate-deal-idUSTRE7B41NH20111206.

15 Hannah Chang, *A "Legally Binding" Climate Agreement: What Does it Mean? Why Does it Matter?*, Columbia U. Earth Inst. (Feb. 23, 2010), https://blogs.ei.columbia.edu/2010/02/23/a-%E2%80%9Clegally-binding%E2%80%9D-climate-agreement-what-does-it-mean-why-does-it-matter/; Nick Dunlop *in* Bigpictv, *Did the Kyoto Protocol Work*, Youtube (May 11, 2011), https://www.youtube.com/watch?v=gsnhOLs-jlw; Nordhaus, *supra* note 9, at 12; Amanda Rosen, *The Wrong Solution at the Right Time: The Failure of the Kyoto Protocol on Climate Change*, 43 Pol. & Pol'y 30 (2015).

16 Fredrich et al., *supra* note 13.

17 *What is the Paris Agreement?*, U.N. Framework Convention on Climate Change, https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement (last visited Dec. 4, 2020).

18 Masson-Delmotte et al., *supra* note 2.

19 *CAT Climate Target Update Tracker*, Climate Action Tracker, https://climateactiontracker.org/climate-target-update-tracker/ (last visited Dec. 4,

Additionally, the Paris Agreement shares a fatal flaw with the Kyoto Protocol: its voluntary nature prevents signatories from sanctioning each other to discourage intentional noncompliance. Like with the Kyoto Protocol, a transition of power within the United States from one party to another resulted in the country exiting the agreement in 2017.[20] Though the Biden Administration has moved to rejoin the Paris Climate Agreement,[21] U.S. participation remains vulnerable to changes in political power. As with the Kyoto Protocol, there is little evidence to suggest that this new climate agreement will result in an "upward spiral," in which countries are inspired to take increasingly bold actions to reduce carbon emissions in an attempt to accrue soft power. Rather, the lack of enforcement measures allows influential carbon-emitters to withdraw from the agreement unscathed, and the absence of incentives moves the remaining participants to make unsubstantial reduction commitments.[22]

Based on the experiences of Kyoto and Paris, it seems that voluntary frameworks stifle the effectiveness of climate agreements since short-term gains motivate countries to do as little as possible to solve climate change. So long as voluntary frameworks continue to be invoked, the ability of treaties to address the climate crisis will remain greatly limited.

II. Why Voluntary Agreements Do Not Work: Sovereignty and Rational Pursuits of the National Interest

Why haven't voluntary agreements like the Kyoto Protocol and the Paris Climate Agreement translated into meaningful reductions in carbon emissions? When answering this question, two essential observations regarding the international system must be kept in mind: 1) states within the international system are sovereign, which makes enforcing agreements through independent organizations difficult, and 2) nations act in their own self-interests at least part of the time, which can jeopardize voluntary initiatives aimed at remedying free-rider problems. These observations are not hypotheses that are merely pushed by one particular school of international relations. Rather, they are widely recognized among political scientists to be innate characteristics of the international system. Per the nature of the international system,[23] any agreement that exists in opposition to these qualities is doomed to fail.

Sovereign nations are generally regarded as states that occupy a geographic territory and exercise an internationally recognized authority over the affairs of this area.[24] Theoretically, states can wield two types of sovereignty: internal sovereignty—a state's right to exercise authority over public affairs within its own area—and external sovereignty—a state's right to define its interactions with the outside world.[25] This second category of sovereignty, external sovereignty, "establishes the basic condition of international relations—anarchy, meaning the lack of a higher authority [e.g., a single global government] that makes claims on lower authorities [such as individual states]."[26]

Though attempts to mitigate the international system's anarchy have brought the establishment of global institutions intended to act as counterweights to individual state sovereignty, it is unrealistic to expect contemporary international agreements to be enforced by non-sovereign actors alone. This is because today's international institutions continue to function in tandem with—and not in place of—the sovereignty of individual states. For example, while the United Nations was formed to promote cooperation across national borders,[27] the organization's charter embraces "the principle of the sovereign equality of all its Members."[28] The upshot of institutions that actively preserve sovereign rights is that while attempts can be made to enforce international law through independent institutions, such efforts are only successful if sovereign nations allow them to be. Thus, when nations are unwilling to hold each other accountable, countries may defect from agreements with impunity, resulting in an inconsistent enforcement of international law. This suggests that climate agreements must mandate that their sovereign participants take action against other countries if they defect.

Observing the weakness of non-sovereign enforcement bodies shows that non-sovereign organizations are relatively powerless to enforce the terms of global agreements unless sovereign states assist them. For instance, the International Court of Justice (ICJ)—the United Nation's judicial arm that settles interstate law disputes[29]—has no enforcement powers of its own and instead, relies on U.N. member states to carry out its decisions. True, when superpowers are not parties to a case, they are more likely to use their influence to pressure smaller, noncompliant states to abide by the court's decisions (e.g., cases like *Cameroon v. Nigeria*,[30] in which the United Kingdom, United States, and France pressured Nigeria into finding a solution to a border dispute with Cameroon in accordance with an ICJ ruling[31]). But in cases where the court rules against influential countries,

2020).

20 Nordhaus, *supra* note 9, at 12.

21 *See* Nathan Rott, *Biden Moves to Have U.S. rejoin Climate Accord*, NPR (Jan. 20, 2021), https://www.npr.org/sections/inauguration-day-live-updates/2021/01/20/958923821/biden-moves-to-have-u-s-rejoin-climate-accord.

22 *CAT Climate Target Update Tracker*, *supra* note 19.

23 Kenneth N. Waltz, *Structural Realism after the Cold War*, 25 Int'l Security 5 (2005), http://www.columbia.edu/itc/sipa/U6800/readings-sm/Waltz_Structural%20Realism.pdf.

24 Janice E. Thompson, *State Sovereignty in International Relations: Bridging the Gap between Theory and Empirical Research*, 39 Int'l Stud. Q. 213, 219-228; Daniel Philpott, *Sovereignty*, The Stanford Encyclopedia of Philosophy (June 22, 2020), https://plato.stanford.edu/archives/fall2020/entries/sovereignty/.

25 Thompson, *supra* note 25.

26 Philpott, *supra* note 25, at 213, 219-228.

27 *History of the UN*, United Nations, https://www.un.org/un70/en/content/history/index.html#:~:text=The%20United%20Nations%20is%20an,living%20standards%20and%20human%20rights (last visited Jan. 19, 2021).

28 U.N. Charter art. 2, para. 1.

29 *Main Organs*, United Nations, https://www.un.org/en/sections/about-un/main-organs/index.html#:~:text=The%20International%20Court%20of%20Justice%20is%20the%20principal%20judicial%20organ (last visited Jan. 19, 2021).

30 Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.: Eq. Guinea Intervening), 2002 I.C.J. 303 (Oct. 10).

31 Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 Eur. J. Int'l L. 815, 835 (2007).

the ICJ has little ability to enforce international law if these nations refuse to abide by its decisions. To see this, we can look to China's disobedience of a 2016 ruling asserting that it did not have claim to certain territories in the South China Sea, or the United States' refusal to lift certain sanctions on Iran after the court deemed them to be illegal in 2018.[32]

Defections under the Kyoto Protocol and Paris Agreement followed the same script. For example, after the United States left both agreements, other countries did not levy any sanctions against the superpower.[33] Although the Kyoto Protocol did establish an enforcement branch, the non-sovereign body lacked the authority to punish defectors and sovereign nations refused to sanction Canada and the United States for prematurely abandoning the agreement. With the experiences of both the ICJ and past climate agreements in mind, it is evident that treaties seeking to hold states accountable for violations of international law must ensure that sovereign nations are at the helm of enforcement measures.

The second observation that is key to appreciating the shortcomings of past climate agreements is that like other social actors, sovereign states are *rational*. For the purposes of this essay, *rationality* is used to refer to the tendency of countries to maximize their gains while minimizing their losses.[34] What constitutes a gain or a loss to a particular depends on the country's *national interest*.[35] The existence of rationality suggests that if a country incurs a lower opportunity cost by defying a treaty rather than abiding by it, one should expect that the country will defect from the agreement. Given the diversity in international relations thought, assumptions that states are (a) rational actors and are (b) motivated by their national interests may initially seem controversial. However, examining how these concepts exist within the major schools of theory reveals that even among rivaling schools, a non-compulsory climate agreement outside of the purview of a country's national interest should be expected to fail.

The rational actor assumption and the national interest assumption are theoretical cornerstones of both the Realist and Liberal schools of international relations. Realists and Neorealists—like Thomas Hobbes and Kenneth Waltz, respectively—argue that governments exist to maximize the security, power, or wealth of their citizens.[36] Realists believe that states are naturally inclined to pursue their national interests and that they do so rationally. This school asserts that rationality motivates states to treat international relations like a zero-sum game by dishonoring international agreements when they perceive themselves to be at a relative disadvantage.[37] Unlike Realists, Liberals insist that the national interest is defined by the preferences of the *body politic*. Thus, objectives besides security and power may satisfy a country's national interest. However, like the Realists, Liberals believe that states are naturally inclined to pursue the national interest in a rational manner.[38] But where Realists believe rationality inspires countries to act in their own interests at the expense of other nations, Liberals believe that rationality moves countries to treat international relations like a mutual-benefit game by cooperating with other states wherever possible.[39]

While Liberals and Realists agree that the pursuit of national interests dictates a state's behaviors in the international system, Constructivists embrace a somewhat inverted form of this thesis: that is, socially constructed norms and values give rise to the national interest.[40] Because they do not believe that there is a naturally determined national interest, Constructivists do not assume (as Realists do) that rationality motivates states to pursue the national interest as if international relations is a zero-sum game,[41] nor do they assume (as Liberals do) that rationality incentivizes interstate cooperation.[42] Unlike Realists and Liberals, Constructivists believe that social identities and cultural ideas—rather than natural determinants—define what objectives a state dedicates itself to and the methods used to attain them.[43] Despite this difference, few Constructivists deny that states pursue their national interests in a rational manner by trying to maximizing their progress towards socially determined goal. So ultimately, while Constructivists believe that "identity is prior to interests and may define those interests,"[44] members of this school still believe that "the pursuit of those interests could be incorporated in a rationalist model."[45]

After reviewing these major schools of thought, it is evident that each maintains two similarities with one another: 1) regardless of how the national interest comes to be, states do have a national interest, and, 2) regardless of how each school interprets the effects of rationality on a state's behavior, countries seek to satisfy their national interests by taking measures that advance these goals and avoiding measures that hinder them. It is valid, then, to assert that any treaty that goes against a state's national interest is likely to fail, and that the state will be motivated to neglect these agreements. Noncompliance under the Kyoto Protocol and Paris Agreement should be understood through this lens. Climate change creates a *free-rider problem* since na-

32 *See* Michael Birnbaum, *By Ignoring the South China Sea Ruling, China Follows a Long Line of Great Powers*, Wash. Post (July 12, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/07/12/by-ignoring-the-south-china-sea-ruling-china-follows-a-long-line-of-great-powers/; Stephanie van den Berg, *U.S. to Challenge World Court's Jurisdiction in Iran Sanctions Case*, Reuters (Sept. 14, 2020), https://www.reuters.com/article/iran-usa-world-court/u-s-to-challenge-world-courts-jurisdiction-in-iran-sanctions-case-idINL8N2GB244.

33 Nordhaus, *supra* note 9, at 10.

34 Miles Kahler, *Rationality in International Relations*, 52 Int'l Org. 919, 936–937 (1998); Andrew Moravcsik, Liberal Theories of International Relations: A Primer (2010); Julian W. Korab-Karpowicz, *Political Realism in International Relations*, The Stanford Encyclopedia of Philosophy (May 24, 2017), https://plato.stanford.edu/entries/realism-intl-relations/.

35 Kahler, *supra* note 35, at 936-937.

36 *See* Philpott, *supra* note 24; Waltz, *supra* note 23.

37 *See* Korab-Karpowicz, *supra* note 35.

38 Moravcsik, *supra* note 34.

39 *Id*.

40 Sarina Theys, *Introducing Constructivism in International Relations Theory*, E-Int'l Relations (Feb. 23, 2018).

41 *Id*.

42 Alexander Wendt, *Constructing International Politics*, 20 Int'l Security 71 (1995).

43 *Id*.

44 Kahler, *supra* note 34, at 936–937.

45 *Id*.

tions are able to benefit from the emission reductions other countries make even if they don't have to incur the short-term costs associated with doing so themselves. These factors raise the opportunity cost of compliance and, in doing so, remove climate agreements from some countries' national interests.[46]

Defections from both climate agreements offer evidence to support this assertion. For example, of the thirty-nine countries that did volunteer for binding emission targets under the Kyoto Protocol, two major signatories—the United States and Canada—disregarded their commitments.[47] Immense greenhouse gas emitters, such as China—which (perhaps understandably) cited the need to develop economically as a justification for not participating in the first round of emission reductions[48]—again refused to take up binding emission targets despite the fact that by the end of the first commitment period, the country achieved an income per capita which exceeded that of many of the agreement's original adherents.[49] Also refusing to commit to continued climate action were nations like Japan[50] and Russia, who opted out of a second round of emission reductions despite demonstrating the capacity to comply with binding emission targets during the first.[51]

Clearly, for some of the globe's heaviest carbon emitters, the Kyoto Protocol failed to fall within the national interest, encouraging defections. While the future of the Paris Agreement remains uncertain, the unambitious and inequitable pledges submitted by member states[52] suggest that the free-rider problem will continue to undermine voluntary climate initiatives, perpetuating a structural hindrance that will only be solved if the opportunity costs of adopting these initiatives can be better aligned with each country's national interest.

III. "Climate Clubs": An Innovative Proposal

Given the shortcomings of past climate treaties, future climate agreements must employ a compulsory framework that incentivizes participation. Yale economist William Nordhaus proposes that international climate agreements should take the form of climate clubs. These arrangements would provide benefits to members while sanctioning those who refuse to reduce their carbon emissions.[53] As previously discussed, agreements regulating public goods provide incentives for governments to abandon their commitments when doing so is determined to be in their national interest. In an anarchic international system, other states are the only actors that can effectively hold others accountable for violating international agreements. The compulsory structure of climate clubs would raise the short-term opportunity cost of forgoing membership in future agreements and mandate that members states use their sovereign powers to sanction countries seeking to pull out of agreements.[54] Nordhaus articulates that ideally a global climate club would consist of as many members as possible; as the number of states willing to sanction noncompliance increases, so too does the cost of ignoring the agreement's call to action.[55] Ideally, then, any state willing to comply with the terms of the climate club should be free to join the arrangement.[56] Unlike the voluntary agreements of the past, the incentives of compulsory climate clubs would ensure that participants experience immediate benefits while noncompliant states are subjected to immediate sanctions.[57] This structure would allow these treaties to remain effective even when they are tested by the realities of the international system.

In particular, Nordhaus observes that a simple and effective method of motivating countries to join climate clubs involves using tariffs as incentives. Simply put, countries that refuse to join climate clubs would suffer a rise in tariffs. Meanwhile, members of the climate club would reward each other with lower tariffs. For example, while participants would have tariffs lowered by five percent, all nonmembers are subjected to a five-percent import tariff or a tax equal to the amount that their unregulated greenhouse gas emissions are monetarily worth.[58] Indeed, Nordhaus presents empirical evidence from an American Economic Association study and his own simulations suggesting that, when faced with the choice of incurring rising tariffs or reducing emissions,[59] countries go for the latter.[60] According to Nordhaus's descriptions, the climate club's incentivized structure naturally provides a double security against faithless members: that is, former participants who fail to abide by the climate club's rules would both lose their membership benefits *in addition* to incurring penalties.

IV. Potential Issues with Climate Clubs

While the evidence Nordhaus presents suggests that these arrangements may be a potential solution to the free-rider problem that has hindered past initiatives, the tariff-centered climate club

46 Jon Hovi et al., *Enforcing the Kyoto Protocol: Can Punitive Consequences Restore Compliance?*, 33 *Rev*. Int'l Stud. 435, 439-441; William Nordhaus, *Climate Clubs: Overcoming Free-Riding in International Climate Policy*, 105 Am. Econ. Rev. 1339, 1346 (2015).
47 Phillipson, *supra* note 9, at 295; *Kyoto Protocol - Targets for the First Commitment Period*, U.N. Framework Convention on Climate Change, https://unfccc.int/process-and-meetings/the-kyoto-protocol/what-is-the-kyoto-protocol/kyoto-protocol-targets-for-the-first-commitment-period (last visited Jan. 18, 2021); Camilla V. Ramos Fjellvang, Fridtjof Nansen Instit., Why Did Canada Withdraw From the Kyoto Protocol? (2014), https://www.duo.uio.no/bitstream/handle/10852/40357/_Fjellvang_master_25.pdf?sequence=15.
48 *See, e.g., GDP per capita*, Our World In Data, https://ourworldindata.org/grapher/gdp-per-capita-worldbank (last visited January 18, 2021).
49 *Id*.
50 Light, *supra* note 12.
51 Astrasheuskaya, *supra* note 12.
52 *CAT Climate Target Update Tracker, supra* note 19.
53 Nordhaus, *supra* note 9, at 10.
54 *Id*. at 16.
55 Nordhaus, *supra note* 46, at 1346.
56 Id. at 1345, 1352.
57 Nordhaus, *supra* note 9, at 14.
58 *Id*. at 16.
59 It is worth noting that Nordhaus favors setting an "international target carbon price" over emission reduction targets. Carbon pricing of this sort involves increasing the global cost of emitting carbon by requiring countries to take economic measures in their own countries that discourage using non-renewable fuels (e.g., by implementing a domestic carbon tax). But as Nordhaus mentions in his writings, it is often more practical to discuss policies that address climate change in terms of emission reductions since reducing emissions remains the ultimate objective of such initiatives. *See* Nordhaus, *supra note* 46, at 1358 (Similarly, for the sake of practicality, this article examines climate clubs in terms of emission reduction targets.).
60 *See* Nordhaus, *supra* note 9, at 16–17; Nordhaus, *supra note* 46, at 1346.

Nordhaus describes is not without its shortcomings. However, by expanding the concept of climate clubs beyond Nordhaus's basic description, it is possible for the proposal's incentivized structure to remain a viable, creative solution to the free-rider problem while avoiding many of its own limitations.

One deficiency involves the ability of climate clubs to limit the emissions of developing countries. Despite the fact that developing countries are expected to suffer disproportionately from the effects of climate change,[61] they are also responsible for a significant portion of global greenhouse gas emissions.[62] While this makes their participation in climate agreements crucial, the immediate problems that arise from the desperate economic conditions in these nations oftentimes incentivize governments to boost emission levels in an attempt to attain high levels of economic growth, particularly since fossil fuels remain both cheap and reliable sources of energy.[63] Here, a shortcoming of using tariffs is apparent: given that the overwhelming economic consensus indicates that raising trade barriers on developing countries adversely impacts economic development,[64] increasing tariffs on poor nations would likely exacerbate the impoverished conditions that prevent countries from taking action to address climate change in the first place. Though he suggests that "a practical exception . . . be made for poor countries" in the form of "a threshold for participation in terms of per capita income," Nordhaus does not suggest amendments for poor nations whose circumstances limit both the effectiveness of tariffs in motivating them to reduce emissions and the policies these countries can enact to do so.[65]

A second shortcoming of Nordhaus's climate club lies in more general effects of issuing tariffs. In his writings, Nordhaus acknowledges that tariffs are universally disadvantageous: countries subjected to tariffs suffer losses in trade that hurt producers while consumers in tariff-issuing countries are forced to stomach price increases.[66] Nonetheless, Nordhaus explains that he favors tariffs for this very reason: because neither party is immune from experiencing economic fallout, tariffs increase the incentives for all parties involved to come to an agreement in a timely manner.[67] Although this may be true, it is likely that at least some nations in the international system will remain unwilling to join a climate club. This could potentially create a scenario where the negative effects of issuing tariffs outweigh the gains that members reap from lower tariffs.[68] Such a case could pose a serious threat to the viability of the climate club's promise to use incentivization to stabilize coalitions of countries. While they may seem easy to incorporate into the compulsory framework described by Nordhaus, using tariffs as sticks and carrots could make it so that participating in climate clubs goes against some countries' national interests.

V. Variations of Climate Clubs: Applications of Different Arrangements with the Club Structure

Even though Nordhaus's tariff-centered climate club has its weaknesses, it is not difficult to imagine successful climate agreements that pair Nordhaus's structure with incentives other than tariffs. If done correctly, climate clubs could be formed that retain the benefits of an incentivized structure while avoiding the negative effects of tariffs. For example, instead of issuing tariffs on noncompliant states, members of a climate club could simply agree to substantially lower other trade barriers among themselves. For example, states could tie membership in climate clubs to policies promoting the free movement of labor, which data from the European Union suggests lowers unemployment by as much as six percent and results in higher wages, increased innovation, and smoother adjustments to changing conditions in the labor market.[69] Similarly, promises to increase the number of trade missions[70] that members allow each other to establish in their countries could also guarantee economic growth in exchange for emission reductions; some studies indicate that for each additional trade mission established in a particular country, bilateral exports between the host and visiting countries increase by as much as ten percent.[71] These policy options represent less damaging substitutes for tariffs. Yet they achieve the same objectives by incentivizing participation, raising the opportunity cost of forgoing membership, and ultimately, discouraging countries from violating their commitments. If adjusted accordingly, climate clubs could demonstrate true potential to address climate change

61 *Climate Change in Developing Countries*, Gov't of Canada (June 23, 2020), https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/environmental_protection-protection_environnement/climate-climatiques.aspx?lang=eng;
Climate Change, Ctr. for Global Dev., https://www.cgdev.org/topics/climate-change (last visited Jan. 18, 2020).

62 *See* Associated Press, *A Bad Climate For Development*, The Economist (Sept. 19, 2009), https://www.economist.com/international/2009/09/17/a-bad-climate-for-development; Press Release, Econ. & Fin. Committee, Unprecedented Impacts of Climate Change Disproportionately Burdening Developing Countries, Delegate Stresses, as Second Committee Concludes General Debate, U.N. Press Release (Oct. 8, 2019), https://www.un.org/press/en/2019/gaef3516.doc.html (last visited Jan. 18, 2021).

63 Tucker Davey, *Developing Countries Can't Afford Climate Change*, Future of Life Inst. (Aug. 5, 2016), https://futureoflife.org/2016/08/05/developing-countries-cant-afford-climate-change/; Carla Delgado, *How Developing Countries Can Reduce Emissions Without Compromising Growth*, Earth.Org (Dec. 16, 2019), https://earth.org/how-developing-countries-can-reduce-emissions-without-compromising-growth/.

64 Santiago Fernández de Córdoba, *Trade and the MDGs: How Trade Can Help Developing Countries Eradicate Poverty*, U.N. Chronicle Online Edition, https://www.un.org/en/chronicle/article/trade-and-mdgs-how-trade-can-help-developing-countries-eradicate-poverty (last visited Jan. 18, 2021).

65 Nordhaus, supra note 46.

66 *See, e.g.,* Davide Furceri et al., *Are tariffs bad for growth? Yes, say five decades of data from 150 countries*, 42 J. Pol'y Modeling 850 (2020), https://dx.doi.org/10.1016%2Fj.jpolmod.2020.03.009; Shuting Pomerleau, *Potential Challenges to a Climate Club*, Niskanen Ctr. (Sept. 21, 2020), https://www.niskanencenter.org/potential-challenges-to-a-climate-club.

67 Nordhaus, *supra* note 46, at 1351.

68 Pomerleau, *supra* note 66.

69 *See, e.g.,* OECD, *Is Migration Good for the Economy?*, Migration Pol'y Debates (2014), https://www.oecd.org/migration/OECD%20Migration%20Policy%20Debates%20Numero%202.pdf; Rosamond Hutt, *The Free Movement of People: What it is and Why it Matters*, World Econ. F. (Sept. 1, 2016), https://www.weforum.org/agenda/2016/09/free-movement-of-people-explainer.

70 Trade missions- consulates that function primarily to increase trade between nations

71 *See e.g.,* Andrew K. Rose, Nat'l Bureau Econ. Res., The Foreign Service and Foreign trade: Embassies as Export Promotion (2005), https://www.nber.org/system/files/working_papers/w11111/w11111.pdf; Lance Eliot Brouthers & Timothy Wilkinson, *An Evaluation of State Sponsored Export Promotion Programs*, 47 J. BUS. RES. 229, 231 (2000), https://www.researchgate.net/publication/4966575.

and overcome the problems that have plagued voluntary climate agreements.

VI. Conclusion

Voluntary agreements like the Kyoto Protocol and the Paris Climate Agreement have failed to produce substantial action to combat climate change. Contrary to the basic rules of the international system, these agreements lack both incentives that motivate participants to abide by their terms and enforcement procedures carried out directly by states. Compulsory agreements, such as climate clubs, address both of these issues by providing states incentives to remain within climate agreements and by mandating that participants cut off these benefits when others fail to fulfill their obligations. Unavoidably, history books recounting the struggles of the twenty-first century will feature an extensive chapter discussing the threat of climate change. If the international community continues to employ the same voluntary framework that has faltered in the past, this chapter could describe a world unrecognizably altered by climate change. But perhaps if compulsory agreements like climate clubs are cultivated, its final pages may recount a successful international effort to thwart a common enemy. For humanity's well-being, the world must shoot for the latter.

In a Pandemic, "Compassionate" Release Needs to Get More Compassionate

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On March 28, 2020, Patrick Jones became the first inmate to die in federal prison from the coronavirus. After thirteen years locked up for a nonviolent drug charge, he wrote to a federal judge in an effort to apply for compassionate release, hoping that he would be able to see the teenage son he left behind as a toddler. On February 26, his request was denied. "He spent the last 12 years contesting a sentence that ultimately killed him," said Alison Loomman, one of the lawyers who had previously represented him.[1]

It soon became clear that Jones was not just a victim of the virus, but also of the federal prison system. A mere three weeks after Jones' death, seven of his fellow inmates at the Federal Correctional Institution (FCI) in Oakdale, Louisiana, also died.[2] Another one hundred inmates and staff members tested positive for the virus, and more than twenty were hospitalized.[3] Correctional officers and staff at the facility revealed that two days after Jones had tested positive for COVID-19, the two correctional officers who had transported him to the hospital had already been cleared to return to work.[4] Though the cause of the fatal outbreak could not be traced back to a clear single source, its consequences were severely exacerbated by a collapse in the institution management's response: an inspection report found that by mid-May, some asymptomatic inmates who had tested positive for COVID-19 were left in their housing units for days without being isolated, while supervising staff were neither provided proper personal protective equipment (PPE) nor informed that the inmates under their watch were infected.[5]

The Federal Bureau of Prisons' (BOP) disorganized response to a global pandemic that uniquely endangers incarcerated individuals has directly contributed to the cause of 209 more deaths since Jones', as of January 31, 2021.[6] This paper aims to capture the severity of prisoners' circumstances during a ruthless pandemic in the hopes that the BOP will reevaluate its direction in light of the irreversible damage they have spawned. In Part I of this paper, I explain why the nature of prison infrastructure puts the federal inmate population at particularly high risk of COVID-19, and in Part II, how the lack of a strong and uniform response by the BOP has crippled its capacity to mitigate those risk factors. Part III delves into how the inadequate enforcement of COVID-19 preventive procedures across individual BOP institutions has inflamed the spread of the virus across prisons nationwide, with Part IV specifically branching into how continued prison transfers overseen by the BOP and the United States Marshals Service (USMS) across the countrywide network of prisons risk prisoners' safety. Next, Part V provides an overview of the BOP's meager use of legal compassionate release and home confinement authorities to rescue vulnerable prisoners from the prison conditions to which they are confined. In Part VI, I describe how the BOP's failure to properly utilize its authorities to grant compassionate release and home confinement to federal prisoners in light of COVID-19 amounts to constitutional violations of the Eighth Amendment, an argument which has been legally upheld in numerous court cases. I then argue that the BOP must expand its compassionate release framework as the best strategy for preserving the safety of federal prisoners who face imminent harm and even death. Finally, I discuss strategies for the BOP to ensure effective implementation of compassionate release policies.

I. COVID-19 Risk Factors in Prisons

As of November 6, 2020, 153,611 total federal inmates are housed across the BOP's 122 institutions—a 623% net increase from the federal agency's first recorded count of the inmate population in 1980.[7] The federal prison system's trend toward mass incarceration has introduced concerning issues of overcrowding, deteriorating facilities, and inadequate healthcare for an aging prison population. The BOP gauges overcrowding within its prisons by establishing a baseline-rated capacity level, which allows for one hundred percent double bunking in low-security prisons; fifty percent double bunking in medium-security prisons; and twenty-five percent double bunking in high-security prisons.[8] As of 2019, the BOP inmate population exceeds the rated capacities of its prison facilities by twelve to nineteen percent on average, meaning double and triple bunking have become common practice far beyond their

1 Rich Schapiro, *1st Prison Inmate to Die of Coronavirus Wrote Heartbreaking Letter to Judge*, NBC News (Apr. 5, 2020, 8:35 AM EDT), https://www.nbcnews.com/news/us-news/1st-federal-inmate-die-coronavirus-wrote-heartbreaking-letter-judge-n1176961.
2 Janet Reitman, *'Something is Going to Explode': When Coronavirus Strikes a Prison*, N.Y. Times Mag. (Apr. 18, 2020), https://www.nytimes.com/2020/04/18/magazine/oakdale-federal-prison-coronavirus.html.
3 *Id.*
4 *Id.*
5 Off. of the Inspector Gen., U.S. Dep't of Justice, Pandemic Response Report: Remote Inspection of Federal Correctional Complexes Oakdale and Pollock iii (2020), https://oig.justice.gov/sites/default/files/reports/21-003.pdf.
6 Fed. Bureau of Prisons, U.S. Dep't of Justice, COVID-19 Cases, https://www.bop.gov/coronavirus/ (last visited Jan. 31, 2021).
7 Fed. Bureau of Prisons, U.S. Dep't of Justice, Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited Nov. 6, 2020).
8 Fed. Bureau of Prisons, U.S. Dep't of Justice, Buildings and Facilities FY 2020 Performance Budget 2 (2020), https://www.justice.gov/jmd/page/file/1144631/download.

intended levels.[9] In low-security prisons with twenty-two percent crowding, fifty-five percent of inmates are triple bunked; in medium-security prisons with seventeen percent crowding, eighty-six percent of inmates are double bunked; and in high-security prisons with twenty-one percent crowding, sixty-seven percent of inmates are double bunked.[10]

As of 2018, BOP facilities were operating with thirteen percent crowding system-wide, augmenting the declining state of federal prison institutions constructed decades ago meant to house a far smaller population.[11] With thirty percent of its institutions over fifty years old and forty-three percent standing at over thirty years old,[12] the BOP invests resources in an increasing amount of maintenance and repair projects each year; as of January 2019, 880 such projects were active, with each project demanding funding ranging from ten thousand to seven million dollars.[13] As the inmate population escalates, the strain on shared resources and aged infrastructure has largely diminished inmates' quality of life by denying them access to proper housing and common areas, shortening recreational space and activity time, and maintaining crowded bathroom facilities and reduced shower times.[14] Overburdened facilities now endanger and even eliminate the possibility of providing safe conditions for prisoners in response to the coronavirus pandemic.

According to the CDC, since viral particles spread more readily in contained places, it is crucial to maintain high air circulation to reduce the airborne concentration of those particles in an indoor environment as crowded as a federal prison.[15] High ventilation effectiveness combined with proper social distancing can drastically mitigate the chances of cross-infection, as one study has shown that reducing occupancy rates by fifty percent in confined spaces can reduce the risk of infection by twenty to forty percent.[16] But considering that social distancing in prisons is impossible and prisoners in either dormitory-style housing or individual cells often share the same ventilation systems, improving air circulation should be of critical priority in combatting the virus.[17] While some states like South Carolina have already invested in air ionizers to mitigate the spread of COVID-19 particles in their correctional facilities,[18] the federal agency has thus far failed to clamp down on the issue. A prison union complaint filed with the Occupational Safety and Health Administration on March 31 alleged that the BOP placed prisoners in "imminent danger" by neglecting to improve its institutions' ventilation systems during COVID-19,[19] such as by implementing air filters or other air-cleaning technologies to comply with CDC guidance.[20]

Considering its aging demographics, the inmate population is particularly vulnerable to the spread of COVID-19, which has charted its deadly path across the country and by now resulted in over 435,000 deaths nationwide.[21] Due to the unhealthy nature of a prison lifestyle and inadequate healthcare, incarcerated individuals reach "old age" at fifty or fifty-five years of age—a full decade earlier than the general U.S. population.[22] Today, almost twenty percent of the prison population is over the age of fifty,[23] and as the fastest-growing demographic in the federal prison system, older incarcerated individuals are predicted to constitute more than one-third of the inmate population by 2030.[24] An older population presents unique—and not to mention, costly—pressures on the prison healthcare system; these individuals are more likely to suffer comorbidities, including physical and cognitive disabilities, that require specialized care and treatment.[25] For that reason, the BOP's annual inmate healthcare costs have risen at an unsustainable rate from thirty-seven percent from $978 million in fiscal year 2009 to $1.34 billion in fiscal year 2016.[26] Considering the average offender in BOP facilities who is forty-one years old and serves an average sentence of 128 months,[27] the CDC projects that they are ten times as likely to die from COVID-19 as younger adults (18-29 years), a probability that jumps to thirty times as likely to die once crossing into the 50–64 year old range.[28]

9 *Id*. at 3.
10 *Id*. at 4.
11 *Id*. at 19.
12 U.S. Gov't Accountability Off., Federal Prison System: Issue Summary, https://www.gao.gov/key_issues/federal_prison_system/issue_summary (last visited Jan. 31, 2021).
13 *Id*. at 20.
14 U.S. Gov't Accountability Off., GAO-12-743, Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure 19 (2012), https://www.gao.gov/assets/650/648123.pdf.
15 Ctrs. For Disease Control & Prevention, Ventilation in Buildings (Feb. 9, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/ventilation.html (last visited Jan. 31, 2021).
16 Chanjuan Sun & Zhiqiang Zhai, *The efficacy of social distance and ventilation effectiveness in preventing COVID-19 transmission*, Sustain Cities Soc. (July 13., 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7357531/.
17 Nathan James & Michael A. Foster, Cong. Res. Serv., R46297, Federal Prisoners and COVID-19: Background and Authorities to Grant Release 3 (Apr. 23, 2020), https://crsreports.congress.gov/product/pdf/R/R46297.
18 Joseph Bustos, *Following 31 Inmate Deaths, SC Prisons to Spend About $1M in Plan to Battle COVID-19*, The State (Oct. 6, 2020, 1:19 PM), https://www.thestate.com/news/coronavirus/article246254875.html.
19 Courtney Bublé, *Federal Prisons Pose 'Imminent Danger' in Spreading COVID-19, Union Says*, Gov't Executive (Apr. 6, 2020), https://www.govexec.com/oversight/2020/04/federal-prisons-pose-imminent-danger-spreading-covid-19-union-says/164390/.
20 Ctrs. For Disease Control & Prevention, *supra* note 15.
21 Ctrs. For Disease Control & Prevention, United States COVID-19 Cases and Deaths by State https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last visited Jan. 30, 2021).
22 Kimberly A. Skarupski, et al., *The Health of America's Aging Prison Population*, 40 Epidemiologic Revs. 157, 158 (Mar. 23, 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5982810/pdf/mxx020.pdf.
23 Fed. Bureau of Prisons, U.S. Dep't of Justice, Inmate Age, https://www.bop.gov/about/statistics/statistics_inmate_age.jsp (last visited Jan. 31, 2021).
24 *Id*. at 157.
25 *Id*. at 157.
26 U.S. Gov't Accountability Off., Federal Prison System: Issue Summary, https://www.gao.gov/key_issues/federal_prison_system/issue_summary (last visited Jan. 21, 2021).
27 U.S. Dep't of Justice, Federal Prison System FY 2019 Performance Budget 23, https://www.justice.gov/jmd/page/file/1034421/download.
28 Ctrs. For Disease Control & Prevention, Older Adults (2021), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html (last visited Jan. 21, 2021).

According to the CDC, older adults constitute the group at highest risk for severe illness from the virus causing COVID-19, while those with underlying medical conditions such as cancer, type 2 diabetes mellitus, and heart problems are also at increased risk.[29] These ailments are highly prevalent in the federal inmate population, with forty-five percent of all incarcerated individuals reporting having multiple chronic medical conditions as of 2019.[30] A 2011–12 survey revealed a nine percent incidence rate of diabetes and 9.8% incidence rate of heart-related problems in the national inmate population, compared to 6.5% and 2.9% in the general population, respectively.[31] Federal inmates thus comprise one of the groups in American society most susceptible to the virus. Given the exponentially increasing cost of servicing the healthcare needs of the aging prison population, combined with severe understaffing due to overcrowding,[32] federal prison facilities are ill-equipped to supply the human and medical resources needed to deliver proper caretaking of inmates in the case of a coronavirus outbreak.

II. BOP's Efforts to Combat COVID-19

In light of the failing conditions of the prison system, the COVID-19 pandemic has exposed the BOP's inability to properly account for the health and safety of the federal inmate population. According to press releases from the BOP, the Bureau coordinated a multi-phase action plan to address the COVID-19 threat that began in January.[33] The BOP states that it implemented a modified pandemic influenza contingency plan, the specific operations of which remain obscure, while also establishing a task force to work with experts from the WHO and CDC for the purposes of strategic planning as part of Phase 1.[34] However, it is unclear how the implementation of this plan materialized in facilities for the first three months of the year. It was not until March 13 that the agency initiated the second phase, which demanded a thirty-day suspension of social and legal visitation, inmate facility transfers, and staff travel.[35] At the same time, the agency continued to allow for the intake of new inmates, who were said to be screened for COVID-19 exposure risk factors and symptoms and quarantined or isolated and tested depending on their respective condition, though it is unknown for how long and through what method.[36]

Modified operations within facilities consisted of limiting congregate gatherings (e.g., implementing staggered meal and recreation times), enhancing health screening of staff in areas with "sustained community transmission," and maximizing social distancing "as much as practicable" within the limited bounds of existing prison infrastructure.[37] On March 18, the agency claims to have secured full inventories of cleaning, sanitation, and medical supplies for distribution to "any facility as deemed necessary" for Phase 3[38] while forgoing specific details as to how it intended to appropriately gauge the supply needs of each of its 122 facilities and reliably distribute adequate inventories across its network. One day later, on March 19, FCI Oakdale inmate Patrick Jones complained he couldn't breathe. He was taken to the local hospital by two correctional officers who were neither informed of the possibility that Jones had COVID-19 nor offered masks to protect themselves.[39]

Jones tested positive while the officers were asked to return to work in two days, calling into question the effectiveness of the BOP's enforcement of exposure risk screening procedures. Despite having already announced plans to implement quarantine and isolation procedures in Phase 2, the BOP said a week later on March 26 that as part of Phase 4, preventative measures for institutions were only now being updated to reflect that all newly admitted inmates, regardless of the method of arrival, must be assessed with a screening tool and temperature check in order to determine needs for quarantine or isolation.[40] On March 28, Jones became the first federal inmate to die from COVID-19, leaving twelve other inmates in the hospital alongside seven confirmed staff.[41] In the aftermath of the outbreak, six more inmates from the same facility died.[42]

In the face of a rapidly deteriorating situation, the Director of the BOP called for the installment of Phase 5 on March 31 "in response to a growing number of quarantine and isolation cases in our facilities," which instituted a fourteen-day inmate lockdown across every institution while allowing for "limited group gathering" in for commissary, laundry, showers, telephone, and computer access "to the extent practical."[43] The BOP also announced that for Phase 5, it would begin collaboration with the USMS to "significantly decrease incoming movement," circling back to a promise made much earlier on March 13 to suspend

29 *Id*.
30 U.S. Dep't of Justice, *supra* note 27, at 23.
31 Laura M. Maruschak, Marcus Berzofsky & Jennifer Unangst, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ No. 248491, Medical Problems of State and Federal Prisoners and Jail Inmates, 2011–12, at 3 (Oct. 4, 2016), https://www.bjs.gov/content/pub/pdf/mpsf-pji1112.pdf.
32 U.S. Gov't Accountability Off., *supra* note 14, at 28. ("BOP headquarters officials confirmed that overall staffing in BOP facilities systemwide is on average less than 90 percent of authorized levels, varying by the facility's location.")
33 Press Statement, Fed. Bureau of Prisons, U.S. Dep't of Justice, Bureau of Prisons Update on COVID-19 (Mar. 24, 2020), https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf.
34 Fed. Bureau of Prisons, U.S. Dep't of Justice, *Federal Bureau of Prisons COVID-19 Action Plan* (Mar. 13, 2020, 3:09 PM), https://www.bop.gov/resources/news/20200313_covid-19.jsp.
35 *Id*.
36 *See id*. (discussing the BOP's use of the following practices in the implementation of Phase Two of their COVID-19 response: "1) All newly-arriving BOP inmates are being screened for COVID-19 exposure risk factors and symptoms. 2) Asymptomatic inmates with exposure risk factors are quarantined. 3) Symptomatic inmates with exposure risk factors are isolated and tested for COVID-19 per local health authority protocols").
37 Press Statement, Fed. Bureau of Prisons, *supra* note 33.
38 *Id*.
39 Reitman, *supra* note 2.
40 Fed. Bureau of Prisons, U.S. Dep't of Justice, *COVID-19 Action Plan: Phase Five* (Mar. 31, 2020, 6:30 PM), https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp ("Asymptomatic inmates are placed in quarantine for a minimum of 14 days or until cleared by medical staff. Symptomatic inmates are placed in isolation until they test negative for COVID-19 or are cleared by medical staff as meeting CDC criteria for release from isolation.").
41 Reitman, *supra* note 2.
42 Fed. Bureau of Prisons, *supra* note 6.
43 Fed. Bureau of Prisons, *supra* note 40.

facility transfer of inmates.[44] On April 23, the BOP announced it had recently received additional Abbott test kits to start rapid COVID-19 testing for inmates "at select facilities experiencing widespread transmission," although it failed to elaborate on testing procedures for inmates being transferred or inmates at facilities that had not yet faced an outbreak. Nowhere does the BOP outline procedures for its crowded facilities to safely quarantine and isolate infected inmates. A month later, on May 22, the BOP and USMS announced they would resume transportation and transfer of 6,800 inmates who had been newly committed to the Bureau in recent months.[45] Movement of "an additional 7,000 inmates . . . pending regular movement to their designated facilities" would begin later, the statement continued, vaguely referring to a massive sum of inmates who were presumably stuck mid-transfer in unknown facilities with unknown housing situations and screening and testing procedures sometime between March and May.[46] By August 2020, the BOP had advanced to Phase 9 of its action plan,[47] which seems to have become an indefinite series of disorganized orders continually streaming along in response to deteriorating situations across federal prisons.

The BOP's response framework has relied on a convoluted timeline without specifics as to how it ensured consistency and delivery upon its promises across the federal prison system. In a document released on May 6, 2020, titled "Correcting Myths and Misinformation about BOP and COVID-19,"[48] the BOP defends its response in several regards. First, the document states that in accordance with CDC guidance that all persons wear a mask in public beginning April 4, all staff and inmates have been issued masks to wear on a daily basis, especially as a remedy for when social distancing is not possible. Second, the BOP claims that the CDC has confirmed that the COVID-19 measures reported by Federal Correctional Complex (FCC) Oakdale[49] are in line with the CDC's guidance for COVID-19 management in correctional facilities, and that individual BOP wardens are working with local health departments to coordinate planning. However, the BOP has used varying vague procedures for institutions to follow, allowing for a wide latitude of interpretation among different facilities. It remains unclear what specific standards each institution is to be held accountable for meeting and how the enforcement of such standards is to be verified or upkept, thus obscuring whether or not reports are reflective of actual circumstances.

Third, the BOP claims to have educated inmates and staff on best practices for disease transmission and prevention through publishing online resources and posting broadcast measures. Fourth, the BOP advises that inmates' cells are cleaned at least once a day, with common areas sanitized multiple times a day. Fifth, in response to claims that staff who have escorted symptomatic inmates to hospitals are being told to return to work, the BOP states that employees "may be cleared to return to work after review by employee occupational health staff"—little is known about the qualifications of those assigned to review exposed staff or about other financial and work pressures faced by exposed staff.

Finally, the BOP holds that movement nationwide is down ninety-five percent when comparing the period from March 13, 2020, to April 23, 2020, with the same period in 2019. While commendable, this comparison does not provide much insight into how the BOP has ensured inmates' health and safety during remaining movement, and it further falters on the grounds that the BOP already determined it appropriate to resume pre-COVID levels of inmate movement in May. The USMS supposedly screens inmates prior to movement, and the BOP requires inmates to wear cloth face coverings during transport. The BOP states that newly admitted inmates, upon arrival, are screened and quarantined for fourteen days before introduction into the general inmate population. While the BOP has outlined general guidelines on paper, its real-life capacity to implement and adhere to its own standards in a safe, swift, and complete manner has been questionable at best.

III. Preventive Procedures in Prisons

According to the American Correctional Association, correctional facilities are required to provide twenty-five square feet of space per person that is "unencumbered" by any bunk, desk, or furniture.[50] But considering that double- and triple-bunking past acceptable levels place inmates in even closer proximity of each other, that minuscule 5x5 feet of living space apportioned to each prisoner barely allows them enough room to stretch, never mind socially distance. In the words of the CDC itself, implementing social distance strategies to create "ideally 6 feet of space between all individuals, regardless of symptoms" is critical in preventing the transmission of COVID-19, yet this most vital procedure is also "challenging to practice in correctional and detention environments."[51] Although each institution arranges inmates' housing differently, in some facilities, photos show inmates' beds a mere three feet apart—barely giving them enough space to walk to the bathroom.[52] Outside

44 *Id.*

45 Press Statement, Fed. Bureau of Prisons, U.S. Dep't of Justice, Bureau of Prisons Announces Update on Inmate Movement (May 22, 2020), https://www.bop.gov/resources/news/pdfs/20200527_press_release_inmate_movement.pdf.

46 *Id.*

47 Memorandum from Andre Matevousian, Assistant Director, Fed. Bureau of Prisons, U.S. Dep't of Justice, et al. to All Chief Executive Officers, Fed. Bureau of Prisons, U.S. Dep't of Justice (Aug. 5, 2020), https://prisonology.com/wp-content/uploads/2020/08/COVID-19-Phase-9-COVID-Action-Plan.pdf.

48 Fed. Bureau of Prisons, U.S. Dep't of Justice, Correcting Myths and Misinformation About BOP and COVID-19 (Mar. 6, 2020), https://www.bop.gov/coronavirus/docs/correcting_myths_and_misinformation_bop_covid19.pdf (last visited Jan. 21, 2021).

49 FCC Oakdale is the broader complex of institutions which comprises FCI Oakdale I and FCI Oakdale II. Jones was an inmate at FCI Oakdale I, but both facilities experienced outbreaks. Altogether, FCC Oakdale was scrutinized for a myriad of issues in its mismanagement of COVID-19.

50 Am. Corr. Ass'n, Standards Committee Meeting Minutes 2 (Jan. 9, 2009), https://www.aca.org/aca_prod_imis/docs/Standards%20and%20Accreditation/sac_January_2009.pdf.

51 Ctrs. For Disease Control & Prevention, Guidance for Correctional & Detention Facilities (2021), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#Social_distancing_examples (last visited Jan. 21, 2021).

52 Abbie Vansickle, *Photos Show Some Prison Beds Are Only Three Feet Apart*, Marshall Project (Mar. 27, 2020, 6:00 AM), https://www.themarshall-

of inmates' housing areas, inmates often meet in crowded areas to receive meals and medicine; despite the BOP's claims that it staggers meal times and pill lines for small groups of inmates, its directions regarding how specific social distancing measures are implemented and executed remain ambiguous.

Improper social distancing heightens the risk of COVID-19 exposure and spread to prisoners, not to mention staff, who are already stretched thin. A 2016 Justice Department report notes a seventeen-percent staffing deficiency across the federal prison institutions' health services unit, with twelve BOP institutions medically staffed at a "crisis level" of seventy-one percent or below.[53] The BOP lacks the medical professionals needed to deliver suitable healthcare for inmates, forcing the agency to send inmates outside institutions themselves to source additional care and thereby raising medical expenses.[54] However, in the time of COVID-19, when local medical resources are already strained and the BOP cannot quickly recruit additional staff, prison outbreaks are ripe for a human resources disaster. During the outbreak at FCI Oakdale, employees described requesting time to self-quarantine after exposure to the virus, but instead facing consistent denials and threats of being labeled "absent without leave" by supervisors.[55] With the nearest hospital fifty minutes away, staff were working anywhere from twenty-four to forty hours overtime and driving back and forth between the institution and the local hospital.[56]

The BOP states that it performs screening of all employees prior to work, and exposed workers must wear masks for fourteen days after their last exposure;[57] however, it has yet to expand sick leave policies and implement testing policies to keep its staff safe. The BOP's issue of understaffing exerts considerable pressure on prison officials to keep staff working as much as possible, in part because if they were too considerate of staff's health, no staff member would be able to report to work and fulfill their valuable role. Thus, BOP prisons like the Oakdale prison lack the human resources needed to manage a public health crisis within their walls.

Although the CDC recommends that staff members "maintain a consistent duty assignment in the same area of the facility across shifts," staff are now being called upon to play additional roles of guard, doctor, or caretaker all at once, a common practice called "augmentation."[58] The BOP advises that "[a]s much as possible, staff are being assigned to the same posts and not rotating"; however, the local union chief at Elkton revealed that there were "no rules to prevent officers from moving between quarantine areas and uninfected housing units."[59] The Marshall Project has further reported that BOP staff have "mixed the sick and healthy together in haphazard quarantines."[60]

Because most cases in correctional facilities originate through individuals working with inmates and not inmates themselves,[61] when staff protection from the virus is not guaranteed, resulting outbreaks can prove catastrophic for those with whom they come in most constant contact: the inmates. The BOP's conglomeration of loose PPE protocols—most of which have been reactive—has further escalated COVID-19 case rates in prisons. On March 13, the BOP issued a directive requiring only BOP employees performing health screenings of staff to wear "appropriate PPE, to include the N-95 respirator, face shield/goggles, gloves and a gown," although the requirement for an N-95 respirator was later reduced to "a surgical mask" on March 26.[62] Despite the virus already beginning to rampage through prisons in March, the BOP failed to proactively assess the situation and implement a more systematic, widespread policy for wearing masks in its close-contact facilities. After the CDC issued guidance on April 3 that face coverings should be worn in public where social distancing could not be maintained, the BOP released a memo stating the agency was "issuing surgical masks as an interim measure to immediately implement CDC's guidance, given the close contact environment of correctional institutions" while working to manufacture cloth masks to replace the use of surgical masks.[63]

To counter the difficulties of social distancing in prison, the BOP says, all inmates have been issued cloth masks to wear[64]—the quality and actual wear of which by prisoners varies. Ironically, the BOP has repurposed its own prison factories as its primary supply chain for PPE while failing to ensure its workers are protected.[65] The cloth masks the BOP speaks of are made by the federal prison labor program, UNICOR, where inmate workers are paid rock-bottom wages below a dollar to produce

project.org/2020/03/27/photos-show-some-prison-beds-are-only-three-feet-apart; *see also* Off. of the Inspector Gen., U.S. Dep't of Justice, Pandemic Response Report: Remote Inspection of Federal Correctional Complex Lompoc 11 (2020), https://oig.justice.gov/sites/default/files/reports/20-086.pdf.

53 Off. of the Inspector Gen., U.S. Dep't of Justice, Review of the Federal Bureau of Prisons' Medical Staffing Challenges 1 (2016), https://oig.justice.gov/reports/2016/e1602.pdf#page=1.

54 Off. of the Inspector Gen., U.S. Dep't of Justice, The Impact of an Aging Inmate Population on the Federal Bureau of Prisons ii (2015), https://oig.justice.gov/reports/2015/e1505.pdf.

55 Reitman, *supra* note 2.

56 *Id*.

57 Fed. Bureau of Prisons, *supra* note 48.

58 Eric Katz, *Federal Prison Employees Fear Staff Shortages and Mass Reassignments as COVID-19 Cases Spike*, Gov't Executive (Dec. 1, 2020), https://www.govexec.com/workforce/2020/12/federal-prison-employees-fear-staff-shortages-and-mass-reassignments-covid-19-cases-spike/170399/.

59 Keegan Hamilton, *'I Begged Them to Let Me Die': How Federal Prisons Became Coronavirus Death Traps*, VICE News (June 18, 2020, 7:00 AM), https://www.vice.com/en/article/pkyayb/i-begged-them-to-let-me-die-how-federal-prisons-became-coronavirus-death-traps.

60 *Id*.

61 Michael Ollove, *How COVID-19 in Jails and Prisons Threatens Nearby Communities*, Pew Stateline (July 1, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities.

62 Memorandum from Andre Matevousian, Acting Assistant Director, & L. Cristina Griffith, Assistant Director, Fed. Bureau of Prisons, U.S. Dep't of Justice, to All Chief Executive Officers 44 (Mar. 26, 2020), https://www.bop.gov/foia/docs/2020_COVID_memos.pdf (This latter memo, contrary to the previous ones, dropped the N-95 requirement.).

63 *Id*. at 79.

64 Fed. Bureau of Prisons, *supra* note 48.

65 Hannah Dreier, *'A Recipe for Disaster': American Prison Factories Becoming Incubators for Coronavirus*, Wash. Post (Apr. 21, 2020, 7:40 PM), https://www.washingtonpost.com/national/a-recipe-for-disaster-american-prison-factories-becoming-incubators-for-coronavirus/2020/04/21/071062d2-83f3-11ea-ae26-989cfce1c7c7_story.html.

cheap, unwearable masks that often fall apart after one wash.[66] Prisoners working to churn out those masks described labeling bottles of hand sanitizer and sewing masks in close quarters while unmasked, just so they could earn enough to afford another call home or buy a bar of soap to wash their hands.[67]

In an inspection of a federal prison in Lompoc, California, the U.S. Department of Justice Office of the Inspector General (OIG) reported that seventy percent of staff indicated that more PPE for staff was an immediate need, and one member even revealed that staff had been directed to return and share eye protection with other staff members[68]—procedures which go against CDC guidance. In another case, Virginia's two U.S. senators and two of its congressional representatives were compelled to write to the BOP demanding answers to the "troubling conditions" at FCC Petersburg and its sibling facility, citing staff and inmates' accounts about inadequate PPE forcing them to reuse supplies and masks.[69] BOP director Michael Carvajal responded that "the Bureau has ensured that all institutions nationwide have ample quantities of PPE," promising that stockpiles had been secured to ensure "PPE can be drop-shipped within one day to any institution that might need additional supplies" before tersely redirecting the lawmakers to the BOP website's pandemic response page.[70] As of date, however, BOP's webpage only contains sparse data and information, including a mysterious line that reads: "The inventory of infectious disease PPE supplies has already been completed at all BOP locations and the use of alternative supply chain options is being explored."[71]

While the BOP's nebulous claims about securing adequate PPE supplies conflict with firsthand staff and inmate accounts, the enforcement of proper use of those supplies remain virtually non-existent in some facilities. At the federal prison facility in Terre Haute, Indiana, an infected staff member advised they had "a lot" of contact with inmates and other staff while admitting they had at times failed to don a mask while working. Without bothering to retest them, the BOP allowed infected staff to return to work after ten days without symptoms.[72] In one particular case, the OIG reported that a prohibition on mask-wearing had been enforced by supervisors at FCC Coleman for fear the safety precaution would "scare the inmates"—as of January 3, it seems the facility has more to fear than simply intimidating its prisoners, as 833 inmates and 175 staff there have tested positive for COVID-19.[73]

Considering that social distancing is already impossible, ensuring inmates' personal hygiene is of utmost priority. However, taking basic sanitation measures remains out of reach for many inmates due to the run-down facilities, a lack of resources, and poor sanitation infrastructure.[74] Poor ventilation, inadequate water and electricity sources, as well as sewage system blockages are not uncommon,[75] while hygiene control is limited; many inmates share communal toilets, showers, many of which are often dirty, broken, or unusable.[76] Prisoners often also experience limited access to soap and water[77]—meaning they cannot engage in the practice of frequent handwashing advised by the CDC[78]—and hand sanitizer is even considered contraband in some facilities due to its alcohol content.[79] At FCI Three Rivers, the lack of access to cold water and proper air ventilation, coupled with the violent coronavirus outbreak, spoke to the issue of federal prisons being in dire need of repair and serves as a representative model of the prisons at large being unable to properly handle the emerging health crisis.[80] In the time of COVID-19, inmates' own homes have become breeding grounds for disease rather than safe havens therefrom.

According to the BOP's website, as of January 14, 2021, 4,718 federal inmates and 2,049 BOP staff had confirmed positive cases; this statistic does not include the 38,535 inmates and 3,553 staff who have since recovered,[81] though far from scot-free when considering the long-term effects of the disease.[82] Given a total population of 123,221 federal inmates in BOP-managed institutions, the inmate infection rate measures

66 Noah Goldberg & Stephen Rex Brown, *NYC Federal Jail Staff Complains About 'Crap' Coronavirus Face Masks Made by Inmates Earning Less Than $1 Per Hour*, N.Y. Daily News (May 11, 2020), https://www.nydailynews.com/new-york/ny-coronavirus-inmate-labor-masks-20200511-luzedqwln-jhpzmot4v44qpi3hy-story.html.

67 *Supra* note 65.

68 Off. of the Inspector Gen., U.S. Dep't of Justice, *supra* note 52.

69 Bill Atkinson, *Lawmakers Demanding Answers on 'Troubling Conditions' at Federal Jails in Petersburg, SWVA,* The Progress-Index (Sept. 23, 2020, 11:20 AM), https://www.progress-index.com/story/news/2020/09/22/senators-congressmen-renew-call-investigation-into-fed-prison-conditions/3493656001/.

70 Bill Atkinson, *Director Refutes Claims by Lawmakers About Inadequate PPE at Petersburg Federal Prison*, The Progress-Index (Sept. 23, 2020, 1:14 PM), https://www.progress-index.com/story/news/2020/09/23/director-federal-prison-bureau-takes-issue-inadequate-ppe-claims/3502822001/.

71 Fed. Bureau of Prisons, U.S. Dep't of Justice, A BOP COVID-19 Overview, https://www.bop.gov/coronavirus/overview.jsp#bop_covid-19_response (last visited Jan. 22, 2021).

72 Nathalie Baptiste, *The Trump Admin's Execution Spree May Have Caused a Coronavirus Outbreak*, Mother Jones (Sept. 21, 2020), https://www.motherjones.com/crime-justice/2020/09/the-trump-admins-execution-spree-may-have-caused-a-coronavirus-outbreak/.

73 Monivette Cordeiro, *Federal Prison in Central Florida Banned Masks for Staff as Pandemic Began, Report Says*, Orlando Sentinel (Jan. 14, 2021, 9:29 AM), https://www.orlandosentinel.com/coronavirus/os-ne-coronavirus-coleman-prison-inspector-report-20210113-7ap3b34qrbeinkvyncljp-p62ke-story.html.

74 Int'l Comm. of the Red Cross, Water, Sanitation, Hygiene and Habitat in Prisons 52 (2012), https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4083.pdf.

75 *Id.*

76 Keri Blakinger & Beth Schwartzapfel, *When Purell is Contraband, How Do You Contain Coronavirus?*, Marshall Project (Mar. 6, 2020, 6:00 AM), https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus.

77 Joan Stephenson, *COVID-19 Pandemic Poses Challenges for Jails and Prisons*, JAMA Network (Apr. 7, 2020), https://jamanetwork.com/channels/health-forum/fullarticle/2764370.

78 Ctrs. For Disease Control & Prevention, *supra* note 51.

79 Blakinger & Schwartzapfel, *supra* note 76.

80 Irene Cruz, *Inmates at Three Rivers Prison Camp Complain About Living Conditions During the Pandemic*, News 4 San Antonio (Sept. 8, 2020), https://news4sanantonio.com/news/local/inmates-at-three-rivers-prison-camp-complain-about-living-conditions-during-the-pandemic.

81 Fed. Bureau of Prisons, *supra* note 6.

82 Ctrs. For Disease Control & Prevention, Long-Term Effects (Nov. 13, 2020), https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html (last visited Jan. 31, 2021).

an astounding thirty-seven percent, meaning that as of January 31, 2021, one in every three inmates had contracted the virus since the BOP first began recording cases in March.[83] During the first few months of the pandemic, even prison case rates obtained from the BOP were severely understated, as many facilities tested either no prisoners or only symptomatic ones.[84] A BOP spokesman explained that prisoners are typically only tested as part of random testing, when they were considered symptomatic (in quarantine), or when there was reason to believe they might have been exposed.[85] These far-from-transparent efforts have not proved particularly effective: as of June 16, 2020, testing had been completed on less than thirteen percent of prisoners in BOP-run facilities;[86] in select institutions where mass testing *has* occurred, COVID-19 outbreaks have unveiled infection rates skyrocketing past sixty-five percent across the inmate population.[87] Forcing inmates to face the virus within the dangerous and unsanitary conditions of prison could amount to a death sentence; the BOP has now overseen the deaths of 210 federal inmates and three staff members in the past ten months.[88]

IV. Prison Transfers Endanger Inmates

Due to the continued processing of criminal cases and the resulting influx of inmates supplied by law enforcement and federal courts, prison transfers never completely stopped. In a March 19 article, the BOP qualified its thirty-day suspension on inmate movement by affording "limited exceptions" to the rule, such as for medical health reasons and for managing bedspace and overcrowding.[89] These overused loopholes have cost the BOP numerous COVID-19 outbreaks across facilities nationwide. Despite the BOP's assurance that both the agency and its delivery partner, the USMS, would perform screening prior to inmate and staff transfers, the USMS claims "an agreement was made" that testing and quarantine procedures would be handled by the BOP upon arrival of inmates to their destination facilities, long after any spread of disease had already occurred.[90]

According to records obtained by The Marshall Project, over ten thousand inmates were flown through the federal transfer center in Oklahoma City from February through early March while on their way to other destination prisons.[91] The BOP's own claim to halt transfers beginning March 13 notwithstanding, evidence shows that transfers continued well into April, allowing prisoners to arrive at coronavirus hubs like FCI Elkton where one of the worst outbreaks occurred. More than one thousand inmates and staff were infected, and workers reported that new prisoners were continually sent and taken in at Elkton throughout March and April. Additional records show that seventy prisoners were transported by air in late April, with smaller groups being flown weekly.[92]

Despite the supposed ninety-five percent decrease in inmate movement nationwide, the BOP and USMS have also failed to enforce testing and quarantine protocols within remaining inmate movement. The Marshals rely on a network of 750 local and private contract jails to house federal prisoners mid-transit for indefinite periods of time,[93] which complicates identifying and keeping primary actors responsible. Grady County Jail in Oklahoma, for example, is one such jail paid by the Marshals to house prisoners in cramped conditions that has since earned a reputation as a "super-spreader." Within a week of receiving transfers from Grady, the Federal Medical Center in Fort Worth had recorded its first COVID-19 case, and in over a month the center had sustained a total of twelve inmate deaths and over six hundred inmate cases.[94] A BOP staff official at an Oklahoma City transfer center stated that multiple prisoners sent there from Grady had tested positive, and a Grady prisoner described his experience in the transfer process out of the jail as a dangerous one, filled with weeks to months of traveling alongside other prisoners crowded in buses, vans, and planes—many times without even wearing masks.[95] In an internal BOP prison email, staff were even warned that contract jails were "transferring inmates with Tylenol or another over the counter type medication to temporarily reduce temperatures of outgoing inmates in an effort to circumvent COVID screening procedures."[96] Although it is unknown how widespread this practice is, another union official confided that "[the BOP is] shoving Tylenol and Motrin in [sick prisoners] so they don't have a fever, then putting them on a plane."[97]

Due to limited supervision on the part of the BOP and USMS regarding coronavirus protocols in the numerous state, local, and private facilities used for transfers, continued prison transfers are magnifying the strength and scope of the disease by causing outbreaks that ripple across federal prison institutions as more and more inmates are moved. In one case, to accommodate for increased social distancing at FCI Elkton, 298 inmates from the prison were transferred in four different groups throughout September and October to FCI Fort Dix; nevertheless, twelve of them tested positive upon arrival.

83 Fed. Bureau of Prisons, *supra* note 6.
84 Cary Aspinwall & Joseph Neff, *These Prisons Are Doing Mass Testing for COVID-19—And Finding Mass Infections*, Marshall Project (Apr. 24, 2020, 5:32 PM), https://www.themarshallproject.org/2020/04/24/these-prisons-are-doing-mass-testing-for-covid-19-and-finding-mass-infections.
85 Kim Bellware, *Prisoners and Guards Agree About Federal Coronavirus Response: 'We Do Not Feel Safe'*, Wash. Post (Aug. 24, 2020, 2:16 PM), https://www.washingtonpost.com/nation/2020/08/24/prisoners-guards-agree-about-federal-coronavirus-response-we-do-not-feel-safe/.
86 Hamilton, *supra* note 59.
87 Aspinwall & Neff, *supra* note 84.
88 Fed. Bureau of Prisons, *supra* note 6.
89 Fed. Bureau of Prisons, U.S. Dep't of Justice, Updates to BOP COVID-19 Action Plan (Mar. 19, 2020, 5:00 PM), https://www.bop.gov/resources/news/20200319_covid19_update.jsp.
90 Hamilton, *supra* note 59.
91 *Id.*
92 *Id.*
93 Keegan Hamilton & Keri Blakinger, *'Con Air' Is Spreading COVID-19 All Over the Federal Prison System*, Marshall Project (Aug. 13, 2020, 6:00 AM), https://www.themarshallproject.org/2020/08/13/con-air-is-spreading-covid-19-all-over-the-federal-prison-system.
94 Keegan Hamilton, *A Super-Spreader Jail Keeps Sparking COVID Outbreaks Across the U.S.*, VICE News (Oct. 13, 2020, 7:53 AM), https://www.vice.com/en/article/889w8p/a-super-spreader-jail-keeps-sparking-covid-outbreaks-across-the-us.
95 Hamilton & Blakinger, *supra* note 93.
96 Hamilton, *supra* note 94.
97 Hamilton, *supra* note 59.

By mid-November, despite the warden's claims that the Elkton inmates were not the direct cause of the outbreak, the Fort Dix prison had 238 inmates and eighteen staff members test positive for the virus.[98]

The problem extends beyond a handful of facilities; 52,000 people are held in various jails across the country contracted with the USMS and the Department of Justice. As of October 2020, the jails in the USMS network continue to utilize a pre-transfer "test," which is not an actual COVID-19 test but consists of a temperature check and questionnaire about systems and risk exposure.[99] The Marshals have since recorded 5,450 infections and seventeen deaths among prisoners along with 153 staff infections and three deaths of contract employees.[100] Clearly, inmate transfer facilities cannot be relied on to properly house, test, and protect the lives of the inmates for which the agency is responsible. In light of these issues, the BOP's decision in May to focus on beginning the movement of 6,800 new inmates to facilities across the country is particularly unwise.

V. BOP Release Authorities

Deplorable living conditions that invite COVID-19 into prison doors have necessitated the use of legal policies and authorities to safely release inmates from prison on a larger scale. On March 18, the American Civil Liberties Union (ACLU) wrote to Attorney General William Barr and BOP Director Michael Carvajal demanding they "release those most vulnerable to coronavirus" by increasing use of safety valve mechanisms such as compassionate release and home confinement.

A. Compassionate Release

First established under the Sentencing Reform Act of 1984 and expanded under the First Step Act of 2018, compassionate release authorizes the BOP to move to reduce an inmate's sentence if warranted by "extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing."[101] The criteria for a compassionate release requests includes inmates who: 1) have a terminal medical condition, 2) have a debilitated medical condition, 2) are age 65 and older, suffer medical conditions, and have served fifty percent of their term of imprisonment, 3) are age 65 and older and who have served the greater of ten years or seventy-five percent of their term of imprisonment, or 4) have suffered a death or incapacitation of a family member caregiver of the inmate's child.[102] An inmate must initiate a compassionate release request to their prison warden asking them to petition the federal district court on their behalf.[103] If the warden recommends release, the request heads to the BOP Central Office for the ultimate decision; if the warden does not recommend release, the inmate may appeal through the administrative remedy procedure.[104] If the BOP either denies the request or fails to respond within thirty days, the inmate (or their representative attorney) may directly move for compassionate release in a federal district court.

B. Home Confinement

Separately, home confinement is a process where the BOP identifies lower-risk, lower-need inmates to complete the last ten percent or six months of their sentence at home, whichever is less.[105] Notably, while prisoners can ask judges for compassionate release, home confinement is a no-appeals process entirely handled by the BOP.[106] The agency selects inmates to be granted home confinement—prisoners do not apply to be considered, although they may provide a release plan to their case manager if they believe they are eligible.[107]

On March 26, 2020, Attorney General Barr detailed a memo addressed to the BOP directing the agency to ramp up efforts to "grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic," indicating that the agency should consider various factors such as the nature of the inmates' offense and their conduct in prison.[108] If an inmate were granted home confinement after review of "the totality of circumstances," they would be placed in a fourteen-day quarantine before being discharged from any BOP facility.[109] After President Donald Trump signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act on March 27, Barr exercised newfound authority in an April 3 memo to declare an emergency state at prisons affected by COVID-19, which waived the requirement that inmates could only spend at most the last six months of their sentence in home confinement.[110] This second memo further expanded the scope of inmates eligible for review and directed the BOP to "immediately review all inmates who have COVID-19 risk factors" in facilities "where you determine that COVID-19 is materially

98 George Woolston, *FCI Fort Dix Officials Deny COVID Outbreak Began With Inmate Transfers*, Burlington County Times (Nov. 19, 2020, 4:43 PM), https://www.burlingtoncountytimes.com/story/news/2020/11/19/fci-fort-dix-officials-deny-covid-outbreak-began-inmate-transfers/6344172002/.

99 Hamilton, *supra* note 94.

100 *Id*.

101 28 C.F.R. § 571.61 (2013).

102 *See generally* Fed. Bureau of Prisons, U.S. Dep't of Justice, Program Statement No. 5050.50, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(G) (Jan. 17, 2019), https://www.bop.gov/policy/progstat/5050_050_EN.pdf.

103 FAMM, Understanding the Difference Between Home Confinement, Compassionate Release, and Clemency in the Federal Prison System, https://famm.org/wp-content/uploads/Understanding-the-Difference.pdf (last visited Jan. 22, 2021).

104 Fed. Bureau of Prisons, *supra* note 102.

105 FAMM, *supra* note 103.

106 Joseph Neff & Keri Blakinger, *Michael Cohen and Paul Manafort Got to Leave Federal Prison Due to COVID-19. They're the Exception.*, Marshall Project (May 21, 2020, 7:45 PM), https://www.themarshallproject.org/2020/05/21/michael-cohen-and-paul-manafort-got-to-leave-federal-prison-due-to-covid-19-they-re-the-exception.

107 FAMM, *supra* note 103.

108 Memorandum from William P. Barr, Att'y Gen., U.S. Dep't of Justice, to Michael Carvajal, Director, Fed. Bureau of Prisons (Mar. 26, 2020), https://www.bop.gov/resources/news/pdfs/20200405_covid-19_home_confinement.pdf.

109 *Id*.

110 Josh Gerstein, *Trump Administration Reverses Prisoner Coronavirus Release Policy, Advocates Say*, POLITICO (Apr. 21, 2020, 2:49 PM), https://www.politico.com/news/2020/04/21/trump-administration-reverses-prisoner-release-policy-198648.

affecting operations"; Barr specifically cited FCI Oakdale, FCI Danbury, and FCI Elkton as examples of such facilities already experiencing a significant numbers of cases.[111]

C. BOP's Use of Authorities

However, the urgency delivered by Barr's memos has been met with an underwhelming response by the BOP. By the end of the seven weeks following his March 26 memo, data provided by the agency shows that only 2,578 prisoners had been added to the pool of those granted home confinement, a mere 1.5% of the 171,000 federal prisoners in BOP custody.[112] As of October, that number has increased to 4.6% of the prison population.[113] The data provided by the agency does not specify how many prisoners' release plan applications for home confinement have been approved or denied, nor does it parse out how many prison-to-home transfers were ordered by the BOP or how many were ordered by federal judges overturning decisions by federal prosecutors.[114]

The agency's guidelines for the implementation of Attorney General Barr's memos have also proved misleading both internally and externally. Although home confinement initially required the individual being considered to already have completed half of their sentence, prison officials were advised by BOP superiors on April 9 that the rule would be waived[115] and moved forward with approving inmates under that guidance. Yet on April 20—after various prisoners across the country had already almost completed a full two weeks of pre-release quarantine—the BOP publicly announced a reversal of the decision.[116] Days later, the BOP retraced their steps to once again announce that prisoners who have served at least fifty percent of their sentence, or who had served at least twenty-five percent of their sentences and who had less than eighteen months of their sentence remaining would be eligible for release to home confinement.[117] Where COVID-19 risk factors are weighed in the criteria remains unclear, and it is unknown how many inmates have been released under separate old, new, and reversed guidelines.

The BOP's track record of approving compassionate release applications is even less promising. Before April 2, 2020, only 144 people had been granted compassionate release since President Trump signed the First Step Act in 2018.[118] Of those whose cases were granted, two-thirds had directly filed a motion in court seeking release rather than applying through the agency's internal review process.[119] From March through May 2020, 10,940 compassionate release requests were filed by prisoners for the first line of review by their wardens.[120] Unremarkably, 156 requests (less than 1.5% of them) were approved, while 9,280 were denied and 1,504 received no response.[121] From there, the 156 warden-approved requests were forwarded to the BOP for a final decision, but only eleven made the cut, constituting an overall 0.1% compassionate release acceptance rate.[122] From the start of the pandemic through October, around 1,600 inmates (out of thousands who applied[123]) have managed to be let out on compassionate release.

The BOP's limited use of home confinement and compassionate release during COVID-19 has hardly made a dent in the massive inmate population. Including prisoners whose sentencers were already bound to end in April, the federal prison population decreased by 3,400 individuals that month, compared to when the bureau released 3,700 people on average each month in 2019.[124] Thus, because the actual population decrease that crucial month was standard compared to the routine population decrease in any other month, the significance of home confinement and compassionate release measures taken by the BOP to reduce the prison population in response to COVID-19 appears lacking.

Overall, the agency seems to have prioritized expediting home confinement transfers over compassionate release, a decision that Kevin Ring, president of prisoner advocacy group FAMM, explains allows the BOP to maintain control and supervision over inmates.[125] In fact, because prisoners in home confinement remain under BOP control and correctional supervision, the BOP could force inmates previously released to home confinement to return back to prison after the pandemic is "over" on the BOP's terms. In one compassionate release case, Mi-

111 Memorandum from William P. Barr, Att'y Gen., U.S. Dep't of Justice, to Michael Carvajal, Director, Fed. Bureau of Prisons (Apr. 3, 2020), https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf.

112 Neff & Keri Blakinger, *supra* note 106.

113 Keri Blakinger & Joseph Neff, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied.*, Marshall PROJECT (Oct. 7, 2020, 6:00 AM), https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied.

114 Keri Blakinger & Joseph Neff, *Few Federal Prisoners Released Under COVID-19 Emergency Policies*, Marshall Project (Apr. 25, 2020, 6:00 AM), https://www.themarshallproject.org/2020/04/25/few-federal-prisoners-released-under-covid-19-emergency-policies. Prison-to-home transfers include those made possible through either home confinement or compassionate release. Although prisoners cannot independently move applications for home confinement in court through any BOP-approved process, federal lawsuits have been filed in court challenging the continued confinement of prisoners during COVID-19. As explained in Part VI, in some cases, federal judges have mandated that prisons must identify and release vulnerable prisoners through processes like home confinement and compassionate release—rulings that have been met with opposition by federal prosecutors.

115 Josh Gerstein, *Virus-Wracked Federal Prisons Again Expand Release Criteria*, POLITICO (Apr. 11, 2020, 1:36 PM), https://www.politico.com/news/2020/04/11/federal-prison-release-criteria-coronavirus-179835.

116 Gerstein, *supra* note 110.

117 Josh Gerstein, *Feds Again Shift Guidance on Prisoner Releases Due to Coronavirus*, POLITICO (Apr. 23, 2020, 11:57 PM), https://www.politico.com/news/2020/04/23/coronavirus-prisons-206155.

118 *Id.*

119 U.S. Sent'g Comm'n, The First Step Act of 2018: One Year of Implementation 6 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf.

120 Blakinger & Neff, *supra* note 114.

121 *Id.*

122 *Id.*

123 Joe Forward, *Compassionate Release & COVID-19: Federal Law Creates Avenue for Relief*, State Bar of Wis. (Nov. 18, 2020), https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=12&Issue=20&ArticleID=28061.

124 Blakinger & Neff, *supra* note 116.

125 *Id.*

chael P. McCarthy of the Department of Justice's Criminal Division Fraud Section ominously commented that "I want to be clear that in the BOP's program [home confinement under the Barr memo], it's a transfer until the end of the pandemic and then a return to prison if the pandemic is declared over, unlike compassionate release, which is just a — which is a release, essentially, to home confinement."[126]

VI. Constitutional Violations

Home confinement is uncertain and presents no legal avenues for prisoners to take action outside of waiting on the BOP's decision. Compassionate release, in comparison, provides a safety net in that inmates have the individual agency to seek redress in courts. However, the BOP's failure to exercise its authority to grant early release to incarcerated individuals in federal prisons represents a constitutional violation that must be remedied. Federal court judges as well as state governments have already taken action to prioritize and expand the use of compassionate release to save inmates from prison tinderboxes of disease in the face of the most urgent public health crisis of our time.[127]

A. "Deliberate Indifference" Under the Eighth Amendment

Under the Eighth Amendment, all incarcerated individuals hold the constitutional right to be free of cruel and unusual punishment.[128] Although the drafters originally intended for the amendment to protect against torturous and barbarous acts,[129] the Supreme Court in Weems v. United States moved past a strict textual interpretation of the amendment to find that excessive punishment (i.e., when the severity of the punishment is disproportionate to the offense) also falls under the umbrella of "cruel and unusual punishment."[130] The Eighth Amendment has thus shaped the social dialogue surrounding prison conditions and human dignity throughout history in asserting the rights of incarcerated individuals under care of the government.

More than half a decade later, *Estelle v. Gamble* found that the government's imprisonment of an individual precludes the individual from meeting their own health needs; as a result, the Court ruled that the government has an obligation to adequately fulfill the healthcare needs of its incarcerated population.[131] The Court further held that treatment by prison officials showing what it termed "deliberate indifference" to prisoners' serious medical needs violates the Eighth Amendment; this standard was later expanded in *Wilson v. Seiter* to apply to all aspects of confinement, not medical care exclusively.[132] Additionally, *Estelle* clarified that the deprivation of appropriate conditions of confinement suffered by prisoners could constitute a cruel and unusual punishment if that deprivation had not been explicitly meted out as punishment at the time of sentencing.[133] In order for a condition of confinement to qualify as such, one must show that prison officials have acted with "deliberate indifference" (which goes beyond mere negligence) by meeting two standards in a double-pronged inquiry: first, the objective standard showing the seriousness of the deprivation or condition, and second, the subjective standard showing a culpable state of mind on the part of the prison official allegedly responsible for the deprivation or condition.[134]

No punishment (apart from perhaps a death sentence) formally meted out at the time of an inmates' sentencing extends to forcing inmates to undergo severe exposure to and risk of contracting a life-threatening virus. Under the objective standard, the skyrocketing number of cases across federal prison institutions nationwide has fully demonstrated the seriousness of the current conditions; prisons fundamentally maintain limited resources, staffing, and physical space, which create unmanageable health and safety hazards during COVID-19—especially to a vulnerable, aging prison population. Under the subjective standard, wardens and federal prison officials have ignored the commands of public health experts and the Attorney General to drastically reduce prison populations, even while presented with existing authorities meant to be utilized to fulfill that responsibility. They have failed to expedite processing of requests for compassionate release, the safety valve mechanism put in place by law to reduce inmates' sentences in the case of extraordinary and compelling circumstance—a model example of which is COVID-19. Not only has this behavior substantially elevated prisoners' risk to COVID-19, but prison officials' commitment to such behavior also proves a culpable state of mind. The rulings of federal judges in various lawsuits brought to court by prisoners (or groups on behalf of prisoners)—which I further detail in the following section—consistently hold that failing to utilize granted release authorities to immediately reduce inmate populations as necessitated by the circumstances and as mandated by expert recommendations constitutes an act of "deliberate indifference" to the elevated risk of substantial harm COVID-19 poses to inmates.

What exactly constitutes an "excessive and cruel punishment"—and thus what constitutes the extent of care inmates must be afforded—is not static, for the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[135] The COVID-19 pan-

126 Walter Pavlo, *US Attorney States Federal Inmates on Home Confinement Will Return To Prison Once "Pandemic Is Declared Over"*, FORBES (Oct. 15, 2020, 6:51 PM), https://www.forbes.com/sites/walterpavlo/2020/10/15/us-attorney-states-federal-inmates-on-home-confinement-will-return-to-prison-once-pandemic-is-declared-over/?sh=7c97bbc73265.

127 Brennan Ctr. for Justice, Reducing Jail and Prison Populations During the COVID-19 Pandemic https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic (last visited Jan. 31, 2021).

128 U.S. Const. amend. VIII.

129 Meaghan A. Sweeney, *Reasonable Response: The Achilles' Heel of the Seventh Circuit's "Deliberate Indifference" Analysis*, 12 Seventh Cir. Rev. 62 (2016), https://www.kentlaw.iit.edu/sites/ck/files/public/academics/jd/7cr/v12-1/sweeney.pdf.

130 Weems v. United States, 217 U.S. 349 (1910).

131 Estelle v. Gamble, 429 U.S. 97, 103 (1976) (recognizing "the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.").

132 Wilson v. Seiter, 111 S. Ct. 2321, 2326–27 (1991).

133 Michael C. Friedman, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 Vanderbilt L. Rev. 921, 929 (1992), https://core.ac.uk/download/pdf/288236233.pdf.

134 *Wilson*, 111 S. Ct. at 2324.

135 Trop v. Dulles, 356 U.S. 86, 100–101 (1958).

demic poses a unique challenge to our society to preserve the safety, dignity, and most of all, decency experienced by individuals in our incarcerated population. In no situation, and especially not during a ravaging pandemic, should any person have their claim to this fundamental Eighth Amendment right be reduced to an inaccessible privilege.

B. Orders by State Governments and Federal Courts

While the BOP has faltered in processing compassionate release applications, inmates have flocked to federal courts to move for the granting of requests from judges themselves. An inmate at FCI Sheridan, for example, filed a lawsuit seeking release amidst the despicable treatment of human life in prison, where inmates were only let out of their confines for four hours in fourteen days and some had begun to engage in self-harm as a means to cope.[136] Pro-bono attorneys have assisted federal prisoners in filing "thousands of petitions for compassionate release" in court,[137] and though the exact number is unknown, federal courts began granting dozens of requests since March upon finding "extraordinary and compelling circumstances" in relation to COVID-19 in a number of individual cases. These decisions are based on varying factors, but most commonly include a consideration of inmates' vulnerable medical conditions, the lack of mass-testing across prison facilities (which has contributed to underreported case numbers), and recognition of the fact that the "risk of transmission, exposure, and harm to individuals who become infected" in jails and prisons is "significantly higher than in the community."[138]

Additionally, judges have independently ruled that distinct federal prison facilities managed by the BOP have engaged in deliberate indifference, which amounts to a violation of the Eighth Amendment. Four inmates at FCI Danbury, a prison in Connecticut, filed a federal civil rights lawsuit arguing that prison officials were failing to leverage granted authority to expedite early releases to inmates in the face of a deteriorating prison environment, citing inmates' medical conditions, improper usage of PPE by staff, as well as the prison's haphazard quarantine procedures that combined healthy and infected inmates.[139] On May 12, U.S. District Judge Michael Shea ruled that the prison's refusal to release at-risk inmates amounted to a constitutional violation of the Eighth Amendment, and subsequently ordered the Danbury warden to submit a list of all inmates eligible for early release within thirteen days; in particular, Shea noted that none of the 241 compassionate release requests submitted to the warden since the start of the pandemic had been approved.[140]

In April, after inmates at FCI Elkton brought an emergency court action case to court requesting the release of inmates under threat of COVID-19, Judge James Gwin found that prison officials had acted with deliberate indifference by "thumbing their nose at their authority to authorize home confinement" in the face of the pandemic, thus endangering the health and safety of both staff and inmates.[141] Gwin then issued a similar order requiring the prison to submit a list of all medically-vulnerable prisoners within six hours, and to release them within twenty-four hours.[142] In finding a severe testing deficiency at the institution—the prison had only received fifty COVID-19 swab tests and one Abbott rapid testing machine to cover its population of 2,400—the judge again ruled the BOP's irresponsible conduct constituted a violation of the Eighth Amendment.[143] "One only need look at Elkton's testing debacle for one example of this deliberate indifference," Gwin stated. In accordance with Gwin's order, prison officials identified 837 prisoners who were particularly vulnerable to the disease and thus due for release,[144] corroborating the claim that the BOP had earlier engaged in deliberate indifference in failing to properly utilize the compassionate release process. In response, the Department of Justice (on behalf of the BOP) initiated a request to the Supreme Court on May 20 to halt the federal judge's order. On May 26, the Supreme Court announced it would not block the order.[145]

In yet another case, ACLU Southern California brought a class action lawsuit to court, arguing that the BOP's actions at two federal prisons in Lompoc placed inmates straight in harm's way of the virus. Prison officials had refused to utilize home confinement to release nonviolent prisoners, instead relocating them across the prison, and inmates further complained that there were no masks left to replace damaged ones—all of which contributed to an infection rate of seventy percent across the inmates in the facility.[146] On July 14, Judge Consuelo Marshall echoed the decisions of previous judges in ruling that the BOP had "likely been deliberately indifferent to the known urgency to consider inmates for home confinement, particularly those most vulnerable to severe illness or death."[147] Again, officials at the two prisons were ordered by the court to supply a list of inmates eligible for release.[148]

136 Conrad Wilson, *Federal Lawsuit Calls Out COVID-19 Conditions At Sheridan Prison*, O.R. Pub. Broadcasting (June 30, 2020, 2:32 PM), https://www.opb.org/news/article/lawsuit-treatment-inmates-federal-prison-covid-sheridan-oregon/.

137 Forward, *supra* note 125.

138 Tom Church, Fed. Docket, Updated List of Compassionate Release Grants, https://thefederaldocket.com/updated-compilation-of-compassionate-release-grants/ (last visited Jan. 22, 2021).

139 Petition for Writ of Habeas Corpus, Martinez-Brooks v. Easter, No. 3:20-cv-00569 (D. Conn. 2020), https://www.courtlistener.com/recap/gov.uscourts.ctd.139062/gov.uscourts.ctd.139062.1.0.pdf.

140 C.J. Ciaramella, *Judge Rules In Favor of Federal Inmates In Coronavirus Suit, Orders Speedier Releases*, Reason (May 12, 2020, 10:54 PM), https://reason.com/2020/05/12/judge-rules-in-favor-of-federal-inmates-in-coronavirus-suit-orders-speedier-releases/.

141 Robert Barnes, *Supreme Court Won't Stop Ohio Order For Prisoners To Be Moved or Released Because of Coronavirus*, Wash. Post (May 26, 2020, 6:06 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-for-now-will-not-stop-ohio-order-to-identify-prisoners-for-release-because-of-coronavirus/2020/05/26/8b6d458a-9f74-11ea-81bb-c2f70f01034b_story.html.

142 Church, *supra* note 139.

143 Walter Pavlo, *Federal Judge In Ohio Says FCI Elkton Meets "Cruel and Unusual Punishment Standard"*, Forbes (Apr. 23, 2020, 11:43 AM), https://www.forbes.com/sites/walterpavlo/2020/04/23/federal-judge-in-ohio-says-fci-elkton-meets-cruel-and-unusual-punishment-standard/.

144 Barnes, *supra* note 142.

145 *Id.*

146 Richard Winton, *Judge Orders Release of Vulnerable Inmates at Lompoc Prisons Hit By Virus*, L.A. Times (July 22, 2020, 2:39 PM), https://www.latimes.com/california/story/2020-07-22/judge-orders-release-some-lompoc-prison-inmates.

147 *Id.*

148 *Id.*

Already, other state governments have taken steps to reduce their prison populations to accommodate the unique circumstances raised by COVID-19. In a plan for 2021–23 released in September 2020, the Washington state prison system proposed reforms to achieve "a significant and permanent reduction in the prison population," ranging from decreasing convictions requiring incarceration and/or shortened terms of imprisonment to expanding the use of partial confinement on electronic home monitoring.[149] On March 31, in an effort to reduce overcrowding in state correctional facilities, California granted early release to 3,500 federal inmates who were due to be released over the next sixty days.[150] By April 19, Los Angeles County had released twenty-five percent of its jail population, and by May 5, San Francisco had reduced its jail population by almost thirty-six percent.[151] The California Department of Corrections and Rehabilitation announced on June 16 it would release another 3,500 inmates who had six months or less to serve on a "community supervision plan."[152] On October 19, New Jersey Governor Phil Murphy signed S2519, which reduces an individual's sentence for every month spent incarcerated during a public health emergency on a rolling basis.[153] Through the legislation, thirty-five percent of the state's prison population will be released by March.[154] Considering that the federal prison population consists of political prisoners and white-collar crime offenders, who are generally safer than the violent offenders confined at state prisons,[155] the proactive steps taken by these states to release prisoners set a high bar for the federal prison system to meet.

VII. Recommendations for the BOP

Even while prisoners have experienced success directly filing for compassionate release in court, their ability to seek that alternative independent route hinges on the BOP first reviewing and denying their request on a timely basis. It is preposterous that the agency's internal processing of compassionate release requests has broken down to such a point that prisoners most commonly have to go to court themselves for the possibility of relief. To tackle the root of the problem, the BOP must fulfill its own responsibility to review, approve, and grant inmate requests in an accelerated and efficient manner, with renewed purpose in the time of COVID-19. Receiving help to move compassionate release requests is often a luxury for prisoners, many of whom lack the legal knowledge, connections, or resources to navigate the complex process by themselves. Moreover, BOP facility staff are not even obligated to notify prisoners that compassionate release is an option when they believe the prisoner to be eligible; in a 2012 response to questions by the Human Rights Watch, the BOP stated that "[n]o Bureau staff are responsible for identifying a prisoner or even assisting one who might meet compassionate release criteria—even one who is terminally ill or medically incapacitated and thus unable to do so unaided."[156] Without reform of the BOP's compassionate release policies, many inmates remain locked up helplessly and in the dark about their options. Thus, in recognition that the pandemic has created extenuating circumstances in prisons placing incarcerated individuals at an extraordinarily high level of risk for infection and plausible death, I recommend that the BOP strengthen its compassionate release efforts on multiple fronts.

First, the agency must expand the speed and scope of its review of compassionate release. Reviewing and revising the BOP's internal guidelines to ensure efficient and effective processing of individual inmates' compassionate release applications should be the focus in the long term; due to the urgency of the circumstances, however, it is necessary in the meantime to bypass the existing timeline of administrative approval by wardens and the BOP Central Office currently required and release qualifying prisoners en masse. As soon as possible, wardens and prison officials in every facility should initiate review of all inmates using not only current compassionate release criteria but also public health guidance specifying conditions that cause individuals to be more highly susceptible to contracting the disease. Each institution should create a list of inmates eligible for compassionate release within fourteen days and proceed to move for release on prisoners' behalf in federal courts.

Second, the BOP should make accessible to inmates transparent information regarding eligibility criteria and ways to apply for compassionate release. The BOP should issue a new policy directing staff and case managers to bring to the attention of those they believe to be experiencing extraordinary and compelling circumstances that they have the option of seeking compassionate release. Prisoner handbooks and bulletins should include information for inmates specifying the steps to achieving compassionate release, examples of qualifying extraordinary and compelling circumstances, and steps to initiating compassionate release applications. Trained staff should be made available to inform illiterate or ill prisoners of their options or advise other prisoners seeking compassionate release as needed, including aiding them in the appeals process or with creating release plans as part of their application.[157]

Finally, the BOP must release specific data on a monthly basis for prisoners and the public alike to understand how it manages compassionate release requests, especially when circumstances caused by the pandemic rapidly shift week by week. In

149 *See generally* Exec. Pol'y Off., Dep't of Corr., State of W.A., Budget Reduction Strategy: 2021–23 Biennium (2020), https://www.doc.wa.gov/about/agency/executive-policy/docs/budget-policy-strategy.pdf.
150 Paige St. John, *California To Release 3,500 Inmates Early As Coronavirus Spreads Inside Prisons*, L.A. Times (Mar. 31, 2020, 2:01 PM), https://www.latimes.com/california/story/2020-03-31/coronavirus-california-release-3500-inmates-prisons.
151 Brennan Ctr. for Justice, *supra* note 129.
152 *Id*.
153 N.J.S. 2C:47-3.
154 Tracey Tully, 2,258 *N.J. Prisoners Will Be Released in a Single Day*, N.Y. Times (Nov. 4, 2020), https://www.nytimes.com/2020/11/04/nyregion/nj-prisoner-release-covid.html.
155 Caroline Wolf Harlow, Bureau of Justice Statistics, Comparing Federal and State Prisons, https://www.bjs.gov/content/pub/press/CFASPI91.PR (1994).
156 Human Rights Watch & Famm, The Answer Is No: Too Little Compassionate Release In US Federal Prisons 29 (2012), https://famm.org/wp-content/uploads/The-Answer-is-No-compassionate-release.pdf.
157 *Id*. at 10.

line with a recommendation by FAMM, these statistics should include but are not limited to: "the number of requests for compassionate release that are made to wardens, as well as the number considered by more senior BOP staff; the category of the 'extraordinary and compelling' reasons alleged by prisoners to support their requests for early release (such as terminal illness or family circumstances); [and] the number of motions for compassionate release made to sentencing courts."[158]

VIII. Conclusion

Incarcerated individuals are not the discards of society and cannot be treated as such. The shortcomings of prison infrastructure, mass incarceration, and the federal government have threatened the health and safety of not only the 151,830 federal inmates in BOP custody but also members of the general public who, too, face the consequences of increased transmission and infection rates. The agency's mismanagement of prison transfers and sanitation and testing efforts have been compounded by internal disorganization with regard to standardized rules and policies for implementation across the BOP's 122 institutions. Facing confinement in close quarters where disease is free to breed and spread at exponential rates, inmates have lost claim to their fundamental constitutional rights in a world where the new normal requires personal hygiene and safety to be the number one priority. A process that *should* allow for the early release of individuals whose lives are compromised by extraordinary and compelling circumstances like those entailed by the pandemic, compassionate release is a saving grace many prisoners and their families have been seeking—yet the BOP has shed all but an ounce of compassion by tying up the vast majority of release requests in red tape and silent dismissals. Beyond the COVID-19 era, a re-envisioned compassionate release process that is adaptable to the ebbs and flows of contemporary society will ensure that all individuals, regardless of their state of incarceration, can enjoy a life of dignity.

158 *Id.*

3.5 Million Homes Short: Is the California Environmental Quality Act to Blame for Housing Unaffordability?

Ben Reicher (PO '22)
Guest Contributor

Housing unaffordability has long been California's most intractable social problem, and it has only been exacerbated by the current COVID-19 economic recession. The root cause of the housing crisis is that, for decades, California has not built enough housing to meet demand. A McKinsey analysis in 2016 found that California needs to build 3.5 million housing units by 2025, a goal adopted by Governor Gavin Newsom.[1] One often-alluded-to reason for this lack of housing supply is the 1970 California Environmental Quality Act (CEQA), which requires most residential projects to undergo reviews for environmental impacts and exposes developers to litigation for inadequate consideration of impacts. According to the law's detractors, CEQA's requirements make it too expensive for developers to build housing (especially high-density multifamily housing, which is less profitable).

This article presents the results of a study I completed in the summer of 2019 of multifamily residential developments in Claremont that sought to analyze the effect of CEQA on housing affordability on the local level. If Governor Newsom's goal is to be met, the causes of California's housing shortage must be thoroughly understood. However, there is a paucity of research on CEQA and any potential link to housing affordability, especially on the local level.

First, I present the background of CEQA's enactment, the details of its procedures, and a summary of California's housing shortage and its effects. Then, I discuss the results of my study and its implications in the broader context of the debate on CEQA. My research provides evidence that CEQA has had minimal impact on housing affordability in Claremont, a result that comports with statewide research that also finds negligible effects.

I. Background of CEQA

CEQA was passed in an atmosphere of nationwide mobilization against pollution and environmental destruction, and it was signed into law in 1970 by then-Governor Ronald Reagan. At the federal level, the growing environmental movement led to the passage of the National Environmental Policy Act (NEPA) that same year. Although intended to complement NEPA (which has the similar purpose of mandating environmental reviews of major developments),[2] CEQA in many ways goes further: while NEPA only applies to projects that receive federal funds, CEQA's review and litigation provisions also apply to privately funded development projects that require government approval, as determined by *Friends of Mammoth v. Board of Supervisors*.[3]

By requiring environmental impact reviews before construction begins, CEQA seeks to ensure precautionary consideration of the environmental impacts of major developments.[4] All relevant projects are assigned one of two review tracks, each ending with the compilation of a particular document. One track ends with a Negative Declaration (ND), which states that the project will not have significant environmental impacts, or, more commonly, that the project's environmental impacts can be made insignificant with some mitigation measures, in which case a Mitigated Negative Declaration (MND) is compiled. The other track ends with an Environmental Impact Report (EIR), which signifies that the project's impacts will be significant regardless of mitigation measures and entails a more extensive and detailed evaluation than an ND/MND.[5] An EIR contains recommendations to minimize a project's environmental impacts as much as possible,[6] and in some circumstances it recommends that the relevant state agency deny permission for the project.[7] The text of CEQA, as amended over the years, grants exemptions to a wide variety of projects, including projects considered economically or socially necessary despite potential environmental harms,[8] as well as designated low-income housing developments.[9]

There is no central body responsible for enforcing the CEQA review process; some reports are compiled by state agencies, while smaller-scale developments are reviewed by city or coun-

1 Jonathan Woezel et al., McKinsey Global Institute, A Toolkit to Close California's Housing Gap: 3.5 Million Homes by 2025 (2016), https://www.mckinsey.com/~/media/McKinsey/Industries/Public%20and%20Social%20Sector/Our%20Insights/Closing%20Californias%20housing%20gap/Closing-Californias-housing-gap-Full-report.pdf.

2 Daniel Selmi, *The Judicial Development of the California Environmental Quality Act*, 18 U.C. Davis L. Rev. 197, 198–199 (1984).
3 *See id*. at 200; Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 502 P.2d 1049 (1972).
4 *Id*. at 202–203.
5 *Id*. at 203–204.
6 Cal. Code Regs. tit. 14, § 15123 (2005).
7 Cal. Code Regs. tit. 14, § 15126.6 (2005).
8 Selmi, *supra* note 2, at 204–205.
9 Cal. Code Regs. tit. 14, § 15194 (2007).

ty governments.[10] However, CEQA gives private citizens enforcement power, by allowing individuals or organizations to file a lawsuit if they feel the review was insufficiently thorough, in order to prevent work on the project until all relevant CEQA requirements are met.[11]

When CEQA was first enacted, few could have envisioned it would evolve into a critical aspect of all land use decisions in California; today, it represents the most comprehensive state environmental law in the country. While CEQA has won praise for safeguarding California's natural environment and ensuring the public has a voice in development decisions,[12] critics have claimed that its requirements are needlessly burdensome and bureaucratic for developers, to the point that it discourages much-needed construction.[13] "CEQA reform," by loosening the environmental review requirements or making it harder for citizens to sue developers, has been a common refrain in Sacramento for almost as long as the law has existed, leading to several attempts to weaken CEQA in the 1980s.[14]

As California's housing shortage has worsened, it has been alleged that CEQA contributed to this crisis by disincentivizing construction of multifamily affordable housing. This viewpoint has found receptive audiences in the state capital, as shown by the passage of AB 1197, which exempted homeless shelters in Los Angeles from CEQA.[15] In particular, AB 1197 makes homeless shelters exempt from CEQA lawsuits, implicitly invoking the central argument made by CEQA's detractors that citizen lawsuits to challenge the environmental review process are rooted in exclusionary not-in-my-backyard (NIMBY) attitudes. It is alleged that, far from empowering marginalized communities vulnerable to environmental exploitation, CEQA lawsuits are weaponized by wealthier residents to prevent construction of low-income housing in their neighborhoods.

Exponents of the idea that CEQA lawsuits have NIMBY motives base their claims in two statewide studies by Hernandez et al., the more recent of which found that, of CEQA lawsuits filed from 2013 to 2015, a twenty-five percent plurality targeted new residential developments.[16] Of those, a forty-nine percent plurality targeted multifamily apartment or condominium developments.[17] Hernandez et al. further report that, from 2013 to 2015, eighty-seven percent of CEQA suits targeted infill development, which they define as any development within city boundaries or surrounded by existing development in an unincorporated area.[18] In a previous study[19] reporting similar findings from 2010 to 2012, Hernandez et al. write, "The 'environmental' use of CEQA litigation against infill projects by NIMBYs disproportionately targets . . . poor, working class, and minority citizens."

II. California Housing Shortage

Any alleged role of CEQA notwithstanding, it is undeniable that California faces a severe shortage of affordable housing. The state has the second lowest housing units per capita in the nation,[20] with "only one affordable housing unit for every five extremely low-income households in the state."[21] As a consequence of not enough housing being available, California has the highest median rents[22] and second-highest median home prices in the country;[23] the state also had the nation's highest poverty rate in terms of the Supplemental Poverty Measure (which accounts for cost of living) on average from 2016 to 2018.[24] For twenty percent of Californians, housing takes up over half their income; the U.S. Department of Housing and Urban Development's definition of housing unaffordability is upwards of thirty percent of income.[25]

Lack of affordable housing, especially in metro areas like Los Angeles County and the Bay Area, has wide-ranging effects that reverberate through Californians' lives. Most visibly, housing unaffordability is the major cause of California's first-in-the-nation homelessness problem—California is home to fifty-three percent of the nation's unsheltered homeless.[26] For the population at large, the inability to afford housing near one's job leads to significant suburban sprawl outside major cities, resulting in long commutes to work and the attendant problems of traffic congestion and air pollution. All told, McKinsey estimates that California's housing shortage costs the state six percent of its

10 Cal. Code Regs. tit. 14, § 15051 (2005).
11 Cal. Code Regs. tit. 14, § 15231 (1998).
12 Donna Frye, *CEQA's environmental protections work for all of us*, San Diego Union-Trib. (Mar. 3, 2017), https://www.sandiegouniontribune.com/opinion/commentary/sd-utbg-ceqa-support-frye-20170302-story.html.
13 Scott Peters, *CEQA an obstacle for needed housing in California*, San Diego Union-Trib. (Mar. 3, 2017) https://www.sandiegouniontribune.com/opinion/commentary/sd-utbg-ceqa-obstacles-peters-20170302-story.html.
14 Selmi, supra note 2, at 199.
15 Emily Alpert Reyes & Liam Dillon, *Homeless shelters in LA could be harder to block if Gov. Newsom signs this bill*, L.A. Times (2019), https://www.latimes.com/california/story/2019-09-13/homeless-housing-shelter-ceqa-lawsuit-los-angeles-law.
16 Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 Hastings Envt'l L. J. 25 (2018).
17 *Id*. at 29.
18 *Id*. at 28.
19 Jennifer Hernandez et al., Holland & Knight, In the Name of the Environment: Litigation Abuse Under CEQA 19 (2015), https://issuu.com/hollandknight/docs/ceqa_litigation_abuseissuu/1.
20 Woezel et al., *supra* note 1.
21 Annelise Bertrand, *Proxy War: The Role of Recent CEQA Exemptions in Fixing California's Housing Crisis*, 53 Colum. J.L. & Soc. Probs. 414 (2020).
22 Stefan Lembo Stolba, Experian, California Leads Nation in Rent Costs (Nov. 6, 2019), https://www.experian.com/blogs/ask-experian/research/median-rental-rates-for-an-apartment-by-state/ (last visited Aug. 20, 2020).
23 Marissa Perino & Dominic-Madori Davis, *Here's the typical home price in every state – and what you can actually get for that money*, Bus. Insider (Apr. 10, 2020), https://www.businessinsider.com/average-home-prices-in-every-state-washington-dc-2019-6 (last visited Aug. 20, 2020).
24 U.S. Census Bureau, The Supplemental Poverty Measure: 2018 (2019), https://www.census.gov/library/publications/2019/demo/p60-268.html.
25 Sara Kimberlin, Cal. Budget & Pol'y Ctr., Californians in All Parts of the State Pay More Than They Can Afford for Housing (2017), https://calbudgetcenter.org/resources/californians-parts-state-pay-can-afford-housing/.
26 Meghan Henry et al., U.S. Dep't Housing & Urb. Dev., The 2019 Annual Homeless Assessment Report (AHAR) to Congress. ii (2020), https://files.hudexchange.info/resources/documents/2019-AHAR-Part-1.pdf.

GDP each year, due to reduced disposable income and unrealized employment in the construction sector.[27]

In response, both the Newsom Administration and the state legislature have made it a (if not *the*) top priority to expedite construction of housing, especially multifamily housing for low-income residents. If the goal of 3.5 million units by 2025 is to be met, the factors impeding housing construction in California must be properly analyzed, and quantitative analysis of CEQA's effect on housing is scant. Therefore, my project sought to evaluate the burden CEQA imposes on developers, through examination of multifamily housing developments in Claremont.

III. CEQA and Claremont Residential Developments

A. Methodology

To carry out my study, I researched housing developments in Claremont built after 1970, ultimately compiling a database of eighteen multifamily residential developments. I acquired my data by searching Laserfiche, the archive database used by the City of Claremont Planning Department (with more than sixty thousand entries), for documents like EIRs, MNDs, and city council minutes and reports.

I evaluated the eighteen developments on three parameters: 1) whether they received an exemption, an ND/MND, or a more costly EIR, 2) the cost of CEQA review, and 3) whether the development faced any lawsuits filed under CEQA. To better understand the intricacies of the review process, I also interviewed officials from two companies that conducted CEQA reviews for the City of Claremont. While precise values for the fraction of construction costs that went to fulfilling CEQA requirements ultimately could not be obtained, I received an estimate of the average percentage that Claremont residential developments spend on CEQA through interviews with City of Claremont Planning Department officials.

B. Results

Of the eighteen developments studied, eleven received MNDs, six received EIRs, and one was exempt from CEQA as a designated affordable housing project. Thus, only a third underwent the most exhaustive level of CEQA review. Importantly, no development since 2007 received an EIR; residential developments evaluated since then received an MND or (in one case) an exemption. This shows that, to the extent that the compilation of an EIR rather than an MND delays a project, more recent residential developments in Claremont have not been subjected to this impediment.

Finally, officials of the City of Claremont Planning Department estimated CEQA costs for Claremont residential developments at between 0.2 and five percent of total project expenses. Most importantly, none of the eighteen developments faced lawsuits under CEQA.

C. Analysis and Implications

My study of residential developments in Claremont indicates that CEQA lawsuits are filed so rarely that their impact on housing construction is insignificant, that it is more common for residential developments to undergo the less demanding MND route, and that the typical cost of CEQA review (less than five percent of the total) is not a serious impediment for developers, or at the very least, it is far less significant than other contributing factors. Although these findings are based on the experience of Claremont, they comport with available statewide data, suggesting that one can use the Claremont data to draw a broader conclusion about California.

The conclusions of Hernandez et al. regarding CEQA's effect on housing have received criticism, for example on the environmental law blog Legal Planet,[28] for relying on an extremely broad definition of infill development that includes any project within city boundaries (cited projects include a jail, a Wal-Mart, and a luxury golf course). To quote Sean Hecht: "Under this definition, it is unsurprising that most CEQA cases [eighty-seven percent] would involve 'infill'. In fact, it would be surprising if any significant number did not!" However, the main weakness of Hernandez et al.'s studies is that they describe the origin or target of CEQA lawsuits but amazingly don't present any data on how prevalent these lawsuits actually are. The claim that CEQA litigation is a widespread barrier to housing construction is refuted by a 2016 study by Smith-Heimer et al., which reports that "the actual number of lawsuits is surprisingly low, averaging 195 statewide per year [between 2002 and 2015]."[29] Smith-Heimer et al. estimate the CEQA litigation rate (court filings against a CEQA environmental review as a fraction of total CEQA reviews conducted statewide) at less than one percent, averaging 0.71 percent for 2013-2015.[30] Admittedly, this estimate only includes lawsuits challenging NDs/MNDs or EIRs, and not those against a CEQA exemption. Such a finding is still highly significant, however, as lawsuits challenging NDs/MNDs or EIRs comprise the majority (sixty-eight percent) of CEQA lawsuits from 2013 to 2015.[31]

Statewide data not only show that CEQA litigation is not a significant burden to developers but that neither is the CEQA review process itself, as currently applied to development projects in California. This is demonstrated by a report compiled by the State Senate Environmental Quality Committee of projects evaluated under CEQA by the State of California (as opposed to by a city or county government). The report finds a negligible litigation rate similar to that found by Smith-Heimer et al., and it further finds that a very small percentage of projects were assigned an EIR. During the covered period, only 201 out of 15,783 reviewed projects received an EIR, a rate of 1.3

27 Woezel et al., *supra* note 1.

28 Sean Hecht, *Anti-CEQA Lobbyists Turn to Empirical Analysis, But Are Their Conclusions Sound?*, Legal Planet (Sept. 28, 2015), https://legal-planet.org/2015/09/28/anti-ceqa-lobbyists-turn-to-empirical-analysis-but-are-their-conclusions-sound/ (last visited Aug. 20, 2020).

29 Janet Smith-Heimer et al., Rose Found. for Communities and the Env't, CEQA in the 21st Century 19 (2016), https://rosefdn.org/wp-content/uploads/2016/08/CEQA-in-the-21st-Century.pdf (last visited Aug. 20, 2020).

30 *Id*. at 22–23.

31 *Id*. at 21.

percent.[32] In fact, according to the report, the vast majority of projects examined by state agencies were ruled exempt from CEQA review—over ninety percent.[33] The Committee also surveyed projects evaluated under CEQA at the local level: out of over 14,000 projects from FY 2011-2016, 92.6 percent received an exemption, 5.4 percent received an MND, and only 2 percent received an EIR.[34] These results comport with my findings that, after 2007, there were no residential projects in Claremont assigned an EIR.

City and county planning officials have been surveyed about their opinions on CEQA's costs (similar to how I obtained my estimate of 0.2 to 5 percent of total cost for Claremont). In a 2012 survey by the California Governor's Office of Planning and Research, respondents representing eighty-seven percent of local governments in the state ranked CEQA twelfth out of sixteen choices in response to a question about impediments to urban infill development.[35] This suggests that costs associated with CEQA are not significant compared to other factors that take up much more of a developer's budget.

A more comprehensive inquiry into the leading cost drivers of affordable housing in California can be found in a state-funded study of affordable housing developments completed from 2001–2011. Published in 2014, the study found that, on average out of 400 projects, construction accounted for sixty-nine percent of developers' cost, followed by demolition/site preparation at eight percent. "Local permits and development fees," of which CEQA environmental reviews comprise a fraction, made up only six percent.[36]

The 2014 study also performed regression analyses to measure the effect of different factors on the cost of providing affordable housing. For example, requirements imposed on a project by local governments, "both in terms of appearance and in terms of physical size and other characteristics," increased costs by about seven percent compared to projects that did not face these requirements. Opposition by local communities (quantified by using the number of community meetings a developer held as a proxy) increased cost by about five percent, for projects that had four or more community meetings compared to projects with less than four. Both of these factors may reflect NIMBYism at the local level.[37]

Most notably, the regression analysis did not find any significant correlation between a project's level of CEQA review (exemption, ND/MND, or EIR) and its cost. While projects assigned an EIR did take longer to build (as an EIR is more comprehensive than other levels of review), CEQA review did not significantly increase a project's cost.[38]

IV. Conclusion

Amid California's severe affordable housing shortage, CEQA opponents have tried to blame the state's landmark environmental law for disincentivizing housing construction. However, my study of multifamily residential developments in Claremont, in accord with available statewide data, finds that CEQA is not as significant a burden as claimed: I find that none of the eighteen projects were litigated under CEQA, that it was more common to be assigned the less burdensome MND review, and that costs spent on the CEQA process are a small fraction of a developer's budget.

While more statewide and local-level data on CEQA is certainly needed, what is available strongly suggests CEQA does not significantly inhibit housing construction. Creating additional CEQA exemptions for housing (as with the recently passed AB 1197 for Los Angeles and ongoing efforts to expand its reach statewide)[39] might help move along some projects, but the data suggests that the practical effects of such an action would be minimal. In fact, the data suggests that the exemptions already in the law are so broad that the vast majority of projects qualify for them.

If California is to meet the governor's goal of 3.5 million new housing units by 2025, more research is needed into why too little housing is being built and what policy actions would be most effective in alleviating this issue. While these topics are outside the scope of my study, further inquiry into the real causes of California's housing crisis could focus on NIMBYism and how it affects local zoning decisions, high costs of land and construction, and tax incentives (e.g., Prop. 13). In comparison to these factors, my research demonstrates that CEQA, as currently applied, is not a significant impediment to housing affordability in California.

32 Senate Envtl. Quality Committee, State of Cal., California Environmental Quality Act (CEQA) Survey 9 (2017), https://senv.senate.ca.gov/sites/senv.senate.ca.gov/files/ceqa_survey_full_report_-_final_12-5-17.pdf (last visited Aug. 20, 2020).
33 *Id*. at 9.
34 *Id*. at 11.
35 TOM ADAMS & DAVID PETTIT, Plan. & Conservation League, CEQA: The Litigation Myth (2013), https://www.pcl.org/media/2019/05/CEQA_Litigation_Analysis.pdf.
36 Dep't Housing & Community Dev. et al., State of Cal., California Affordable Housing Cost Study 24–25 (2014), https://www.hcd.ca.gov/policy-research/plans-reports/docs/finalaffordablehousingcoststudyreport-with-coverv2.pdf.
37 *Id*. at 33–34.
38 *Id*. at 40.
39 Liam Dillon, *This bill would let new homeless shelters and affordable housing bypass environmental law*, L.A. Times (2020), https://www.latimes.com/california/story/2020-01-08/affordable-housing-homeless-shelter-bill-bypass-environmental-law-ceqa.

Novel Legal Challenges to the Danish Ghetto Laws: A Tripartite Approach

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This paper considers the so-called "ghetto laws" recently introduced in Denmark. The laws prescribe harsher treatment and lesser social benefits for residents of ethnic ghettos in an effort to promote integration of migrants into Danish culture. The laws have been the subject of numerous protests, but no legal challenge has yet been mounted to repeal them. In this paper, I examine whether the laws would pass muster in three courts: the Danish Supreme Court, the European Court of Justice, and the European Court of Human Rights. In regard to the latter two, Denmark, although not a member of the Eurozone, is not exempt from EU law. The paper concludes that there is a basis for challenging the laws under the Danish Constitution, as well as under EU law. They fail to satisfy the Danish constitutional requirement of non-discrimination in the granting of civic benefits, as well as a number of European non-discrimination laws. However, a lack of precedent and a historical reluctance to conduct judicial review through either the Danish or the European courts mean that such a challenge is not guaranteed to succeed.

I. The Danish Ghettos and the Ghetto Laws

Denmark, like many of its neighboring countries, has experienced a significant influx of migrants from the Middle East over the course of the past three decades. As a member of the European Union, Denmark is bound by the Schengen Agreement of 1995 to allow free movement into Denmark from other European countries.[1] Like in many of its peer nations, this has led to a sizeable migrant population from Eastern European countries, who hope to find better economic opportunities in an affluent state such as Denmark. In 2020, immigrants numbered a little over six hundred thousand, making up about a tenth of the Danish population.[2] This number is on the lower end of European nations: Germany, Belgium, and the Netherlands, for example, all had a higher share of immigrants in their population.[3] In 2019, Polish immigrants were the largest ethnic group present in Denmark. Syrian and Turkish immigrants formed the second and third largest groups, respectively.[4]

Although the demographics of immigrants in Denmark are quite varied, anti-immigrant sentiment has focused specifically on those from majority Muslim countries. This is not a new phenomenon: Danish political parties have used themes of migration and "Islamification" to drum up votes since 1995.[5] Evidence for Danish nationalism can also be found in the rising share of seats in the Folketing[6] held by the Danish People's Party, Denmark's far-right populist party known for its anti-immigrant and Islamophobic platform.[7] Although the Social Democrats, Denmark's center-left party, remain Denmark's most popular party by far, Islamophobia has become relatively blatant in Danish legislation. Political analysts have pointed out that the Social Democrats have increasingly adopted the Danish People's Party's immigration platform, thereby shifting Denmark's entire political spectrum toward a more nationalist slant.[8] This paper focuses specifically on the so-called "ghetto laws," which were first approved in May 2018.[9] The laws were supported by almost all major parties, including the far-left Socialist People's Party, ostensibly "intended to combat the social problems that plague struggling neighborhoods and improve the lives of their residents."[10] Practically, they form a package of policies that apply only in "ghetto areas," a list of which is compiled and published by the Danish Ministry of Transport, Building and Housing annually. The ghettos are defined as:

1 EUR-Lex Publications Office, European Union, The Schengen Area and Cooperation, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33020 (last visited Dec. 25, 2019).

2 Statistics Denmark, Immigrants and their descendants (2020), https://www.dst.dk/en/Statistik/emner/befolkning-og-valg/indvandrere-og-efterkommere.

3 U.N. Dep't of Econ. & Soc. Affairs, Population Div., World Population Prospects: 2019 Revision, *in* World Bank, Net Migration, https://data.worldbank.org/indicator/SM.POP.NETM (last visited Dec. 25, 2019).

4 Agnete Lundetræ Jürgensen, Denmark: number of immigrants by country of origin 2019, Statista, http://www.statista.com/statistics/571909/number-of-immigrants-in-denmark-by-country-of-origin/ (last visited Dec. 12, 2019).

5 Ellen Brun & Jacques Hersh, *The Danish Disease: A Political Culture of Islamophobia*, Monthly Rev. (2008), https://monthlyreview.org/2008/06/01/the-danish-disease-a-political-culture-of-islamophobia/ (last visited Dec. 12, 2019).

6 Folketinget, Kingdom of Den., Members in each Party Group, https://www.thedanishparliament.dk/en/members/members-in-party-groups (last visited Mar. 10, 2021).

7 *See, e.g.*, Karina Piser, *The European Left's Dangerous Anti-Immigrant Turn*, The Nation (June 7, 2019), https://www.thenation.com/article/archive/denmark-social-democrats-welfare-chauvinism/ (last visited Apr. 4, 2020).

8 Farhiya Khalid & Nikolaj Houmann Mortensen, *How anti-immigrant sentiment infected Denmark's politics*, New Statesman, https://www.newstatesman.com/world/europe/2019/06/how-anti-immigrant-sentiment-infected-denmark-s-politics (last visited Dec. 12, 2019).

9 Regeringen, Kingdom of Den., Ét Danmark Uden Parallelsamfund (2018), https://www.regeringen.dk/media/4937/publikation_%C3%A9t-danmark-uden-parallelsamfund.pdf.

10 *See* John Graversgaard & Liz Fekete, *Denmark's 'ghetto package' – discrimination enshrined in law*, Inst. of Race Rel., http://www.irr.org.uk/news/denmarks-ghetto-package-discrimination-enshrined-in-law/ (last visited Dec. 23, 2019); Rik Rutten, *Assimilation, or Alienation? Denmark Mulls 'Ghetto' Laws Targeting Immigrants*, World Pol. Rev. (Nov. 13, 2018), https://www.worldpoliticsreview.com/articles/26741/assimilation-or-alienation-denmark-mulls-ghetto-laws-targeting-immigrants.

A general residential area with at least 1,000 residents, where the proportion of immigrants and descendants from non-western countries[11] exceeds fifty percent and where at least two of the following four criteria are met:[12]

I. The proportion of residents aged 18–64 who are unemployed or not enrolled in some form of education exceeds forty percent on average over the past two years.
II. The proportion of residents convicted of violating the Criminal Code, the Arms Act or the Drugs Law is at least three times the national average over the past two years.
III. The proportion of residents aged 30–59 who only have a basic education exceeds sixty percent.
IV. The average gross income for taxpayers aged 15–64 in the area (excluding current students) is less than fifty-five percent of the average gross income for the same group in the country as a whole.

As of 2018, there were twenty-nine areas characterized as "ghettos," with fifteen of those being "hard ghettos." An area is classified as a "hard ghetto" if it has stayed on the ghetto list for more than five years. Together, these areas are home to roughly sixty-thousand inhabitants.[13] For the purpose of EU law, it is important to note that ghettos are not classified based on the nationality of the inhabitants. Rather, the ghettos are designated based on *ethnicity*, which is a protected class in the European Union. An area that meets two or more of the four aforementioned criteria but does *not* have a majority non-Danish population is classified as a "vulnerable housing area" and would *not* be included in the ghetto laws.[14]

The laws prescribe harsher punishments for crimes committed by residents of ghettos, as well as require specific actions to be taken by residents in order to facilitate their "assimilation" into Danish culture. Some of the more salient policies include:[15]

I. Lower unemployment payments and educational benefits[16] for residents of ghettos.
II. Significantly increased police presence in ghetto areas, as well as more traffic checks and other police actions.
III. Creation of a "sharpened penalty zone": penalties for low-level crime (e.g., vandalism or petty theft) would increase significantly, and penalties for high-level crime (e.g., robbery or murder) would increase by one third. Certain offences that were so far punishable by fine only will now be punishable by imprisonment.[17]
IV. Compulsory daycare or language stimulation programs for all children who are either bilingual or do not speak Danish at home, starting at age 1 for a minimum of thirty hours per week. Children that do not reside in ghettos may not be assigned places in daycares adjacent to ghettos.
V. Withholding of children's benefit[18] if a child raised in a ghetto area either fails their final exams or is absent for more than fifteen percent of classes in a given quarter. This section also leaves open the possibility of establishing curfews or mandatory after-school program attendance for students who are in danger of failing either of the two aforementioned criteria.
VI. Criminalization of ghetto parents who send their children on "re-education"[19] journeys, punishable by up to four years of imprisonment or deportation, regardless of citizenship or residency status. This section also allows for the withdrawal of ghetto children's passports if there is reason to believe parents are attempting to send their child on such a journey.
VII. Limit the share of public housing to forty percent of total housing stock.

The response to these proposed laws has been mixed. Some see them as a way to prevent immigrants from abusing Denmark's generous welfare system, whereas others claim they unfairly discriminate against minorities.[20] The seventh rule in particular has led to outcries from many sides, including the United Nations, which believes that upwards of a thousand people will lose their homes as Denmark demolishes public housing to reach the forty percent quota.[21] In response to those who protest that the laws are unjust and inequitable, Denmark's Minister of Justice claimed that "[the allegations are] nonsense and rubbish. To me this is about, no matter who lives in these areas and who they believe in, they have to profess to the values required to have a good life in Denmark."[22] The government has further

11 Statistics Denmark, under the Danish Ministry for Economic and Interior Affairs, defines "non-Western" as any country outside the EU, with the exceptions of Andorra, Australia, Canada, Iceland, Liechtenstein, Monaco, New Zealand, Norway, San Marino, Switzerland, the USA, and the Vatican State. The effect is that "non-Western" disproportionately means Denmark's non-white, non-European ethnic populations. *See* Press Release, Office of the United Nations High Comm'r for Human Rights, UN human rights experts urge Denmark to halt contentious sale of "ghetto" buildings (Oct. 23, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26414&LangID=E#:~:text=If%20redevelopment%20is%20not%20practical,residents%20may%20be%20forcibly%20relocated.&text=Under%20the%20laws%2C%20when%20they,Danish%20values%E2%80%9D%20and%20Danish%20language.

12 Emphasis added.

13 Sidsel Overgaard, *In Denmark's Plan To Rid Country Of 'Ghettos,' Some Immigrants Hear 'Go Home'*, NPR (Mar. 30, 2018), https://www.npr.org/sections/parallels/2018/03/30/593979013/in-denmark-s-plan-to-rid-country-of-ghettos-some-immigrants-hear-go-home.

14 Regeringen, *supra* note 9.

15 *Id.*

16 Danish students are paid roughly nine hundred dollars per month for attending university. Under the ghetto laws, residents of ghettos would not be eligible for this benefit.

17 This specifically applies to repeat offenders.

18 Denmark, like many Western European countries, provides parents a stipend of roughly seven hundred dollars per quarter per child. This varies slightly as children age.

19 This refers to trips to an immigrant's "home country." The reasoning behind the law is that retaining roots in your country of origin will hamper assimilation into Danish society.

20 *See, e.g.*, Ellen Barry & Martin Selsoe Sorensen, *In Denmark, Harsh New Laws for Immigrant 'Ghettos,'* N.Y. Times (July 1, 2018), https://www.nytimes.com/2018/07/01/world/europe/denmark-immigrant-ghettos.html (last visited Dec. 25, 2019).

21 Press Release, Office of the United Nations High Comm'r for Human Rights, *supra* note 11.

22 *Outrage in Denmark after EU-funded report brands it "Islamophobic"*, The Local (Nov. 6, 2019), https://www.thelocal.dk/20191106/outrage-in-den-

argued that the laws only affect those who break the law and that minorities who follow the rules thus have little to fear. However, a recent report on Islamophobia commissioned by the European Union cited the ghetto laws as an example of the increasingly hostile climate Muslims face in Europe, explicitly linking the laws to Islamophobia and discrimination. The report claimed that the laws "in practice restrict the freedom of Danish Muslims"[23] and that they represent a growing "ethnocracy [in Denmark]."[24] In response, Denmark's Minister of Foreign Affairs Jeppe Kofod said that he was "really angry" about the report, as well as that "EU funds should not be used to finance a Turkish NGO's report on Islamophobia in Europe, including Denmark."[25]

Whether or not these laws were motivated by Islamophobia is outside the scope of this paper. That being said, ghettos are defined as having fifty percent or more non-Western residents, and since immigration to Denmark is primarily from the Middle East (as well as from Eastern Europe), it is in effect an Islamophobic policy. In that way, the ghetto laws seem to violate the principles of equality so frequently espoused in Danish—and more broadly, European—society.[26] This allows for a number of possible legal challenges to the proposed laws, three of which will be detailed in the following sections.

II. A Constitutional Challenge Through the Danish Supreme Court

A. Denmark's Constitutional Framework

Denmark has been a constitutional monarchy since 1849, when its first constitution was adopted, and its current rendition dates from 1953.[27] Among other things, the Danish constitution lays out a form of government governed by parliament, where powers are separated into a legislative, executive, and judicial branch. The constitution further spells out a number of fundamental rights that apply to all Danish citizens. Some of these rights include:

> 1. "No Danish subject shall, in any manner whatsoever, be deprived of his liberty because of his political or religious convictions or because of his descent"[28]
> 2. "Parents or guardians making their own arrangements for their children or wards to receive instruction equivalent to the general primary school standard shall not be obliged to have their children or wards taught in a publicly provided school."[29]
> 3. "No person shall by reason of his creed or descent be deprived of access to the full enjoyment of civic and political rights . . . ."[30]

Denmark's constitution is relatively sparse in comparison to some of its peer nations, but it nonetheless goes some way toward granting inalienable rights to its citizens.

Neither descent nor creed is sufficient to deprive any person of their "civic and political rights,"[31] according to the Danish constitution. However, the ghetto laws seem to do exactly that. Migrants who choose to send their children on vacations to their country of origin are criminalized, whereas ethnic Danes and their children enjoy absolute freedom of movement. Daycare is made compulsory for those who do not speak Danish at home, while ethnic Danes are free to keep their children at home until they reach primary school age.[32] Educational benefits and unemployment insurance, both very much seen as civic rights in Denmark,[33] are lower for residents of ghetto areas.

B. Judicial Review in Denmark

There is limited legal precedent for judicial review in Denmark. In a report to the Conference of European Constitutional Courts, the Danish Supreme Court wrote that

> [t]he Danish Courts have . . . since long clearly stated that they consider it to fall within their competence to examine the constitutionality of Parliamentary Acts, and the Supreme Court has in a judgment from 1999 set a Parliamentary Act aside on grounds that the act was unconstitutional.[34]

The 1999 judgment in question revolved around the Tvind network of schools.[35] In this case, the Danish government cut off funding for a number of Tvind schools based on a suspicion that they had been forging and artificially inflating enrollment numbers. Fearing an overwhelming number of lawsuits, the legislature enacted a bill prohibiting the Tvind schools from suing the government over lost funding. The Supreme Court ruled that this violated the separation of powers, and as such it declared the law unconstitutional. In its ruling, the Court wrote that it "finds, that § 7 in law nr. 506 of the 12 of June 1996 is invalid with regards to The Free School in Veddinge Bakker as contradicting the Basic Law §3, 3. pkt."[36] Although

mark-after-eu-funded-report-calls-it-islamophobic (last visited Dec. 17, 2019).

23 Sibel Özcan & Zeynep Bangert, Islamophobia in Denmark: National Report (2018), *in* European Islamophobia Report 2018, at 251, 258 (Enes Bayrakli & Farid Hafez eds., Found. for Pol., Econ and Soc. Res. 2018), https://www.islamophobiaeurope.com/wp-content/uploads/2019/09/EIR_2018.pdf.

24 *Id*. at 278.

25 The Local, *supra* note 22.

26 *See, e.g.*, Ministry of Foreign Aff. of Den., Kingdom of Den., Income and gender equality, https://denmark.dk/society-and-business/equality (last visited Apr. 4, 2020).

27 Folketinget, Kingdom of Den., The Constitutional Act of Denmark, https://www.thedanishparliament.dk/en/democracy/the-constitutional-act-of-denmark (last visited Dec. 25, 2019).

28 Folketinget, Kingdom of Den., My Constitutional Act 40 (2014), https://www.ft.dk/~/media/pdf/publikationer/english/my_constitutional_act_with_explanations.ashx (last visited Dec. 25, 2019).

29 *Id.* at 44.

30 *Id*. at 39.

31 *See, e.g.*, Jens Faerkel, *Some Aspects of the Constitution of Denmark*, 17 Irish Jurist 1 (1982).

32 Even then they are able to keep their children at home, as long as the children "receive instruction equivalent to the general primary school standard."

33 See Danmarkskanon, Denmark Canon, https://www.danmarkskanon.dk/om-danmarkskanonen/english/.

34 Supreme Court of Denmark, Danish National Report: For the XIVth Congress of the Conference of European Constitutional Courts 1 (Nov. 30, 2007).

35 The Tvind school network is an organization of private alternative schools in Denmark, founded in 1970. It has been at the center of a number of controversies.

36 M.H. Jensen & J.P. Christensen, *Højesterets afgørelse i Tvind-sagen*, Ugeskrift for Retsvæsen 223 (1999).

this is the only case in Danish history where the declared a law unconstitutional, the legality of judicial review has never been disputed in the country.[37]

Judicial review is thus a tool that is available to the Danish Supreme Court, but the Court has historically been reluctant to use it. Part of this reluctance stems from a propensity toward parliamentary precedence in Denmark, a doctrine common throughout Scandinavia which implies that the legislative branch "has a qualified or preferred, position vis-a-vis the executive and the judiciary."[38] This belief is facilitated by the Danish constitution, which outlines preciously little inherent powers for the judiciary or executive branch. Alf Ross, a prominent Danish legal scholar, argues that

> only the legislature has direct constitutional competence. The legislature can fulfill its function relying on the Constitution alone, whereas the executive and the judiciary in addition must have legal authority from legislated acts. The powers as institutions are all mentioned in the Constitution, but as functions, the legislature is superior.[39]

Scholars have noticed that the Danish court frequently practices "soft" judicial review: they occasionally interpret the law in a broad sense to protect the rights of citizens, but rarely get involved in politically sensitive issues where they would have to practice "hard" judicial review, where they explicitly declare a law unconstitutional.[40] Denmark's parliament has also been fairly respectful of individual rights and freedoms over the years, allowing for a more hands-off judicial system.[41] That being said, judicial review in the Danish Supreme Court remains an option for challenging the ghetto laws.

C. Challenges

A case against the ghetto laws would almost certainly run into a number of difficulties, many of them stemming from the nebulous nature of the Danish constitution.[42] A case would likely need to claim that the ghetto laws violate civic rights on the basis of creed or national descent. Unfortunately, "civic rights" are never explicitly defined in the Constitution. One could make the argument that many of the actions prohibited by the ghetto laws, such as sending children back to their country of origin, are privileges, rather than rights. Furthermore, ghetto areas are defined both by their ethnic composition and by their meeting two out of four criteria. Since these four criteria are not strictly related to ethnicity, but rather to poverty or crime, it may be difficult to argue that ghetto areas are solely ethnic or religious enclaves. This is an essential part of arguing that citizens are being discriminated against on the basis of ethnicity or creed. No similar case has yet been tried by the Danish Supreme Court, so it is difficult to anticipate the way the Court would approach such arguments.

III. A Legal Challenge Through European Courts

European courts pose as another way of challenging the Danish ghetto laws. Denmark has been a full member state of the European Union, and the European Communities prior to that, since 1973.[43] While it is not a member of the Eurozone, it is not exempt from European Union law nor from supervision by the Court of Justice of the European Union and the European Court of Human Rights.[44] The former is seen as the Supreme Court of Europe, and it deals with all matters of EU law. The latter is specifically tasked with hearing cases regarding violations of human rights provisions in the European Convention on Human Rights. The relationship between these two courts and their respective jurisdiction is not always clearly delineated, but both have the power to issue binding judgments over EU member states.[45]

A. Court of Justice of the European Union (ECJ)

i. Judicial Review and European Union Law

The Court of Justice of the European Union (ECJ) was established in 1952, but it only reached its current form with the signing of the Maastricht Treaty in 1993.[46] According to Article 263 of the Treaty on the Functioning of the European Union,

> [t]he Court of Justice of the European Union shall review . . . the legality of acts of bodies . . . of the Union intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. . . . Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them . . . .[47]

As such, any individual can bring suit to a nation with the ECJ as long as the suit addresses an "act which is of direct and individual concern to them." There is some precedent of the ECJ engaging in judicial review of member states' laws. In *Sean Ambrose McCarthy*

37 Unlike in the United States, judicial review in Denmark does not have the power to "strike down" a law. Rather, it can declare the enforcement of certain laws to be unconstitutional, which would de facto render a law useless.

38 Sten Schaumburg-Muller, *Parliamentary Precedence in Denmark - A Jurisprudential Assessment*, 27 Nordisk Tidsskrift for Menneskerettigheter 170, 171 (2009).

39 *Id*. at 170.

40 *Id*. at 176.

41 *See, e.g.*, Danish Inst. for Human Rights, Human rights in Denmark, https://www.humanrights.dk/our-work/our-work-denmark (last visited Dec. 30, 2019).

42 Faerkel, *supra* note 33.

43 *See* Ian Bache et al., Politics in the European Union, 119–133 (Oxford Univ. Press 4 ed. 2014).

44 *See* European Union, EU Law (2016), https://europa.eu/european-union/law_en (last visited Dec. 30, 2019).

45 *See e.g.*, Snezana Bardarova, *Comparison Between the European Court of Justice and European Court of Human Rights*, SSRN (June 18, 2013), https://papers.ssrn.com/abstract=2281215 (last visited Dec. 30, 2019).

46 Encyclopaedia Brittanica, Court of Justice of the European Union (Apr. 20, 2020), https://www.britannica.com/topic/European-Court-of-Justice.

47 Consolidated Version of the Treaty on the Functioning of the European Union, EU, art. 263, May May 99, 20089, EUR-LEX 12008E2632008 O.J. (C 115) 162.

et al. v Secretary of State for the Home Department, the ECJ struck down a UK law requiring non-citizen EU residents[48] to acquire a visa before entering the United Kingdom.[49] The Court held that this law infringed on the "right of citizens of the Union and their family members to move and reside freely within the territory of the Member States."[50] In general, the ECJ has maintained that "an infringement of the Treaties or of any rule of law relating to [the application of a law]" is grounds for judicial review.[51]

The European Union has enacted fairly extensive anti-discrimination legislation. For example, it expressly prohibits discrimination on the basis of racial or ethnic origin in relation to "social protection, including social security and healthcare; social advantages; education, and access to and supply of goods and services which are available to the public, including housing."[52] The European Union does, however, allow for member states to "discriminate" in the case of "positive action." This refers to situations in which "[member states maintain or adopt] specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin."[53] Furthermore, the European Union's framework does not cover "difference of treatment based on nationality . . . and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned," as long as that discrimination does not involve EU citizens.[54] European non-discrimination law is marked by a sort of hierarchy, with EU law providing stronger protection against discrimination based on racial or ethnic origin than it does for most other classes.[55] As such, EU law presents a promising pathway for challenging the Danish ghetto laws.

ii. Relevant Case Law of the ECJ

The ECJ has ruled in favor of applicants in some cases that are pertinent to the Danish ghetto laws. In *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, a non-Roma Bulgarian alleged that the district she worked in had electricity meters installed at a difficult-to-reach height because of the high density of ethnic Romanis in the area. As such, she claimed discrimination on the basis of nationality and ethnicity, even though she was not a member of the group that was being discriminated against.[56] The Court held that, regardless of the applicant's ethnicity, the placement of electricity meters did constitute unfavorable treatment of a specific ethnic group, and as such was in violation of the non-discrimination directive. The Court further held that a measure does not need to be introduced with discrimination as its main purpose in order to amount to discrimination, but merely needs to "[have] the effect of placing particularly persons possessing that characteristic at a disadvantage."[57] This holds important implications for the ghetto laws: as long as an applicant is able to prove that ethnic minorities are placed at a disadvantage because of the laws, the Court could find them discriminatory.

In *European Commission v. Republic of Austria*, an Austrian law granting reduced public transport fare only to students whose parents received Austrian government benefits was deemed discriminatory. The ECJ found that this law was likely to unfairly disadvantage non-Austrians without sufficient reason, and felt that it constituted clear discrimination on the basis of nationality and citizenship.[58] Since the ghetto laws would similarly reduce benefits for a protected class (albeit based on ethnicity rather than nationality), this case could prove predictive of the viability of a legal challenge to them. Similarly, *Heinz Huber v. Bundesrepublik DE* saw an Austrian residing in Germany file suit against the German state for its refusal to remove his personal data from their files. This data was collected only for non-German residents, which Germany argued was required for statistical purposes.[59] Pursuant to Article 9 of Regulation 2016/679,[60] the ECJ ruled that discrimination in data collection would only be allowed if *necessity* could be demonstrated—that is, if the State could demonstrate a compelling government interest that could not be fulfilled in any other way.[61] In *Heinz Huber*, the Court did not see the necessity of having personalized data for statistical purposes, and as such it ruled in favor of the applicant. The concept of necessity is a recurring one in EU law,[62] and it is one to which the ghetto laws would likely have to conform. Whether or not the laws serve a government interest that could not be fulfilled in a less discriminatory way would be up to the Court to decide.

iii. Implications for the Ghetto Laws

European Union law seems irreconcilable with the Danish ghetto laws. Under these laws, access to social advantages and education can reasonably be seen as being dependent on ethnicity. Furthermore, access to housing is prohibited for residents of ghettos who are convicted of a crime, whereas non-ghetto residents in social housing are not moved after a conviction. The European Union's anti-discrimination legislation mentioned above also champion the importance of equality before the law, regardless of ethnicity or nationality. Instituting stricter penalties for residents of ethnic ghettos is at odds with this fact. However, a challenge to these laws before the ECJ would run into similar problems as a challenge under Danish constitutional law. For one, it would be difficult to prove that the ghettos are purely ethnic or religious enclaves, which

48 The case dealt specifically with those who obtained this status by virtue of marriage or family relations with an EU citizen.
49 Case C-202/13, Sean Ambrose McCarthy et al. v. Sec'y of State for the Home Dep't, 2014 E.C.R. 1 (Dec. 18, 2014).
50 *Id*.
51 Gabriël Moens & John Trone, Commercial Law of the European Union 361 (2010), https://doi.org/10.1007/978-90-481-8774-4_11.
52 Council Directive 2000/43, art. 3(1)(e), 2000 O.J. (L 180) 22, 24 (EC).
53 Council Directive 2000/43, art. 5, 2000 O.J. (L 180) 22, 24 (EC).
54 Council Directive 2000/43, art. 3(2), 2000 O.J. (L 180) 22, 24 (EC).
55 *See, e.g.*, Erica Howard, *EU anti-discrimination law: Has the CJEU stopped moving forward?*, 18 Int'l J. Discrimination & L. 60 (2018).
56 Case C-83/14, CHEZ Razpredelenie Bulg. AD v. Komisia za zashtita ot diskriminatsia, 2015 E.C.R. 1 (July 16, 2015).
57 *Id*. at 18.
58 Case C-75/11, Eur. Comm'n v. Republic of Austria, 2012 E.C.R. 366 (Nov. 24, 2012).
59 Case C-524/06, Heinz Huber v. Bundesrepublik Deutschland, 2008 E.C.R. 9725 (Dec. 16, 2008).
60 This regulation supplanted Directive 95/46/EC in 2016. At the time of *Heinz Huber*, the latter was still in effect, but Regulation 2016/679 is not substantially different in content or meaning for our purposes.
61 Case C-524/06, Heinz Huber v. Bundesrepublik Deutschland, 2008 E.C.R. 9725 (Dec. 16, 2008).
62 *See* Panos Koutrakos, *The Notion of Necessity in the Law of the European Union*, 41 Neth. Y.B. Int'l L. 193 (2010).

is something that the anti-discrimination clauses are entirely dependent on. That being said, *CHEZ* established that any law placing a protected class at a *de facto* disadvantage could be seen as discriminatory. A defense of the laws could also claim that these ghetto laws constitute "positive action"—they attempt to prevent disadvantages linked to ethnicity by forcing children to learn Danish from an early age and by instituting a "tough on crime" attitude, among other things. However, it is questionable whether this defense would satisfy the necessity requirement established in *Heinz Huber*.

B. European Court of Human Rights (ECHR)

i. Judicial Review and the Convention of Human Rights

The European Union has adopted a number of fundamental human rights established by the European Convention of Human Rights (ECHR) and outlined in the Charter of Fundamental Rights, and the ECHR is the institution tasked with enforcing them. These rights include, among others, "the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right" (Article 14); equality before the law (Article 20); and non-discrimination based on gender, nationality, race, ethnicity, etc. (Article 21).[63]

Like the ECJ, the ECHR has the power to conduct judicial review of member nations' legislation. The ECHR will typically rule on whether a law was misinterpreted or wrongfully applied in a certain case, and it will either uphold or reject the ruling of a lower national court. Although rare, "in cases of systemic shortcomings, typically of a legislative kind, the Court can identify legislation which a State should pass, modify, or repeal. The Court offers these judgments in an effort toward non-repetition. 'Measures of non-repetition are mandates that require states to change their policies and their practices to avoid the repetition of violations.'"[64] This means that they do not repeal laws outright but only order a review of them to prevent a similar case from appearing before the court again—a form of "weak" judicial review. This is a key difference between the ECHR and the ECJ. In *M. v. Germany*, for example, the plaintiff had been detained beyond his original sentence as "preventive detention."[65] The Court held that his detention was an unjust deprivation of liberty under Article 5, Section 1 of the Human Rights Charter, and it recommended that Germany reconsider the domestic legislation that had enabled this violation. As a result, Germany ordered a judicial review of all prior cases that occurred under the same statute and declared unconstitutional the mandate that allowed for preventive detention.[66]

ii. Relevant Case Law of the ECHR

Of the three articles mentioned above, the ECHR most frequently hears cases regarding Article 21 (non-discrimination). This article is also the most promising avenue through which to challenge the ghetto laws. The laws constitute what could be seen as "discrimination based on any ground such as . . . race, colour, ethnic or social origin, . . . religion or belief, . . . [or] membership of a national minority," which the Convention and Charter prohibit. The Court has held that direct discrimination occurs when "an individual is treated less favourably; by comparison to how others, who are in a similar situation, have been or would be treated; and the reason for this is a particular characteristic they hold, which falls under a 'protected ground.'"[67] Under ECHR rules, an applicant must be able to prove they were directly affected by discrimination, similar to the requirement of "standing" in U.S. law.

The ECHR has heard a number of cases that could have implications for the Danish ghetto laws. In *Savez crkava "Riječ života" and Others v. Croatia*, for example, the Croatian government refused to grant certain privileges to three Reformist churches, even though these privileges were granted to other religious communities.[68] The Court found that a violation of Article 21 had occurred, given that there was a clear difference in treatment between two different religious groups. It held that "the State had a duty to remain neutral and impartial in exercising its regulatory power in the sphere of religious freedom and in its relations with different religions, denominations and beliefs."[69] Were the Court to extend this ruling to the duty of impartial provision of benefits and neutral administration of justice, it could have pivotal implications for the Danish ghetto laws.

In *Biao v. Denmark*, a Danish national born in Tonga sought a residence permit for his Ghanian wife.[70] At the time Denmark had a law requiring Danish citizens who were not born in Denmark to prove the strength of their ties to Denmark in order to receive a family residency permit, and the applicant failed to demonstrate sufficiently strong ties. The ECHR ruled in favor of the applicant, arguing that Danish citizens born elsewhere are likely to disproportionately be of a different ethnic origin, and that the law was therefore discriminatory on the basis of ethnicity.[71] This ruling, in particular, is relevant to the ghetto laws in Denmark. The Court was willing to *infer* that a law discriminated on the basis of ethnicity, even though it did not explicitly say so in the legislation. The fact that ethnic discrimination was likely to result *de facto* was sufficient for the Court to establish a violation of Article 21.

Finally, in *Ponomaryovi v. Bulgari*a, an applicant was required to pay school fees in Bulgaria due to his lack of a residence permit, whereas those who held residency were allowed to at-

63 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.
64 Courtney Hillebrecht, *The power of human rights tribunals: Compliance with the European Court of Human Rights and domestic policy change*, 20 Eur. J. of Int'l Rel. 1100, 1103 (2014).
65 M. v. Germany, Eur. Cr. H.R. (2009).
66 *See* Marianna Klaudia Lévai, Indefinite Sentencing in Criminal Law: A Human Rights Perspective 43 (2013).
67 European Union Agency for Fundamental Rights, Handbook on European Non-Discrimination Law 42 (2010), https://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf.
68 Savez crkava "Riječ života" and Others v. Croatia, Eur. Cr. H.R. (2010).
69 *Id.*, at 26.
70 Biao v. Denmark, Eur. Cr. H.R. (2016).
71 *Id.* at 34–35.

tend secondary education for free.[72] The Court held that this constituted discrimination on the basis of nationality, and ordered Bulgaria to reimburse the applicant for all fees.[73] Here, the Court was unwilling to accept the government's argument that this discrimination was required to achieve a necessary aim—namely, to reduce government spending on benefits for non-Bulgarians.

iv. Implications for the Ghetto Laws

The above cases show that the ECHR has previously been willing to hear non-discrimination cases, and the Danish ghetto laws seem at least as discriminatory as the laws in *Savez crkava "Riječ života," Biao*, or *Ponomaryovi*. However, the Court has been reluctant to extend these rulings beyond the specific cases they arose from. In Ponomaryovi, the Court wrote that "[i]t is not the Court's role to consider in the abstract whether national law conforms to the Convention"[74] and that "a State may have legitimate reasons for curtailing the use of resource-hungry public services—such as welfare programmes, public benefits and health care—by short-term and illegal immigrants . . . ."[75] The ECHR thus explicitly limits itself to specific cases, and it is careful not to impede on member nations' sovereignty. As such, there is no strong established precedent for challenging the ghetto laws—rather, the Court would likely view the case on its own merits and consider the unique context that led to the creation of these laws. The ECHR has further established that differential treatment can be justified, but only if it can be shown "that the rule or practice in question pursues a legitimate aim; that the means chosen to achieve that aim . . . is proportionate to and necessary to achieve that aim, . . . that there is no other means of achieving that aim that imposes less of an interference with the right to equal treatment. . . , and that the disadvantage suffered is the minimum possible level of harm needed to achieve the aim sought . . . ."[76] A possible defense of the ghetto laws could thus be that they are meant to achieve a legitimate aim (integration of non-ethnic Danes) and that they are both proportionate and necessary. That being said, the aforementioned non-discrimination cases saw the defense make similar arguments, and the ECHR maintained a stringent standard of proof in regards to a law having a "legitimate aim" and being "proportionate to" that aim.

The ECHR is slightly more constrained than the ECJ. It requires that applicants have standing, lacks explicit power of judicial review, and focuses on specific cases rather than on establishing broad precedent. That being said, the Court has repeatedly ruled in favor of applicants when it comes to non-discrimination cases, and the ghetto laws certainly seem incompatible with the European Union's Charter of Fundamental Rights. *Biao* established that laws need not be discriminatory *de jure* in order to be found in violation of the right to non-discrimination, which is likely to be a key point in any case involving the ghetto laws. A legal challenge to the ghetto laws by way of the ECHR may thus not be as promising as one by way of the ECJ, but it is by no means dead in the water.

IV. Legal Challenges to the Ghetto Laws: A Promising Path?

A number of directives set forth in the Danish ghetto laws have been enacted into law, and today residents of Danish ghettos face increased criminal punishment, mandatory pre-school programme, a burqa ban, and more.[77] The remaining directives are set to be implemented in the coming months. So far, challenges to the laws have yet to veer into the legal realm. Civil discontent has primarily been voiced through peaceful protests and newspaper opinion columns.[78] This paper has attempted to show the promise of a legal challenge to the ghetto laws, and it has set out a tripartite framework to do so. The laws could be challenged under the Danish constitution, European Union law, or under the European Union's Charter of Fundamental Rights. Of these three options, the latter two seem most promising—the Danish Supreme Court has been reluctant to engage in judicial review, and it has generally demonstrated an acceptance of parliamentary precedence. The European courts, in contrast, have heard a number of cases regarding discriminatory legislation, and they have repeatedly ruled in favor of applicants. The drawback of both courts is that member nations cannot be pressured into implementing their judgments into domestic legislation; in 2018, nearly ten thousand judgments made by the ECHR were yet to be implemented, some dating from 1992.[79] The ECJ has enacted a system of financial penalties to punish non-implementation, but it similarly fails to wield real authority over member states' domestic legislation.[80]

It is thus unclear whether a legal challenge under any of these three frameworks would result in a repeal of the laws. The larger issue surrounding these laws is that they enjoy widespread political support across the ideological spectrum. Until Danish citizens stop supporting nationalist rhetoric and stop empowering xenophobic politicians, the ghetto laws are likely to survive in one form or another. The surest way to challenge them can be found at the ballot box, not the courthouse. However, few Danes today feel warmly towards migrants, which Denmark's public policy reflects.[81] As of yet, there does not seem to be enough public outrage (or even public concern) to put a halt to the ghetto laws.

72 Ponomaryovi v. Bulgaria, Eur. Cr. H.R. (2011).
73 *Id*. at 18, 20.
74 *Id*. at 17.
75 *Id*. at 15.
76 European Union Agency for Fundamental Rights, *supra* note 71, at 43Justification for less favourable treatment under European non- discrimination law in Handbook on european non-discrimination law 91-103, (Europäische Union, Europarat, & Europäischer Gerichtshof für Menschenrechte eds., 2018 edition).
77 *See* Graversgaard & Fekete, *supra* note 10.
78 *See, e.g.,* Peoples Dispatch, *Danish activists protest "ghetto" law that targets minorities*, Peoples Dispath (Oct. 1, 2019), https://peoplesdispatch.org/2019/10/01/danish-activists-protest-ghetto-law-that-targets-minorities/ (last visited Dec. 31, 2019).
79 Ginger Hervey, *Europe's human rights court struggles to lay down the law*, Politico (Sept. 20, 2017), https://www.politico.eu/article/human-rights-court-ilgar-mammadov-azerbaijan-struggles-to-lay-down-the-law/ (last visited Dec. 23, 2019).
80 *See* European Comm'n, Infringement Procedure, https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en (last visited Dec. 23, 2019).
81 Kevin T. Smiley, Michael Oluf Emerson, & Julie Werner Markussen, *Immigration Attitudes Before and After Tragedy in Copenhagen: The Importance of Political Affiliation and Safety Concerns*, 32 Soc. F. 321, https://doi.org/10.1111/socf.12332.

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