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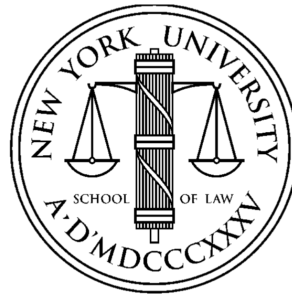

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Or land or life, if freedom fail?
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SUMMARY OF CONTENTS

Tributes

Introduction by Kathryn Morris xii
Robert Schwartz xv
Olivia Golden xviii
Martin Guggenheim xxi
John Sexton xxiv
Jim Weill xxviii
Elaine Jones xxxi
Sara Rosenbaum xxxvi
Acknowledgement by Marian Wright Edelman xli

Articles

No Child Left Behind? An Interest-Convergence Roadmap to the U.S. Ratification Of the Convention On the Rights of the Child
Ndjuoh MehChu 1

Juvenile Court Interagency Agreements: Subverting Impartial Justice to Maximize Revenue from Children
Daniel L. Hatcher 33

Putting Poverty Law Into Context: Using the First Year Experience to Educate New Lawyers for Social Change
Zoe Niesel 97

Notes

The Way We Do Things Around Here: What Progressive Prosecutors Can Learn from Corporate Compliance
Yelena Niazyan 131

This Volume of

New York University Annual Survey of American Law

is respectfully dedicated to

MARIAN WRIGHT EDELMAN

Marian Wright Edelman

MARIAN WRIGHT EDELMAN

Marian Wright Edelman, founder and president emerita of the Children's Defense Fund (CDF), has been an advocate for disadvantaged Americans for her entire professional life. Under her leadership, CDF has become the nation's strongest voice for children and families. Mrs. Edelman, a graduate of Spelman College and Yale Law School, began her career in the mid-60s when, as the first black woman admitted to the Mississippi Bar, she directed the NAACP Legal Defense and Educational Fund office in Jackson, Mississippi. In l968, she moved to Washington, D.C., as counsel for the Poor People's Campaign that Dr. Martin Luther King, Jr. began organizing before his death. She founded the Washington Research Project, a public interest law firm and the parent body of the Children's Defense Fund. For two years she served as the Director of the Center for Law and Education at Harvard University and in l973 began CDF. Mrs. Edelman served on the Board of Trustees of Spelman College which she chaired from 1976 to 1987 and was the first woman elected by alumni as a member of the Yale University Corporation on which she served from 1971 to 1977. She has received over a hundred honorary degrees and many awards including the Albert Schweitzer Humanitarian Prize, the Heinz Award, and a MacArthur Foundation Prize Fellowship. In 2000, she received the Presidential Medal of Freedom, the nation's highest civilian award, and the Robert F. Kennedy Lifetime Achievement Award for her writings.

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TRIBUTE TO MARIAN WRIGHT EDELMAN

KATHRYN MORRIS

What is the worth of a child? Imagine a world where children are not valued, where we do not put their needs and desires before our own. Imagine a world where we do not invest in their future, where we do not make sacrifices to ensure their health, happiness, and spiritual wellbeing.

What is the worth of a child? Not so long ago, the worth of a child was measured by the value of her labor.[1] On our farms, children were responsible for household chores, so that men could go and work in the fields. Industrialization created a special demand for child labor in our factories and our textile mills, because their small hands were perfectly equipped to work among the dangerous machinery. For the working-class family, a child was a vital source of income. She was the secondary wage earner to her father, because her mother's place was still in the home.

The American Society for the Prevention of Cruelty to Animals predated any organization devoted to the protection of children. Early advocates for the rights of children had to confront a society that did not recognize their worth beyond the value of their labor.

In our cities, automobiles and streetcars soon replaced horse-drawn carriages. The streets, once the playgrounds of our children, became the scene of public tragedy. In the 1920s, sixty percent of all vehicle-related deaths were children under the age of nine.[2] On May Day in 1926, the nation mourned the 7,000 children killed in the previous year alone.

What is the worth of a child? In wrongful death suits, our courts held that the life of a slain child was valued at the lost labor and wages to her parents.[3] For children too young to work, there was no compensation for their grieving parents because there was no economic value in their lives. For the working-class family who relied on the earnings of their child, insurance companies offered life policies specifically for children. Advocates argued that such policies were the continued exploitation of children even in death. They warned that allowing parents to bet on their

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1. VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD 56-72 (1985).
2. Bill Loomis, *1900-1930: The years of driving dangerously*, DETROIT NEWS (April 26, 2015, 2:14 p.m.), https://www.detroitnews.com/story/news/local/michigan-history/2015/04/26/auto-traffic-history-detroit/26312107/ [https://perma.cc/UY7Y-JH8R].
3. ZELIZER, *supra* note 1, at 138-68.

child's mortality could lead to abuse and neglect. But for some, the economic need was real. The payout on a child's life policy determined whether the child would receive a proper Christian burial or a pauper's grave.

Early state legislation regulated child labor to provide working children a minimum education but did not exclude them from the labor market. It was not until 1938, with the Fair Labor Standards Act, that child advocates bounded over the first hurdle towards children's rights.[4]

But, with this new federal law, we had to redefine the worth of a child. It was no longer the value of her labor. The worth of a child was now the sentimental value to her family. In wrongful death suits, juries began to award significant damages. This was in part to acknowledge that no amount can ever really make parents whole again after the loss of their child.

But should the worth of a child be her sentimental value? Should she be a symbol of youth and innocence to society? An object of parental affection, to be coddled and adored? What becomes of the value of a child who is forgotten, neglected, or seemingly unloved?

Marian Wright Edelman is one of the child rights advocates of our time. The worth of a child does not come from the value of her labor, nor from the love and affection of her family. Her worth comes from within—it is her dignity, her spirit, that gives her value.

Mrs. Edelman, you have always seen the worth of every child. You have fought for their rights.[5] Because of you, there are children who are free from hunger and homelessness. Because of you, there are children who have access to healthcare. Who have a foundation to be successful in the classroom. And who feel safe, supported, and loved in their homes and communities.

Mrs. Edelman, through the Children's Defense Fund, you have provided us with a model of excellence.[6] Through your organization's policies and lobbying, you have created a path for us to follow and to continue the advocacy for children's rights. We cannot imagine a world where children are not valued. We cannot imagine a world where we do not invest

4. 29 U.S.C. § 203 (1938)

5. CHILDREN'S DEFENSE FUND POLICIES AND PRIORITIES, https://www.childrensdefense.org/policy/policy-priorities/ [https://perma.cc/DC5H-BJ82] (last visited April 10, 2019).

6. CHILDREN'S DEFENSE FUND 40+ YEARS OF VIGILANCE (2018), https://www.childrensdefense.org/wp-content/uploads/2018/08/40-years-of-vigilance.pdf [https://perma.cc/Z8K5-QCCR].

in their future. Thank you for helping us see their dignity, their spirit, their worth.

TRIBUTE TO MARIAN WRIGHT EDELMAN

ROBERT G. SCHWARTZ

It is an honor for me to join today's tribute. Marian has taught and inspired me, and countless colleagues, many of whom have passed through NYU's doors. It is fitting, indeed, that we celebrate Marian at *this* law school, with its unparalleled history of advocating for the rights and well-being of children and families.

When I was young, before so many of us turned gray, I was part of a team that founded the Juvenile Law Center. That was 1975. We were influenced by a one-year-old, bright yellow paperback edition of the Harvard Educational Review. That volume, on the rights of children, was breathtaking. There were articles by Walter Mondale, Hillary Rodham, Peter Edelman, Mary Jo Bane and a dozen other luminaries.

The article that bewitched me most, as I took my first toddling steps as a lawyer, was an interview with Marian. The opening question to her was, "You recently announced the formation of a new organization, the Children's Defense Fund. Can you tell us what it is and why it was created?"[1]

"CDF," Marian said, "is an attempt to create a viable, long-range institution to bring about reforms for children. If they are to receive fair treatment and recognition in this country, children require the same kind of planned, systematic, and sustained advocacy, legal and otherwise, that the NAACP Legal Defense and Education Fund . . . instigated for blacks three decades or more ago."[2] That resonated in the early days of the Juvenile Law Center, where we saw ourselves as building on the civil rights movement. Marian in 1974 went further, identifying half a dozen issues that she would pursue from the outset, including exclusion of children from school and reform of the juvenile justice system. Marian's issues, as was so often the case, would become the Juvenile Law Center's. (I was also excited to see the word "Fund" appear in CDF's name—only to be disappointed when I learned that CDF wasn't a funding source after all).

In the years that followed, Marian built a political powerhouse. She did it with a stellar CDF staff. She did it by finding strategic allies, by

1. *An Interview with Marian Wright Edelman*, 44 HARV. EDUC. REV. 53, 53 (1974).
2. *Id.* at 53-54.

building coalitions, by mobilizing parents and advocates, interested citizens, people of faith, and people who had faith in children. Marian's CDF was a force on Capitol Hill. As a young lawyer in the early 1980s, I was excited when CDF asked me to testify about reducing the use of foster care before Tom Downey's House Ways and Means subcommittee. CDF gave me my first taste of testifying in Congress. Marian and her staff knew how to build a record that a progressive Congress could use. Marian also helped folks like me gain our place in the world of child advocacy. She wasn't worried about turf. Marian wanted results, and she was happy to bring a callow advocate like me along, as long as I advanced the cause.

In 1992, Marian published a book, *The Measure of Our Success: A Letter to My Children and Yours.* It's a slender, wise volume. I got my copy at one of the annual, national conferences that Marian convened to mobilize her people. In this book, Marian wrote that she learned from her parents that "service is the rent we pay for living."[3] She wrote that in her family there was no talk of "burnout."[4] In *The Measure of Our Success,* Marian also observed that "It does not take character, intellect or talent to inherit a million dollars or to be born white or male."[5]

One of Peter and Marian's amazing sons, Jonah, wrote the forward to *The Measure of Our Success.* Jonah wrote that his mother was "probably one of the most honest people in the world."[6] Indeed, honesty is one of Marian's many virtues— in modern jargon, one associates Marian's "brand" with honesty, excellence, intellect, passion, justice. It was no accident that the Juvenile Law Center asked Marian to sit in 2000 for our twenty-fifth anniversary video. We knew that Marian's presence alone would reflect well on us. She shared her brand. I can tell you that I was deeply moved when I heard Marian talk. If Marian Wright Edelman was saying good things about the Juvenile Law Center and me, well, maybe we really were making a difference in the world.

In 2014, on the anniversary of the 1974 Educational Review and CDF's founding, Harvard's Graduate School of Education brought Marian together with practitioners and scholars. We reflected on topics dear to Marian, a list of CDF's greatest hits: prenatal and infant health, early childhood care, school reform, vulnerable children, child poverty. I was there as a juvenile justice practitioner.

3. MARIAN WRIGHT EDELMAN, THE MEASURE OF OUR SUCCESS 6 (1992).
4. *Id.*
5. *Id.* at 26.
6. *Id.*

The symposium glimpsed back but, in keeping with Marian's way of looking at things, it was largely devoted to the future. Participants took ideas that were once revolutionary—ideas like Head Start, or a youth's entitlement to due process when charged with a crime—and showed how we could make them better, comprehensive, permanent.

The symposium produced a book—the third that I'm citing tonight to capture the arc of Marian's time at CDF. It is called *Improving the Odds for America's Children: Future Directions in Policy and Practice.* Marian wrote the afterward, an ironic title for an essay about the years to come.[7]

"As we look toward the future," Marian wrote, CDF "remains steadily focused on helping catalyze and mount the transforming nonviolent social justice movement for children our nation desperately needs and on pursuing justice for children and the poor with urgency and persistence."[8]

Urgency and persistence. In today's high-tech world, there are very few people who can pursue *anything* for more than a few minutes with urgency and persistence. Marian has done it for decades.

In her 1992 book, *The Measure of Our Success,* Marian told a story about Sojourner Truth. "One day during an anti-slavery speech she was heckled by an old man. 'Old woman, do you think that your talk about slavery does any good? Why I don't care any more for your talk than I do for the bite of a flea.' 'Perhaps not [Sojourner Truth replied], but the Lord willing, I'll keep you scratching.'"[9]

A few years ago, the Juvenile Law Center had a small DC event to honor Marian and Peter. Marian, I noticed, wore a Sojourner Truth medal around her neck. Marian is Sojourner Truth's heir. Marian is in a line of persistent advocates who have made their mission the improvement of other people's lives. If I had a book to sign for Marian today, I would inscribe it the way she did in my copy of *The Measure of Our Success.* I would write, "To Marian, with love and deep gratitude for all you do for children."

7. MARIAN WRIGHT EDELMAN, IMPROVING THE ODDS FOR AMERICA'S CHILDREN: FUTURE DIRECTIONS IN POLICY AND PRACTICE, AFTERWARD (Kathleen McCartney, Hirokazu Yoshikawa, & Laurie B. Forcier, eds., 2014).

8. *Id.* at 220.

9. MARIAN WRIGHT EDELMAN, *supra* note 3, at 59-60.

TRIBUTE TO MARIAN WRIGHT EDELMAN

OLIVIA GOLDEN

It's an honor to be here with such distinguished colleagues to honor Marian Wright Edelman. Marian was my first boss when I came to D.C., more than twenty-five years ago. I've thought of her and what I learned from her so many times over those years—and especially in the last two years. In this time that has demanded strength, clarity, strategy, and passion above what any of us thought we could give, Marian has been my gold standard.

And of course, I'm just one of many people who came to Marian early in a career and soaked up what she had to teach. From the beginning, she has left an extraordinary legacy for younger leaders. From the CDF staff and board, to her alums including Hillary Clinton and Maggie Williams, along with Geoffrey Canada and Angela Glover-Blackwell, whom I met as young rising stars on the CDF Board, as well as people who may be less famous to the outside world but who are essential to advocacy for children and low-income people in Washington, D.C. That includes people like Debbie Weinstein, the long-time leader of the Coalition for Human needs, Cliff Johnson, the creator of a child and families advocacy team at the National League of Cities, and Arloc Sherman, the brilliant numbers expert at the Center for Budget and Policy Priorities. What did all of us in this CDF diaspora learn from Marian? Three themes keep coming back to me.

First, Marian taught us to hold on stubbornly to our own core values and instincts. She taught by example, and sometimes by words, that we should never allow others to define our mission in life or the values we hold dearest. She often quoted a phrase she attributed to her childhood: "assign yourself," meaning that each of us holds the responsibility for figuring out what needs to be done.

One of my most vivid CDF memories is a story told to me by the late Paul Smith, our beloved research and data guru, who had been with Marian for years and served some of us newer recruits as a guide. He said to me once, "You always need to remember that somewhere inside Marian is still that young woman standing up to the sheriff in a small southern town." That story was about Marian's courage and defiance—but also about a good kind of stubbornness, holding a line because you knew in your own core-being that it divided right from wrong. So, while that story taught me a great deal about Marian, I have come to think it also captured

something she taught us about ourselves: that each of us needs to find and define that stubborn core. In these last years of the Trump administration, that lesson has been constantly in my mind.

A second lesson that all of us who worked at CDF of course absorbed was Marian's big project: placing child advocacy at the center of an economic and racial justice advocacy agenda. She placed children at the center for two reasons: because of who they are—their vulnerability and the moral importance of how society treats them—and also because sympathy for children offers a way of engaging the public in caring about their families and communities. CDF's goal was that people's moral and emotional reaction to the suffering of children would help bridge racial and class divides and lead to solutions.

In keeping with this aim, Marian always viewed children in the context of their parents and their communities. She and the CDF have been models to a child advocacy world that can sometimes blur parents out of the picture or look for solutions that bypass them. For example, I remember how valuable I found the reports we did while I was at CDF on "Young Parents," showing that young children's poverty arises in part from the inadequate earnings of young adults. The good news is that this lesson stuck with me after I left, and I've replicated that analysis in the poverty report that the Center for Law and Social Policy (CLASP) puts together each year. But the bad news is that the grim result remains true today. CLASP's analysis of the Census Bureau's most recent poverty data showed that fully one in five parents under age 30 lives in poverty.[1]

The persistence of this and other grim news about child and young adult wellbeing does raise a question about the effectiveness of centering advocacy on children. Does the bad news undermine Marian's powerful and influential insight about child advocacy as a driver for change? It's always easy to give up hope, particularly now when attacks on children—especially children in immigrant families and children of color—are so widespread and hate-filled.

But I remain convinced that advocacy for children and their families is a crucial lever for reform. For one thing, despite the disappointments, there are important successes where children's experiences have powerfully moved people and politics, including in these past two years. Perhaps

1. HANNAH MATTHEWS, CTR. FOR L. AND SOC. POL'Y, CHILDREN AND FAMILIES IN TROUBLE: CENSUS DATA SHOWING DECLINING HEALTH COVERAGE AND ENDURING POVERTY (2019), https://www.clasp.org/sites/default/files/publications/2019/09/2019_povertydatabrief.pdf [https://perma.cc/SND4-VKT6].

most dramatically, in the outcry against separating children from their parents at the border. For another, the moral urgency of child advocacy remains undimmed. Children are the poorest Americans, and we owe it to them to persist in fixing the damage. And finally, no single strategy for reform has ever been sufficient in itself – that's the wrong standard for success. Marian's core insight about the power of advocating for children doesn't transform the nation all by itself, but it remains indispensable many decades after her initial framing.

But in these last few months of political turmoil, I've thought most of all about a third lesson Marian taught me: her commitment to both long-term vision and immediate (even call it incremental) success. In my first few months at CDF, which were also my first months in Washington, I remember feeling honored and awed to be invited to a dinner Marian hosted at her home for advocacy and policy thought leaders in Washington, D.C. At the end of the evening, I was a lot less awed by the thinkers and by Washington, D.C., and a lot more awed by Marian. I felt truly grateful to work for someone whose vision was not bound by what was possible in the current Congress. Her sense of the sweep of American history taught her that the limits that look permanent today could collapse tomorrow.

Yet at the same time, Marian never believed in holding off on doing good today in favor of perfection ten years from now. An old friend who worked for Marian decades ago told me a story that resonated with my own experiences. She asked Marian whether she should accept a compromise on a piece of legislation she was working on, and Marian responded: "If it will improve children's lives, then take it."

At a moment when so much commentary tries to pit big picture, visionary, long-term reforms against so-called "incremental improvements," it's especially important to hold onto this "both-and" framing. We should not delay improving people's lives right now when we have a chance, and we shouldn't hold back from the grand sweep of change over the longer haul. That lesson, among so many others, is one that I owe to Marian.

I don't know if the United States will come out of this perilous time with our democracy intact and with the enormous public energy for change successfully channeled to tear down the barriers of poverty and injustice. But if we do, that success will be Marian's legacy, due at least in part to her inspiration, the leaders she has guided, and the wisdom she has offered to all of us. Thank you.

TRIBUTE TO MARIAN WRIGHT EDELMAN

MARTIN GUGGENHEIM

It's a great pleasure and honor to be here.

I'm embarrassed to acknowledge that until today, I had never met Marian Wright Edelman personally. I've never quite understood how that could be true, since I've dedicated my life to children's rights, and I worked very closely with her husband Peter for many years. Despite having never met you, I was more than thrilled to be asked to say some words to honor your remarkable career, and I thank Kathryn for this opportunity.

This is always a very special event at the law school. *Annual Survey's* yearly dedication invariably chooses an eminently worthy person. And as amazing as each of them is, they feel honored to be associated with the brilliant men and women that are on this distinguished list. Reviewing just some of the individuals who have been honored before gives you a sense of what I mean. William Brennan, Thurgood Marshall, Harry Blackman, John Paul Stevens, Sandra Day O'Connor, Ruth Bader-Ginsburg, Sonia Sotomayor, Hillary Clinton, Janet Reno, Ronald Dworkin, Anthony Amsterdam, Lawrence Tribe, Desmond Tutu. Just some of the names. You may have noticed a decided preference for important judges and brilliant legal scholars, along with a nod to public officials, but no one, no one before, has led the life, *lived* the life, of public service.

I can't call you Marian, I'm sorry. I'll call you Dr. Edelman, because of your 103 honorary degrees. By the way, how many of us, when we Google our names, can find the title "Top 25 Quotes by Marian Wright Edelman?" She can.

But we honor you outside of the academy, the courthouse, or as a public official. You're unique, and I am so proud of *Annual Survey* for recognizing how special you are, and what you mean to this country. What you did was create the most important NGO of its kind in the world. You set out to change how we treat children, with a strong commitment to improving the lives of what society perceives to be the least important people in this country. And that's not children, that's poor children of color. That's been your compass of true-north, and I know no one who has walked that walk with the integrity, commitment, vision, and brilliance you have. Truly nobody can compare to you, and to what you've accomplished.

The sad truth about the United States is that it is both the richest country in the world and ranks at the very bottom in sharing its wealth with children. One of your methods which I've always so appreciated is

your shaming effort of America. Because when I'm feeling blue, I consult the CDF website, and I get to read the truth about our country, spoken in a unique voice of clarity. And I ask the students in the room who mean to honor Marian Wright Edelman's life to consult that website this week and learn things about this country that you may not know, but that is important you learn.

The shaming includes an annual report that ranks each state in terms of child poverty. There's a chart of children living in extreme poverty. A chart of children under six. There's a chart of children living in poverty by race. Consider this: in only four states in the country is the percentage of black children living in poverty below twenty percent.[1] In ten states, the percentage of black children living in poverty is greater than forty percent, ranging as high as seventy-five percent in Idaho.[2] In Ohio, fifty-five percent of black children under six live in poverty.[3] If you don't know that, it's because you haven't followed the work of Marian Wright Edelman. She screams this out daily, but few of us are aware of it. Or too few of us are aware of it. Forty percent of Hispanic children in Ohio live in poverty.[4]

I could go on, but I won't, given the hour, to talk about the truths that Marian Wright Edelman speaks daily through her website, and through the work. The list of things that CDF has accomplished is remarkably long. The list of things it needs to accomplish is considerably longer. And I know there's nobody in this room who believes that and understands that more than you. It's what makes you so special. You know you're not special. You're wrong, but you know that.

Here are some of her quotes. "I'm sure I'm impatient sometimes. I sure do get angry. I think it's outrageous how hard it is to get this country to feed its children, and to take care of its children, and to give them a decent education."[5] "We have the capacity to make sure that every mother has prenatal care, yet we don't do it. What is it about America? It says we don't value children and families, we're hypocrites."[6] "Child poverty and

1. CHILD.'S DEF. FUND, CHILD POVERTY IN AMERICA 2017: STATE ANALYSIS 4 (2018), https://www.childrensdefense.org/wp-content/uploads/2018/09/Child-Poverty-in-America-2017-State-Fact-Sheet.pdf [https://perma.cc/9P34-QDBX].

2. *Id.* at 4, 16.

3. *Id.* at 17.

4. *Id.* at 19.

5. *Marian Wright Edelman Quotes*, BRAINYMEDIA INC., https://www.brainyquote.com/quotes/marian_wright_edelman_463726 [https://perma.cc/J2J6-439Y] (last visited Apr. 22, 2019).

6. *Marian Wright Edelman Quotes,* BRAINYMEDIA INC., https://www.brainyquote.com/quotes/marian_wright_edelman_463730 [https://perma.cc/H3Q3-KMBB] (last visited Apr. 22, 2019).

neglect, racial disparities in systems that serve children, and the cradle to prison pipeline are not acts of God, they are America's immoral, political, and economic choices that can and must be changed with strong political, corporate, and community leadership."[7]

Those are the focused and crucial ideas of Marian Wright Edelman, and that's why you're my hero.

Thank you.

7. Marian Wright Edelman, *The Cradle to Prison Pipeline: America's New Apartheid*, CHILD.'S DEF. FUND (Feb. 6, 2009), https://www.childrensdefense.org/child-watch-columns/health/2009/the-cradle-to-prison-pipeline-americas-new-apartheid [https://perma.cc/D5FE-PKB5].

TRIBUTE TO MARIAN WRIGHT EDELMAN

JOHN SEXTON

When Lisa and I graduated from law school in 1979, it was impossible to be a law student or young lawyer without knowing that one of the heroes of the law was Marian Wright Edelman. In 1980, our first year in D.C., the Children's Defense Fund (CDF) was already an admired public interest organization and Marian's work was legendary. Interestingly, though we were in the same city for two years and had scores of mutual connections, to the best of my knowledge, we never met and certainly never forged a friendship.

Marian entered our lives as a friend one year after we had settled in New York; Lisa at the Revson Foundation, and I at NYU. I remember the night when Lisa, at dinner, first described the work at the CDF that she proposed to support with a grant from the Foundation. Suddenly, the hero whom we had admired became a person known to us. There was excitement in Lisa's description of the possibilities she saw—an excitement that was vindicated in the record of the following decades, the record we honor today.

At the time, Hilary Clinton was the chair of the CDF's board. So, it came to be that three quite magnificent women forged a friendship and, in many respects, a partnership. Eventually, the three husbands were added to the circle. And that is how Marian, the person, entered my life. So, like many things, this blessing—my friendship with this very special woman—came to me through Lisa.

Today, several distinguished colleagues and friends will speak of Marian's extraordinary professional accomplishments and, in a moment, I will highlight just a few of those achievements from a particular angle. I want to begin, however, by telling you a more private story, one that illustrates what I believe is a foundational trait of Marian's continued success.

Early on, in the summer of either 1983 or 1984, the three women conceived of gathering a dozen or so people for several days of collective conversation in a relaxed setting where we all would be together around the clock. It was a form of intellectual retreat. They decided that we would discuss certain big topics and that we would read a set of common books in advance of gathering. Notwithstanding the ample time for social activities and sidebar conversations, there was substantial designated time each

day for serious conversation on designated topics. The husbands were invited to participate; this was the first time I met Peter, Marian's husband, and Bill Clinton. We repeated these conventions for a few years.

What I found extraordinary about those summer days is something that I think always has been reflected in Marian's work: the importance, even as one deals with immediate challenges, of concentrating on how those immediate challenges and even intermediate needs can be shaped to serve long-term goals.

This capacity to operate effectively on several levels simultaneously within the context of a complex organization with pressing immediate needs is a very rare talent; and it is a talent Marian possesses in abundance. Many will speak of her achievements in advancing the cause of children—from primary education, to healthcare, to a number of other areas. My point is that her singular success on those fronts is a product of her capacity to think and act in this multi-dimensional way.

So it is, for example, that one of the first accomplishments of the CDF was the enactment of the Education for All Handicapped Children Act in 1975.[1] Only two years after founding the CDF, Marian engineered this legislation which brought education to millions of disabled children. But even as she celebrated this advance, Marian already was working to build upon the victory. Like Thurgood Marshall carefully building the precedents to support *Brown*,[2] or Ruth Ginsburg building the precedents to support *Roe*,[3] she, on the political front, was molding the form of a future victory. Through the CDF, she founded two Freedom Schools in 1995. Since then, tens of thousands of children have been given a meaningful, high-quality education during their summers, in over 183 program sites around the country. From there, she built further victories. From 1975 through today, Marian has forced the country to change its approach to educating impoverished and disabled children.

In the same way, Marian led the long-term effort to expand children's healthcare. In 1984, she and the CDF achieved the passage of the Children's Health Assurance Program, which expanded Medicaid to 500,000 mothers and children who previously were not eligible for healthcare coverage. With these most pressing needs met, she immediately began work to expand healthcare coverage to every child in America. A little over a decade later, she had secured passage of the Children's

1. Pub. L. No. 94-142, 89 Stat. 773.
2. Brown v. Board of Education, 347 U.S. 483 (1954).
3. Roe v. Wade, 410 U.S. 113 (1973).

Health Insurance Program in 1997; today, 9.4 million children are covered by CHIP.

One final example, perhaps the clearest, is the work she has done over decades to put in place the next generation of advocates for children. The Beat the Odds Program, founded in 1990, has rewarded many high school students who faced extraordinary challenges on the road to success. Alumni of Beat the Odds have gone on to graduate from competitive colleges; one has become a Rhodes Scholar. These students have become the contemporary versions of a younger Marian (Marian is still young); they are tomorrow's change agents. And the graduates of Beat the Odds are not alone in Marian's army of advocates. My daughter, Katie, today is a legal aid lawyer working with children; I am certain that a subliminal influence in her career choice came from the stories she heard about Marian at our dinner table. Perhaps Marian's greatest long-term legacy is the thousands of Katies she has inspired. She showed the way, and they will follow it.

Since Lisa's death, I have followed Marian's career more from a distance, but always with admiration. I never hear her name without experiencing a flood of memories of how she, already a model for anyone associated with the law or public advocacy, took seriously people far junior, including Lisa and me. But there have been some poignant intersections, one of which I will use to conclude.

This semester I am teaching again my course, *Baseball as a Road to God*. As part of the course, the students will watch a documentary film: BROOKLYN DODGERS, GHOSTS OF FLATBUSH.[4] I have told over the decades, in many contexts and on five continents, what I consider to be one of my greatest stories—the story of how I experienced October 4, 1955, the day the Brooklyn Dodgers won the World Series for the first—and as it turned out, the last—time. I will not tell that story today; those of you who want to hear it can watch the film, because, simply put, I never told that story as well as I got to tell it with the brilliant artistic supplementation provided by a young man named Ezra Edelman in that documentary film. Ezra Edelman is Marian's son.

Having my story memorialized in a film was a treat. But a greater treat was the time off camera spent with Ezra talking about his mother. We all should be so lucky as to be loved by our children the way she is loved by him.

So, I close by saying, as Lisa would want me to say, that I have observed Marian from many angles. Yes, I have seen her as the hero of

4. BROOKLYN DODGERS, GHOSTS OF FLATBUSH (HBO June 28, 2007).

the law that we celebrate today. But I also have seen Marian as a friend, a mentor, a wife, and a mother. To those who are privileged to know her in all of those roles, no amount of celebration will be enough. To friends, family, colleagues, and children around the country, Marian is, and has been, a constant blessing.

TRIBUTE TO MARIAN WRIGHT EDELMAN

JIM WEILL

I am hugely honored to have been asked to participate in this tribute today to Marian Wright Edelman, and to be among this group of distinguished speakers. Choosing to dedicate the 76th volume of the *Annual Survey of American Law* to Marian was a wonderful choice, and I congratulate the editors for doing so.

I will be focusing my remarks on three aspects of Marian's leadership: first is her pioneering of essentially a new area of social justice advocacy work; second is Marian's grounding of that work in her profound interest in and knowledge of American history; and third is Marian's ability to adjust her strategies to keep the work fresh and relevant, and to adapt to a rapidly changing American society.

Let me start with Marian's role as the pioneer of a new area of social justice work.

It would be an overstatement to say that Marian invented child advocacy in the United States. She would be the first to object to that, and she would call out the names of many forebears, many of them unheralded; many of them women; many of them people of color.

But when Marian launched the Children's Defense Fund in 1973, there was no entity like the one she set out to create—a multi-faceted advocacy organization committed to protecting the rights of and building support for children and their families. Not just through litigation but through research, lobbying, regulatory advocacy, network building, organizing, and consistent and outspoken moral leadership. CDF's work would span the spectrum from the most aspirational to the most granular interventions on behalf of children in need. And not just its strategies have been multi-faceted. So have been its concerns. It has addressed a robust range of issues central to children's lives.

The genius in the creation of CDF was in recognizing the size and shape of the vacuum of advocacy for children, and that American politics and jurisprudence needed—and would have to respond to—a forceful presence to fill that vacuum. And the genius in the creation of CDF came as well in the insight that meeting children's needs would be an important tool also for addressing the related harms of racism and poverty in this society.

As Marian herself has said, "I'd got the idea that children might be a very effective means for broadening the base for change."

The weaving together of these strands of meeting children's needs, promoting racial equity and pursuing aggressive anti-poverty advocacy created the fabric that has made CDF unique and Marian a clarion voice for justice for close to fifty years.

Second, Marian's vision for this effort also has always been intimately connected to her knowledge of the history of American social change movements. To work with Marian—and you can see and hear this in her writings and speeches as well as her day-to-day conversation—was to have an immersion course in the history of oppression, and resistance to it, that should define how one should act in an unjust society. It is no accident that she wears pendants with pictures of Sojourner Truth and Harriet Tubman. And the history she tells has continuity—it continues into our lifetimes as well, like her commitment to describing the courage of the women from the African-American communities in Mississippi who built the voter registration campaigns and the Head Start programs, while encountering fierce resistance. Marian knows this history, honors it, integrates it into her thinking and work and makes it real for the rest of us. She uses the history of these struggles for social justice as a source of inspiration and resilience for herself and those around her.

The third attribute of Marian that I want to point to is her foresight and ability—and willingness—to adjust her goals and methods. The story of CDF is a story of change not just in the sense of the organization being an effective agent of social change, but in the sense of the organization going through its own evolutions and revolutions. Its mission always remained the same and Marian never deviated an inch from the focused pursuit of that mission, but its strategies evolved as—for better and worse—the America around it changed for children, women, poor people, people of color, and for lawyers and advocates.

This coming June it will be fifty years since I graduated from this law school. It was also June 1969 when Warren Burger replaced Earl Warren as Chief Justice of the Supreme Court – one key starting point for the long-term erosion of litigation as a tool for enforcing basic rights and pursuing equality.

This erosion is not what those of us who had been inspired by cases like *Brown v. Board*,[1] *In re Gault*,[2] *Reynolds v. Sims*,[3] and *Goldberg v. Kelly*[4] foresaw. I'm not up here to complain about this, as much as that is

1. 347 U.S. 483 (1954).
2. 387 U.S. 1 (1967).
3. 377 U.S. 533 (1964).
4. 397 U.S. 254 (1970).

a strong temptation. Rather, my point is that Marian always has carved out new paths—rethinking the strategy and keeping CDF flexible. Within the progressive advocacy community as a whole, Marian's adaptations typically were ahead of and served as models for other groups.

Even in 1973, the year CDF was launched, some of the handwriting was on the wall when, for example, in *San Antonio Independent School District v. Rodriguez*[5] the Supreme Court largely eviscerated the ability to use the courts and Constitution as a means to achieve educational equity and quality. Throughout the 1970s and 1980s, while it kept litigating, CDF grew its toolkit of strategies, growing its research capacity, its lobbying capacity, its regulatory work, its budget analysis and particularly its state and local presence. These changes were complemented by a growing field capacity, and, more recently, a special focus on organizing among youth of color, ministers, and religious congregations.

These three qualities—an extraordinary conceptual breakthrough at the beginning, a deep connection to history and its meaning for the work, and unusual adaptability to new circumstances—combined with Marian's force of personality and commitment to moral leadership, have made her a leader not just in this country but around the world. For several years during the Clinton administration, Marian was the head of the U.S. delegation to the UNICEF Executive Board – in effect, the U.S. Ambassador to UNICEF. I saw there how child advocates and government and international agency officials from around the world reacted with deference and awe to meeting her and listening to her.

This was not because the U.S. was so advanced in its recognition of children's rights—very often, we lagged behind many or most other countries. It was because they felt that Marian had created a path that was important everywhere, that she inspired their efforts and that she embodied their aspirations and the qualities they wanted to bring to the work. And she is indeed a force, a unique leader of a compelling cause for our times that must engage us all. That is why we honor her today.

5. 411 U.S. 1 (1973).

TRIBUTE TO MARIAN WRIGHT EDELMAN

ELAINE JONES

Good afternoon, everyone. Evening, I guess I should say.

This is truly a wonderful occasion, and I am glad that all of us were able to get here. I was able to make it to New York from Washington, but the Lyft to NYU Law was not quite as easy to do.

Let me see my thoughts.

All of us are pleased to assemble this evening, to recognize the past, present, and continuing work of Marian Wright Edelman, because she is by no means finished. And she has spent decades molding our institutions, economic, social, political, educational, to recognize, serve, and promote and protect the interests of the least of these. The least of these, those who are most vulnerable. Those who are in greatest need. Those who should have the highest call on our collective conscience. Now, preeminent among these I am describing, are our children, for whom we are still not doing nearly enough. It is better than it has been, due principally to CDF's work. And as Robert Frost reminds us, we have miles to go before we sleep.[1]

I also must take a moment to applaud the editorial board of the NYU *Annual Survey of American Law*, because you deserve it. Honor the leadership of the 2019 Editor in Chief, Kathryn Morris, for choosing extraordinarily well, and dedicating this 76th volume to tonight's honoree.

What I find amazing, is how the *Annual Survey* persuaded the humble, erudite, hard-working, "MWE," as she is often lovingly and respectfully referred to behind her back, to allow us to pause for a well-deserved moment of recognition for her extraordinary achievements. Now, I am one who understands the absolute necessity of fundraising to support a nonprofit. And I could comprehend this a bit better were this a fundraiser for CDF. Or giving a scholarship to a worthy child. Or to finance a weekend to inspire and mold children and young adults at Haley Farm. Or even to help finance a summit or conference on some aspect of the elimination of poverty. This evening, however, is a tribute to the force of nature who has been trying to teach us for decades how to love all of our children. My experience also with MWE is that personal recognition is not her cup of

1. Robert Frost, *Stopping by Woods on a Snowy Evening*, *in* THE POETRY OF ROBERT FROST 224, 224 (1923).

tea. However, for a worthy cause, she will endure. Show up, be pleasant, and enjoy it.

But upon reflection, we must remember that Marian is an activist. However, she is also an author and a scholar. And through it all she has demonstrated an appreciation for a life of letters, for writing. Reflection, chronicling, teaching, and inspiring through the printed word. With her gifts of insight and strategic vision, she would understand, value, and be honored by the gift of this 76th volume, to inform and inspire generations to come. Therefore tonight, we thank you, the *Annual Survey*, for conceiving the 76th volume, and for persuading Marian to bear with us as we express our gratitude for using her extraordinary gifts to move us inch by inexorable inch to a realization of her vision.

There are others who will spend their time tonight talking about CDF. Those who work there, who understand it, who know it. That is really not my place. But I want to spend an additional few minutes thinking about Marian in a pre-CDF period. For as odd as it may seem, there was such a time.

To be frank, in hindsight, I can see that even during that pre-CDF period, the idea of CDF was planted and nurtured. Jack Greenberg, the head of the NAACP LDF from '61 to '84, had the uncanny ability (as did his predecessor, Thurgood Marshall) to find, fund, and otherwise support, talented students and young lawyers. Jack's goal was to identify promising young graduates whose goal was simply to serve, and to find a place where they could fight for racial justice and equality. As the new Director-Counsel of LDF in '61, Jack had to scramble and find some money. And he found some fellowship funds, so he could only fund two interns. And he funded Marian Wright, then a recent graduate in 1963 from Yale Law School, and Julius Chambers, the first African American graduate of the University of North Carolina School of Law, and LDF's third Director-Counsel.

Upon her graduation from law school, when Marian received that LDF fellowship, after a year in New York she was whisked off to Mississippi. And I can't say she became one of four black lawyers in Mississippi, because Marian was not then a member of the bar. And there were three gentlemen, one a former in his 80s, and two others who were in Mississippi. That was the Mississippi Bar. And Marian passed the bar the next year, in 1965, but during that 1964 year, that Freedom Summer year, she opened an office in a pool hall on Farish Street in Jackson, Mississippi, and clerked for the three black lawyers who were located downstairs. And so, everything that Marian wrote, they filed. They also signed everything she wrote. So, they'd get credit for it in terms of the historical record. So,

when Marian then became a member of the Mississippi Bar the following year, she was the first African American woman admitted.[2]

Now, I know her bar exam had to have been perfect, because if Mississippi could have found any pretense, they would have found it. Now I know this, personally, because I brought too many lawsuits against bar examiners in the early '70s across this country, especially in the South. Alabama, South Carolina, across the country, for messing around with the bar exams of African American students. And I would see C-O-L beside the name when we filed the lawsuit, and I asked in deposition one bar examiner, "what is C-O-L?" And they told me "colonel." I said, "so everybody was a colonel? Everybody black was a colonel?" So, Marian passed that bar exam. She was valedictorian from Spelman, and she did well, she's always done well.

But here is what's interesting. Judge Connor Martley was the first woman of color to try a case in Mississippi, but she was not a member of the Mississippi Bar, she didn't have to be. She came out of New York, went down there, tried a case, and went back. Marian was a different kettle of fish. She was living in Mississippi. Mississippi was home, and she was there for four years.

Marian had three law students who joined her, ones she knew before the bar, who joined her in her office. One of whom was Danny Parker, now a senior judge on the Second Circuit Court of Appeals. He learned a great deal from Marian, and I have not yet deposed him on exactly what all of that was, but that time will come.

The Jackson, Mississippi office with Marian at its head, with the sisters from LDF National Office, and Northern volunteers, handled more than 120 cases arising out of Freedom Summer, because that was Freedom Summer.[3] Some of which involved lots of defendants. She had school desegregation cases, peaceful protest cases, criminal justice cases, welfare and municipal service cases, employment discrimination cases, and cases seeking public accommodations particularly against most of the Dairy Queens in Mississippi, which strangely proved to be fairly intransigent when it came to desegregating its facilities.

During that four-year stint, CDF incubated in Marian, because she learned that lawsuits alone will not eliminate disparity, unequal treatment,

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2. *Marian Wright Edelman*, CHILD.'S DEF. FUND, https://www.childrensdefense.org/staff/marian-wright-edelman/ [https://perma.cc/U6E8-TGHG] (last visited Apr. 22, 2019).

3. *Freedom Summer*, THE MARTIN LUTHER KING, JR. RSCH. AND EDUC. INST., https://kinginstitute.stanford.edu/encyclopedia/freedom-summer [https://perma.cc/U6R3-XH2A] (last visited Apr. 22, 2019).

and segregation. When she became involved in bringing Head Start to Mississippi during that period, she knew then that the community and political action were needed in the struggle. So Marian was down there during some of the most turbulent years in Mississippi, giving it her all.

In 1967, she and Peter Edelman laid eyes on one another when he, as assistant to Robert Kennedy, showed up and within a year Mississippi was in the rearview mirror. Marian was back in D.C. marrying Peter the following year. But she didn't give up the struggle, she stayed with the struggle. This year, they've been together for fifty-one years, Marian and Peter. So now I want to read that book. She's written several, but that one I have not yet seen, and I'm waiting for it.

After beginning the Washington Research Project, she represented Dr. Martin Luther King in the Poor People's Campaign.[4] There she was, four years later, in 1972. I was a young lawyer at the Legal Defense Fund. Marian came in to meet with the board of directors. She was standing in front of the board, explaining her vision of this new institution devoted to molding children into wholesome, responsible adults. The reaction was interesting. They listened. They were intrigued. I wouldn't say enthusiastic, but they heard it. I was mesmerized. I think I was the youngest person in the room. But from that time on, listening to her passion and her commitment and seeing her vision—she has been a hero of mine from that day to this. And that has been forty-seven years.

I continue to learn from Marian, her conferences, her seminars, her work at CDF. She deserves all the honors we can give her. I mean, you know, the woman has more than 100 honorary doctorates. I guess that's easier than having to write dissertations, there, you only give a speech for the honorary doctorate, but we give her credit. You know, she's got more than 100, and they keep coming. She got one last year, got one the year before. All of the awards, she has earned, she deserves. And, paraphrasing, what comes to mind is: *the lives of great men and women all remind us we can make our lives sublime. And departing, leave behind footprints on the sands of time. Footprints that perhaps another, sailing o'er like Charlemagne, a forlorn or shipwrecked brother or sister, seeing, to take heart again*.[5]

4. *Marian Wright Edelman*, CHILD.'S DEF. FUND, https://www.childrensdefense.org/staff/marian-wright-edelman/ [https://perma.cc/3XU4-Y972] (last visited Apr. 22, 2019).

5. HENRY WADSWORTH LONGFELLOW, *A Psalm of Life*, *in* VOICES OF THE NIGHT: BALLADS AND OTHER POEMS 10 (1887).

Let us then be up and doing, with a heart for anything, still achieving, still pursuing, learn to labor, and to wait. Marian has big feet, and she continues to give us big footprints. And it's going to be very, very difficult to fill them, but all we can do is do our very best.

Congratulations, my friend.

TRIBUTE TO MARIAN WRIGHT EDELMAN

SARA ROSENBAUM

Well, it's an incredible honor to be here, and everybody who's spoken before me has given you sort of a wonderful soaring vision of Marian. So, given the hour, and that I'm the second to the last speaker, I'm going to tell you two stories. The first story, which I didn't put in my written remarks, tells you about Marian as a person. And the second story tells you about Marian as a leader.

So, the Marian as a person story goes like this: It was the end of the summer, 1980. CHAP, which nobody in this room except probably Marian remembers, was the Carter administration's failed Medicaid expansion initiative. It was going down the tube. And I had a new baby. It was too early to put her into childcare. She went off to a great childcare center, but they weren't ready to take her until she was 60 days old. So, unable to just stay at home, especially since in those days, there was no electronic connection to anything, I had to go to work. And I couldn't bear to stay away, because we were losing this Medicaid expansion, and here I had a baby, and this expansion was all about babies. So, I would bring the baby to work, and I was one of the most loving but incompetent mothers. I just couldn't figure out how to get my baby to go to sleep.

One afternoon, she was in the cradle screaming, and my office was a couple of floors above Marian's. And Marian came upstairs for some reason, and discovered the screaming baby, and said, "You clearly don't know what you're doing." So, she took the baby, and about 40 minutes later, I went down to her office on the second floor. I was, by then, sort of curious. And her door was closed, she had gone off somewhere. The door was closed, and there was a screaming baby inside. I could hear my baby screaming. And there was a sign on the door that said, "Quiet, baby sleeping." She had a real knack for teaching you that at some point, when your baby was really tired, sooner or later the baby would fall asleep, and I came back an hour or so later, and she'd had a nap. But she was a most wonderful friend, and just a wonderful human being. And I think in all of the incredible imagery of Marian, for all that she has accomplished in life, that to me is the most meaningful part of Marian. Just what a really wonderful person she is.

So now, here's my story about working with Marian. Working with her, obviously, was being a little part of history. Which we appreciated at the time, when we were going through it, although most of us who worked

at the Children's Defense Fund, we were all little kids. And so, we didn't quite appreciate what we were given, the honor we were given, when we were going through it, but we had a good sense. And what we understood was that CDF was, as many people have said now, about altering the course of events for children in many different areas. And the thing that was so incredible about CDF was that we could see, even if none of us saw the whole, that Marian had designed a mosaic in her head for children, and then she'd gone and built this fantastic organization that was going to make the mosaic come into life. And over the course of CDF's existence, as so many people have alluded to now, the impact that it's had is really incalculable.

But our global presence became evident to all of us, I think, in 1981. So, it was January of 1981. President Reagan had just taken office. The Carter administration was history. All of the initiatives were toast. But more important than being toast, of course, we were on the verge of losing everything. We had achieved a lot of victories at that point, although really, child health policy reforms had eluded us, and that was the area I worked in. And then suddenly, we were facing David Stockman and his black book,[1] which I'm sure many people in this room remember. I don't think it's possible to convey just how frightening that was. He was a brilliant man; he had assembled this black book. He was walking all around Washington with lists of programs that would go away. And everybody was essentially in despair.

But Marian, of course, wasted no time on despair. She announced—and this is the way Marian was—that we would have our own black book. He had a black book; we'll have a black book. And that black book would reintroduce poor children to lawmakers, in case they had forgotten about poor children. It would explain the programs that poor children depended on, and why and how the choices that they were about to make would matter so much to children and their families, and ultimately to the nation. The book would do more than just argue against the cuts. And this was, to me, core to Marian's brilliance. We were not, and you see a lot of this today, we were not just fighting about the cuts. Marian insisted that every chapter lay out the things that had to be done for children. And we all sort of scratched our heads, thinking we're barely holding on to what we've got, but every chapter had to have a positive agenda as well as arguments

1. *See* Sidney Blumenthal, *David Stockman: The President's Cutting Edge*, N.Y. TIMES (March 15, 1981), https://www.nytimes.com/1981/03/15/magazine/david-stockman-the-president-s-cutting-edge.html [https://perma.cc/YA2Z-55JB].

against the cuts. And putting that book together was an unbelievable experience.

So, basically, we were all assembled in this rambling building that we inhabited. There were rats in the basement. And we were given a few days, basically, to put this thing together. We all went off, we all compiled facts, we were called downstairs to the second floor to give Marian factoids. But the more common thing was that her wonderful assistant Beverly would come upstairs with notes. And the notes would say, can you get me X or Y? And the notes were totally unintelligible, you couldn't read anything Marian wrote down. And you'd sit there and puzzle over these notes. Just bewildered. We'd sort of make our way through, and this book came together.

It came together in great part because CDF had many subject area experts in various fields, who knew their stuff really well, whether it was education, or childcare, or health care, or whatever. And we had Jim, who was absolutely brilliant, and who, as you could hear tonight, sort of pull us all together and help with the big picture. And then there was, of course, the genius Paul Smith, who, you cannot imagine the reams of statistics he made come out of his hat at a time when I think he must have done it with a slide rule. I mean, we had no equipment.

And what ultimately emerged from all of this was really quiet a pathbreaking document. It was produced in record time. Marian told me tonight that everything is scanned in electronically, so I have to go and see if it still exists, the first black book. And it was black, it was this horrible Xerox job. It had our boat on it. And this thing was sock-o from the moment it hit. I mean, I've been practicing now for about forty-three years, and I have people today who I worked with way back at CDF, who come up to me and still talk about the black book. What a watershed it was. It was short. Our later books got much longer and more involved and had lots of tables. And Marian would think of more tables that she wanted. It had an incredible impact, and the impact was not just the agenda it laid out and the arguments against the cuts. It was a moment when suddenly things turned a little. There was a horribly long way to go, and we ended up losing a fair amount of ground in the '80s. We gained a lot of ground, but we lost a lot of ground. But you could feel the sigh of relief when that book appeared. That there was a way to fight back, and you could fight back effectively, and mitigate damage, and even make some gains. And by the mid-80s we were making many gains. Things got lost, but other things got found.

I know our child health work the best, because that's what I did at CDF. It is difficult to overstate the contribution Marian made to child

health policy. It was a long time coming. The '70s were a time of great research and effort, and nothing went anywhere. And her great contribution was not only spearheading the effort to take the Medicaid program, which once covered about 10 million children, to today paying for half of all the births in the United States and covering forty percent of all children.[2] Not poor children, *all* children. Although that tells you how poor children are today.

But, Marian's brilliance was not just the vision of turning Medicaid into true public insurance, which it has become, but being able to navigate two unbelievable political perils. One was the eternal peril of Medicaid. Medicaid is always on the verge of blowing up. It's the biggest program, and there was the problem with navigating budgets, and being able to put an argument together that would get us through the budgeting process so that we could move this legislation.

But the other and much more serious problem, which of course is with us to this day, is the problem of Medicaid and abortion. From the time that *Roe v. Wade* was decided, Medicaid has been in the crosshairs of American law, as one of the great vehicles for essentially eliminating the means by which women would secure a fundamental right. And she was able to navigate this. She was able to navigate between what was the terrible, desperate need to fight back against the stripping away of women's access to essential services, and the need to allow advances for women, because of the pregnancy and postpartum, and ultimately preventive services gains that we could make with Medicaid expansion and children.

It was not possible under the Carter administration to move the Medicaid legislation because it was hobbled by abortion riders. And Marian, more than anybody else, in her special relationship with Henry Hyde, made that possible. It was something that I appreciated greatly as we went through it but came to appreciate even more deeply as the years have gone by, just what it took to navigate our way through that, what could only be Scylla and Charybdis cubed. It took twenty-five years to complete the Medicaid expansion cycle, and to add CHIP later on as a companion program.

But the amazing thing is that these advances have proved to be unbelievably durable. It is now a given that children in the United States should not be without health insurance. In my lifetime as a lawyer, we

2. Sara Rosenbaum & Genevieve Kenney, *The Search for a National Child Health Coverage Policy*, 33 HEALTH AFFS. 2126, exhibit 4 (2014).

have gone from it being perfectly acceptable for millions of children to not be insured, to every child being insured, of course. And based on those advances, we built the great advances of the Affordable Care Act, and public insurance for all Americans. And so, really, Marian deserves the thanks not just of children, but of all Americans.

ACKNOWLEDGMENT

MARIAN WRIGHT EDELMAN

I'm not sure I recognize who you have all been talking about tonight.

I feel like the luckiest person in the world, having been born at the intersection of great events, and great people, and great role models. And everything I do today comes out of my childhood. I had great parents, and community co-parents. And I always have something to fight about, and to be against, and to be for. And my daddy and momma said that God runs a full employment economy. And that if you just follow the need, you'll never lack for a cause worth living and dying for. And so, I did exactly what my parents, and my community co-parents, and all the great role models of the time did. They drug me out everywhere to listen to the Howard Thurmans, the Mordecai Johnsons, to the Mary McCleod-Bethunes, to all these.

It was always clear that God did not make two classes of children. And I was a rebel from the time I was four or five. When I went out to Bell's Department Store with my Sunday school teacher and I didn't know the difference between white and black water. And I went to it and drank out of the white water fountain. And she jerked me away in terror, and I said, what's the matter? And I took great pleasure in going to switch the signs wherever I saw them, all over, and got great satisfaction from that.

Every issue that the Children's Defense Fund works on came out of my childhood. And I don't want to see that continue in this nation, but nobody builds an institution alone, nobody builds a movement alone, and one of my prayers from the beginning has been: *send me who you want, God, to do what you need to have done*. And boy did he send me some gifted friends and gifted people. And I have always felt very blessed to have been at the intersection of great events and great role models. And it's miraculous. I mean, I heard Mrs. Bethune, when I was seven, say, "The blacker the berry, the sweeter the juice." I'd never heard a woman command men that way. I used to have to go every year to the Columbia, South Carolina, auditorium and sit on hard folding seats for four and a half hours when Mordecai Johnson, the President of Howard, would speak with an intermission. And we would groan. Dr. Benjamin E. Mays had to come and stay with us, because there were no public accommodations for the people who traveled. But I was always exposed to great role models. But the model was: you don't like the way the world is, you change it. And

I can cite every issue that the Children's Defense Fund relates to now today, to something that happened.

I can't stand seeing a child excluded from anything that any other child has access to. Every child is sacred. There was a big accident in front of our church, which was on a highway. And the ambulance came and found that the white truck driver who had hit the migrant car was not wounded and drove away and left the people who were lying in the highway— the black migrant workers, laying there without help. Little Johnny Harens, who lived two houses down from me, with his grandma Ruth, died because he stepped on a nail, and tetanus shots were not available back then, and I am obsessed with immunization of children. We didn't have decent recreation, but my parents built a playground behind the church.

If you see something that needs to be done, it's not out there, you do it for yourself. And then you help others. But we didn't have a lot of recreation, we built a playground behind the church. But then, my playmate around the corner jumped off the bridge into the local creek, which was right down the road, and broke his neck and died. But then we learned later, as I grew up, that the creek was the outlet for the hospital sewage. And we got hand me down books from the white schools. We always had books in our house before we had a second pair of shoes. And when Old Man Rattick got what I now know as Alzheimer's, and began to wander the streets, my parents began a home for the aged across the street, and all of us children had to cook and clean. We didn't like it at the time, not one bit, but that's how we learned that everybody was our neighbor. And we called our mother, had to close her down, we still have a home for the aged. Everything my mother and father touched still is there. And my nieces and grand-nieces carry on the home for the aged. The church is still there. But I learned the importance of not asking: *why doesn't somebody do something about an injustice*? You ask what I can do. And so I grew up with this community of parents and co-parents who believed in God, and said that God ran a full employment economy. And if you just follow the need, you'd never lack for meaning in life. And that has certainly been true.

So, when people say, why do you do what you do? I say, I do exactly what my parents and my co-parents did, and my grandparents did. And it wouldn't have occurred to me not to do that.

When I went to Mississippi, boy, you talk about courage. I mean, the courage—you would file your little LDF school desegregation case, and the next day, twenty names were tacked up on the telegram posts, and

they were evicted from their houses, and shot at. But they want their children to have a better life and be able to go to school. I've never seen such courage. And I tell you, every time I thought I was scared, or couldn't do this, Miss Hamenols would get me up at three in the morning, and Mrs. Maybrother-Carter would get me up.

I've never seen such courage, and I've always wanted to be half as good as those people, the grit. Everything my mother and father started, with the home for the aged, or my twelve foster sisters and brothers. I would wake up and I would have another child in my bedroom. So, I just did what my parents did, it never occurred to me not to.

So, I feel so lucky to have been born who I was, where I was, with the parents and community co-parents who built a cocoon around us, who taught us history. We had oratorical contests, and we were gonna put oratorical contests in our Freedom Schools. I can repeat Ralph Bunche's 1946 speech at Fisk University about how the barriers of race can be surmounted.

But we need to create the world we want, and I had empowering parents around, and great faith. And I went for years and years in our church vestibule with my daddy, and he always had books. We always had books in our house. We didn't have a second pair of shoes, but we always had books. And I'm gonna put it in this year's report, that we're gonna put out in the next month. But in Herb Block, we did a cartoon that was very close to that. But every day in my formative years, until I was fourteen or fifteen, I would walk into the church vestibule, and there was this picture, a newspaper editorial cartoon. Or not a cartoon, whatever you call it. Whatever Herb Block does, and people like that. But there was this picture of a Thanksgiving occasion, and hordes of brown, sunken-jawed people, hungry, starving, and a table laden with an unbelievable amount of food. And turkeys, and hams. And a white family sitting there, and the caption was, "Shall we say grace?" And those kinds of things sear in a child's mind, but the message, again, is when you see something needs to be done, don't ask why somebody doesn't do something, you ask why you don't do something. And God runs a full employment economy.

I do today what my parents and community co-parents did. What those incredibly courageous people in Mississippi did, because they wanted their children to have a better life. I had the best education in the world at the Legal Defense Fund, which is the spawn and inspiration for the Children's Defense Fund. And I wouldn't do anything else. And I always try to make sure that the baby sits in the middle of the table when policy discussions are being had. And if the policy is going to hurt that child, or not help that child, or not be just for that child, then you fight it.

So, God does run a full employment economy. And if you just stick with it, you can just make things happen.

And we've got a long way to go. We're going to end child poverty in this country. It's obscene. We're going to break up that cradle to prison pipeline. And we're going to either do it or we're going to continue to slide backwards, but I think it's the Achilles Heel of this nation, and I think it's the most important work.

But I just feel so blessed to have had the chance to make a difference with such extraordinary talent. One of my prayers has been: *Lord, send me who we need to do what you want*. And he has sent me this bountiful, gifted group of folk. And one I just want to single out tonight again, Paul Smith, who was our genius research director. Who never gave me a bad fact. Never gave me a wrong fact. And who could just make the most complicated thing so simple. And he looked like Einstein. His budget never increased one penny in the thirty years he worked with us. But he was indispensable. Important, and who's not sitting here is Mary Lee Ellen, because she's taking care of business with our policy director now. These great, gifted people whom you have heard. Nobody builds an institution by themselves. And Elaine, thank you. So, I just have felt so blessed.

And I just wanted to end with a prayer, because I'm a praying lady. And it's by a white journalist out in Tennessee, named Ina Hughes,[1] but I think it captures what we need to be doing in this country, because it's our Achilles Heel. We're never going to be a great nation, we're never going to be a moral nation, unless we create a decent chance to succeed and a level, fair, just playing field for every child. And she says we pray for, and I say we will fight for, and advocate for those who sneak popsicles before supper, who erase holes in math workbooks, who can never find their shoes. But we've got to pray and stand up and fight for children who stare at photographers behind barbed wire. And it's unbelievable what is going on in this country now with this wall. It's just Biblical evil. And we're just simply going to have to decide we are not going backwards. We are not, we're just not. Who can't bound down the street in a new pair of sneakers, who never "counted potatoes," who are born in places where we wouldn't be caught dead, who'd never go to the circus, and who live in an X-rated world.

Let's commit to praying, and standing, and fighting, and voting for children who bring us sticky kisses and fistfuls of dandelions. Who hug us in a hurry and forget their lunch money. And let's pray, and stand, and

1. Ina Hughes, A PRAYER FOR CHILDREN XII-XV (1997).

fight, and advocate for children who never get dessert, who never have a safe blanket to drag behind them, who watch their die, who can't find any bread to steal, who don't have any rooms to clean up, whose pictures aren't on anybody's dresser, and whose monsters are real.

Let's pray and advocate for children who spend all their allowance before Tuesday, throw tantrums in the grocery store and pick at their food, who like ghost stories, who shove dirty clothes under the bed, and never rinse out the tub. But let's also stand up and fight for children who don't like to be kissed in front of the carpool, children who never get a visit from the tooth fairy, who squirm in church or temple and scream in the phone.

But we also must make sure that we stand up, and pray, and laugh with children, and make them smile. Those children have things that only make them cry. Let's pray and accept responsibility for children whose nightmares come in the daytime, who will eat anything, who have never seen a dentist, who aren't spoiled by anybody, who go to bed hungry and cry themselves to sleep, who live and move, and have no being.

We pray for children who want to be carried and for children who must be carried, for children we never give up on, who are our own, and for children who never get a second chance. Let's pray for those children we smother, but also those who will grab the hand of anyone kind enough to offer it.

This is the Achilles Heel, both morally and economically. Who lets preschool children be killed by guns more frequently than law enforcement officers in the line of business? What kind of nation does this? And so I think that there's never been something that is not worth living and dying for in the cause for children, and the cause for racial justice, and the cause for economic justice. And I just, it's been a privilege to carry on the tradition of the people who taught me that your faith is something you live, and God does not make two distinctions between children.

And so, thank you for this honor. Thank you, young people.

NO CHILD LEFT BEHIND? AN INTEREST-CONVERGENCE ROADMAP TO THE U.S. RATIFICATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD

NDJUOH MEHCHU

Introduction .... 3 R
I. The U.N. Convention on the Rights of the Child .... 7 R
A. Background on the Convention on the Rights of the Child .... 7 R
B. U.S. Non-participation in the Convention on the Rights of the Child .... 9 R
1. Federalism .... 9 R
2. Religious Fundamentalism .... 11 R
II. The Interest-Convergence Thesis .... 13 R
III. An Interest Convergence Roadmap to the U.S. Ratification of the Convention on the Rights of the Child .... 17 R
A. President Trump's Approach to International Rules-based Institutions Diverges with the Political Majority's .... 17 R
1. Transnational Legal Processes have been Upended under Trump .... 17 R
2. The Family Separation Policy Exemplifies Trump's Attacks on International Rules-based Institutions .... 19 R
3. The Family Separation Policy Struck a Global Nerve .... 21 R
B. President Trump's Freewheeling Approach to International Rules-based Institutions has Compromised the United States' Global Standing .... 24 R
C. The Political Majority's Adherence to International Rules-based Institutions can be used as Pressure Point to Form a Single-issue Coalition to Ratify the CRC .... 26 R
1. Ratifying the CRC is in the Interest of the Political Majority .... 26 R

2. Ratifying the CRC is in the Interest of Children . . . 28 R
IV. Objections . . . 30 R
Conclusion . . . 32 R

In 2008, then-United States presidential candidate Barack Obama was among those arguing that the United States' failure to ratify the United Nations Convention of the Rights of the Child (CRC or Convention) is an embarrassment. At the time, the United States and Somalia were the only two nations not party to the CRC. The United States is now alone on this front. As populist authoritarian forces gain strength under the administration of President Donald J. Trump, assaults on human rights are occurring with regularity, exacerbating the impact of our absence from global rights-conferring documents that seek to protect vulnerable groups. Illuminating the nation's backsliding, asylum-seeking families are being ripped apart simply for seeking a better life and migrant children are dying in the custody of the United States government. As a consequence, the United States' moral authority is waning—a development President Macron of France alluded to in a November 2018 address—compromising our ability to exercise global leadership.

With due attention to these developments, this article argues that the global impact of the crisis at the U.S.-Mexico border is a pressure point where political will can be marshaled to ratify the CRC. It suggests that Professor Derrick Bell's interest-convergence theory, which posits that the progress of minorities in the United States is defined by the extent to which it converges with the material interests of the political majority, can be applied as a normative tool to explore the United States' ratification of the Convention. In reaching this conclusion, we must bear in mind that while Trump's instincts are to withdraw from globalism wherever possible, the political majority—comprised of transnational actors including civil society, the media, courts, and Congress—has not lost sight of the fact that engagement with ongoing transnational legal processes has historically been central to the nation's "soft power" approach to foreign policy because it facilitates the United States' ability to cooperate with other nation's around shared goals.

Given the United States' history as the *only* U.N. member state not party to the CRC, ratification is in the interest of the political majority because it would help to close the distance with other nations by joining a transnational legal project where there is near-universal participation. For children's rights advocates, the clarion

call for U.S. participation in the treaty began when the CRC was adopted more than 30 years ago. CRC ratification is in the interest of children's rights advocates because it would at long last operationalize the CRC, which affords robust protections to children including freedom from inhumane treatment and detention.

INTRODUCTION

Seven-year-old Jakelin Caal Maquin died in the custody of the U.S. Customs and Border Protection (CBP) on December 13, 2018.[1] Her autopsy revealed that she was visibly sick for several hours before succumbing to septic shock.[2] Likely contributing to her untimely death was CBP's failure to provide earlier medical care[3]—a recurring theme for children in the custody of the United States government during the month of Jakelin's death.[4] Just weeks later, eight-year-old Felipe Alonzo-Gomez died of the flu.[5] Felipe's death prompted CBP to revisit its protocol for evaluating children in its custody for medical problems.[6] These tragedies focused attention on the unsettling reality that the United States' moral authority is waning.[7] Indeed, commentators across the globe have repudiated the United States' handling of migrants at the U.S.-Mexico border

1. Amanda Arnold, *Everything We Know About the 8-Year-Old Migrant Boy Who Died in U.S. Custody*, THE CUT (Dec. 28, 2018), https://www.thecut.com/2018/12/felipe-alonzo-gomez-cbp-death-reports.html [https://perma.cc/UU7C-2SRJ].

2. *See id.*

3. Sheri Fink, *Migrant Girl's Autopsy Shows She Would Have Been Visibly Sick for Hours, Doctors Say*, N.Y. TIMES (Mar. 29, 2019), https://www.nytimes.com/2019/03/29/us/migrant-girl-death.html [https://perma.cc/2BKV-G8BT].

4. There are many examples to draw from illuminating the U.S. government's failure to ensure the welfare of all children. A particularly horrifying one involves an ailing five-month old girl reportedly held in a freezing cell and denied proper medical care. Adam Raymond, *Migrant Baby Contracted Pneumonia After Five Days in a 'Freezing' Holding Cell*, INTELLIGENCER (Dec. 20, 2018), http://nymag.com/intelligencer/2018/12/migrant-baby-got-pneumonia-after-days-in-freezing-cell.html [https://perma.cc/5DUH-TXLF].

5. Arnold, *supra* note 1. **R**

6. Fink, *supra* note 3. **R**

7. *See* David Nakamura et al., *Macron Denounces Nationalism as a 'Betrayal of Patriotism' in Rebuke to Trump at WWI Remembrance*, WASH. POST (Nov. 11, 2018, 12:20 PM), https://www.washingtonpost.com/world/europe/to-mark-end-of-world-war-i-frances-macron-denounces-nationalism-as-a-betrayal-of-patriotism/2018/11/11/aab65aa4-e1ec-11e8-ba30-a7ded04d8fac_story.html [https://perma.cc/PL3P-GDVW].

as an unjustified attack on children and families, as well as a flagrant violation of human rights norms.[8]

Although these and other tragic events have stirred the public consciousness in profound ways, it is true that the United States' failure to ensure robust protections for migrant children and their families is not uniquely a defect of the Trump administration.[9] To take a recent example, controversy also surrounded the Obama administration's treatment of this vulnerable group.[10] However, under Trump, the xenophobic policies invoked under the pretext of protecting against national security threats have escalated the situation into a global humanitarian crisis, throwing into doubt the nation's commitment to human rights and the rule of law.[11] In light of this development, this article suggests that the international gaze on the U.S. government's mistreatment of migrant children and families intensifies the need for the United States to shore up its commitment to human rights by ratifying the United Nations Convention on the Rights of the Child (CRC or Convention) and that Professor Derrick Bell's interest-convergence thesis provides a useful framework to explore ratification.

This article proceeds in four parts. Part I begins with a brief overview of the Convention, describing its adoption and its rights-conferring articles. It then examines the arguments against importing the CRC into the framework of domestic law, which are primarily two-fold: (1) ratification of the CRC impinges on the U.S. system of federalism, and (2) the CRC is incompatible with U.S.

8. *See* Zeid Ra'ad Al Hussein, High Comm'r for Hum. Rts., United Nations, Opening Statement and Global Update of Human Rights Concerns (June 18, 2018).

9. Carrie F. Cordero et al., *The Law Against Family Separation*, 51.2 COLUM. HUM. RTS. L. REV. 432, 436 (2020) ("To be sure, bona fide concerns about children's safety and increased awareness of the problem of human trafficking mean that some children were likely also separated from accompanying adults prior to 2017.").

10. The Obama administration was criticized for housing children and families crossing the border illegally in detention centers that were constitutionally inadequate. *See, e.g.*, Richard Gonzales, *Obama Immigration Detention Policies Under Fire*, NAT'L PUB. RADIO (June 12, 2015, 5:57 PM), https://www.npr.org/sections/itsallpolitics/2015/06/12/414023967/obama-immigrant-detention-policies-under-fire [https://perma.cc/DW79-QGES].

11. *See, e.g.*, Thomas M. McDonnell & Vanessa H. Merton, *Enter at Your Own Risk: Criminalizing Asylum-Seekers*, 51.1 COLUM. HUM. RTS. L. REV. 1, 3 (2019) ("Not only do the Trump Administration's harsh immigration policies and practices violate international law and American values, but also foretell a government tending toward exclusion, racism, nationalism, parochialism, authoritarianism, and disregard of the rule of law.").

views of family policy. While these concerns are understandable and are entitled to some weight, they provide only a partial view of the CRC landscape and should not be considered dispositive because the U.S. Senate has demonstrated in the context of other treaties that it is adequately equipped to address each by passing appropriate implementing legislation. Part II begins by laying the conceptual groundwork for the interest-convergence thesis. The thesis posits that the progress of minorities in the United States is defined by the extent to which it converges with the material interests of the political majority.[12] "But absent such convergence, governmental institutions—assumed to be controlled by the [political] majority—will not protect or advance minority interests in meaningful ways."[13] The term "political majority" as used in this Article refers to the collection of individuals and institutions that drive domestic or international policies. It is comprised of our "allies; states, municipalities, and localities of the United States; government bureaucracies; the media; courts; nongovernmental organizations (NGOs); international organizations (IGOs); and committed individuals."[14] Drawing from legal historian Mary Dudziak's account of the foreign policy considerations that motivated the *Brown v. Board of Education* decision, Part II then situates the insights of Bell's thesis in historical context to highlight its descriptive and normative value.

With that background in place, Part III operationalizes the thesis in the context of the separation of migrant families. It argues that because of the outrage attendant to the sundering of migrant children from their families, the interests of children and the political majority are joined by the United States ratifying the CRC. For children's rights advocates, the interest in ratifying the CRC is straightforward and rests on the puzzlingly controversial idea that becoming party to the most robust document conferring rights to

12. *See* Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 6 (1976) ("[T]he most significant political advances for blacks resulted from policies which were intended and had the effect of serving the interests and convenience of whites rather than remedying racial injustices against blacks . . . ."); *see also* Sudha Setty, *National Security Interest Convergence*, 4 HARV. NAT'L SEC. J. 185, 187 (2012) (explaining that "[i]nterest convergence is the process by which the divergent self-interests of different political groups overlap to the degree necessary to enable the formation of an issue-specific coalition powerful enough to effect serious policy change").

13. Kevin L. Terry, *Community Dreams and Nightmares: Arizona, Ethnic Studies, and the Continued Relevance of Derrick Bell's* Interest-Convergence Thesis, 88 N.Y.U. L. REV 1483, 1490 (2013).

14. HAROLD HONGJU KOH, THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW 7 (2019).

children would help to improve the condition of children domestically and abroad. It is in the interest of the political majority to ratify the CRC, this Article contends, because ratification would help to rehabilitate the United States' global reputation on human rights, an interest that extends beyond placating foreign critics.

The Trump administration's mistreatment of children at the U.S.-Mexico border has indicated that the United States is no longer committed to human rights norms[15] and has damaged international relations in the process. As such, ratifying the CRC is in the interest of the political majority because participation in the Convention may help to alleviate concerns about the nation's commitment to rules-based international institutions and global democratic ideals.[16] Cooperating with "rights-respecting democratic allies" has historically been central to the United States' "broader national security interests"[17] and key to its ability to construct and lead international institutions. Flagrantly violating global human rights norms is obviously incongruous with the goal of fostering cooperation with global allies. If Trump's unorthodox approach to engaging with the global community continues to gain the upper hand, a worrying possibility is that rules-based institutions might be irreparably altered and the nation's ability to effectively engage with allies will be dealt a serious blow. To that end, for the political majority, ratifying the CRC may help to allay concerns about the United States' commitment to human rights and rules-based institutions, facilitating the reconstruction of our relationships with our global allies.

I do not intend to suggest that the interest-convergence thesis is an infallible instrument for ratifying the CRC. Indeed, there are some constraints to the proposal that warrant consideration. For example, we cannot preclude the inference that relying on interest-convergence to ratify the CRC may result in a hollow victory for children's rights. In what Professor Bell referred to as a "contradic-

15. The Leadership Conference on Civil and Human Rights has developed a compendium of the human rights rollbacks under the Trump administration. Among other things, the compendium makes clear that the administration is actively withdrawing the United States from the global human rights framework. *See* Leadership Conf. on Civ. & Hum. Rts., *Trump Administration Civil and Human Rights Rollbacks*, https://civilrights.org/trump-rollbacks/ [https://perma.cc/ED5Z-AVTY] (last visited Sept. 28, 2020).

16. Debra Cassens Weiss, *US Falls Out of Top 20 in Rule of Law Index, While Global Declines Continue*, A.B.A. J. (Mar. 12, 2020, 11:39 AM), https://www.abajournal.com/news/article/us-falls-out-of-top-20-in-rule-of-law-index-while-overall-declines-continue [https://perma.cc/PNB8-VN53].

17. KOH, *supra* note 14, at 34. R

tion-closing" case,[18] the mere fact of ratification could be used as cover to argue that the interests of children have been sufficiently addressed, obviating the need for further reform. The limitations of the proposal are taken up in Part IV and a conclusion follows.

I.
THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD

The United Nation's adoption of the U.N. Declaration of Human Rights in 1948 marked the first time children's rights were collectively recognized by U.N. member states.[19] The declaration provides that "[m]otherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."[20] The rights enumerated in the U.N. Declaration were expanded by the 1959 Declaration of the Rights of the Child (1959 Declaration).[21] The 1959 Declaration called "upon parents, voluntary organizations, local authorities, and national governments to recognize children's rights and 'strive for their observance by legislative and other measures.'"[22] And in 1989, the then-190 member states of the United Nations General Assembly (UNGA) unanimously adopted the United Nations Convention on the Rights of the Child, continuing the momentum of the previous two documents.[23] This section provides background on the CRC and the reasons that have informed the United States' non-participation in the treaty.

A. Background on the Convention on the Rights of the Child

The CRC is the most robust international document recognizing the rights of children. At the heart of the treaty is the view that children are "agents who share the power to shape their own lives"

18. Derrick Bell, *The Supreme Court 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 32 (1985).

19. *See generally* LUISA BLANCHFIELD, CONG. RESEARCH SERV., R40484, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: BACKGROUND AND POLICY ISSUES 1 (2009).

20. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25 (Dec. 10, 1948).

21. G.A. Res. 1386 (XIV), Declaration of the Rights of the Child (Nov. 20, 1959) [hereinafter 1959 Declaration].

22. Warren Binford, *The Constitutionalization of Children's Rights in South Africa*, 60 N.Y.L SCH. L. REV. 333, 336 (2016) (quoting the 1959 Declaration).

23. *See* U.N. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

and should fully exercise those rights.[24] The Convention's fifty-four articles and three optional protocols "set out the civil, political, economic, social and cultural rights that all children everywhere are entitled."[25] The CRC articles range in coverage from inhumane treatment and detention (Article 37)[26] to separation from parents (Article 9)[27] to the right to education (Article 28).[28] The drafters had intended that all articles be treated with equal importance.[29] The CRC's three optional protocols concern the sale of children, child prostitution, and child pornography; the involvement of children in armed conflict; and the adjudication of complaints.[30] Thirty years after its adoption, the Convention is the most widely ratified human rights treaty ever.[31] Despite playing a central role in drafting the Convention and "[making] textual recommendations for 38 of the 40 substantive law articles,"[32] including the article establishing a child's right to family reunification,[33] the United States is the only member of the United Nations that has not ratified the treaty.[34]

24. Lotem Perry-Hazan, *Freedom of Speech in Schools and the Right to Participation: When the First Amendment Encounters the Convention on the Rights of the Child*, 2 BYU EDUC. & L.J. 421, 422 (2015).

25. *How We Protect Children's Rights with the UN Convention on the Rights of the Child*, UNICEF, https://www.unicef.org.uk/what-we-do/un-convention-child-rights/amp/ [https://perma.cc/E3LR-ATDK] (last visited Apr. 20, 2020).

26. CRC, *supra* note 23, at art. 37.

27. *Id.* at art. 9.

28. *Id.* at art. 28.

29. *Introducing the United Nations Convention on the Rights of the Child*, UNICEF, https://www.unicef.org.uk/rights-respecting-schools/the-rrsa/introducing-the-crc/ [https://perma.cc/JXA9-2M7K] (last visited Apr. 20, 2020).

30. The United States is party to the CRC Optional Protocol on the Sale of Children and the Optional Protocol on Children and Armed Conflict. S. REP. NO. 107-4, at 2 (2002).

31. *See Convention on the Rights of the Child*, UNICEF, https://www.unicef.org/crc/ [https://perma.cc/27FF-CGC9] (last visited May 20, 2020).

32. Cris R. Revaz, *An Introduction to the U.N. Convention on the Rights of the Child*, *in* THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 13 (Jonathan Todres et al., eds., 2006).

33. Howard Davidson, *Does the U.N. Convention on the Rights of the Child Make a Difference?*, 22.2 MICH. ST. INT'L L. REV. 497, 501 (2014).

34. Amy Rothschild, *Is America Holding Out on Protecting Children's Rights?*, THE ATLANTIC (May 2, 2017), https://www.theatlantic.com/education/archive/2017/05/holding-out-on-childrens-rights/524652/ [https://perma.cc/QY46-BU5X]. As a signatory to the Convention, the United States is only legally obligated to refrain from contravening the object and purpose of the Convention.

B. U.S. Non-participation in the Convention on the Rights of the Child

To some observers, it is an embarrassment that the United States has not ratified the CRC.[35] Non-participation suggests "we haven't focused attention on children in the United States."[36] Our failure to ratify the convention is shaped in different measure by the arguments that ratification is (1) at odds with the U.S. system of federalism,[37] and (2) would impinge on traditional American views on family policy.[38] But these grievances should not stand in the way of the United States ratifying the CRC.

1. Federalism

A primary reason CRC ratification efforts have stalled in the United States is because of concerns that importing the treaty into domestic law would conflict with the U.S. system of federalism.[39] Opponents of ratification point to the Supremacy Clause of the United States Constitution as prohibitive. A typical argument that helps to explain the opposition on federalism grounds is as follows: under the Supremacy Clause, ratified treaties are the supreme law of the land.[40] Since the CRC primarily covers areas of the law that are traditionally the jurisdiction of state governments,[41] ratification would impinge on states' rights by allowing the federal government to legislate in its place.[42] But left unsaid is that a treaty ratified by

35. *See, e.g.*, NICHOLAS D. KRISTOF & SHERYL WUDUNN, TIGHTROPE: AMERICANS REACHING FOR HOPE 221 (2020) ("It's perhaps telling that the United States for years was, embarrassingly, the only country in the world that had not ratified the Convention on the Rights of the Child. That has now changed: the United States is the *only* nation that hasn't bothered to ratified it.").

36. Karen Attiah, *Why Won't the U.S. Ratify the U.N.'s Child Rights Treaty?*, WASH. POST (Nov. 21, 2014, 4:12 PM), https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/?noredirect=on&utm_term=.c505bef098c1 [https://perma.cc/4XJV-QE66].

37. *See generally* Susan Kilbourne, *The Convention on the Rights of the Child: Federalism Issues for the United States*, 5 GEO. J. ON FIGHTING POVERTY 327, 329-30 (1998).

38. *See, e.g.*, Soo Jee Lee, *A Child's Voice vs. A Parent's Control: Resolving a Tension Between the Convention on the Rights of the Child and U.S. Law*, 117 COLUM. L. REV. 687, 690 (2017) ("U.S. law treasures the right of parents to control the upbringing of their children . . . .").

39. For a comprehensive discussion on U.S. ratification of the CRC and the issue of federalism, see Kilbourne, *supra* note 37, at 327. R

40. U.S. CONST. art. VI, cl. 2.

41. *See, e.g.*, Cynthia L. Schirmer, *Punishing Children as Adults: On Meeting International Standards and U.S. Ratification of the U.N. Convention on the Rights of the Child*, 16 MICH. ST. J. INT'L. L. 715, 719 (2008) (explaining opposition to ratification on federalism grounds as "limiting [states'] jurisdiction over children").

42. *Id.*

the United States is usually subject to a declaration that the treaty's provisions will be "non-self-executing," or will not automatically change federal or state laws and will require legislation to implement.[43] Indeed, the United States certainly *could*, and likely *would* include a similar "non-self-executing" declaration if it ratified the CRC, thereby reducing any concerns that ratification would step on the toes of individual states.[44] Moreover, the Convention does not actually *require* the federal government to pass legislation implementing its provisions.[45] Instead, *state* legislatures could take on the role of ensuring compliance with the terms of the CRC by passing the necessary legislation at the state level, ameliorating any federalism concerns.[46]

Should the federal government exercise its authority to pass legislation implementing the CRC, federalism concerns would also be addressed because the United States consistently includes "federalism understandings" on ratified treaties, setting forth that the federal government's implementation power is limited to issues it "exercises legislative and judicial jurisdiction over."[47] Given this history, and in light of the fact that the Senate included a federalism understanding when it ratified the CRC's Optional Protocol on the Sale of Children, Child Pornography, and Child Prostitution,[48] it seems doubtful that a federalism understanding would not be attached to the federal government's legislation implementing the CRC.

Another way the Senate could address federalism concerns is by including reservations in its advice and consent to the CRC. Reservations are declarations that purport to "exclude, limit, or modify

43. 138 CONG. REC. 8071 (1992). The Senate's advice and consent to the *International Covenant on Civil and Political Rights*, for example, included a declaration "[t]hat the provisions of Articles 1 through 27 of the Covenant are not self-executing."

44. Lawrence L. Stentzel, *Federal-State Implications of the Convention*, *in* CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW 57, 57 (Cynthia Price Cohen & Howard A. Davidson eds., 1990).

45. Kilbourne, *supra* note 37, at 329. **R**

46. *Id.* at 334.

47. Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 422 (2000) (quoting U.S. Reservations, Understandings, and Declarations to International Covenant on Civil and Political Rights, 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992)).

48. Cris Revaz & Jonathan Todres, *The Optional Protocols to the Convention on the Rights of the Child and the Impact of U.S. Ratification*, *in* THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 300 (Jonathan Todres et al. eds., 2006).

the state's legal obligation"[49] and seek to harmonize international treaties with domestic law. Some reservations lay out the interpretive boundaries for the terms of a treaty[50] while others explicitly decline to consent to specific treaty obligations.[51] When the United States ratified the International Covenant on Civil and Political Rights, a reservation preserving states' rights was attached:

> [T]he United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.[52]

Assertions that the CRC cannot square with U.S. principles of federalism overlook a number of relevant mechanisms that would permit ratification while ensuring states' rights are not disrupted. That the United States has previously ratified treaties, while attaching mechanisms that stipulate that Congress intends to leave issues dominated by state law in the hands of state legislatures, demonstrates that compliance with the CRC could be achieved with acceptable legislation.[53]

2. Religious Fundamentalism

The religious fundamentalist critique of U.S. ratification of the CRC is that the Convention's recognition of children as full rights-bearing individuals is a threat to traditional U.S. views on family

49. RESTATEMENT (THIRD) OF THE FOREIGN AFFAIRS LAW OF THE UNITED STATES § 313 cmt. g (1987).

50. The United States included a reservation to the Torture Convention's prohibition on "cruel, inhuman, or degrading treatment or punishment." Bradley & Goldsmith, *supra* note 47, at 418 (quoting Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pmbl., para. 4, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85, 113). R

51. The U.S. attached a reservation to the International Covenant on Civil and Political Rights restricting propaganda for war and hate speech. Declarations and Reservations to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

52. 138 CONG. REC. 8071 (1992) (U.S. Senate's resolution for ratification of the International Covenant on Civil and Political Rights).

53. Kilbourne, *supra* note 37, at 333. R

policy.[54] Opponents of the United States ratifying the CRC argue that conferring rights to children through the terms of the Convention would upend traditional conceptions of the parent-child relationship and destabilize long-standing U.S. views of children as "purely passive objects of the authority of parents and governments."[55]

These concerns are animated by CRC provisions like Article 13. Under Article 13, "[t]he child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice."[56] There has been a tendency to interpret Article 13 as displacing parental authority in favor of the child's complete agency.[57] This view generally contends that the legal consequences of integrating the CRC into the United States' body of law "may lead to extremes which are destructive of the family and thus detrimental to the children we seek to protect."[58] While a piecemeal reading of the CRC may indicate that furnishing protection to children under the treaty is detrimental to parents and families in the United States, traditional parental roles are firmly established within the object and purpose of the Convention. Article 5 of the Convention is a case in point. It requires that nations "respect the responsibilities, rights, and duties of parents."[59] Another example is Article 7, which establishes the rights of the child to "know and be cared for by his or her parents."[60]

The Committee on the Rights of the Child (the Committee), the primary institution charged with interpreting and implementing the CRC, has routinely urged states to "*do more to support struggling families* in order to make sure children stay under the care and

54. Eric Engle, *The Convention on the Rights of the Child*, 29 QUINNIPIAC L. REV. 793, 797–98 (2011); *see also* Richard G. Wilkins et al., *Why the United States Should Not Ratify the Convention on the Rights of the Child*, 22 ST. LOUIS U. PUB. L. REV. 411, 412 (2003) (arguing that the CRC's recognition "of separate rights for children with the Government accepting [the] responsibility of protecting the child from the power of parents" is at odds with traditional conceptions of the American family).

55. Lee, *supra* note 38, at 687. **R**

56. CRC, *supra* note 23, at art. 13. **R**

57. Schirmer, *supra* note 41, at 721 ("Article 13 is read by some as replacing parental authority on the part of the child."). **R**

58. Barbara J. Nauck, *Implications of the United States Ratification of the United Nations Convention on the Rights of the Child: Civil Rights, the Constitution and the Family*, 42 CLEV. ST. L. REV. 675, 676 (1994).

59. CRC, *supra* note 23, at art. 5. **R**

60. *Id.* at art. 7.

control of their parents, rather than enter the custody of the government."[61] Consider, for example, the Committee's recommendation to Sweden, emphasizing that state programs should prioritize "protecting the natural family environment."[62] In another instance, it was recommended by the Committee that Bolivia take all steps "to return [children] to their families whenever possible and consider placement of children in institutions as a measure of last resort and for the shortest possible period."[63] Contrary to what some critics of ratification maintain, the global experience with the CRC affirms the view that the CRC does not seek to empower children at the expense of the family unit.

II.
THE INTEREST-CONVERGENCE THESIS

In his classic article *Brown v. Board of Education and the Interest-Convergence Dilemma*,[64] Derrick Bell proposed that the U.S. Supreme Court's decision to overturn *Plessy v. Ferguson*'s[65] "separate but equal" doctrine as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment and assign a fundamental right to children was driven by a desire to rehabilitate the nation's global reputation.[66] Specifically, as communist regimes began to undermine the image of American democracy by including stories of American racism in their propaganda, the United States sought to distance itself from the darkness of racial segregation by presenting an airbrushed account of racial progress in the country.[67]

When the Court first heard *Brown*, arguments made in favor of desegregation did not win over a number of the Justices.[68] The ground shifted on the issue when racial inequality in the United States became a fixture of the international press. Many nations

61. Davidson, *supra* note 33, at 526. R

62. *Id.* (quoting *Concluding Observations of the Comm. On the Rights of the Child: Sweden*, U.N. Comm. on the Rts. of the Child, 51st Sess., para. 35, U.N. Doc. CRC/C/SWE/CO/4 (June 12, 2009)).

63. *Id.* (quoting *Concluding Observations of the Comm. On the Rights of the Child: Bolivia*, U.N. Comm. on the Rts. of the Child, 52nd Sess., para. 46, U.N. Doc. CRC/C/BOL/CO/4 (Oct. 2, 2009)).

64. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

65. Plessy v. Ferguson, 163 U.S. 537 (1896).

66. Bell, *supra* note 64, at 524.

67. *See* DUDZIAK, *infra* note 69, at 107.

68. For a thorough review of the Justice's deliberations leading up to the *Brown* decision, see Mark Tushnet & Katya Lezin, *What Really Happened in* Brown, 91 COLUM. L. REV. 1867 (1991).

questioned "how the United States could argue that its form of government was a model for the world when American democracy accommodated racial oppression."[69] The U.S. government understood that news coverage around the globe underscoring the race issue in the United States could be ameliorated with court decisions invalidating discriminatory practices against African Americans.[70] "In amicus curiae, or 'friend of the court,' briefs in civil rights cases [like *Shelley v. Kraemer*[71] and *Brown*], the Truman administration stressed to the Supreme Court the international implications of race discrimination and at times focused on the negative impact on U.S. foreign relations that a pro-segregation decision might have."[72] The DOJ under President Dwight D. Eisenhower filed an amicus brief explaining that

> The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.[73]

In 1954, the Court handed down a unanimous 9-0 decision in *Brown*, giving "the U.S. government the counter to Soviet propaganda it had been looking for."[74]

The extent to which the Justices' ruling in *Brown* was guided by foreign policy considerations is not definitive.[75] But ample evidence supports the conclusion that members of the Court were "acutely aware of the nation's need to protect its national security against those who would exploit our internal difficulties for the benefit of external forces,"[76]and that "[t]he historic attraction to granting recognition and promising reform of racial injustice when such action

69. MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 76 (2000).

70. *Id.* at 32.

71. Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that racially restrictive covenants were unenforceable under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution).

72. DUDZIAK, *supra* note 69, at 90.

73. *Id.* at 100.

74. *Id.* at 107.

75. *See generally* Justin Driver, *Rethinking the* Interest-Convergence Thesis, 105 NW. U. L. REV. 149 (2011); *see also* Tushnet & Lezin, *supra* note 68, at 1868 ("[W]hat happened behind the scenes in *Brown* . . . cannot be definitive."). R

76. DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 66 (2004). For example, Chief Justice Earl Warren—who wrote the Court's opinion—recognized that vulnerability on the racial issue "enabled our enemies to attack us with no ready response available." *Id.* And Justice Felix Frankfurter, another member of the *Brown* court, ob-

converges with the nation's interests, provided an unacknowledged motivation for the Court's ringing statement in *Brown*."[77]

News of the decision traveled across the globe. A few months after *Brown* was decided, a National Security Council Report published by the United States Information Agency proclaimed that some countries in Africa viewed the decision as "the greatest event since the Emancipation Proclamation, and it remove[d] from Communist hands the most effective anti-American weapon they had in Black Africa."[78] Others were less sanguine in their interpretation of *Brown*'s significance. In China, for example, "the *People's Daily* thought that the U.S. did not really intend to protect black people's rights, but to hoodwink the public domestically and abroad."[79] The skepticism towards the "racial progress" account of *Brown* was best conveyed by the inimitable James Baldwin: "White Americans congratulate themselves on the 1954 Supreme Court decision outlawing segregation in the schools; they suppose, in spite of the mountain of evidence that has since accumulated to the contrary, that this was proof of a change of heart-or, as they like to say, progress."[80] The presumption was that *Brown* was a way to placate foreign critics by "reinforc[ing] the story of race and democracy that had already been told in U.S. propaganda."[81]

Bell's thesis rejects the traditional narrative that *Brown* was decided on the basis of a moral and legal reckoning with the injustices of racial segregation in public schools.[82] Rather, it posits that driving the *Brown* calculus was a desire to repair the image of the United States abroad as a nation that took civil rights, human rights, and democratic ideals seriously. Today, interest-convergence is a cornerstone of the legal realist position at the heart of critical race theory and challenges the principles of classical legal theory

served in an earlier decision that the Court "may take judicial notice" when communist propaganda threatens the "institutions of this country." *Id.*

77. *Id.* at 67.

78. DUDZIAK, *supra* note 69, at 109.

79. *Id.* at 135.

80. JAMES BALDWIN, THE FIRE NEXT TIME 86 (1963).

81. DUDZIAK, *supra* note 69, at 109.

82. Those who share the intuition that extra-legal concerns motivated the *Brown* decision can point to the racial arrangements in public schools today for support. Not much has improved. *See* P.R. Lockhart, *65 Years After* Brown v. Board of Education, *School Segregation is Getting Worse*, VOX (May 10, 2019, 7:00 PM), https://www.vox.com/identities/2019/5/10/18566052/school-segregation-brown-board-education-report [https://perma.cc/63SY-C33V].

that advancements in civil rights will be achieved by relying on doctrinal developments and sophisticated legal strategies alone.[83]

While the interest-convergence thesis initially emerged in the *Brown* context, its insights have been applied to contemporary issues involving the interplay of power and oppression from a descriptive and normative perspective.[84] These scholarly contributions have shifted the application of the thesis beyond the black and white binary Bell introduced in 1980 and showcased the theory's versatility as a legal realist tool. Bell, for example, later used interest-convergence to explain doctrinal developments in cases concerning race and education in the United States.[85] Professor Stephen Feldman used interest-convergence as a framework for explaining courts' interpretation of religion clauses under the First Amendment and its relationship to non-Christian groups.[86] And another scholar has even deployed the theory to examine the viability of building coalitions to secure animal rights.[87] Taking cues from this rich body of scholarship, this article argues in Part III that the interest-convergence thesis offers a framework for the United States to ratify the CRC.

83. William M. Carter, Jr., *The Maryland Constitutional Schmooze: The Thirteenth Amendment*, Interest Convergence, *and the Badges and Incidence of Slavery*, 71 MD. L. REV. 21, 23 (2011).

84. *See* Danné L. Johnson, *What's Love Got to Do With It?* Interest-Convergence *as a Lens to View State Ratification of Post-Emancipation Slave Marriages*, 36 W. NEW ENG. L. REV. 143, 150 (2014) ("Scholars can use interest-convergence as a tool or, . . . a new pair of glasses, to help view historical developments related to equality and justice."); *see also* Raymond H. Brescia, *When Interests Converge: An Access-to-Justice Mission for Law Schools*, 24 GEO. J. ON POVERTY L. & POL'Y 205, 223 (2017) ("While Bell articulated the *Interest-Convergence Theory* as a way of explaining and justifying the Court's decision in *Brown*, some have taken it as a theory of social change itself, a way of both explaining how social change occurs and also spurring that change.").

85. *See, e.g.*, BELL, *supra* note 76 (explaining how the Supreme Court's decision in *Grutter v. Bollinger* illuminated the continued relevance of the interest-convergence theory).

86. Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 Iowa L. Rev. 833 (1996).

87. *See* Joseph Lubinski, *Screw the Whales, Save Me! The Endangered Species Act, Animal Protection, and Civil Rights*, 4 J.L. SOC'Y, 377, 413 (2003).

III.
AN INTEREST CONVERGENCE ROADMAP TO THE U.S. RATIFICATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD

As the Cold War context shows, there is authority for the idea that enacting rights-protective measures for the politically powerless can advance the foreign policy interests of the political majority. Applying the central insight of Bell's interest-convergence thesis, my argument comes in three parts. The first part explores the division between Trump and the political majority in their approach to international rules-based institutions. The second part contends that Trump's freewheeling approach to international rules-based institutions has compromised the United States' global standing. Finally, the third part contends that the political majority's adherence to transnational legal processes can be used as pressure point to form a single-issue coalition to ratify the CRC.

A. *President Trump's Approach to International Rules-based Institutions Diverges with the Political Majority's*

1. Transnational Legal Processes have been Upended under Trump

Prior to the Trump administration, a soft-power strategy had underwritten the nation's foreign policy since World War II.[88] A soft-power strategy

> means first that, given the choice, the United States—and other like-minded states—should choose *engagement* over unilateralism. When faced with a foreign policy problem, the United States should not proceed alone but rather seek to engage with other countries and adversaries around common values in search of diplomatic solutions that can be embedded within durable international law principles.[89]

When Trump entered the White House, "he found himself enmeshed in a complex web of international and domestic rules that created a persistent default path to compliance with preexisting norms," writes Professor Harold Honju Koh.[90] This transnational legal process, "[o]nce in place . . . became a 'guardrail' keeping certain political and policy decisions traveling along previously

88. *See, e.g.*, Amy Ebitz, *The Use of Military Diplomacy in Great Power Competition*, Brookings Inst.: Order from Chaos (Feb. 12, 2019), https://www.brookings.edu/blog/order-from-chaos/2019/02/12/the-use-of-military-diplomacy-in-great-power-competition/ [https://perma.cc/3C7Y-68C6].

89. Koh, *supra* note 14, at 9–10 (emphasis in the original). R

90. *Id.* at 141.

agreed-upon paths."[91] Trump's foreign policy strategy of staking out positions untethered to the ideas that built the global community—and propelled the United States to global leadership—"has moved a lot of us out of our comfort zone, me included,"[92] said Trump's former national security adviser H.R. McMaster. Traditionally, "the consensus view has been that engagement overseas is an unmitigated good, regardless of the circumstances," Secretary McMaster reminds us.[93]

The President's unorthodox views are a magnet for criticism. Journalist David A. Graham of *The Atlantic* describes the situation like this: "In essence, executive-branch employees are hearing orders from Trump and responding, *I don't have to listen to you—you're just the president*."[94] Peter Baker, Chief White House Correspondent for the *New York Times*, noted that "the president's own advisers and allies are challenging his view of the world and his prescription for its problems."[95] Recognizing Trump's anti-globalist posture as a threat to national security, Congressional lawmakers have repeatedly pushed back at Trump. In 2017, a near-unanimous Congress passed sanctions on Russia despite Trump's objections.[96] The Senate voted overwhelmingly in 2019, in a bipartisan repudiation, "to advance legislation drafted by the [Senate] majority leader [Mitch McConnell] to express strong opposition to the President's withdrawal of United States military forces from Syria and Afghanistan."[97] Senator Lindsey Graham, one of the President's most vocal supporters on Capitol Hill, summed it up this way: "I expect the

91. *Id.*

92. Mark Landler, *Trump, the Insurgent, Breaks with 70 Years of American Foreign Policy*, N.Y. TIMES (Dec. 28, 2017), https://www.nytimes.com/2017/12/28/us/politics/trump-world-diplomacy.html [https://perma.cc/ZA6J-54DX].

93. *Id.*

94. David A. Graham, *No One Listens to the President*, THE ATLANTIC (Apr. 19, 2019), https://www.theatlantic.com/ideas/archive/2019/04/no-one-listens-to-the-president/587557/ [https://perma.cc/S8KK-VHQB].

95. Peter Baker, *A Growing Chorus of Republican Critics for Trump's Foreign Policy*, N.Y. TIMES (Jan. 29, 2019), https://www.nytimes.com/2019/01/29/us/politics/trump-foreign-policy.html?searchResultPosition=1[https://perma.cc/7QQ3-YH76].

96. Patricia Zengerle & Amanda Becker, *House Approves New Russia Sanctions, Defying Trump*, REUTERS (July 25, 2017, 1:08 PM), https://www.reuters.com/article/us-usa-trump-russia-idUSKBN1AA28W [https://perma.cc/CYE9-64X9].

97. Catie Edmondson, *Senate Rebukes Trump Over Troop Withdrawals From Syria and Afghanistan*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/2019/01/31/us/politics/senate-vote-syria-afghanistan.html [https://perma.cc/X368-VJUD].

American president to do what's in our national security interest. It's never in our national security interest to abandon an ally . . . ."[98]

2. The Family Separation Policy Exemplifies Trump's Attacks on International Rules-based Institutions

Many of Trump's policies have created a wedge between the United States and its allies. Illuminating this wedge is the Department of Homeland Security's (DHS) cruel policy and practice of separating migrant children from their parents at the U.S.-Mexico border.[99] In April 2018, then-U.S. Attorney General Jeff Sessions rolled out a "zero-tolerance" policy, prosecuting any adult who crossed or attempted to cross the U.S.-Mexico border illegally.[100] He described the policy as follows:

> I have put in place a "zero tolerance" policy for illegal entry on our Southwest border. If you cross this border unlawfully, then we will prosecute you. It's that simple. If you smuggle illegal aliens across our border, then we will prosecute you. If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law. If you make false statements to an immigration officer or file a fraudulent asylum claim, that's a felony. If you help others to do so, that's a felony, too. You're going to jail. So if you are going to come to this country, come here legally. Don't come here illegally.

National security was used as a pretext for the "zero-tolerance" policy.[101] But it is clear that the policy was enacted to deter immi-

98. Press Release, Senator Lindsey Graham, ICYMI: Graham on Syria Withdrawal: "Disaster in the Making" (Oct. 7, 2019), https://www.lgraham.senate.gov/public/index.cfm/2019/10/icymi-graham-on-syria-withdrawal-disaster-in-the-making [https://perma.cc/4ANH-S2LQ].

99. Perhaps no policy enacted during Trump's administration has struck a global nerve like the family separation policy. A strong contender is Executive Order 13769, the Trump administration's policy barring immigrants from Muslim-majority countries from entering the United States in the name of a superficial national security threat. More on Trump's "travel ban" can be found at Editorial, *Diplomats Decry Muslim Ban*, N.Y. TIMES (Jan. 30, 2017), https://www.nytimes.com/2017/01/30/opinion/diplomats-decry-muslim-ban.html?searchResultPosition=5 [https://perma.cc/UNG2-VMS7].

100. Memorandum from the Attorney General (Apr. 6, 2018) (on file with Dep't of Justice) https://www.justice.gov/opa/press-release/file/1049751/download [https://perma.cc/ZKF4-PLN2].

101. Press Release, Dep't of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry [https://perma.cc/M3LJ-DCD2]. Trump has routinely described immigrants arriving from the U.S.-Mexico border as an "invasion." *See, e.g.*, Kathryn Krawczyk,

gration to the United States from the Southwest border, as then-White House Chief of Staff and former Secretary of DHS explained in unambiguous terms: "[Family separation] would be a tough deterrent . . . a big name of the game is deterrence . . . ."[102]

Before the policy was implemented, DHS's practice was to "catch and release" any families with children attempting to cross the border illegally, meaning that the Department released immigrants in deportation proceedings from its physical custody within twenty days,[103] as mandated by the 1997 *Flores* settlement.[104] Peddling the false charge that immigrants released during deportation proceedings never show up to their court dates, Trump tried to deal with this alleged "catch and release" loophole by separating thousands of children from their parents at the U.S.-Mexico border.[105]

Trump Just Called Immigration an 'Invasion.' So Did the New Zealand Shooter, THE WEEK (Mar. 15, 2019), https://theweek.com/speedreads/829486/trump-just-called-immigration-invasion- did-new-zealand-shooter [https://perma.cc/9S5P-MAAU]. This disturbing rhetoric rings hollow when we consider that the per capita crime rate for native-born U.S. Americans is higher than for immigrants. *See* Alex Nowrasteh, *Illegal Immigrants and Crime—Assessing the Evidence*, CATO INST.: CATO AT LIBERTY (Mar. 4, 2019), https://www.cato.org/blog/ illegal-immigrants-crime-assessing-evidence [https://perma.cc/9ZL4-Y4UT]. Moreover, when the Director of National Intelligence presented the 2018 and 2019 World Threat Briefing to Congress, he did not identify migrants arriving from Central America as a national security threat to the United States. *See Worldwide Threat Assessment of the U.S. Intelligence Community: Hearing Before the S. Select Comm. On Intelligence*, 115th Cong. (Feb. 13, 2018) (statement of Daniel R. Coats, Dir. Of Nat'l Intelligence).

102. Bill Chappell & Jessica Taylor, *Defiant Homeland Security Secretary Defends Family Separations*, NAT'L PUB. RADIO (June 18, 2018, 9:42 AM), https://www.npr.org/2018/06/18/620972542/we-do-not-have- a-policy-of-separating-families-dhs-secretary-nielsen-says [https://perma.cc/4MMR-4Z3K].

103. Dara Lind, *"Catch and Release," Explained: The Heart of Trump's New Border Agenda*, VOX (Apr. 9, 2018, 12:50 PM), https://www.vox.com/2018/4/9/17190090/catch-release-loopholes-border-immigrants-trump [https://perma.cc/KM7W-YGK9].

104. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997).

105. Ron Nixon, *'Zero Tolerance' Immigration Policy Surprised Agencies, Report Finds*, N.Y. TIMES (Oct. 24, 2018), https://www.nytimes.com/2018/10/24/us/politics/immigration-family-separation-zero-tolerance.html/ [https://perma.cc/N8ZH-ZJCT]. A January 2019 report by the Inspector General of the Department of Health and Human Services concluded that at least 2,737 immigrant children had been separated from their parents as a result of the zero-tolerance policy, and the true number was likely "thousands" greater. U.S. DEP'T OF HEALTH AND HUM. SERVS., OEI-BL-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE 1 (2019).

3. The Family Separation Policy Struck a Global Nerve

The family separation policy did not go unnoticed by the international community. In June 2018, then-U.N. High Commissioner for Human Rights offered a biting assessment of the situation at the U.S.-Mexico border: "[T]he practice of separating families amounts to arbitrary and unlawful interference in family life, and is a serious violation of the rights of the child."[106] Later that month, a similar point was made by the Permanent Council of the Organization of American States, "reminding the United States of its international legal obligation to respect the human rights of migrants, and especially children."[107] The Inter-American Commission on Human Rights explained that, "the rights to family life and personal integrity, as well as the right to identity of the children are *prima facie* in a situation of risk. . . . [The United States should assure] that these rights are protected through the reunification of children with their biological families and in support of the children's best interests . . . ."[108] In July 2019, U.N. High Commissioner for Human Rights Michelle Bachelet, echoed her predecessor's sentiments on the family separation policy:

> In most of these cases, the migrants and refugees have embarked on perilous journeys with their children in search of protection and dignity and away from violence and hunger. When they finally believe they have arrived in safety, they may find themselves separated from their loved ones and locked in undignified conditions. This should never happen anywhere.[109]

The European Parliament adopted a policy denouncing the "illegal family separations and the arbitrary and indefinite detention of asylum seekers without parole [as] cruel policies and flagrant violations of both U.S. asylum law and international law."[110]

Images of families forcibly separated from their parents blanketed the world's press. In France, Brian Miles of *Le Devoir* warned

106. Al Hussein, *supra* note 8. **R**

107. Cordero et al., *supra* note 9 (citing Permanent Council Res. 1106 (2168/18) (July 6, 2018)). **R**

108. INTER-AM. COMM'N ON HUMAN RIGHTS, RES. 64/2018, at 1 (Aug. 16, 2018).

109. *Bachelet Appalled by Conditions of Migrants and Refugees in Detention in the US*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (July 8, 2019), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24800 [https://perma.cc/4XWB-Y449].

110. Resolution on the Situation at the USA-Mexico Border, EUR. PARL. DOC. 2019/2733 (RSP) (July 18, 2019).

that "President Donald Trump once again sinks into the depths of bigotry and resentment with his migration policy . . . taking children hostage in the vain hope of wrestling concessions from the Democrats on building a wall between the United States and Mexico."[111] *El Universal* of Mexico calculated that "under the international framework of protection for children and considering also the protection that the United States establishes for children, it is an unjustifiable attack on minors."[112] In the United Kingdom, *The Independent* put it like this: "Trump has no shame, though hopefully the country as a whole will find its own and stop this barbarism at the border before more lives are ruined."[113]

Transnational actors in the United States also weighed in. Amnesty International USA attacked the Trump administration's "policies of cruelty towards migrant and asylum-seekers at the border" calling for an immediate end "before any more children are harmed."[114] The pro-immigration group America's Voice sounded a similar concern, characterizing DHS's policies as "deliberately cruel and dehumanizing."[115] The American Civil Liberties Union sued the Trump administration,[116] winning a court order from U.S.

111. Brian Myles, *Trump Prend des Enfants en Otage* [Trump Takes Children Hostage], LE DEVOIR (June 19, 2018), https://www.ledevoir.com/opinion/editoriaux/530657/immigration-trump-prend-des-enfants-en-otage [https://perma.cc/5BH8-PF6P].

112. Tonatiuh Guillen Lopez, *Estado Unidos Contra sus Niños* [United States Against their Children], EL UNIVERSAL (Mar. 24, 2017), http://www.eluniversal.com.mx/entrada-de-opinion/colaboracion/tonatiuh-guillen-lopez/nacion/2017/03/24/estados-unidos-contra-sus [https://perma.cc/APE4-98VR].

113. David Usborne, *History Will Never Let Donald Trump Escape the Shame of Separating Parents and Children at the Border*, THE INDEPENDENT (May 29, 2018, 4:59 PM), https://www.independent.co.uk/voices/trump-us-border-children-immigrants-wall-parents-separate-families-a8374671.html [https://perma.cc/7UF4-DDM].

114. *Statement Responding to Another Child's Death in Custody of Customs and Border Protection*, AMNESTY INT'L (Dec. 25, 2018), https://www.amnestyusa.org/press-releases/statement-responding-to-another-childs-death-in-custody-of-customs-and-border-protection/ [https://perma.cc/5JDQ-LNBG].

115. Press Release, Am.'s Voice Educ. Fund, Frank Sharry: "Will this be the Death that Leads to a Thorough Investigation and Some Genuine Accountability?" (Dec. 14, 2018), https://americasvoice.org/press_releases/frank-sharry-will-this-be-the-death-that-leads-to-a-thorough-investigation-and-some-genuine-accountability/ [https://perma.cc/C8BZ-DEVE].

116. Trevor Hughes, *Meet the Judge Who is Forcing the Government to Reunite Immigrant Families*, USA TODAY (July 14, 2018, 3:39 PM), https://www.usatoday.com/story/news/2018/07/13/immigrant-children-judge-dana-sabraw-profile/775946002/ [https://perma.cc/9TG6-RQDH].

District Court Judge Dana M. Sabraw.[117] The order provided that the administration had fourteen days to reunite separated children younger than five with their parents and thirty days for older children.[118] Judge Sabraw wrote:

> [T]here is no genuine dispute that the government was not prepared to accommodate the mass influx of separated children. Measures were not in place to provide for communication between governmental agencies responsible for detaining parents and those responsible for housing children, or to provide for ready communication between separated parents and children. There was no reunification plan in place and families have been separated for months.[119]

Issuing an executive order ostensibly intended to reverse the family separation policy,[120] Trump yielded to transnational actors when pressure was applied.[121] The administration's decision to rescind the "zero-tolerance" policy is directly traceable to actors in the political majority condemning the policy as a flagrant violation of international human rights norms and the rule of law. A likely inference to be drawn is that even as Trump attempts to remove the United States from ongoing transnational legal processes, the political majority continues to embrace the benefits of engaging with transnational legal processes.[122] As Harold Hongju Koh explains, "The first years of the new administration have shown that the United States is much bigger than Donald Trump. Donald Trump will shift on many aspects of his stated foreign policy aims if subjected to enough political pressure."[123]

117. *See* Ms. L. v. U.S. Immigration & Customs Enf't, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (order granting plaintiffs' motion for preliminary injunction).

118. *Id.* at 1149.

119. *Id.* at 1137.

120. Exec. Order No. 13841, 83 Fed. Reg. 29,435 (June 20, 2018). The order instructed the DHS Secretary to "maintain custody of alien families during the pendency of any criminal improper entry or immigration proceedings" except where joint detention would endanger the child.

121. Charlie Savage, *Explaining Trump's Executive Order on Family Separation*, N.Y. TIMES (June 20, 2018), https://www.nytimes.com/2018/06/20/us/politics/family-separation-executive-order.html?smid=nytcore-ios-share [https://perma.cc/3RNB-GKUQ].

122. KOH, *supra* note 14, at 153. **R**

123. *Id.* at 139.

B. President Trump's Freewheeling Approach to International Rules-based Institutions has Compromised the United States' Global standing

In the foregoing discussion this article has attempted to show that "under [Trump's] worldview, the United States should act based on its perceived national interests, not international rules: an approach grounded on perceived *national* rights, not the universal rights on which this country was founded and that form the foundation of modern international human rights law."[124] Trump's penchant for operating on the fringes of transnational legal processes bears responsibility for the United States' diminishing international standing and "soft-power."[125]

The Pew Research Center reported in 2017 that "[a]lthough [President Trump] has only been in office a few months, [his] presidency has had a major impact on how the world sees the United States," as the chart below shows.[126] "Trump and many of his key policies are broadly unpopular around the globe, and ratings for the U.S. have declined steeply in many nations."[127] This shift in opinion "stands in stark contrast to the final years of Barack Obama's presidency," where a median of sixty-four percent of respondents expressed confidence in Obama "to direct America's role in the world," compared to twenty-two percent of respondents under Trump.[128]

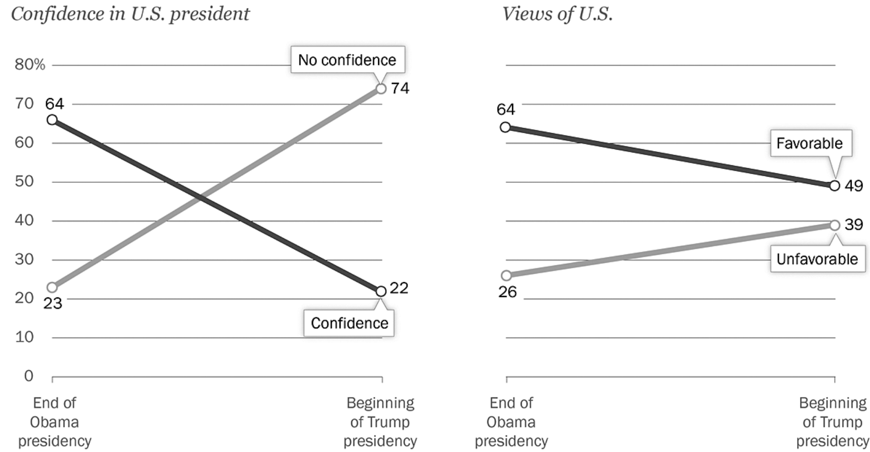
124. *Id.* at 13 (emphasis in the original).

125. *See, e.g.*, Thomas B. Edsall, *The Self-Destruction of American Democracy*, N.Y. TIMES (Nov. 30, 2017), https://www.nytimes.com/2017/11/30/opinion/trump-putin-destruction-democracy.html [https://perma.cc/453M-VSEG].

126. Richard Wilkes et al., *U.S. Image Suffers as Publics Around World Question Trump Leadership*, PEW RSCH. CTR. (June 26, 2017), https://www.pewglobal.org/2017/06/26/u-s-image-suffers-as-publics-around-world-question-trumps-leadership/ [https://perma.cc/62ML-D789]. The survey, which polled 40,448 respondents spanning 37 countries, was conducted from February 16 to May 8, 2017.

127. *Id.*

128. *Id.*



More recently, a similar study found that "[f]avorable views of the U.S. remain at historic lows" across the twenty-five countries where the survey was conducted.[129] Although the "shift began in the sixth year of the Obama administration, after the National Security Agency spying scandal . . . it has accelerated [since 2017]."[130] The problems are compounded by the considerable negative influence Trump's "America First" agenda has had on international relations. The diminishing image of the United States abroad is especially pervasive in Europe, where "people are more critical of the civil liberties record under President Trump than under prior administrations."[131] "Positive opinions of the U.S. have declined significantly" in Europe, including "dips of 27 percentage points in Germany, 25 points in France and 11 points in the UK."[132] A similar story emerges from North America where "positive views of the U.S. are sharply down from the last reading in the Obama presidency in

129. Richard Wike et al., *America's International Image Continues to Suffer*, PEW RSCH. CTR. (Oct. 1, 2018), https://www.pewglobal.org/2018/10/01/americas-international-image-continues-to-suffer/ [https://perma.cc/L247-TVPU].

130. *Id.*

131. *Id.*

132. *Id.*

both Mexico (-34 percentage points) and Canada (-26 points)."[133] While the image of the United States is generally positive among allies in Asia, views "have trended slightly downward since Donald Trump became president."[134]

C. The Political Majority's Adherence to International Rules-based Institutions can be used as a Pressure Point to Form a Single-issue Coalition to Ratify the CRC

1. Ratifying the CRC is in the Interest of the Political Majority

As Trump's policies continue to place extraordinary hardship on children and families, the United States' allies have also been dealt a serious blow. "Far from learning on the job or modifying his views to fit imperatives of America's global role—as did so many of his predecessors—Mr. Trump is falling back on the familiar mix of belligerence and isolationism that fueled his 'America First' campaign."[135] It is unmistakable that "the United States' global standing—and its moral authority and ability to persuade other countries to comply with international legal standards—have been severely damaged."[136]

CRC ratification is an attractive tool for the United States to close the distance with its global allies for a number of reasons. One reason is the nation's history as the *only* U.N. member state not party to the Convention. Indeed, there are other treaties that the United States has not ratified. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) comes to mind. However, while it is regrettable that the United States has failed to ratify the most comprehensive international agreement to improve the conditions of women, non-participation in CEDAW does not highlight the nation's failure to engage with global institutions like non-participation in the CRC.[137] On the CEDAW side, pointing out that other nations have not ratified the treaty can mitigate challenges to the United States' commitment to human rights. As the *only* U.N. member state not party to the Convention, the

133. *Id.*

134. *Id.*

135. Mark Landler, *On Foreign Policy, President Trump Reverts to Candidate Trump*, N.Y. TIMES (Apr. 3, 2018), https://www.nytimes.com/2018/04/03/us/politics/trump-foreign-policy.html?searchResultPosition=28 [https://perma.cc/DJ48-KBPD].

136. Cordero et al., *supra* note 9, at 486. **R**

137. It is worth noting that the U.S. is the only industrialized country that has not ratified CEDAW. *See* U.N. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13.

United States cannot mount the same defense when it comes to the CRC.

Another reason is that the U.S. government's mistreatment of migrant children illuminates a common theme about the Trump administration's abdication of human rights norms. Trump's hostility towards the global human rights project comes from a bigoted worldview that is guided by doctrines of racial hierarchy. In addition to the policies at the U.S.-Mexico border, this worldview found expression in January 2018 when Trump was discussing a bipartisan immigration deal, which included protections for immigrants from Haiti, El Salvador, and Africa.[138] On the grounds that immigrants from these parts of the world could not help America economically, Trump questioned "why [the United States was] having all these people from these shithole countries here?"[139] Instead, he spoke of allowing immigrants to the United States from European countries like Norway.[140] It should come as little surprise that his remarks were globally condemned. To take one example, the President of the International Rescue Committee did not mince words when he stated that, "Trump Administration [is] leading a race to the bottom on refugees and immigrants that is a betrayal of America's future as well as of its history. These are PEOPLE."[141]

At this critical juncture, participation in the Convention may help to alleviate concerns about the United States' commitment to human rights and facilitate the reconstruction of our relationships with our global allies. The United States cannot afford to continue to ignore the warnings from transnational actors. Should Trump's patterned ways of implementing policies in contempt of human rights norms continue, it may prove exceedingly difficult for other nations to credibly rely on the United States to take action to uphold rule-based institutions, tarnishing our legitimacy as a nation that takes global democratic ideals seriously. If our reputation for legitimacy is compromised, it imposes constraints on our ability to exercise global leadership.[142]

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138. Josh Dawsey, *Trump Derides Protections for Immigrants from 'Shithole' Countries*, WASH. POST (Jan. 12, 2018, 7:52 AM), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html [https://perma.cc/2727-6SSH].

139. *Id.*

140. *Id.*

141. David Millband (@DMillband), TWITTER (Jan. 11, 2018, 7:45 PM), https://twitter.com/DMiliband/status/951616195379236864 [https://perma.cc/Y8Z5-9HRG].

142. KOH, *supra* note 14, at 12. R

2. Ratifying the CRC is in the Interest of Children

Children's rights advocates can leverage the political majority's adherence to transnational legal processes and their interest in a foreign affairs boost to form a single-issue coalition to ratify the CRC. The case for CRC ratification from the standpoint of children's rights is straightforward: it would facilitate the expansion of rights-protective measures for children in the United States and abroad. There has been a false tendency in the United States to presume that the nation furnishes adequate protection to children. Two explanations for this presumption come to mind. The first is that the United States played a central role in the adoption of the 1948 Universal Declaration of Human Rights and directed the development of "soft law" instruments such as the U.N. General Assembly Resolutions.[143] The soft law instruments formed a backdrop for the international community to embrace "principles for decent and humane societies."[144] Having established itself as a pioneer in human rights, the United States could comfortably—for a while—fall back on its reputation, and so it has.

The second reason for the inertia on the children's rights front owes something to so-called "American exceptionalism." U.S. military and economic dominance tends to be conflated with strength in other areas. Therefore, the intuition runs that the nation is also making fundamental investments in its human infrastructure and particularly its children. The combination of these two factors has created a remarkable blind spot in the United States' approach to child welfare. Evidence has been mounting that the United States is not doing enough for children. A recent peer-review study conducted by *Health Affairs* calculated that children in the United States are fifty-five percent more likely to die than children in other rich countries.[145] On the basis of child mortality data between 1961 and 2010 from the United States and other comparable countries, Dr. Ashish Thakrar, the lead author of study, concluded that "[t]he

143. *See, e.g.*, Cordero et al., *supra* note 9, at 493. R

144. *Id.*

145. Ashish P. Thakrar et al., *Child Mortality in the U.S. and 19 OECD Comparator Nations: A 50-Year Time-Trend Analysis*, 37 HEALTH AFF. 140, 143 (2018); *see also* KRISTOF & WUDUNN, *supra* note 35, at 13 ("America ranks number 41 in child mortality, according to the Social Progress Index, which is based on research by three Nobel Prize-winning economists and covers 146 countries for which there is reliable data."). R

U.S. is the most dangerous of wealthy, democratic countries in the world for children."[146]

The child welfare system in the United States draws low marks even when compared to developing countries. Pulitzer Prize-winning journalists Nicholas Kristoff and Sheryl WuDunn have commented on this point:

> The United States has about 13 million children living in poverty. Of those, about 2 million may live in 'extreme poverty' by global definitions (in households earning less than about $2 per person per day), when looking at the cash incomes. These kids would be considered extremely poor if they lived in Congo or Bangladesh, yet they're here in the United States. We don't want to overstate the comparison—Congolese kids can't typically access food stamps, hospital emergency rooms or church pantries and soup kitchens—but it is still staggering that by formal definition some American children count as extremely poor even by Bangladeshi standards.[147]

Kristoff and WuDunn summed up the situation in this way: "Let's be honest: America has been guilty of child neglect."[148]

Nowhere is the nation's vulnerability on the children's rights front more apparent than "our unique insistence on subjecting juveniles to . . . extraordinarily harsh punishment."[149] In 2005 the United States became the last country to outlaw the practice of sentencing children to die.[150] Even though the Supreme Court's recent child sentencing cases have moved U.S. courts away from imposing the most extreme punishment on children,[151] changes in penological practices have yet to be attained. For example, the

146. Jacqueline Howard, *Among 20 Wealthy Nations, US Child Mortality Ranks Last, Study Finds*, CNN (Jan. 18, 2018), https://www.cnn.com/2018/01/08/health/child-mortality-rates-by-country-study-intl/index.html [https://perma.cc/RX3J-6YRB].

147. KRISTOF & WUDUNN, *supra* note 35, at 220. R

148. *Id.*

149. Elizabeth Bartholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 80, 86 (2011).

150. Roper v. Simmons, 543 U.S. 551, 575 (2005) ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.").

151. *Roper*, 543 U.S. at 575; Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012) (expanding legal protection for juvenile offenders). Taken together, *Roper*, *Graham*, and *Miller* emphasize that juveniles are categorically less culpable than adults such that sentencing determinations must take into consideration the mitigating factors that are the hallmark features of youth.

United States is the only nation that sentences children to life without parole (LWOP),[152] a practice that is categorically prohibited by Article 37(a) of the CRC.[153] The CRC would serve as an instrument to apply pressure against this sentencing practice and reform other defects in our problematic child welfare system.

IV. OBJECTIONS

There is room for argument that the interest-convergence thesis does not provide a compelling justification for the United States to ratify the CRC. Three anticipated objections to the argument advanced in this article follow. The first concerns the constraints of interest-convergence as a normative tool. As a normative tool, interest-convergence runs the risk of generating what Derrick Bell termed "contradiction-closing cases."[154] According to Professor Bell, contradiction-closing cases "serve as a shield against excesses in the exercise of white power, yet they bring about no real change in the status of blacks."[155] In other words, Professor Bell suggests that contradiction-closing cases create a false impression that the underlying conditions giving rise to action have been adequately addressed, obviating the need for further reform.[156] At best such cases are hollow victories. *Brown* is a case in point.[157] More than sixty-five years after *Brown* was decided, it is fair to say that in some parts of the United States segregation in public schools persists to a degree similar to or worse than the status quo ex ante.[158] Given this predicament, the objection goes, it is not obviously clear why interest-convergence should be utilized as a framework for progressive policies in the first instance. This article has no general disagreement with such arguments. The tension is not easily resolved, and this article will not intend to do so here. Instead, it will suggest that those who lean towards the view that groups are largely amoral and

152. Brief for Amnesty Int'l et al. as Amici Curiae Supporting Petitioners at 2, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174238.

153. CRC, *supra* note 23, at art. 37(a). **R**

154. Bell, *supra* note 18, at 32. **R**

155. *Id.*

156. *Id.*

157. *See* Derrick A. Bell Jr., *The Unintended Lessons in* Brown v. Board of Education, 49 N.Y.L. SCH. L. REV. 1053, 1060 (2005) ("The Brown decision's rejection of the racial barriers imposed by segregation . . . reinforced the fiction that the path of progress was clear. Everyone could and should succeed through individual ability and effort.").

158. *See, e.g.*, Lockhart, *supra* note 82.

that the function of law is to reshape the norms of society will find more utility in an interest-convergence framework.

The second objection involves questions about the substantive impact of the United States ratifying the CRC. An argument could be entertained that, even if we set the concerns about contradiction-closing cases aside, ratifying the Convention would not provide additional protection to children in the United States. The basis for this argument is that the Senate would likely attach reservations and federalism understandings to implement the CRC (as it has with other treaties the United States has ratified) and address concerns about stepping on the toes of individual states. The implementing legislation would, therefore, effectively delegate the enforcement of the treaty back to the states because the CRC covers areas of the law that are traditionally the jurisdiction of state governments. As a consequence, ratifying the CRC would do no more than the status quo because the executing legislation would flatten the robust protections of the treaty to fit within the parameters of state law.

Even accepting this premise, the benefits of ratification would accrue to the global community by virtue of each U.N. member states' participation in the Convention. Parties to the Convention are required to submit reports to the Committee on the Rights of the Child, describing their efforts to comply with the CRC.[159] The Committee—comprised of eighteen experts selected from member-states—makes recommendations for best practices to protect children's rights.[160] Non-participation by the United States is a missed opportunity for children's rights reform because the "United States has so much expertise to potentially share through promotion of CRC reforms in areas where our country has developed model laws, policies, and practices."[161] As the efforts to mitigate the negative impact of climate change have shown, it takes collaboration from *all* nations to effectively address issues with implications for present and future generations.

Finally, Trump's disregard for transnational legal processes casts doubt on whether or not global discontent with his administration's border policy could truly serve as a catalyst for rights-protective measures for children. And because ratification has not been contemplated as a serious possibility under past administrations, some might argue that this proposal is magical thinking. As

159. *Committee on the Rights of the Child*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx [https://perma.cc/8EGC-S89X] (last visited May 26, 2020).

160. *Id.*

161. Davidson, *supra* note 33, at 520. R

James Baldwin observed, "[I]n our time, as in every time, the impossible is the least one can demand."[162] Should ratification prove impossible under the Trump administration and the nation continues to backslide on human rights, transnational actors can still use this framework to engage the subsequent administration to pick up the pieces when the White House changes hands.

CONCLUSION

As Trump continues to batter the guardrails that have kept U.S. foreign policy aligned with the global human rights framework, ratification becomes doubly urgent. The corrective possibilities of the interest-convergence thesis suggest that the Trump administration's mistreatment of migrant children at the U.S-Mexico border—perhaps the most visible face of the administration's abandonment of human rights norms—is an area where a single-issue coalition around improving the nation's human rights record can emerge from groups with typically divergent interests. This article argues that the United States' ratification of the CRC would join the interests of children and the political majority. The message is not that ratification will provide immediate relief to migrant children at the U.S.-Mexico border. Rather, ratification may help to recuperate the United States' soft-power, which *had* been the backbone of the nation's foreign policy and essential to its ability to construct and lead global institutions.

162. BALDWIN, *supra* note 80, at 104.

JUVENILE COURT INTERAGENCY AGREEMENTS: SUBVERTING IMPARTIAL JUSTICE TO MAXIMIZE REVENUE FROM CHILDREN

*DANIEL L. HATCHER**

Introduction .... 33 R
I. State Juvenile Courts: From Foundational Justice To Efficiency-Seeking Factories .... 37 R
A. The Neglected Importance of State Juvenile Courts .... 37 R
B. Juvenile Courts as Efficiency-Seeking Factories ... 38 R
1. Juvenile Division, Common Pleas Court of Montgomery County, Ohio .... 38 R
2. Juvenile Court of Memphis and Shelby County, Tennessee .... 43 R
II. Juvenile Courts Maximizing Revenue From IV-E Foster Care Funds .... 45 R
III. Court Revenue from Child Support .... 54 R
A. Title IV-D Child Support Program .... 54 R
B. Juvenile Court IV-D Contracts .... 56 R
IV. State Prosecutors and Attorney General's Offices Interagency Contracts .... 60 R
V. Unconstitutional and Unethical Juvenile Court Systems .... 64 R
A. Separation of Powers .... 64 R
B. Due Process Concerns .... 83 R
C. Judicial and Prosecutorial Ethics .... 90 R
Conclusion .... 95 R

INTRODUCTION

Fair and equal justice requires an independent and impartial judiciary, free from the influence or control of the other branches

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of government and other external pressures. Judicial independence is necessary for all courts, including our nation's highest Court, federal appellate courts, and the thousands of state and local courts across the country. Perhaps most strikingly, judicial independence and impartiality is crucial in juvenile and family courts in order to protect the best interests of our nation's vulnerable children.

However, America's juvenile court systems[1] are contracting away their independence and impartiality, using interagency contractual arrangements to maximize revenue from children. Faced with historically insufficient state and county funding,[2] juvenile court systems have increasingly sought out other funds and have begun entering revenue generating contractual relationships that allow the courts and agency litigants to profit from the very children they exist to protect. Many juvenile court systems are even issuing annual financial reports similar to corporations, which include details of profiteering from child litigants.

Juvenile courts, state and county prosecutors' offices, and attorneys' general offices have become active participants in a growing poverty industry,[3] siphoning federal funding streams that are intended to help impoverished children. These revenue efforts create financial and structural conflicts that prioritize the fiscal self-interests of juvenile court systems over their missions of serving justice and the best interests of children. The resulting conflicts undermine the independence of judicial decisions and prosecutorial discretion, violating ethical obligations and constitutionally required due process and separation of powers.

For example, Title IV-E federal foster care funds are intended to help state child welfare agencies provide foster care services to vulnerable children.[4] But some state juvenile courts are pursuing a contractual mechanism which allows them to claim the federal foster care funds for themselves. These mechanisms function as follows: a juvenile court signs a contract with the state executive branch agency that normally administers the state child welfare programs. Through that contract, the juvenile court becomes a subgrantee of the executive branch agency, which allows it to be

1. This article uses the phrase "juvenile courts" in a broad sense, meaning courts that serve children and families in child support and other family law matters, and in proceedings regarding child welfare and juvenile delinquency.

2. *See* Michael L. Buenger, *The Challenge of Funding State Courts in Tough Fiscal Times*, 41-2 CT. REV. 14 (2004).

3. *See generally* DANIEL L. HATCHER, THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICA'S MOST VULNERABLE CITIZENS (2016).

4. 42 U.S.C. §§ 671–679b.

considered a Title IV-E foster care placing agency and makes the court itself responsible for the care and placement of children.[5] Then, if the court—through its judicial role—rules that a child is delinquent and should be removed from her home, the court—through its role as a child-placing agency—can claim IV-E revenue regarding services and administrative costs tied to that child. Further, the court can claim additional IV-E revenue by labeling some children "candidates" for foster care and keeping them in the system. The court literally reviews itself through these dual roles. When the court reviews its own actions as a child-placing agency favorably, it receives more federal funds. After entering these interagency contracts with executive branch agencies in order to claim IV-E revenue from children, some courts further contract with a private revenue maximization consultant who promises to help maximize the revenue from children for a contingency fee.[6]

Further, juvenile courts, state prosecutors' offices, and attorneys' general offices also use contractual arrangements to generate revenue from child support. Similar to IV-E foster care funds, the Title IV-D child support program is intended to provide funds to help state executive branch child support agencies carry out their enforcement efforts. However, many juvenile courts are now claiming these funds as revenue for themselves by contracting with the state agencies.[7] Through these contracts, juvenile courts hold a financial stake in the issuance and enforcement of child support obligations, and could be incentivized to act against the best interests of children in a variety of situations, including pursuing bonus incentive payments based on their performance percentages.

Such conflict resulting from the courts' financial incentives is present in all child support cases, but poses a particular concern in those cases where support payments are owed to the government rather than to the children. When impoverished parents receive cash assistance, or when children are removed from their homes due to allegations of abuse and neglect or juvenile delinquency, state child support agencies seek orders against the parents to pay child support to reimburse the government costs.[8] Although still called child support, the money is owed to the state rather than to

5. *See infra* notes 56–72 and accompanying text. **R**
6. *See infra* notes 73-75 and accompanying text. **R**
7. *See infra* notes 91-119 and accompanying text. **R**
8. *See generally* Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029 (2007); Daniel L. Hatcher, *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support*, 74 BROOKLYN L. REV. 1333 (2009).

the children. When juvenile courts have established the aforementioned interagency contracts, they receive these payments, and the more they initiate and enforce such support obligations, the more money they can make for themselves.

Several state prosecutors' and attorneys' general offices are also joining the courts' revenue strategies, entering interagency agreements in order to maximize both IV-E foster care and IV-D child support revenue from children.[9] Just as pursuit of funding can have an inappropriate influence on judicial decisions, pursuit of funding can conflict with prosecutorial discretion. For example, prosecutorial decisions about whether to initiate and enforce child support obligations and how to enforce the obligations, are supposed to be guided only by considerations of justice and the best interests of children. However, these contracts financially incentivize prosecutors to initiate and maximize child support orders and enforcement mechanisms against impoverished parents. These financial incentives are doubled in cases of state-owed support.[10] The revenue maximization strategy harms the efforts of low-income parents to obtain economic stability in order to better care for their children, and undermines the efforts of parents to reunite with their children who have been temporarily removed into foster care. Foster children are used as collateral in a vicious cycle. The more support obligations prosecuted and enforced, the more IV-D revenue generated for the prosecutors' and attorney's general offices, and parents may never get their children back unless they pay off the state-owed child support.

This article will expose and analyze the above funding strategies and their resulting harm. Part I describes the foundational role of state court systems in America, especially juvenile courts. Parts II and III explain how state juvenile courts and prosecutors' and attorneys' general offices are increasingly using interagency contracts to maximize federal foster care and child support funds. Finally, Part IV provides an analysis of how contractual revenue maximizing strategies are subverting the mission and independence of the juvenile court systems to the point of unconstitutional and unethical conduct—thereby causing harm to children, to parents, and to us all.

9. *See infra* notes 120-136 and accompanying text. R

10. *See* 42 U.S.C. §?658a(b)(5)(C).

I. STATE JUVENILE COURTS: FROM FOUNDATIONAL JUSTICE TO EFFICIENCY-SEEKING FACTORIES

The strength of any structure lies in its foundation, and America's judicial system is no exception. But in our courts, attention is typically aimed toward the top. Federal courts are generally viewed as more prestigious than state courts, with federal appellate courts ranking highest. Most judges and law clerks alike aspire for the federal judiciary and seek to move from federal district court appointments to the courts of appeal, and then few up to the U.S. Supreme Court. Within state court systems, the state appellate courts are again viewed as more prestigious than trial courts.

This ranking of prestige is inverted from reality. Over ninety-five percent of all U.S. cases are in state courts, not federal.[11] Of those state court cases, over ninety-nine percent are in the state trial courts—the courts of first resort.[12] However, these courts that are charged with handling the vast majority of cases are overwhelmed as they struggle with insufficient state and county funding, crowded dockets, frustrated or jaded judges, and inadequate legal representation. Unfortunately, this problem is at its worst in the courts serving most of America's children and impoverished adults.

A. *The Neglected Importance of State Juvenile Courts*

Attorneys often consider juvenile court as a stepping stone: "In most jurisdictions, the prosecuting attorneys and public defenders assigned to the juvenile court are some of the least experienced in their offices; these assignments are used as a training ground for new lawyers to learn state laws, rules of procedure, and trial techniques."[13] Similarly, this "phenomenon is also generally true in judicial assignments to the juvenile court," as the "[j]udges are rotated

11. R. LaFountain et al., *Examining the Work of State Courts: An Analysis of 2009 State Court Caseloads*, NAT'L CENT. FOR STATE COURTS (2011), http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf [https://perma.cc/WT2A-G839] (showing that 95 percent of U.S. cases are filed in state courts).

12. Court Statistics Project, *State Court Caseloads Digest: 2017 Data*, NAT'L CENT. FOR STATE COURTS 2, 16 (2019), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/Overview/CSP%202017%20Data%20-%20Spreads%20for%20viewing.ashx [https://perma.cc/WAK4-2AXS] (showing that of state court filings in 2017, 83 million were in state trial courts, compared to 241 thousand in state appellate courts).

13. JOSH WEBBER ET AL., TRANSFORMING JUVENILE JUSTICE SYSTEMS TO IMPROVE PUBLIC SAFETY AND YOUTH OUTCOMES 8 (2018).

to give them experience on the bench as they prepare for assignment into divisions that are deemed more prestigious and of greater importance than juvenile court, such as criminal and civil courts."[14] This ladder of prestige is also present in journalism: "Just as the juvenile court is considered the least prestigious assignment among judges and attorneys, the juvenile beat often doesn't hold a lot of prestige within the newsroom."[15]

This perception has an impact. The "lower" level state trial courts—including juvenile courts—have long struggled with insufficient state and county funding despite handling the largest caseloads. A 1966 law review article describes the New York Family Court:

> "It is a poor man's court." . . . Each morning a hundred stories of poverty are suggested by the faces and the personal effects of those who wait to appear before the judges. The cold atmosphere of the room only intensifies the feelings of helplessness, fear, and frustration which accompany poverty. "[C]ourtrooms are bare, toilet walls are defaced. The court's waiting rooms resemble those at hospital clinics."[16]

Over fifty years later, not much has changed. Many judges and masters have tried their best to carry out justice in such circumstances but are overwhelmed by the numbers. The fear, helplessness, and frustration—the cold atmosphere of poverty—continues. Therefore, facing decades of insufficient funding, juvenile courts have simultaneously evolved through Darwin-like self-preservation, finding ways to maximize revenue from the poverty.

B. Juvenile Courts as Efficiency-Seeking Factories

Juvenile court systems are inserted into local government budget structures where they must struggle for their own funding while simultaneously contributing to broader revenue strategies for their parent states and counties.[17] For example, a news report from Victoria, Texas explains how the county juvenile detention center is

14. *Id.*

15. Jill Wolfson & John Hubner, *Inside the Juvenile Justice System*, NIEMAN REP. (Dec. 15, 1998), https://niemanreports.org/articles/inside-the-juvenile-justice-system/ [https://perma.cc/4T93-G6BB].

16. Monrad G. Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CAL. L. REV. 694 (1966).

17. *See generally* James W. Douglas & Roger E. Hartley, *The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?*, 63 PUB. ADMIN. REV. 441 (2003); Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1993).

used to maximize county revenue by housing children sentenced by juvenile court judges from multiple jurisdictions:

> Victoria County is projected to almost double the revenue it brings in by housing youths from outside the county in its juvenile detention center, showing a shift in the economics behind the facility.
>
> The proposed 2019 budget for Victoria County projects that contracts at the juvenile center will bring in almost $2.3 million for the county in the next budget year. In 2015, the county brought in about $1.2 million from contracts with other counties. The county has contracts with about 50 other counties, most of which don't have secure facilities to hold kids and teenagers who courts determine require supervision.
>
> *County Judge Ben Zeller credited the juvenile detention center as a growing source of revenue for the county that helped to offset a decline in property values.* "We have a lot of improvements out at the juvenile detention center," Zeller said at the Aug. 6 budget workshop. "Due to our work out there in improving trends, increasing populations, better payment rates, we were able to budget upward $450,000 in revenue at juvenile detention."[18]

While participating in revenue strategies for their county and state governments, juvenile courts face historically inadequate funding for their own operations.[19] Adapting to their constant need for funds, the courts started searching for ways to reduce costs and increase revenue, sometimes running more like efficiency-seeking factories than justice-seeking courts. Many of the courts now publish annual reports, similar to those published by companies for their shareholders, which focus on their financials. Unfortunately, many courts have become just as profit-focused as those public companies. The juvenile court in Cuyahoga County, Ohio, one of the courts using interagency contracts to profit from children, also explains its evolution to seek efficiency and revenue in the face of ongoing budget concerns:

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18. Ciara McCarthy, *Revenue From Juvenile Detention Center Shows Growing Trend for Victoria County*, VICTORIA ADVOCATE (Sept. 8, 2018) (emphasis added), https://www.victoriaadvocate.com/news/government/revenue-from-juvenile-detention-center-shows-growing-trend-for-victoria/article_434d6a6e-b218-11e8-849d-1f19478df37d.html [https://perma.cc/TB3C-P4A9].

19. *See, e.g.*, Paulsen, *supra* note <*CITE* _Ref37756408">; Alison Kitchens & Andrew Damstedt, *Day in Juvenile Court Reveals Challenges for All Parties*, CAP. NEWS SERV. (May 6, 2011), https://cnsmaryland.org/2011/05/26/day-in-juvenile-court-reveals-challenges-for-all-parties/ [https://perma.cc/H6C9-PZ4A].

The juvenile court identified significant savings and revenue enhancements that may equal $5 million. . . . The 2016 budget for the juvenile court was cut by nearly 4%. In 2017, the budget was cut again about 6%. And for the 2018, the budget was cut by over 6%. . . . The Court is working hard to make numerous cuts and to increase revenues for the 2018-2019 biennium . . . .[20]

As one of their cost reduction strategies, many high volume court proceedings impacting vulnerable populations are not held before actual judges but rather before other judicial officials such as magistrates, masters, officers, or referees—who in some states are not even required to be attorneys. Juvenile court "referees" in New Jersey are not required to be lawyers and only need a four-year college degree.[21] North Carolina magistrates who decide civil and criminal cases do not need a college degree,[22] and North Carolina also allows non-attorney juvenile court counselors to issue custody orders.[23] And in Alaska, magistrates who can hear all sorts of criminal, civil, and juvenile matters do not even need a high school degree—but simply to be 21 and a citizen of the state.[24] However, the situation is not always much better in states with seemingly stricter requirements. For example, Pennsylvania does require that its juvenile court hearing officers be licensed attorneys, but only requires the attorneys to receive 6 hours of specific juvenile law instruction before they start deciding the fate of children.[25] As a comparison, Pennsylvania requires 600 hours of training before someone can be a licensed massage therapist.[26]

Further, to increase efficiencies and possible revenue streams, the courts have brought multiple non-judicial services in house, with the juvenile court judges running their courts more like large

20. CUYAHOGA CNTY. COURT OF COMMON PLEAS-JUV. DIV., 2017 ANNUAL REPORT 6 (2017), http://juvenile.cuyahogacounty.us/pdf_juvenile/en-US/AnnualReports/2017AnnualReport.pdf [https://perma.cc/2HTJ-9TAN].

21. SUP. CT. OF N.J., JUVENILE REFEREE PROGRAM STANDARDS (2000), https://www.njcourts.gov/notices/n001207a.pdf [https://perma.cc/XJ9Z-GXLF].

22. *The Important Role of the North Carolina Magistrate*, JUDICIAL BRANCH OF N.C. (2018), https://www.nccourts.gov/assets/documents/publications/Magistrates_FactSheet_2018_0.pdf [https://perma.cc/Z5UH-SNP2] ("The candidate also must have a four-year college degree or eight years of work experience as a clerk of superior court; or a two-year associate degree and four years of work experience in a job related to the court system.").

23. N.C. GEN. STAT. § 7B–1902 (1979).

24. Job Posting for Magistrate Judge II, WORKPLACE ALASKA (2013), https://agency.governmentjobs.com/alaska/default.cfm?action=jobbulletin&JobID=692861 [https://perma.cc/M4CK-QSDD].

25. 237 PA. CODE § 1182.

26. 49 PA. CODE § 20.11.

revenue-generating factories while simultaneously doling out decisions in the children's cases. Two county juvenile courts provide examples.

1. Juvenile Division, Common Pleas Court of Montgomery County, Ohio

In Montgomery County, Ohio, an annual report explains that the county's juvenile court, which has only two actual judges and about ten magistrates (who often cannot issue orders but only recommendations that must be adopted by the judges), handled over 21,000 new cases in 2017.[27] Although the court only has two judges, a large organization of 400 employees has grown beneath the judges, combining what are typically intended to be many independently run departments under one roof.[28] The court runs the programs, with the head Administrative Judge in charge.

The court runs its own detention center for children it decides to detain, which holds children as young as 8 years old.[29] The entire juvenile probation department also falls under the control of the court, although it is intended to independently carry out multiple types of investigations, supervisions, and related services and to provide recommendations to the judge.[30] The court started its own inhouse psychological services department, which is supposed to conduct independent evaluations that are then used by the judge.[31] The Court Appointed Special Advocate Program supervises the guardians ad litem who are supposed to independently advocate for children's interests, but the program is overseen by the court.[32] Similarly, the Citizen's Review Panel is supposed to provide an independent review of the juvenile court and agency process for in-

27. COMMON PLEAS CT. OF MONTGOMERY CNTY., 2017 REPORT TO THE CITIZENS OF MONTGOMERY COUNTY 31–42 (2017), https://www.mcohio.org/2017_Report_to_the_Citizens_of_MC_04_05_18.pdf [https://perma.cc/FD4J-RF5P]; *see also* Ohio R. Civ. P. 53.

28. *See* COMMON PLEAS CT. OF MONTGOMERY CNTY., 2018 REPORT TO THE CITIZENS OF MONTGOMERY COUNTY 23–35 (2018), http://www.mcjcohio.org/Files/Annual.Report/2018-Common-Pleas-Court-Annual-Report.pdf [https://perma.cc/47TG].

29. Jimmie L. Carter, *Detention*, MONTGOMERY CNTY JUV. CT., http://www.mcjcohio.org/Department/Detention/default.asp [https://perma.cc/A9X8-9HFN] (last visited Apr. 7, 2020).

30. COMMON PLEAS CT. OF MONTGOMERY CNTY.-JUV. DIV., 2018 ANNUAL REPORT 43, http://www.mcjcohio.org/Files/Annual.Report/2018-JC-Annual-Report.pdf [https://perma.cc/4ZGV-LKNZ].

31. *Id.* at 46.

32. *Id.* at 43.

volved children, but it is run by the court.[33] Further, the court operates its own residential treatment centers that house children removed from their homes and allow the court to maximize revenue from the children through the interagency contracts analyzed in Part II.[34] The court even maintains its own school.[35] All of the employees, including the teachers, serve "at the pleasure of the Administrative Judge," putting them directly under the control of the court.[36]

The Administrative Judge indicated that he may only have six to ten minutes for each child's case in the juvenile treatment court docket.[37] Rather than hiring more judges to handle the large caseloads, the juvenile court sought to increase efficiency by becoming an IBM Watson design partner in order to use artificial intelligence in the court room. The judge describes the use of IBM Watson to provide decisions in children's cases: "Watson accumulates information, and the more information it gets, the more it learns . . . . [T]he concept is that as we feed into Watson more scenarios, it will be able to give back to me in a year or 18 months suggested solutions to a problem."[38] The juvenile court judge was elected President of the National Council of Juvenile and Family Court Judges in 2017,[39] and IBM Watson became the lead sponsor of the organization's national conference the following year.[40]

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33. *Id.*

34. *Id.* at 9.

35. Carter, *supra* note 29.

36. Job Posting for Science Teacher, COMMON PLEAS COURT OF MONTGOMERY COUNTY-JUVENILE DIVISION (2019), http://www.mcjcohio.org/Files/HRJobPostings/SCIENCE%20TEACHER%20-%207-2-2019-Until%20Filled.pdf [https://perma.cc/TZ74-TRMH].

37. *Montgomery County Juvenile Court*, IBM, https://www.ibm.com/case-studies/montgomery-county-juvenile-court [https://perma.cc/6R3M-3SLZ] (last visited Apr. 7, 2020).

38. Chris Stewart, *County First to Use IBM Watson's Supercomputer on Juvenile Cases*, DAYTON DAILY NEWS, (Aug. 3, 2017), https://www.daytondailynews.com/news/local/hey-watson-local-judge-first-use-ibm-artificial-intelligence-juvenile-cases/InVqz6eeNxvFsMVAe5zrbL/ [http://perma.cc/ZB5L-FPJD].

39. Marisol Zarate, *Ohio Judge Elected President of National Council of Juvenile and Family Court Judges*, CHRON. SOC. CHANGE (Aug. 8, 2017), https://chronicleofsocialchange.org/news-2/ohio-judge-elected-president-national-council-juvenile-family-court-judges/27751 [https://perma.cc/LE7Z-NG6L].

40. NAT'L COUNCIL OF JUV. AND FAM. CT. JUDGES, 2018 NATIONAL CONFERENCE ON JUVENILE JUSTICE (2018), https://ncjfcj-old.ncjfcj.org/2018-national-conference-juvenile-justice. [https://perma.cc/GJR4-R9EX].

2. Juvenile Court of Memphis and Shelby County, Tennessee

In Shelby County, Tennessee, the juvenile court heard over 45,000 cases in 2017, with only one actual judge and about ten magistrates who serve at "the pleasure of the judge."[41] The court's annual report describes a focus on revenue and efficiency: "The goal of the Clerk's Office in 2017 was to continue to function efficiently and effectively, to respond to the needs of the families of our community, and to generate revenue through collection of court ordered fines and fees, grant contracts and state reimbursement to offset the cost of court operation."[42]

The court charges children $150 a day when it orders the children to be held in its detention center.[43] Much like the court in the previous section, this court runs its own corrective and protective services departments, probation services, psychological services, a school, and multiple other programs intended to be independent but that report to the judge.[44] The guardian ad litem program, which provides the legal representation for both children and parents, has also been operated by the court.[45] Further, as described in Part III, the court is one of several state juvenile courts that have entered interagency contracts to maximize revenue from federal IV-D child support funds when the court issues and enforces orders against impoverished parents.[46]

While the court has tried to run like an efficiency-seeking factory, it has failed at administering equal justice. The court's 2008 annual report asserts that "[m]any juvenile justice initiatives undertaken at this Court have been adopted as models for other programs in Tennessee and across the nation."[47] However, the U.S. Department of Justice's Civil Rights Division began an investigation into the court the following year in 2009, resulting in its 2012 report finding that the juvenile court "fails to provide constitutionally

41. JUV. CT. OF MEMPHIS AND SHELBY CNTY., ANNUAL REPORT (2017), https://www.shelbycountytn.gov/DocumentCenter/View/32885/Annual-Report-2017 [https://perma.cc/W8Q4-32V3]; *See* TENN. CODE ANN. § 37–1–107 (2020).

42. JUV. CT. OF MEMPHIS AND SHELBY CNTY., ANNUAL REPORT, *supra* note 41, at 7. **R**

43. *About the Detention Centers*, SHELBY CNTY, TENN., https://www.shelbycountytn.gov/378/About-the-Detention-Centers [https://perma.cc/9PFQ-8RWG] (last visited Apr. 4, 2020).

44. JUV. CT. OF MEMPHIS AND SHELBY CNTY., ANNUAL REPORT, *supra* note 41. **R**

45. *Id.* at 9.

46. *See infra* notes 911-119 and accompanying text. **R**

47. JUV. CT. OF MEMPHIS AND SHELBY CNTY., ANNUAL REPORT 2 (2008), https://www.shelbycountytn.gov/DocumentCenter/View/11677/2008-Annual-Report?bidId= [https://perma.cc/26TY-M9YB].

required due process to children of all races," the court's "administration of justice discriminates against Black children," and the court "violates the substantive due process rights of detained youth by not providing them with reasonably safe conditions of confinement."[48] As a result, the court entered a memorandum of agreement to implement numerous improvements recommended by the Department of Justice, with ongoing monitoring. However, when the Trump Administration took control, the Department of Justice ended the agreement and oversight after a request to do so from the Shelby County Juvenile Court judge, mayor, and sheriff.[49]

Despite the decision by the DOJ to end the monitoring, the due process monitor—who had been monitoring the agreement since 2012—entered a final report on December 10, 2018. The report concluded that "the structure of the Juvenile Court of Memphis and Shelby County remains deeply flawed enabling a culture of intimidation that undermines due process," and that "[t]he abrupt termination of oversight by the United States Department of Justice, Civil Rights Division (DOJ) on October 19, 2018 failed to recognize that Juvenile Court has actively resisted compliance with the word and the spirit of the Agreement and is likely to result in the Court reverting to prior practices."[50] As an example, the report describes how the juvenile court continued a structure where the judge exerted control and intimidation over children's attorneys.[51] The University of Memphis School of Law created a Children's Defense Clinic in 2016 to help provide independent legal representation, but after "the airing of a podcast where the Clinic Director expressed concerns about the conditions of confinement in the juvenile detention center, the juvenile court judge responded by instructing the Panel Coordinator to stop assigning cases to the clinic."[52] According to the report, the judge emailed the Dean of the Law School and the President of the University to complain and stated "that since the Court had 'no input' into who was hired for the clinical position and because the law school failed to 'discipline

48. U.S. DEP'T. OF JUST., INVESTIGATION OF THE SHELBY COUNTY JUVENILE COURT 1 (2012).

49. Wendi C. Thomas, *Juvy Court's Discrimination Goes On, But Mayor Wants Federal Oversight to End*, MLK50 (June 18, 2017), https://mlk50.com/juvy-courts-discrimination-goes-on-but-mayor-wants-federal-oversight-to-end-cc8e6af6f4a3 [https://perma.cc/P5CR-DRRU].

50. SANDRA SIMKINS, U.S. DEP'T OF JUST., FINAL REPORT ON SHELBY COUNTY JUVENILE COURT 1 (2008).

51. *Id.* at 3.

52. *Id.*

its staff' the Court's decision to stop assigning cases was final."[53] The Monitor's report provided copies of emails from the juvenile court's chief legal officer and the Juvenile Defender Panel's coordinator that used derogatory and offensive language against the clinic director.[54] The law school ultimately discontinued the Children's Defense Clinic. The juvenile court's judge was elected treasurer of the National Council of Juvenile and Family Court Judges in 2018, with the organization's press release calling him a trailblazer in his home state, and he was subsequently elected president of the organization in 2020.[55]

II.
JUVENILE COURTS MAXIMIZING REVENUE FROM IV-E FOSTER CARE FUNDS

Expanding their efforts to run like revenue seeking businesses, juvenile courts are entering contracts with the executive branch of state governments and using children as the commodity. For example, the federal government provides Title IV-E foster care funds to help state child welfare agencies provide foster care services to children. However, some state juvenile courts are entering contracts which allow them to take over the foster care agency executive branch function and claim the funds for themselves.

Before turning to the details, it is important to consider the children and families who are used in this revenue strategy. Children involved in the foster care and juvenile justice systems usually do not come from wealthy, or even middle-class, families. Rather, the parents have often faced years of poverty, incidences of homelessness, lack of education, domestic violence, struggles with addiction, mental illness, and lack of healthcare. When the children are

53. *Id.* at 34–37.

54. *Id.* (including emails from the court's Chief Legal Officer saying, in reference to the clinic director, "Did she spend her Christmas break with the Stepford Wives? I may barf!" to which the court's Juvenile Defender Panel Coordinator indicated, "I was thinking more Mommy Dearest," and the Chief Legal Officer later replied, "She really is trailer park trash.").

55. *Judge Dan H. Michael Elected as Treasurer to NCJFCJ Board of Directors*, NAT'L COUNCIL OF JUV. AND FAM. CT. JUDGES (Sept. 1, 2018), https://www.ncjfcj.org/news/judge-dan-h-michael-elected-as-treasurer-to-the-ncjfcj-board-of-directors-2/#:~:text=%d2%80%93%20The%20National%20Council%20of%20Juvenile,%2C%E2%80%9D%20said%20Judge%20John%20J [https://perma.cc/DBK5-R3LZ]; *Judge Dan H. Michael Elected as 76th President of the NCJFCJ*, NAT'L COUNCIL OF JUV. AND FAM. CT. JUDGES (July 22, 2020), https://www.ncjfcj.org/news/judge-dan-h-michael-elected-as-76th-president-of-the-ncjfcj/ [https://perma.cc/N53L-7W9Z].

removed from their homes rather than providing needed services to families, they often face further difficulties in the "system"—over-crowded juvenile courts, over-worked social workers, poorly monitored foster placements, and unsafe group homes. Children who have struggled with the trauma of poverty can face even greater trauma after entering the foster care system, and the statistics are daunting as they leave foster care. Studies have indicated foster children suffer from post-traumatic stress disorder at almost twice the level of war veterans, many experience homelessness, more than half experience unemployment, twenty-five percent do not graduate from high school, and only two percent obtain a bachelor's degree. Further, a past study found that almost eighty-two percent of former foster males had been arrested by age twenty-six. These are the children and families subjected to the revenue strategies, as described in more detail below.

The analysis begins in Ohio, where at least thirty of the county juvenile court systems are pursing IV-E funds to maximize court revenue when they order children removed from their homes and when they label children as "foster care candidates."[56] The courts signed interagency contracts ("subgrant agreements") with the Ohio Department of Job and Family Services, the state agency that includes the child welfare agency.[57] Normally, state child welfare agencies, which are part of the executive branch, are responsible for operating state foster care services—including the receipt of IV-E federal foster care funding to help run the agency services. However, through these subgrant agreements, the Ohio juvenile courts have contracted to take over the executive branch functions while simultaneously carrying out their judicial branch functions. Through the agreements, the juvenile courts contract to act as Title IV-E placing agencies, so when juvenile court judges rule that children are "unruly" or delinquent and should be removed from their family homes, the courts are literally removing the children to themselves so they can receive the IV-E funds.[58] The financial payoff to the courts for entering these contracts is significant. In Summit County, Ohio, just one of the thirty-two participating county

56. OHIO DEP'T OF JOBS & FAM. SERVS., TITLE IV-E JUVENILE COURT CONTACT LIST (Mar. 2020), http://jfs.ohio.gov/ocf/JuvenileCourtContactList.stm [https://perma.cc/CDU8-74UF].

57. *See, e.g.*, OHIO DEP'T OF JOB AND FAM. SERVS., LUCAS CNTY. JUV. CT. SUBGRANT AGREEMENT, G-1819-06-0131 (2017); OHIO DEP'T OF JOB AND FAM. SERVS., SUMMIT CNTY. JUV. CT. SUBGRANT AGREEMENT, G-1213-06-0242 (2009).

58. *See* SUMMIT CNTY. JUV. CT. SUBGRANT AGREEMENT, *supra* note 57, at 1. R

court systems, the juvenile court received over $1.1 million in IV-E revenue annually through this strategy as of 2015.[59]

For the Ohio courts to generate revenue after ordering child removals, the children and the placements must be IV-E eligible.[60] The courts can choose between several eligible options, including "non-secure settings such as foster care, group homes, treatment foster care, residential treatment facilities and other child care institutions."[61] Although the IV-E requirements limit the size of public facilities to no more than twenty-five beds, there is no restriction on the size of private facilities, and "both in-state and out-of-state residential programs qualify, as do non-profit and for-profit organizations."[62] The state agency provides a list of hundreds of organizations for the courts to choose from, listing their costs in a manner which amounts to a bidding process for the children.[63] Additionally, some of the juvenile courts, like the court in Montgomery County, even run their own IV-E qualifying residential treatment centers.[64]

Only impoverished children are eligible to be used in this IV-E funding strategy. Unless a child's family is poor enough for welfare cash assistance, the juvenile court cannot receive IV-E funds after removing the child from her home.[65] In light of this, the Ohio child welfare agency's Bureau of Fiscal Operations provided a training for juvenile courts about how to maximize IV-E funds, including the importance of the "penetration rate" (also termed the "eligibility ratio or "discount rate")—a measure which involves the percentage of children removed from their homes who are IV-E eligible (and thus from poor families). As described in the training, the penetration rate is determined by "[t]he number of placement days experienced by Title IV-E program eligible children housed in al-

59. SUMMIT CNTY. CT. OF COMMON PLEAS JUV. DIV., 2015 ANNUAL REPORT (2015), https://juvenilecourt.summitoh.net/index.php/information/publications/reports/finish/17-annual-reports/1254-annual-report-2015 [https://perma.cc/38FH-HREE].

60. *See* LUCAS CNTY. JUV. CT. SUBGRANT AGREEMENT, *supra* note 57. R

61. *Using Federal Title IV-E Money to Expand Sanctions and Services for Juvenile Offenders*, 2 TRAINING & TECHNICAL ASSISTANCE PROGRAM BULL. 1, 4 (2004).

62. *Id.*

63. STATE OF OHIO, TITLE IV-E REIMBURSEMENT CEILINGS FOR APRIL 1, 2019 THROUGH MARCH 21, 2020 (2020), https://jfs.ohio.gov/ocf/IVECeilings1920.stm [https://perma.cc/KBB9-A6U8].

64. COMMON PLEAS CT. OF MONTGOMERY CNTY.-JUV. DIV., *supra* note 34 and accompanying text. R

65. Shardé Armstrong, *The Foster Care System Looking Forward: The Growing Fiscal and Policy Rationale for the Elimination of the "AFDC Look-Back,"* 17 N.Y.U. J. LEGIS. & PUB. POL'Y 193, 209–12 (2014).

lowable settings DIVIDED BY the total number of placement days experienced for all children in custody/care placements for the reporting period."[66] The resulting ratio can be multiplied by several administrative costs to determine how much IV-E funding the courts can claim. Thus, the greater the percentage of poor children removed by the courts into foster care, and the longer those poor children are held in foster care as compared to non-poor children, the more money the juvenile courts can obtain. Considering the incentives, a demographic comparison is striking: the percentage of Ohio foster children from poor families reached seventy-seven percent by 2014, although Ohio's statewide poverty rate was 14.6%.[67]

Often, the greatest amount of the IV-E revenue generation for juvenile courts involves administrative costs. Once the court removes a IV-E child from the home, the court can begin using the child almost like a commodity to fund a long list of court operational costs, such as:

- Payroll and fringe benefit costs of court staff,
- equipment and supply costs,
- postage and telephone costs,
- the cost of liability insurance,
- travel and per diem costs,
- costs of rent, leases and utilities,
- a listing of over a dozen categories of training costs,
- costs of contracted services,
- and other "shared administrative costs" which can include the costs of court staff such as administrative assistants and receptionists, and utilities and supplies.[68]

The courts can even use IV-E children to seek funding for depreciation of their court buildings.[69] Then, the courts will engage in a pyramid-like strategy: after using the children to pursue all the potential IV-E revenue for administrative costs, the courts will circle

66. OHIO DEP'T OF JOB AND FAM. SERVS., HOW TO ALLOCATE COSTS (DEVELOP THE ALLOWABLE COST POOL) AND COMPLETE THE QUARTERLY BILLING FORM (JFS 01797) FOR TITLE IV-E 5, 56, http://jfs.ohio.gov/ocf/JVCIV_ECostAllocation_QBillTrain020613Final1.stm [https://perma.cc/2QTZ-654P] (last visited Mar. 30, 2020).

67. *Child Welfare Financing SFY 2014, Ohio*, ANNIE E. CASEY FOUND. (2014), https://www.childtrends.org/wp-content/uploads/2016/10/Child-Welfare-Financing-SFY2014_Ohio.pdf [https://perma.cc/QRQ4-LBXC].

68. *See* HOW TO ALLOCATE COSTS, *supra* note 66; LUCAS CNTY. JUV. CT. SUBGRANT AGREEMENT, *supra* note 57, at Attachment B. R R

69. *See* HOW TO ALLOCATE COSTS, *supra* note 66; LUCAS CNTY. JUV. CT. SUBGRANT AGREEMENT, *supra* note 57, at Attachment B. R R

back to seek additional IV-E revenue for the costs of pursuing revenue for the administrative costs.[70]

Training materials advise the juvenile courts on how they can increase their IV-E revenue from children by claiming more administrative costs than actually occur, through what is essentially an accounting gimmick. The training provides an example that although the "actual costs" of supplies for the juvenile court IV-E staff may be $2,000, the court can instead use a "Percentage of Full Time Equivalent (FTE) Method" in order to charge $2,500, or twenty-five percent more than the actual costs.[71] Using such a method for administrative costs, the courts would be knowingly submitting IV-E claims that are not accurate.

As an example of the pay-off from administrative cost claiming, when the Lucas County Juvenile court used IV-E children in 2016 to generate $123,124.12 in revenue for foster care placement reimbursement, the court also parlayed those children into $457,381.01 in IV-E funding for administrative costs—almost four times the amount of direct services.[72]

Realizing the potential revenue, Lucas County and many other of the Ohio juvenile courts hired a private revenue contractor, Justice Benefits, Inc. (JBI), to help maximize the IV-E funds from children. The company explains that it engages in "federal revenue maximization for state and local political entities," that "[w]e specialize in Enhanced IV-E Administrative Claiming," that "JBI has been working with Ohio Juvenile Courts since 2003," and that "[c]urrently, JBI works with over 20 Ohio Juvenile Courts to successfully file IV-E quarterly claims."[73] A Miami County Commissioner's Meeting explains that a contingency-fee contract with JBI helps the juvenile court to maximize funds: "JBI is paid 22% on monies recovered through claims submitted by the Court, and will be paid from the Juvenile Court Title IV-E Fund."[74] Thus, each time the Ohio

70. HOW TO ALLOCATE COSTS, *supra* note 66. R

71. *Id.*

72. LUCAS CNTY. JUV. CT., 2016 ANNUAL REPORT 35 (2016), http://www.co.lucas.oh.us/DocumentCenter/View/70170/2016-Annual-Report-LCJC [https://perma.cc/2V9E-K75X].

73. *Web Bases System for the Ohio Juvenile Courts*, JUSTICE BENEFITS, INC., http://jfs.ohio.gov/ocf/WebBasedRMSinformation.pdf [https://perma.cc/6SDG-M8BP]; *see also* MIAMI CNTY., OHIO, COMMISSIONERS MEETING MINUTES SUMMARY (July 19, 2018), http://jfs.ohio.gov/ocf/JVCIV_ECostAllocation_QBillTrain020613Final1.stm [https://perma.cc/2QTZ-654P].

74. MIAMI CNTY., OHIO, COMMISSIONERS MEETING MINUTES SUMMARY (Dec. 30, 2014), https://www.co.miami.oh.us/ArchiveCenter/ViewFile/Item/379 [https://perma.cc/PB9H-RDLZ].

juvenile court rules that IV-E children are delinquent or unruly, JBI can help the court obtain more IV-E funds. The courts' decision to engage a contingency-fee based revenue contractor even further incentivizes the courts in their revenue strategy. Moreover, while seeking funds from child removals, the courts also developed a strategy to obtain more revenue by treating other children as "foster care candidates." If the courts issue rulings that children are delinquent or unruly and order them into court supervision through probation, the courts can hold the threat of removal over the families and use the children to claim IV-E funds for court administrative costs. The courts similarly contract with Justice Benefits, Inc. for assistance, including trainings for how children can be treated as "foster care candidates" to claim the IV-E revenue.[75]

Similar to Ohio, other state juvenile courts also use similar interagency contracts to claim IV-E funds from children. In Louisiana, financial statements of the Jefferson Parish Juvenile Court from 2005 indicate how "the Judicial Expense Fund budget was favorably impacted by the accrual of $326,286.45 in Title IV-E money."[76] The reports further explain:

> As indicated by the financial statements and mentioned previously, the Court has identified Title IV-E funding as a significant new revenue source. Essentially this money represents Federal reimbursement, passed through the Louisiana Department of Social Services, of various indirect, administrative, and direct expenditures associated with the provision of services to children in the foster care system.
>
> The Court currently has a contract with the Department of Social Services that provides for the drawdown of $750,000.00 of Title IV-E money, and is likely to be amended, as initial revenue estimates were conservative. This contract expires on June 30, 2006 and Management is reasonably confident that the agreement will be renewed for at least one year.[77]

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75. *Candidacy for Foster Care Webinars*, OHIO DEP'T OF JOB AND FAM. SERVS. (2018), https://jfskb.com/sacwis/index.php/ofc-policy/862-candidacy-for-foster-care-webinar-qa [https://perma.cc/RY3M-BESJ] ("The webinar titled 'Foster Care Candidacy and RMS Overview Webinar for Title IV-E Courts and DYS' was held June 20, 2018. The webinar discussed how Foster Care Candidacy and RMS apply to Title IV-E Courts and DYS staff. This webinar was presented by ODJFS and JBI (Justice Benefits, Inc.)").

76. JUV. CT. OF THE PARISH OF JEFFERSON, STATE OF LOUISIANA, FINANCIAL STATEMENTS 7 (2005), https://app.lla.state.la.us/PublicReports.nsf/AC395D55385EFD5D862571CB00533F01/$FILE/00000544.pdf [https://perma.cc/TM4X-P5VG].

77. *Id.*

A 2017 financial statement explains how the Jefferson Parish Juvenile Court continued the agreement to obtain the IV-E funds, and how the amount "has steadily increased over the last [three] quarters of 2017 due to additional training and better documentation in determining eligibility status," and that "Title IV-E revenue is expected to continue on this pattern throughout 2018.[78]

In Arizona, the Administrative Office of the Courts similarly manages interagency agreements to obtain IV-E funds for juveniles in out-of-home placements in delinquency cases.[79] Again, the resulting revenue is significant. The Pima County Juvenile Court reports $170,000 in Title IV-E revenue "derived via cost reimbursement from the federal government through the Administrative Office of the Courts."[80] In Muskegon County, Michigan, the Circuit Court-Family Division similarly entered a contract with Justice Benefits, Inc. to "capture new Title IV-E federal reimbursement dollars."[81] Additionally, the Iowa Department of Human Services Employee's Manual explains that responsibility for administering IV-E programs "extends to Juvenile Court Services through an interagency agreement that authorizes Juvenile Court Services to provide child welfare services."[82]

Further, some states are maximizing IV-E funds through their juvenile probation departments—which are in turn connected to

78. JUV. CT. OF THE PARISH OF JEFFERSON, STATE OF LOUISIANA, FINANCIAL STATEMENTS 8 (2017), https://app.lla.state.la.us/PublicReports.nsf/06DBEDF6B7F7A7F8862582D500627D06/$FILE/0001A193.pdf [https://perma.cc/4R7Y-LCQM]; *see also* ORLEANS PARISH JUV. CT., 2018 PROPOSED ANNUAL BUDGET 8 (2018), http://cityofno.granicus.com/MetaViewer.php?view_id=3&clip_id=2782&meta_id=387149 [https://perma.cc/H7KE-S67X] (noting $250,000 in IV-E revenue in 2018).

79. See Title IV-E Program, ARIZ. JUD. BRANCH (2020), https://www.azcourts.gov/jjsd/Budgeting-and-Program-Development/Title-IV-E-Program [https://perma.cc/F4P6-VWTW] ("The AOC [Administrative Office of the Courts] manages the Title IV-E program through Service Agreements"); ARIZ. ST. JUV. CT. R. 19.1 ("Notwithstanding the foregoing, the following procedures shall be employed where the Juvenile Court has entered into signed agreements to obtain reimbursement under Title IV-E of the Social Security Act.").

80. PIMA CNTY. ADM'R, FISCAL YEAR 2019/2020 COUNTY ADMINISTRATOR'S RECOMMENDED BUDGET 5–161 (2019), https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/Finance%20and%20Risk%20Management/Reports/budget%20reports/2019-2020/2019-2020%20Recommended%20Budget%20Book.pdf [https://perma.cc/S4P3-LBLN].

81. MUSKEGON CNTY. BD. OF COMM'RS, MINUTES 202 (Oct. 9, 2001), https://www.co.muskegon.mi.us/DocumentCenter/View/5514/2001-Board-Minutes-PDF [https://perma.cc/N9V3-AL9Q].

82. IOWA DEP'T OF HUM. SERVS., EMPLOYEE'S MANUAL 6 (2012), https://dhs.iowa.gov/sites/default/files/13-B.pdf [https://perma.cc/M3EP-SF59].

the courts. In Illinois, the Juvenile Probation and Court Services Departments report directly to chief judges of each county.[83] In 2014, Justice Benefits, Inc. entered a contract with the Cook County Office of the Chief Judge Juvenile Probation and Court Services to maximize IV-E funds for a contingency fee through which the company would get ten percent of the first fifteen million dollars in IV-E funds and fifteen percent of all claims over fifteen million dollars.[84]

In Texas, the state Juvenile Justice Department entered an interagency cooperation contract, valued up to $10,500,000, in order for the agency's juvenile probation departments to maximize IV-E revenue.[85] Although the juvenile probation departments are considered part of the state Juvenile Justice Department, each of the county probation departments is run by a juvenile board which is comprised of judges. For example, the Bexar County Juvenile Probation Department claimed $650,000 from IV-E children in 2017, and the head of the juvenile probation department is the Juvenile Board Chair, who is a Juvenile District Court Judge.[86]

Again, in some of these Texas counties, Justice Benefits, Inc. entered contracts directly with the Juvenile Boards—run by the judges—to help maximize IV-E funds when the judges order children removed from their homes.[87] The judges of the Nueces County Juvenile Board (the Board) entered such a contract with Justice Benefits, Inc. in 2014: "The intent of this agreement is to

83. 705 ILL. COMP. STAT. 405/Art. VI (1987).

84. COOK CNTY. GOV'T, CONTRACT BETWEEN COOK COUNTY. GOVERNMENT AND JUSTICE BENEFIT, INC. 2 (Feb. 19, 2014), http://opendocs.cookcountyil.gov/procurement/contracts/1490-13306.pdf [https://perma.cc/FQ74-9BWE]; *see also* MCLEAN CNTY, IL, MINUTES OF THE JUSTICE COMMITTEE 4 (Apr. 1, 2008), https://www.mcleancountyil.gov/Archive/ViewFile/Item/1861 [https://perma.cc/Y3YA-9EHU] ("Motion by Nuckolls/Harding to Recommend Approval of an Addendum to the Justice Benefits Contract to seek Title IV-E Administrative Claims Funds for McLean County Court Services, Juvenile Division.").

85. TEX. DEP'T OF FAM. AND PROTECTIVE SERVS., CONTRACT BETWEEN TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES. AND TEXAS JUVENILE JUSTICE DEPARTMENT. (Dec. 1, 2011), https://www2.tjjd.texas.gov/procurementfiles/Interagency/DFPS%20-%20Title%20IV-E/CON0000206-Amend_3-Executed.PDF [https://perma.cc/WD8D-MYM4].

86. BEXAR CNTY. JUV. PROBATION DEP'T, 2017 ANNUAL REPORT 29 (2017), http://home.bexar.org/JPDAnnualReport/2017/BCJPD_annualreport_2017_web.pdf [https://perma.cc/D7BP-T4KN]; *see also* TEX. HUM. RES. CODE ANN. § 152.0032 (West 2007).

87. NUECES COUNTY, CONTRACT BETWEEN JUSTICE BENEFIT, INC. AND NUECES COUNTY JUVENILE BOARD (Nov. 20, 2014), http://ncagenda.co.nueces.tx.us/docs/2014/CC-REG/20141203_271/5835_JBI%20Agreement%20executed%2011-20-14.pdf [https://perma.cc/Q5LW-L8GG].

compensate JBI only for new [IV-E] revenues received by the Board . . . " and a contingency fee arrangement of "fifteen percent (15%) of all [IV-E] revenue paid to the Board . . . ."[88] The judges of the Juvenile Board in Alice, Texas similarly approved an agreement with Justice Benefits, Inc. to claim the IV-E funds, and the Board approved using the resulting IV-E funds for merit payments to department staff and costs for remodeling a building "paid for through Title IV-E federal funds and not local county funds . . . ."[89] In Harris County, Texas, the judges of the Juvenile Board approved a contract with Justice Benefits, Inc. to claim IV-E funds, outside of the normal competitive bid process.[90]

Thus, as illustrated by the prior examples, the juvenile court systems' practice of entering contractual deals to maximize revenue from children is spreading. The strategies divert the courts' focus from serving the interests of vulnerable children to using the children to fund the courts. The diversion undermines judicial independence and the core purpose of the courts, and risks harm to the children and families the courts exist to protect. Further, as the next section explains, the juvenile court systems have sought further interagency contracts to profit from children—by targeting child support.

88. *Id.*

89. Mauricio Julian Cuellar, *Juvenile Board Members Review Next Year's Probation Dept. Budget*, ALICE ECHO-NEWS JOURNAL (Dec 19, 2008), https://www.alicetx.com/article/20081219/News/312199996 [https://perma.cc/6DBQ-JW8S].

90. HARRIS CNTY. JUV. BD., MEETING AGENDA (Feb. 24, 2010), https://hcjpd.harriscountytx.gov/Board%20Agendas/Board%20Agenda%20-%20February%2024,%202010.pdf [https://perma.cc/C59Y-CBRD] (Approval of exemption from competitive bid process and renewal of contract with Justice Benefits, Inc.). As further insight into the business-like operations of the court, a news investigation in 2018 explained how three Republican juvenile court judges in Harris County were "assigning an extraordinary number of cases to a handful of private lawyers" who were making campaign contributions to the judges, rather than assigning the cases to the public defender's office. Neena Satija, *Harris County Juvenile Judges and Private Attorneys Accused of Cronyism*, TEX. TRIB. (Nov. 1, 2018), https://www.texastribune.org/2018/11/01/harris-county-texas-juvenile-judges-private-attorneys/ [https://perma.cc/9FWX-YXEP]. ("Those courts are also appointing the same lawyers to dozens of family court cases, where the same judges preside over child custody disputes, protective orders and decisions for kids in foster care.") For example, one lawyer "took on 377 juvenile cases . . . along with 126 family court cases and some probate cases," which "brought his total haul in taxpayer money for the year to about $520,000, data from the county auditor's office shows." *Id.*

III.
COURT REVENUE FROM CHILD SUPPORT

While expanding their contractual efforts seeking foster care funds, juvenile courts are also using children and impoverished parents to pursue another federal funding stream—through the Title IV-D child support program. This section provides a brief summary of the IV-D child support program, including the cost recovery focus, and explains how juvenile courts are targeting the federal funding stream.

A. *Title IV-D Child Support Program*

The Title IV-D child support program is intended to provide federal funds to help state executive branch child support agencies carry out their services.[91] For children in single-parent households, child support can be a crucial benefit when the payments are properly established and directed to the benefit of the children. Courts are supposed to carefully and impartially consider the circumstances of the parents and children to establish child support orders that obligors have the ability to pay, and only order the use of enforcement mechanisms when in the best interests of the children. If courts are financially incentivized to increase collections and use enforcement tools regardless of the children's interests, harm can result—to the parents, children, and to society.[92] Further, over $24 billion in child support debt across the country is owed to the government rather than to children,[93] and courts receive even greater financial incentives to order and enforce such state-owed support obligations.

Child support is converted to a state-owed obligation in multiple ways. First, when struggling custodial parents seek welfare assistance, states force the parents to assign their child support rights to the government to pay back the costs of the assistance. Also, states will simultaneously pursue "medical support" payments as part of the support obligation to offset the cost of Medicaid.[94] States re-

91. For a history of the program, see Hatcher, *Child Support Harming Children*, *supra* note 8, at 1034–44.

92. *Id.*; *see also*, VICKI TURETSKY, REFORMING CHILD SUPPORT TO IMPROVE OUTCOMES FOR CHILDREN AND FAMILIES 3 (5th ed. 2019).

93. OFF. OF CHILD SUPPORT ENF'T, PRELIMINARY REPORT 95 (2018), https://www.acf.hhs.gov/sites/default/files/programs/css/fy_2018_preliminary_data_report.pdf [https://perma.cc/BCQ7-SFZJ] ($24 billion in government-owed arrearages is over 21 percent of the total national child support debt of $114 billion).

94. *Id.* at 115.

quire poor mothers to cooperate in identifying absent fathers and then to sue them repeatedly for child support that is assigned to the state. When mothers are poor, the fathers are also usually poor, so the ability to pay back the cost of welfare is unrealistic. Studies have indicated that over seventy percent of the national child support debt is owed by parents with incomes of only $10,000 or less.[95] The resulting collection efforts of state-owed child support pits impoverished parents against each other, harming fragile families and children.

> Poor fathers who try to catch up almost always fail, as the poverty industry lines up against them and the relentless enforcement mechanisms never slow: a poor father finally obtains a new job but then is fired after he is jailed for unpaid child support; a truck driver trying to catch up on child support arrearages has his license suspended due to the back payments of child support, so he can't work; a construction worker has 65 percent of his wages garnished for child support and as a result he can't afford his rent or insurance on his old work truck.
>
> As a result of the forced welfare cost recovery mechanisms, the poverty industry is further harming the already fragile relationships between poor mothers and fathers, and poor children often lose contact with their fathers as the insurmountable child support mechanisms drive the fathers away. Moreover, society is also harmed by the welfare cost recovery focus. Poor fathers who are unable to pay child support retreat from their families and are driven into the underground economy, reducing legitimate work and resulting tax payments—and increasing crime.[96]

Moreover, the administrative costs of enforcing the state-owed child support against impoverished families are likely greater than the resulting payments.[97] And even when the support payments are collected, the result is payments taken from the low-income families that increases their economic turmoil and their likelihood of needing future public assistance—thus further increasing state costs.[98]

Further, states will pursue government-owed support when children are removed into foster care from impoverished families. Again, the costs likely outweigh collections, and only harm results:

95. *See* TURETSKY, *supra* note 92. R
96. HATCHER, *supra* note 3, at 144.
97. *Id.*
98. *Id.*

> When children enter foster care, the parents struggle to overcome poverty and other barriers with the hope of reuniting with their children. However, the additional debt obligation from government-owed child support can often derail the parents' struggle for economic stability and family reunification. Many states include the child support payments as a requirement in plans before reunification can be considered. States convert foster children into collateral, with the parents only able to seek reunification if they can pay off the government debt first.[99]

Despite the harm, juvenile courts are entering interagency IV-D contracts—described below—that create financial incentives for the courts to issue such support orders against impoverished parents.

B. Juvenile Court IV-D Contracts

Similar to the IV-E interagency contracts, juvenile courts are now claiming federal IV-D child support funds as revenue for themselves by entering interagency contracts so that the courts seek the federal funds when ordering and enforcing child support obligations. Ohio again provides an example. The Ohio county child support agencies and juvenile courts use similar contract forms for these interagency agreements "to purchase services for the effective administration of the support enforcement program."[100] Through the agreements, the child support agencies are purchasing the time of the juvenile court magistrates as units of service to "[c]onduct hearings; to prepare and review Magistrate reports; [and] to conduct status review for all eligible IV-D cases; including but not limited to establishment of paternity; establishment of support, enforcement of support and related orders."[101] Both the child support agencies and juvenile court certify in the contracts "that all units of service are eligible for federal financial participation (FFP) reimbursement," meaning eligible for the IV-D federal funds.[102]

99. *Id.*

100. OHIO DEP'T OF JOB AND FAM. SERVS., IV-D CONTRACT, WARREN COUNTY. CHILD SUPPORT ENFORCEMENT ADMINISTRATION AND WARREN COUNTY JUVENILE COURT, https://www.co.warren.oh.us/Commissioners/Resolutions/2019/031919.pdf [https://perma.cc/3U3L-B3DU]; *see also* FRANKLIN CNTY. BD. OF COMM'RS, RES. NO. 0134-19 (Feb. 26, 2019), https://crms.franklincountyohio.gov/RMSWeb/pdfs/58027.Court%20of%20Common%20Pleas%20Resolution%202019.pdf [https://perma.cc/9TQY-8NHF].

101. OHIO DEP'T OF JOB AND FAM. SERVS., *supra* note 100. R

102. *Id.*

The Lorain County juvenile court describes how its "IV-D Domestic Support Unit provides judicial services to the Child Support Enforcement Agency (CSEA)," and that the interagency "contract provides funding for the operation of the Domestic Support Unit and includes full and partial reimbursement of salary and benefits for 16 court employees, including two magistrates."[103]

The interagency contracts are lucrative for the Ohio juvenile courts: in Franklin County, the child support agency renewed a one-year contract with the county juvenile court in 2019 for child support services worth over $1.2 million to the juvenile court;[104] in Lucas County, the juvenile court received an additional three-quarters of a million in revenue in 2013 through the IV-D child support funds;[105] and in Cuyahoga County, the juvenile court received over $2.2 million in IV-D revenue in 2011.[106] As a result of their interagency contracts with both the state foster care and child support agencies, the Ohio juvenile courts can order children removed from their home and claim IV-E foster care revenue—which simultaneously triggers the ability of the courts to receive IV-D revenue by issuing and enforcing child support orders against the children's impoverished parents.

Similarly, the California child support agency contracts with the Judicial Council of California (JCC), which oversees all the state courts, for Title IV-D child support services.[107] The Judicial Council then arranges for its individual county courts to do the contractual work for the child support agency. As a result of the contracts, the courts turned their attention to the money. As an example, an audit found that the Alameda County Superior Court went so far as to report inaccurate information in an attempt to claim more child support funds.[108] Rather than submitting actual hours worked, the court used a method that maximized funds by inaccurately report-

103. *Department of Fiscal Management*, LORAIN CNTY. DOMESTIC RELATIONS CT., https://www.loraincounty.com/domesticrelations/departments/department-fiscal-management.shtml [https://perma.cc/3JHX-N7HZ].

104. FRANKLIN CNTY. BD. OF COMM'RS, *supra* note 100.

105. LUCAS CNTY. JUV. CT., 2013 ANNUAL REPORT 25 (2013), https://www.co.lucas.oh.us/DocumentCenter/View/70173/2013-Annual-Report-LCJC [https://perma.cc/S9KB-WLQX].

106. CUYAHOGA CNTY. COUNCIL, RES. NO. R2011-0104 (Mar. 22, 2011), http://council.cuyahogacounty.us/pdf_council/en-US/Legislation/Resolutions/2011/R2011-0104s.pdf [https://perma.cc/ZY42-QQX7].

107. *See* CAL. DEP'T OF CHILD SUPPORT SERVS., JUDICIAL COUNCIL OF CALIFORNIA CONTRACT REVIEW AUDIT REPORT 3 (2017), https://www.courts.ca.gov/documents/Audit-Report-dcss-Alameda-20170901.pdf [https://perma.cc/5YXN-K6ME].

108. *Id.* at 5.

ing more hours than the court staff actually worked for the child support agency—adding up to an amount of over $440,000 inappropriately claimed by the court:

> As a result, overall grant hours were recorded based on a methodology that maximizes grant funding, not in accordance with the JCC policy and procedures or federal regulations that require salary to be allocated based in the actual direct labor hours worked in the program. In addition, the FLF staff and FLF supervisors "certify under penalty of perjury that this time sheet accurately represents actual time worked. . ." on the JC-4 timesheet. As a result, we deemed the time reporting documentation unreliable and unsupported as there is no support, in terms of direct labor hours, to allocate salary, benefit or indirect costs to the AB 1058 grant program.[109]

Other state juvenile court systems also carry out these revenue practices. The juvenile court in Shelby County, Tennessee, which was described above, explains how "[t]he Court maintained two special grant agreements with the Tennessee Department of Human Services that provide funding for four child support magistrates, six principal court clerks and two management/supervisory personnel."[110] In Maryland, "[e]ach year the Maryland Judiciary enters into a "Cooperative Reimbursement Agreement" (CRA) with the Maryland Child Support Enforcement Administration (CSEA)" and as a result, "[t]he Judiciary receives several million dollars each year under the CRA."[111] Similarly, in New Jersey, the statewide executive branch child support agency "has a cooperative agreement with the Administrative Office of the Courts (AOC) for assistance in the establishment and enforcement of child support orders, central registry and reconciliation of accounts related to support payments."[112]

In Michigan, the courts actually established their own child support enforcement department—called the "Friend of the Court

109. *Id.* at 6.

110. JUV. CT. OF MEMPHIS AND SHELBY CNTY., ANNUAL REPORT 3 (2016), https://dashboard.shelbycountytn.gov/sites/default/files/file/pdfs/Annual%20Report%202016%20v3%2010-11-17%20.pdf [https://perma.cc/DXT9-CFMC].

111. MD. JUDICIARY, MANAGING THE JUDICIARY'S COOPERATIVE REIMBURSEMENT AGREEMENT 3 (Oct. 2015), https://www.mdcourts.gov/sites/default/files/import/family/grants/cra/managingjudiciaryscramanualforadminjudgesmagistratesctadministrators.pdf [https://perma.cc/R6HU-RU63].

112. N.J. DEP'T OF TREASURY, PROJECT MANAGEMENT STRUCTURE APPENDIX E, https://www.state.nj.us/treasury/purchase/bid/attachments/37829-e.pdf [https://perma.cc/UA38-EKJT] (last visited Apr. 3, 2020).

Bureau" (FOC).[113] The FOC has offices in each county court and carries out essentially all the child support functions that would typically be undertaken independently by both the court (order establishment) and the executive branch agency (enforcement).[114] The duties of the Friend of the Court Bureau are "performed under the direction and supervision of the chief judge" and the chief judge also appoints "referees" to hold hearings for the Friend of the Court Bureau in establishing and enforcing recommended child support orders.[115] This court agency then contracts with the statewide child support agency in the executive branch, in order for courts to obtain federal Title IV-D revenue, including federal incentive funds.[116]

The courts in Pennsylvania have taken the interagency agreements even further, not just contracting with the state child support agencies, but actually becoming the county IV-D child support agencies.[117] Pennsylvania's statewide child support agency explains how it completely contracted out its executive branch functions to the judiciary:

> The Department of Human Services, Bureau of Child Support Enforcement (BCSE), administers Pennsylvania's Child Support Enforcement Program through Cooperative Agreements with the 67 counties and county Courts of Common Pleas. The Domestic Relations Sections (DRSs) of the Courts of Common Pleas provide child support services in the counties. The DRSs

113. *See, e.g.*, MICH. SUP. CT., FRIEND OF THE COURT HANDBOOK (2018), https://courts.michigan.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/focb_hbk.pdf [https://perma.cc/JFP2-SUHU]; THIRD JUD. CIR. CT. OF MICH., 2017 ANNUAL REPORT 29-30 (2017), https://www.3rdcc.org/Documents/Administration/General/AnnualReports/2017%5EAnnual%20Report%20for%202017%5E%5E.pdf [https://perma.cc/82UU-6V4Q] ("The FOC is an administrative arm of the Court . . . .").

114. Friend of the Court Act 294, MICH. COMP. L. §§ 552.501-552.535 (1982).

115. *Id.*

116. *See* BD. OF COMM'RS OF THE CNTY. OF ALLEGAN, FRIEND OF THE COURT TITLE IV-D COOPERATIVE REIMBURSEMENT AGREEMENT 2017/2021, STATE OF MICHIGAN (Sept. 8, 2016), http://cms.allegancounty.org/sites/pages/Calendar/Lists/Board%20of%20Commissioners/Attachments/737/D1_147-607_FOC_approve5YRCRPAgreement.pdf [https://perma.cc/B966-WGC5].

117. PHILA. FAM. CT., 2012: YEAR IN REVIEW 49 (2012), https://courts.phila.gov/pdf/report/2012/FC-2012-Annual-Report.pdf [https://perma.cc/L358-AS9M] ("Philadelphia Domestic Relations serves as the county Title IV-D child support agency.").

establish paternity and child support orders, and enforce support obligations for Pennsylvania families.[118]

A sample "intergovernmental cooperative agreement" between the Pennsylvania statewide child support agency and the Domestic Relations Section of the Court of Common Pleas of Summerset County explains that through the agreement "the Domestic Relations Section (DRS) or equivalent child support division of a family court will function as the local Title IV-D agency in its county."[119]

IV.
STATE PROSECUTORS AND ATTORNEY GENERAL'S OFFICES INTERAGENCY CONTRACTS

In addition to courts, state prosecutors and attorneys general are also contracting to maximize revenue from children. First, regarding federal foster care revenue, Michigan county prosecutors' offices enter contracts with the state Department of Human Services (which runs the foster care agency) to represent the state agency where children may be removed from their homes due to state petitions of abuse and neglect. These contracts enable the prosecutors' offices to claim federal foster care IV-E revenue.[120] For example, the Genesee County Board of Commissioners approved the request "to allow the Prosecutor's Office to apply for Title IV-E funds through the renewal of a contract with the Michigan Department of Human Services to provide legal services to DHS in Family Court on child abuse and neglect cases . . . ."[121] Similar to the prac-

118. *Bureau of Child Enforcement*, PA DEP'T OF HUM. SERVS. (2016), https://www.humanservices.state.pa.us/CSWS/csws_controller.aspx?PageId=CSWS%2Fbcse_about.ascx&Preference=Desktop&Owner=Client [https://perma.cc/WES5-JMA8].

119. PA DEP'T OF HUM. SERVS., 2015-2020 IV-D COOPERATIVE AGREEMENT WITH DOMESTIC RELATIONS SECTION OF THE COURT OF COMMON PLEAS, SUMMERSET COUNTY. (2015), https://contracts.patreasury.gov/Admin/Upload/331135_4100070496_201510201057.pdf [https://perma.cc/8JZR-F3MT].

120. *See, e.g.*, MICH. DEP'T HUM. SERVS., CONTRACT BETWEEN MICH. DEPARTMENT OF HUMAN SERVS. AND COUNTY OF MUSKEGON COUNTY TREASURER (Dec. 22, 2014), https://www.co.muskegon.mi.us/DocumentCenter/View/221/DHS-Contract-PDF [https://perma.cc/26KK-74V4] (agreement with County of Muskegon Prosecuting Attorney); BAY CTY. BD. OF COMM'RS, RES. 2011-71 (Apr. 19, 2011), https://www.baycounty-mi.gov/Docs/BoardComm/2011/05-03-11-Results.pdf [https://perma.cc/2945-PJTP] ("This Agreement funds a portion of the Assistant Prosecutor's Wages directly related to the IV-E Agreement . . . .").

121. Memorandum from Governmental Operations Comm. to Genessee Cnty. Bd. of Comm'rs (Sept. 18, 2013), https://www.gc4me.com/departments/board_of_commissioners_1/docs/GOC_091813.pdf [https://perma.cc/F7E7-PW67].

tices of juvenile courts and probations offices, the prosecutors can use the children to maximize IV-E administrative cost revenue.[122] Also, the county prosecutors sometimes seek further private contractor expertise in maximizing the revenue. The Ingham County prosecutor's office enters contracts with the state agency in order to obtain both foster care IV-E funds and child support IV-D funds, and the office sought help from a revenue maximization consultant, Maximus, Inc.: "Ingham County Prosecuting Attorney's Office wished to engage their consultant Maximus, Inc. in the preparation and billing for the Title IV-D and Title IV-E in order to maximize the eligible reimbursement to the Prosecutor's Office . . . ."[123] Other states have similar interagency agreements between prosecutors' offices and the state foster care agency, triggering the claiming of IV-E funding. The commissioners in Green County, Ohio, approved "the IV-E contract between Job & Family Services and the Prosecuting Attorney for the prosecutor's activities which contribute to the administration of the IV-E program for Children Services."[124]

State attorneys general and prosecutors also pursue child support IV-D revenue through interagency agreements. In Lucas County, Ohio, the prosecutor's office contract payments are contingent upon receipt of the federal IV-D funds (FFP).[125] Similarly, the

122. *Id.* at 15. ("Title IV-E funds are earned on a reimbursement basis; there are no prepayments for services. The amount of reimbursement is based on a formula that takes into account the amount of legal services and their associated costs provided by the Prosecutor's Office to DHS.").

123. INGHAM CNTY. BD. OF COMM'RS, RESOLUTION AUTHORIZING CONTRACT WITH MAXIMUS, INC., FOR THE PREPARATION AND BILLING FOR TITLE IV-D AND IV-E GRANTS, RESOLUTION #09-212 (June 23, 2009).

124. BD. OF COMM'RS OF GREEN CNTY., OHIO, MINUTES 12 (Jan. 18, 2018), https://www.co.greene.oh.us/AgendaCenter/ViewFile/Minutes/_01182018-582 [https://perma.cc/K6WU-FSQB]; *see also* ATHENS CNTY. CHILDREN'S SERVS. BD., AGREEMENT WITH ATHENS COUNTY PROSECUTING ATTORNEY (Jan. 29, 2019), http://www.co.athensoh.org/document_center/Commissioners%20Office/2019%20Commissioners/Jan.29.19.M.signed.pdf [https://perma.cc/N3QK-XUZP]; TEX. DEP'T OF FAM. AND PROTECTIVE SERVS., CONTRACT FOR TITLE IV-E COUNTY LEGAL SERVICES (Aug. 29, 2018), https://co.jefferson.tx.us/agenda/agendas_pl/20180910_471/Attachments/cc091018%20-TITLE%20IV-E%20LEGALSERV.CONTRACT.pdf [https://perma.cc/9RBS-RZDL].

125. LUCAS CNTY. CHILD SUPPORT ENF'T AGENCY, IV-D CONTRACT WITH LUCAS COUNTY PROSECUTOR'S OFFICE RESOLUTION NO. 19-16 (Jan. 8, 2019), https://lcapps.co.lucas.oh.us/carts/resos/22144.pdf [https://perma.cc/HW42-DDG9]; *see also* OHIO ADMIN. CODE 5101:12-1-80 (2020); LAKE CNTY. CHILD SUPPORT ENF'T AGENCY, IV-D CONTRACT WITH LAKE COUNTY PROSECUTOR'S OFFICE (2013), https://myneighborsandme.files.wordpress.com/2019/03/prosecutor-iv-d-contract.pdf [https://perma.cc/H4C5-ZLRB]; BELMONT CNTY. CHILD SUPPORT ENF'T AGENCY,

Wadena County Attorney's office in Minnesota entered a "cooperative agreement" with the county child support agency.[126] In Muskegon County, Michigan, the court entered such an interagency agreement,[127] and then the court went further—essentially joining with the prosecutor's office: "In 2012, Muskegon's prosecuting attorney and chief judge determined that the public in Muskegon County would be better served by having their offices combine resources to provide in one location the services that were formerly provided separately."[128] Although intended to be two separate branches of government, "the Muskegon County Prosecutor's Office Child Support Division was moved into the Family Court and became the Muskegon County Family Court Establishment Division."[129] The county hopes that combining the courts and prosecutor's offices as one agency/office will become the national model.[130]

The Texas Attorney General's office uses an even broader approach, taking control of both the child support agency functions and the courts in the effort to maximize child support revenue. A state statute designates the Texas Attorney General's office as the statewide IV-D agency, allowing the office to reap millions in federal IV-D revenue each year.[131] The attorney general's office then

IV-D CONTRACT WITH BELMONT COUNTY PROSECUTOR'S OFFICE (Feb. 15, 2017), http://belmontcountycommissioners.com/wp-content/uploads/bsk-pdf-manager/2017/02/February-15-2017.pdf [https://perma.cc/V5XA-DZ9S].

126. WADENA CNTY. OFF. HUM. SERVS., IV-D CHILD SUPPORT COOPERATIVE AGREEMENT BETWEEN WADENA COUNTY OFFICE OF HUMAN SERVICES, COUNTY SHERIFF AND COUNTY ATTORNEY (2018), http://www.co.wadena.mn.us/AgendaCenter/ViewFile/Item/979?fileID=1784 [https://perma.cc/74WD-LB9E].

127. CNTY. OF MUSKEGON, TITLE IV-D COOPERATIVE REIMBURSEMENT 1 (2013), https://www.co.muskegon.mi.us/DocumentCenter/View/160/Cooperative-Reimbursement-PDF [https://perma.cc/5HYA-E8UE].

128. Jane Hess, *Muskegon County's Holistic Approach to Child Support is Becoming a National Model*, 31 THE PUNDIT 1 (2017).

129. *Child Support Division*, MUSKEGON CNTY. PROSECUTORS, https://www.co.muskegon.mi.us/581/Child-Support-Division [https://perma.cc/876C-GPN7] (last visited Apr. 7, 2020).

130. *See* Hess, *supra* note 128.

131. *See* TEX. FAM. CODE ANN. § 231.001 (West 1995). Similarly, the Washington, D.C. child support courts work "collaboratively" with the Attorney General's office, who is the D.C. child support agency. *Parentage and Child Support Branch*, D.C. CTS., https://www.dccourts.gov/superior-court/family-court-operations/parentage-and-child-support-branch [https://perma.cc/X77C-VUR6] (last visited Apr. 7, 2020). In its role as the IV-D agency, the DC Attorney General's office receives federal child support incentive payments, so the agency is financially incentivized in how it prosecutes and enforces cases. D.C. CODE ANN. § 46-226.01 (West 2001).

enters cooperative agreements with the county domestic relations courts. Through these interagency contracts, the attorney general's office funds the "child support courts" as part of an "integrated child support system."[132] As the Midland County courts explain:

> The child support courts program is funded with federal and state funds. The Office of Court Administration receives the funds through a cooperative agreement with the Child Support Division of the Office of the Attorney General. The existing agreement authorizes the Office of Court Administration to expend approximately $5 million annually to operate the program. Of that amount, approximately 66% comes from federal funds and the remainder comes from general revenue appropriated to the Office of the Attorney General.[133]

Through the agreement, the courts receive IV-D child support funding, including "incentive funding" if the courts meet performance standards, and the courts agree to be monitored and reviewed by the attorney general's office.[134] Thus, the attorney general's office, acting as the state child support agency, funds the very courts that the agency appears before—and requires that the judicial branch be monitored and reviewed by the executive branch. Further, the Texas legislature, the third branch of state government, enacted legislation requiring that the courts and the attorney general's office focus their efforts on maximizing federal child support revenue. The statute explains how the "presiding judges of the administrative judicial regions, state agencies, and counties may contract with the Title IV-D agency for available federal funds under Title IV-D to reimburse costs and salaries associated with associate judges, court monitors, and personnel appointed under this subchapter."[135] Then, the statute explicitly requires that "*[t]he presiding judges and the Title IV-D agency shall act and are authorized to take any*

132. *E.g.*, Travis Cnty. Integrated Child Support System, Cooperative Agreement 17-C0090 (Feb. 10, 2017), http://traviscountytx.iqm2.com/Citizens/FileOpen.aspx?Type=4&ID=34126&MeetingID=1696 [https://perma.cc/5J4D-ST9W].

133. *Title IV-D Child Support Court*, Midland Cnty. Tex., https://www.co.midland.tx.us/315/Title-IV-D-Child-Support-Court [https://perma.cc/H8RE-997H].

134. Travis Cnty. Integrated Child Support System, *supra* note 131, at § 5.2 (2017); El Paso Cnty. Integrated Child Support System, Cooperative Agreement, No. 13-C0116 (2012), http://www.epcounty.com/meetings/commcourt/2012-10-29/13.pdf [https://perma.cc/3C84-4PVF].

135. Tex. Fam. Code Ann. § 201.107 (West 2020)

action necessary to maximize the amount of federal funds available under the Title IV-D program."[136]

V.
UNCONSTITUTIONAL AND UNETHICAL JUVENILE COURT SYSTEMS

These contractual agreements and structures that link the courts, state human service agencies, and prosecutors and attorneys general create significant legal concern. This section of the article summarizes how the structural linkages and financial incentives are likely unconstitutional, including separation of powers and due process violations, and can cause violations of attorney and judicial ethics.

A. *Separation of Powers*

To prevent tyranny and better protect the ideals of justice and individual liberties, constitutional democracies are founded upon the core principles of separate and independent government functions combined with checks and balances. The U.S. Congressional Research Service describes the historical intent of separation of powers as drafted into the U.S. Constitution:

> The framers viewed human nature as inherently bad, and suspected that the natural inclination of men is to abuse power. Tyranny, to them, was "the accumulation of all powers, legislative, executive, and judiciary, in the same hands." To separate the functions of government into independent branches was necessary but not sufficient. Each branch would also need the ability to stand as a check against the others. No branch, however, would possess an overruling influence over the others, and each would be provided with the necessary means to resist encroachment from the others.[137]

In the 47th paper of *The Federalist,* James Madison explained, "The accumulation of all powers, legislative, executive and judiciary, in the hands of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny."[138] Alexander Hamilton also strongly supported the separation of powers between the three branches, and expressed most concern regarding independence of the judiciary:

136. *Id.* (emphasis added).

137. Matthew E. Glassman, Cong. Rsch. Serv., R44334, Separation of Powers: An Overview (2016).

138. The Federalist No. 47 (James Madison).

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution."[139] Similarly, U.S. Senator Sam J. Ervin, Jr., who was chairman of the Senate select committee that investigated the Watergate scandal, wrote:

> [J]udicial independence is the strongest safeguard against the exercise of tyrannical power by men who want to live above the law, rather than under it. The separation of powers concept as understood by the founding fathers assumed the existence of a judicial system free from outside influence of whatever kind and from whatever source, and further assumed that each individual judge would be free from coercion even from his own brethren.[140]

In the instances when branch functions are shared the original intent at the country's founding was that such overlap exists for the purpose of checks and balances:

> Madison recognized that the doctrine of separation of powers did not stand alone in the constitutional document, but was inextricably bound to the concept of checks and balances. The constitutionally required sharing and participation in the exercise of some of the power and authority of the other branches, this interdependence through carefully created checks and balances, was deliberately designed, as Madison noted in Federalist 51, so that "ambition could be made to counteract ambition."[141]

Moving forward in time, some shared functions have additionally become recognized as necessary for purposes of efficiencies and the practical operations of modern government. Although overly simplified, scholarship has described two lines of reasoning in applying the separation of powers doctrine: formalism, requiring strict adherence to separation of powers, and functionalism, embracing flexibility to allow some overlap. The functionalist approach recognizes that "[a] model of strict separation may have been possible two hundred years ago when the national government had relatively few employees and little regulatory responsibility, but not at a time when the government needs vast bureaucracies to oversee far reaching and complicated legislation."[142] However, even under the functionalist analysis, the purposes and limitations

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

140. Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 L. & CONTEMP. PROB. 108, 121 (1970).

141. 38 Mass. Prac., Admin. Law & Prac. § 2:1.

142. David Orentlicher, *Conflicts of Interest and the Constitution*, 59 WASH. & LEE L. REV. 713 (2002).

of the separation of powers doctrine remain under what is essentially a two-step analysis: (1) whether the overlap of branch functions is necessary for a genuine governmental need, and (2) whether "a proposed reallocation can go too far in its innovation and disrupt the Constitution's careful balance of power."[143] For example, "[a]ccording to one characterization of functionalist analysis, the issue addressed is whether a 'contested action usurps a function constitutionally reserved to [an]other branch or whether it threatens to interfere substantially with operations of the other branch of government.'"[144] Further, inherent in separation of powers analysis is that shared functions between the branches must be limited when conflicts of interest are present.[145] Conflicts of interest concerns are significant for each of our branches, and perhaps most paramount for our courts:

> [T]he notion that no man can be a judge in his own cause was among the earliest expressions of the rule of law in Anglo American jurisprudence. . . . Conflicts of interest destroy the independence that is the hallmark of the judiciary, and by extension of all public officers. Yet the judiciary must internalize that principle because judges are the arbiters of justice; if they fail, civil society in Locke's sense fails, and we revert to a state of nature.[146]

The separation of powers doctrine is also explicitly present in most state constitutions, with potentially even more strict separation application.[147] Courts have struggled with application of the separation of powers doctrine over the years, and scholars have attempted to label and categorize the court decisions into lines of reasoning such as "formalism" and "functionalism."[148] However, there are

143. *Id.*

144. *Id.* at 730 (quoting Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1283 (1988)).

145. *Id.* at 736 ("As the subsequent subparts indicate, one can generally understand the Court's separation of powers decisions in terms of a functionalist approach limited by conflicts of interest concerns.").

146. Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 306 (1989).

147. G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 337 (2003). Further, states still recognize the separation of powers doctrine when not explicitly stated in their state constitution. *See* Curtis Rodebush, *Separation of Powers in Ohio: A Critical Analysis*, 51 CLEV. ST. L. REV. 505 (2004).

148. Orentlicher, *supra* note 142. For a general discussion of the importance of separation of powers for state courts, see Hon. Ellan A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543 (1997). R

some circumstances—such as the sampling described in this article—that are an affront to the separation of powers doctrine regardless of what line of reasoning is applied.[149]

In state after state, examples of separation of powers violations result from the linkages of courts and the executive branch functions in the IV-D and IV-E interagency contracts described in this article.[150] The Ohio juvenile court IV-E contracts provide a good starting point for the constitutional analysis, where at least thirty of the county juvenile court systems entered interagency contracts with the state child welfare agency so that the courts obtain federal IV-E foster care funds.[151] Although executive branch child welfare agencies normally operate state foster care services, including the receipt of IV-E funds, the Ohio juvenile courts contracted to take over the executive branch functions by becoming the Title IV-E placing agencies.[152] As a result, when the Ohio courts use their judicial branch function to rule that IV-E eligible children are unruly or delinquent and should be removed from their homes, the rulings allow the courts to exercise their contractual executive branch placement agency functions—enabling the courts to claim and maximize federal IV-E foster care revenue. The contractually combined judicial and executive branch functions result in a separation of powers violation, as discussed below.

The Ohio juvenile courts began this contractual effort to maximize IV-E revenue in 1996, when four of the county juvenile courts entered the interagency agreements to become IV-E child placing

149. For an important article describing an unconstitutional juvenile court structure in Missouri, see Josh Gupta-Kagan, *Where the Judiciary Prosecutes in Front of Itself: Missouri's Unconstitutional Juvenile Court Structure*, 78 Mo. L. Rev. 1245 (2013).

150. *See, e.g.*, Child Support Enforcement Program, Conn. Dep't of Soc. Servs., https://portal.ct.gov/DSS/Child-Support/CCSES-Transition/CCSES-Transition [https://perma.cc/9FNJ-MNZE] (last visited Mar. 30, 2020) ("The Connecticut Child Support Enforcement Program (Title IV-D of the federal Social Security Act or the Child Support/IV-D program) is a cooperative effort between dual agencies: the Office of Child Support Services (OCSS) in the Executive branch and the Support Enforcement Services (SES) in the Judicial branch of Connecticut government to deliver quality child support services with a mission to improve the well-being of children and promote the self-sufficiency of families. The program partners working with OCSS under cooperative agreements are: the Office of the Attorney General, Support Enforcement Services of the Judicial Branch, Family Support Magistrates, and Superior Court Operations.").

151. *See supra* notes 56-72 and accompanying text. **R**

152. *Id.*

agencies.[153] By 2006, at least twenty-five of the county juvenile courts followed the financial incentives to enter the agreement—with one county court system pausing to ask questions about legality.[154] Butler County officials raised legal concerns regarding conflicting roles of the courts under interagency agreements.

> On March 1st, 2006 the Supreme Court Of Ohio's Board of Commissioners on Grievances and Discipline (Board) was asked: '(W)hether or not it is permissible, within the canons, for a juvenile court to act as a child placing agency for the purpose of receiving reimbursement through Title IV-E of the Social Security Act when provisions of that act require the court to make judicial determinations concerning whether or not continued placement in the home is contrary to the welfare of the child, and whether or not the placing agency (in this case the court) has made reasonable efforts to prevent the need for the placement of the child in order to receive such reimbursement.'[155]

The Board declined to offer an opinion, and instead referred the question to the Ohio Judicial Conference Juvenile Law and Procedure Committee, comprised of juvenile court judges.[156] Thus, the question of whether it is legally and ethically permissible for juvenile court judges to enter contracts for their courts to take on executive branch IV-E child placing agency functions was considered by a committee of juvenile court judges.[157] On November 17, 2006, the committee of judges in the Juvenile Law and Procedure Committee issued a "Resolution" in what is essentially a short legal brief supporting their arguments, and concluding, "It is the position of the juvenile judges of Ohio, in light of the preceding arguments that optional juvenile court participation as a Title IV-E placing

153. Patrick Griffin & Gregory Halemba, *Federal Placement Assistance Federal Placement Assistance Funding for Delinquency Services*, 1 CHILD., FAM. AND THE CTS.: OHIO BULL. 1 (2003).

154. Encarnacion Pyle, *Juvenile Courts' Role Debated*, COLUMBUS DISPATCH (Sep. 11, 2006), https://www.pressreader.com/usa/the-columbus-dispatch/20060911/282033322676879 [https://perma.cc/FJJ5-ZA9Y].

155. *Ohio Updates: Title IV-E Courts Receive Support of Ohio Judicial Conference*, 3 CHILD., FAM. AND THE CTS: OHIO BULL. 17 (2006).

156. *Id.*

157. OHIO JUD. CONF. JUV. L. AND PROC. COMM., RESOLUTION TO SUPPORT OPTIONAL JUVENILE COURT PARTICIPATION AS A TITLE IV-E PLACING AGENCY (Nov. 17, 2006), http://www.ohiojudges.org/Document.ashx?DocGuid=400faab0-352d-474a-bcb9-d85a82f81bd7 [https://perma.cc/2MQ9-7NMT].

agency is supported by law and consistent with the ethical standards embodied in the Judicial Canons."[158]

The committee of juvenile court judges addressed "whether this structure violates the separation of powers doctrine inherent in the Ohio Constitution or whether it causes violation of the Ohio Canons of Judicial Conduct . . . ."[159] The analysis is incomplete and incorrect. The Committee's separation of powers analysis is considered here, and the judicial ethics analysis and concerns with due process (which the judges failed to address) are then considered in the sections that follow.

The judges' legal brief in support of their resolution only devoted about one page to the separation of powers concerns. Attempting to minimize their new contractual role, the judges actually referred to the executive branch responsibilities in serving as a foster care child placing agency as merely "incidental administrative activities."[160] Further, seeking to alleviate concerns regarding influence from the executive branch agency resulting from the interagency agreements, the judges asserted that contractual oversight of the agency is only "analogous to an audit."[161] After briefly referencing case-law regarding separation of powers, the judges' analysis was the following:

> Applying the law to the facts of this case, the constitutional function of courts as adjudicators is not impeded by incidental administrative activities such as providing for the placement of children. Nor is the fact that the court has entered into a contract with an executive agency for reimbursement to be considered an overruling influence. The Department of Job and Family Services handles the administration of reimbursement with federal funds but not the administration of the court. The actions of Job and Family Services are analogous to an audit.[162]

Turning first to the juvenile court judges' description of the separation of powers doctrine in their argument, their short legal analysis references U.S. and Ohio Supreme Court precedents, essentially indicating that separation of powers between the three branches "were not intended to operate with absolute independence," but that when there is any shared branch functions one branch still must not exert such influence as to prevent another branch from "accomplishing its constitutionally assigned func-

158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. OHIO JUD. CONF. JUV. L. AND PROC. COMM., *supra* note 157. R

tion"[163]—and that "none [of the branches] ought to possess directly or indirectly an overruling influence over the others."[164] The analysis accurately cites precedent but is incomplete, as countless court opinions and scholarship has attempted to address the various iterations of how concerns can be present depending on which branches are involved in shared, delegated, or usurped powers, and how they are involved. Application of the separation of powers doctrine has been complex and varied over the years.[165] But, as the following paragraphs make clear, under any analysis or any theory of separation of powers, the practices of the juvenile courts in Ohio under the interagency agreements violate the principles.

The judges' description of their contractual role as merely an "incidental administrative activit[y]" is concerning and incorrect. Through the interagency agreement, the judges have taken on the crucially important executive branch function of serving as the IV-E foster agency responsible for the placement and care of all children who the judges order removed from their homes.[166] The U.S. Department of Health and Human Services briefly summarizes the importance of this placement and care responsibility under Title IV-E of the Social Security Act, including being "legally accountable for the day-to-day care and protection of the child":

> The title IV-E foster care program requires, as a condition of eligibility, that a child's placement and care responsibility be vested either with the State agency or another public agency with which the State has a bona fide agreement pursuant to section 472(a)(2)(B)(ii) of the Act. The term placement and care means that the State agency is *legally accountable for the day-to-day care and protection of the child* who has come into foster care through either a court order or a voluntary placement agreement. . . . Placement and care responsibility allows the State agency to make placement decisions about the child, such as where the child is placed and the type of placement most appropriate for the child. It also ensures that the State

163. *Id.* (citing Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977)).

164. *Id.* (citing State *ex rel.* Bryant v. Akron Metro. Park Dist., 166 N.E. 407, 410 (Ohio 1929), as cited in Bray v. Russell, 729 N.E.2d 132, 134 (2000)).

165. See *supra* notes 142-150 and accompanying text. R

166. OHIO ADMIN. CODE 5101:9-7-08 (2020) ("The county juvenile court and the board of county commissioners may enter into a subgrant agreement with ODJFS to administer Title IV-E of the Social Security Act, which allows the juvenile court to assume full responsibility for the placement and care of adjudicated unruly and delinquent children. The subgrant agreement enables these courts to receive Title IV-E reimbursement for allowable foster care maintenance (FCM), administration, and training costs as outlined in this rule.").

provides the child with the mandated statutory and regulatory protections, including case plans, administrative reviews, permanency hearings, and updated health and education records.[167]

Because of the importance of the responsibilities for the placement and care of foster children, the agency's role is subject to an extensive body of detailed federal statutes and regulations, with the overarching purpose of ensuring the "safety and well-being of children."[168] In addition to the extensive federal law requirements, Ohio law also explains some of the responsibilities—even insuring the provision of adequate education services:

> The Title IV-E agency having responsibility for the placement and care of the child shall:
>
> (1) Ensure the proper administration of funds, allocated or reimbursed.
>
> (2) Determine eligibility for FCM program services.
>
> (3) Maintain a separate FCM case record for each program eligible child in the legal responsibility of the Title IV-E agency.
>
> (4) Assure that each child who has attained the minimum age for compulsory school attendance receiving FCM reimbursement is a full-time elementary or secondary school student. Full-time elementary or secondary school attendance includes the following:
>
> (a) A child is enrolled, or in the process of enrolling in an institution providing elementary or secondary education.
>
> (b) A child is instructed in elementary or secondary education at home in accordance with the home school law of the state where the home is located.
>
> (c) A child in an independent study elementary or secondary education program in accordance with the law of the state where the program is located, which is administered by the local school or school district.
>
> (d) A child is incapable of attending school on a full-time basis due to the medical condition of the child,

167. ADMIN. FOR CHILDREN AND FAM., CHILD WELFARE MANUAL, 8.3A.12 TITLE IV-E, FOSTER CARE MAINTENANCE PAYMENTS PROGRAM, ELIGIBILITY, RESPONSIBILITY FOR PLACEMENT AND CARE (2020), https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=31 [https://perma.cc/Z9FV-2JGC] (emphasis added); *see also* OHIO ADMIN. CODE 5101:2-42-04 (D)(1)-(3).

168. *E.g.*, 42 U.S.C. §?670, *et. seq.* (2018); 45 C.F.R. § 1355, *et. seq.* (2020).

and the incapability is supported by regularly updated information in the case plan of the child.

(5) Facilitate service planning and provision of services under the FCM program. Service planning and provision of services shall include but are not limited to:

(a) Placement prevention efforts.
(b) Determining the appropriateness of placement.
(c) Ensuring all procedural safeguards are provided.
(d) Case management.
(e) Family reunification efforts.
(f) Providing support to the child's caregivers.
(g) Discharge planning.
(h) Independent living.
(i) Referral to other programs as required or necessary . . . .[169]

Because of the importance of the role, the executive branch agency functions of placing and caring for children are subject to continuous judicial review, which means the Ohio juvenile court judges are actually reviewing themselves. This conflict is not minor. A publication jointly prepared by the Supreme Court of Ohio, the National Center for Juvenile Justice, and the Ohio Department of Job and Family Services summarizes specific required judicial findings under federal law during three procedural phases of a child's case:

In practice, that calls for participating courts to consider and make detailed, formal and timely findings on three issues in the cases of children who need out-of-home placement:

1. Necessity of removal. First, compliance with IV-E requirements calls for the court authorizing a child's removal from the home to make a fact-based determination that "continuation in the home would be contrary to the welfare" of the child—and to do so in the first order that sanctions the child's removal, even temporarily.

2. Efforts to prevent removal. Within 60 days of the child's removal, the court must find that "reasonable efforts have been made to prevent the child's removal from home"—which may be satisfied by a finding that, under the circumstances, a failure to make advance efforts to prevent removal was "reasonable."

3. Efforts to finalize permanency. Within 12 months of the date that the juvenile enters IVE eligible foster care—generally at a special "permanency hearing" that is required for children

169. OHIO ADMIN. CODE 5101:2-47.

who have lingered that long in placement—the court must find that "reasonable efforts have been made to finalize a permanent placement for the child."[170]

In each of these important judicial determinations, the Ohio juvenile court judges—through their judicial branch role—are reviewing themselves in their executive branch role, contradicting one of "the earliest expressions of the rule of law in Anglo American jurisprudence," that "no man can be a judge in his own cause."[171] As just one example of this conflict, the Ohio statutes explain how the "Title IV-E agency which has legal responsibility for a child," which is the juvenile court, "must obtain a judicial determination by a juvenile court of competent jurisdiction signifying that reasonable efforts were made by the Title IV-E agency to finalize the permanency plan for a child placed in substitute care . . . ."[172] Further, the judges are financially incentivized to rule in their own favor, because making such determinations triggers the courts' ability to claim and maximize IV-E foster care revenue. Also, in addition to the three specifically required judicial determinations outlined above, the juvenile courts must hold review hearings every 6 months, which again includes review of their own actions as the IV-E agency responsible for placement and care of the children:

> The review hearing provides an opportunity to evaluate case progress and to revise the case plan as needed. They also guide efforts toward achieving permanency for the child. The review also considers the extent of progress that has been made toward alleviating or mitigating the causes necessitating placement in foster care . . . .[173]

Moreover, the juvenile courts have continuing jurisdiction over the actions of the IV-E agency (themselves) throughout the time when the child is in the care of the courts' dual role,[174] and any party can bring a matter regarding agency actions or services to the courts attention by motion at any time, again with the courts review-

170. *See* Griffin & Halemba, *supra* note 153, at 3 (citing 45 C.F.R. § 1356.21(b)-(c), 42 U.S.C. § 671(a)(15), 65 Fed. Reg. 4053 (Jan. 25, 2000)). **R**

171. *See* Verkuil*, supra* note 146, at 305. **R**

172. OHIO ADMIN. CODE 5101:2-47-22.

173. ADMINISTRATION OF CHILDREN AND FAMILIES, CHILD AND FAMILY SERVICES REVIEWS, REVIEW HEARINGS, https://training.cfsrportal.acf.hhs.gov/section-2-understanding-child-welfare-system/3024 [https://perma.cc/LQ6Z-5APL] (last visited Apr. 15, 2020).

174. OHIO ADMIN. CODE 2151.23 ("(14) To exercise jurisdiction and authority over the parent, guardian, or other person having care of a child alleged to be a delinquent child, unruly child, or juvenile traffic offender, based on and in relation to the allegation pertaining to the child[.]").

ing themselves.[175] In fact, due to the dual executive and judicial branch roles, the juvenile courts are also in the conflicting position where they can issue orders controlling the conduct of the current custodians of the children, who again are the courts themselves in their contractual role as the IV-E care and placement agencies.[176]

In addition to ignoring these significant conflicts with their dual contractual roles, the juvenile court judges' resolution also incorrectly seeks to minimize the separation of powers concerns regarding the influence of the executive branch agency as a result of the interagency agreements, which the judges argued is merely "analogous to an audit."[177] In fact, the actual contract language in the interagency agreements provides the executive branch agency with significant control and influence, including explicit contract language granting the executive branch "final and binding" control over the courts.[178] As part of the contract between an Ohio juvenile court (subgrantee) and the Ohio Department of Job and Family Services (ODJFS), the juvenile court "agrees to allow ODJFS to periodically assess and monitor SUBGRANTEE's [the juvenile court's] adherence to all the requirements" of the contract (which includes carrying out the IV-E placement and care obligations in accordance with all the legal requirements discussed above).[179] When ODJFS assesses the court's performance of their contractual obligations, the agency is to "produce and submit a written report of its findings" to the court, and then the court must:

> [F]ile a written response to ODJFS noting areas of disagreement. The response will include a continuous improvement plan (CIP) to remedy, within 90 calendar days, any deficiencies noted in the assessment with which [the court] concurs. In the event that [the court] disagrees with any portion, it agrees to note the areas of disagreement in its response state its reasons why.[180]

Within 60 days after the court submits its written reply to the state agency, "ODJFS will inform [the court], in writing, of its final determination related to the matters in the dispute."[181] Then, the court "*agrees to accept the decision of ODJFS as final and binding*," and the court "further agrees to develop and implement, within 30 cal-

175. Ohio R. Juv. P. 19, 35.
176. OHIO REV. CODE ANN. § 2151.61. (West 2020).
177. *Id.*
178. *See* LUCAS CNTY. JUV. CT. SUBGRANT AGREEMENT, *supra* note 57. R
179. *Id.*
180. *Id.*
181. *Id.*

endar days of the final decision, a written CIP [continuous improvement plan] to remedy any deficiencies within 90 calendar days of the final decision."[182] This contract language illustrates concerning control of the state executive branch agency over the court, and the language continues, requiring that "[t]he ODJFS Agreement Manager may periodically communicate specific requests and instructions to [the court] concerning the performance of activities described in this agreement," and the court "agrees to comply with any requests or instructions to the satisfaction of ODJFS within 10 business days."[183] Further, multiple other contractual provisions exist regarding the executive branch agency's resulting control over the court, including the state agency control and contractual ownership of records and documents produced by the court.[184]

Thus, the interagency agreements result in a conflicted and convoluted arrangement where the juvenile courts are conducting judicial reviews regarding their own actions as the IV-E placing agencies, with financial incentives—which is a significant conflict in itself—and then the courts are simultaneously agreeing to submit to the final determinations of the state executive branch agency regarding the courts' performance of those IV-E agency responsibilities. Such intertwined conflicts are precisely a reason why the separation of powers doctrine exists and why the doctrine is so clearly violated by the juvenile court interagency agreements in Ohio. The U.S. Department of Justice's Civil Rights Division found comparable separation of powers concerns when investigating the Family Court in St. Louis, and concluded:

> The organizational structure of the Family Court, wherein both prosecutor and probation officer are employees of the court, the prosecutor is counsel for the probation officer, and the probation officer acts as both an arm of the prosecution as well as a child advocate, causes inherent conflicts of interest. These conflicts of interest are contrary to separation of powers principles and deprive children of adequate due process. U.S. Const., art. I, art. II, § 2, cl. 5; art. III, § 2.[185]

The DOJ's opinion supports the conclusion that the Ohio juvenile courts' interagency agreement structure is blatantly violating

182. *Id.* (emphasis added).

183. *Id.*

184. LUCAS CNTY. JUV. CT. SUBGRANT AGREEMENT, *supra* note 57, at Article VII. **R**

185. U.S. DEP'T OF JUST., CIVIL RIGHTS DIVISION, INVESTIGATION OF THE ST. LOUIS COUNTY FAMILY COURT 3 (2015), https://sites.ed.gov/underservedyouth/files/2017/01/Report-Investigation-of-the-St-Louis-County-Family-Court.pdf [https://perma.cc/57WJ-KL6E].

the separation of powers doctrine, and also leads us to further consideration provided below of due process concerns.

Similar to the concerns with the IV-E contracts in Ohio, significant separation of powers violations result from interagency IV-D contracts. Considering Texas again, in addition to its traditional role of serving as the state's top legal advisor and law enforcement agency, the Texas Attorney General's office has become the state IV-D child support agency.[186] Those multiple functions are within the executive branch, but the Attorney General's office—through its role as the state child support agency—has in turn contracted with the Texas judicial branch. Through interagency contracts, the domestic relations courts and office of court administration are contractually funded to work for the Attorney General's office in helping to establish and enforce child support obligations in a manner that triggers the receipt of federal funds.[187] The Attorney General's office hired the courts to work for the Attorney General's office while those courts are also supposed to issue judicial decisions regarding the Attorney General's office enforcement efforts—enforcement efforts that the courts are simultaneously contracted to provide.

As further evidence of violations of the separation of powers doctrine in the Texas structure, impoverished custodial parents who receive public benefits are required to assign their child support rights to the Attorney General's office, and the child support is converted to a state debt owed to the agency.[188] Thus, in such cases, the Attorney General's Office is hiring the courts to establish and help enforce the debts that are owed to the Attorney General's office, and the courts also receive federal incentive payments for enforcing such state-owed debts at twice the amount of regular child support obligations that are owed to children.[189] Through the contracts, the courts can receive "incentive funding" if they meet performance standards, and the courts must agree to be monitored and reviewed by the Attorney General's office.[190] The interagency contract even provides for a division of the court "to file motions regarding child support under Title IV-D of the Social Security Act, in the same manner as any Texas Attorney General's Office." So, motions filed by the court, on behalf of the executive branch Attor-

186. TEX. FAM. CODE ANN. § 231.001 (West 1995).

187. *Supra* notes 131-136 and accompanying text. **R**

188. *Id.*

189. *Supra* note 10 and accompanying text. **R**

190. TRAVIS CNTY. INTEGRATED CHILD SUPPORT SYSTEM, *supra* note 131; EL PASO CNTY. INTEGRATED CHILD SUPPORT SYSTEM, *supra* note 133.

ney General's office, will be heard by the court—which is funded by the Attorney General's office.[191] Such a structure undermines, and virtually ridicules, the separation of powers doctrine.

Hawaii is similar to Texas in that the Hawaii legislature established a branch of the state Attorney General's office as the statewide IV-D child support agency.[192] However, Hawaii has taken a different structural approach to violating the principles of separation of powers in combining executive and judicial branch functions. Rather than contracting with the courts like in Texas, the Hawaii Attorney General's office established its own internal judicial branch functions within the executive branch agency. The Hawaii legislature passed a law requiring the Attorney General's office to establish its own "office of child support hearings" and for the Attorney General's office to commission hearing officers to preside over the contested hearings and issue orders. Thus, the legislative branch required the executive branch to effectively establish its own judicial branch—with a result that the Attorney General's office seeks to initiate and enforce child support petitions in its role as the child support agency, and the Attorney General's office then appears before itself for it to rule on contested cases[193]—and through both executive and judicial branch roles, the Attorney General's office can receive federal incentive payments if it reaches performance criteria.[194]

Returning to consider the Michigan structure under the separation of powers lens, the Michigan judicial branch actually created their own executive branch child support enforcement agency—the "Friend of the Court Bureau" (FOC)—within the courts, which in turn enters "IV-D Cooperative Reimbursement Agreements" with the Michigan Department of Human Services.[195] The Friend of the Court child support enforcement agency functions are "performed

191. TARRANT CNTY. DOMESTIC RELS. OFF., ENFORCEMENT OF CHILD SUPPORT, IV-D MONITORING PROGRAM, https://access.tarrantcounty.com/en/domestic-relations-office/legal-enforcement/enforcement-modification-of-child-support.html [https://perma.cc/75PX-2BND] (last visited Apr. 15, 2020).

192. HAW. REV. STAT. § 576D-2 (2013).

193. HAW. REV. STAT. § 576E-10 (2013).

194. HAW. REV. STAT. § 576D-9 (2013). In one case the Supreme Court of Minnesota held that such a structure with even fewer separation of powers concerns violated the constitution. Holmberg v. Holmberg, 588 N.W.2d 720 (Minn. 1999).

195. *See, e.g.*, MICH. SUP. CT., FRIEND OF THE COURT HANDBOOK (2018); THIRD JUD. CIR. CT. OF MICH., 2017 ANNUAL REPORT 29 (2017), https://www.3rdcc.org/Documents/Administration/General/AnnualReports/2017%5EAnnual%20Report%20for%202017%5E%5E.pdf [https://perma.cc/N6PB-H3NG] ("The FOC is an administrative arm of the Court. . .").

under the direction and supervision of the chief judge" and the chief judge also appoints "referees" to hold hearings for the Friend of the Court Bureau in establishing and enforcing recommended child support orders.[196] Thus, a division of the courts has taken on the executive branch function of initiating child support actions against litigants (who are usually poor) and then the actions initiated by the courts are ruled upon by the courts, all in order for the courts to obtain Title IV-D child support revenue—including federal incentive funds.[197] Through the contracts, the courts are also required to be monitored and overseen by the statewide executive branch human services agency.[198] Further, in at least one of the Michigan counties, the court also entered a cooperative agreement with the county prosecutor's office,[199] and although intended to be two separate branches of government, "the Muskegon County Prosecutor's Office Child Support Division was moved into the Family Court and became the Muskegon County Family Court Establishment Division."[200] Again, the separation of powers doctrine is destroyed through this structure.

Moving to Pennsylvania, all of the state's county domestic relations courts have entered interagency contracts to carry out the child support agency functions.[201] So again, the courts carry out the executive branch functions of preparing and filing complaints, motions, and other enforcement requests, which the courts then rule upon.[202] Further, through their agreements with the executive branch, the courts are contractually required to prioritize cases where parents have received public assistance and must assign their child support rights to the state.[203] When the parents apply for pub-

196. MICH. COMP. LAWS §§ 552.503, 507, 508 (1997).

197. *See* FRIEND OF THE COURT TITLE IV-D COOPERATIVE REIMBURSEMENT AGREEMENT, *supra* note 116. **R**

198. *Id.*

199. MICH. DEP'T HUM. SERVS., *supra* note 120.

200. MUSKEGON CNTY. PROSECUTORS, CHILD SUPPORT DIVISION, https://www.co.muskegon.mi.us/581/Child-Support-Division [https://perma.cc/XY3Y-DXU6] (last visited Apr. 15, 2020).

201. PHILA. FAM. CT., *supra* note 117 ("Philadelphia Domestic Relations serves as the county Title IV-D child support agency."); *Bureau of Child Support Enforcement*, PA. DEP'T OF HUMAN SERVS. (Sept. 17, 2016), https://www.humanservices.state.pa.us/CSWS/csws_controller.aspx?PageId=CSWS%2Fbcse_about.ascx&Preference=Desktop&Owner=Client [https://perma.cc/F754-93WH]. **R**

202. PA. DEP'T OF HUM. SERVS., 2015-2020 PENNSYLVANIA TITLE IV-D COOPERATIVE AGREEMENT WITH SUMMERSET COUNTY DOMESTIC RELATIONS § 1.1 (2015), https://contracts.patreasury.gov/Admin/Upload/331135_4100070496_201510201057.pdf [https://perma.cc/TM6B-ZWEP].

203. *Id.* at § 2.

lic assistance, the county assistance office electronically informs the courts—and the courts themselves complete and file the complaint for child support that will be owed to the state—and those complaints for state-owed support filed by the courts are then ruled upon by the courts. The courts contractually agree to process these cases faster than other child support cases.[204]

Such structure already squarely conflicts with the intended separation of powers doctrine, and yet the interagency contracts in Pennsylvania go further, requiring the courts to directly report to the executive branch Department of Human Services (DHS). For example, a sample agreement in Sumerset County requires that the domestic relations court "shall provide access to DHS, The Pennsylvania Auditor General . . . with respect to all books, documents, papers, financial transactions, or other records which are pertinent to the functions of the DRS [domestic relations court] under this agreement."[205] Through a contract section titled "Cooperation with DHS Staff Required," the agreement requires that the court "shall cooperate with DHS in the performance of DHS's responsibilities," and the court "shall provide adequate work space, computer access, telephone and copying/scanning facilities as reasonably possible for DHS employees who are assigned work at the [court]."[206] Further, "[f]or intergovernmental cases, the DRS [domestic relations court] shall provide responses within 5 working days of receipt of such requests from DHS/BCSE employees for case specific information, documentation and/or supportive services . . ."[207] The contract also requires the courts to provide attorneys in the IV-D cases, even though those attorneys can represent the interests of the state human services agency.[208] An attachment to the contract indicates that court must provide an attorney whenever "DHS's interest is jeopardized."[209] The contract also creates a "DRS Memorandum process" through which the state executive branch agency ultimately directs the process of issuing the binding memoranda that controls the actions of the courts.[210] Also, like in Michigan, the contracts allow the Pennsylvania courts to obtain federal incentive funding—which is discussed in more detail in the sections below.

204. *Id.* at § 2.2(a) (The DRS must process referrals within two days or no later than 20 days).

205. *Id.* at § 3.8.

206. *Id.* at § 3.11(a).

207. *Id.* at § 3.11(b).

208. PA. DEP'T OF HUM. SERVS., *supra* note 212, at § 3.13. **R**

209. *Id.* at Attachment B, § 2(i).

210. *Id.* at § 4.4(p).

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And despite all of this, the contract incorrectly and almost comically asserts that the independence of the judiciary is still "guaranteed."[211]

Other state structures similarly violate the principles of separation of powers. In New Jersey, the statewide executive branch child support agency (the Office of Child Support Services, or OCSS) entered similar interagency agreements:

> OCSS has a cooperative agreement with the Administrative Office of the Courts (AOC) for assistance in the establishment and enforcement of child support orders, central registry and reconciliation of accounts related to support payments. OCSS also has contracts with twenty of the county sheriff's offices and one of the county prosecutor's offices for the execution and service of warrants related to child support and has contracts with two county departments of law for legal services in Title IV-D cases.[212]

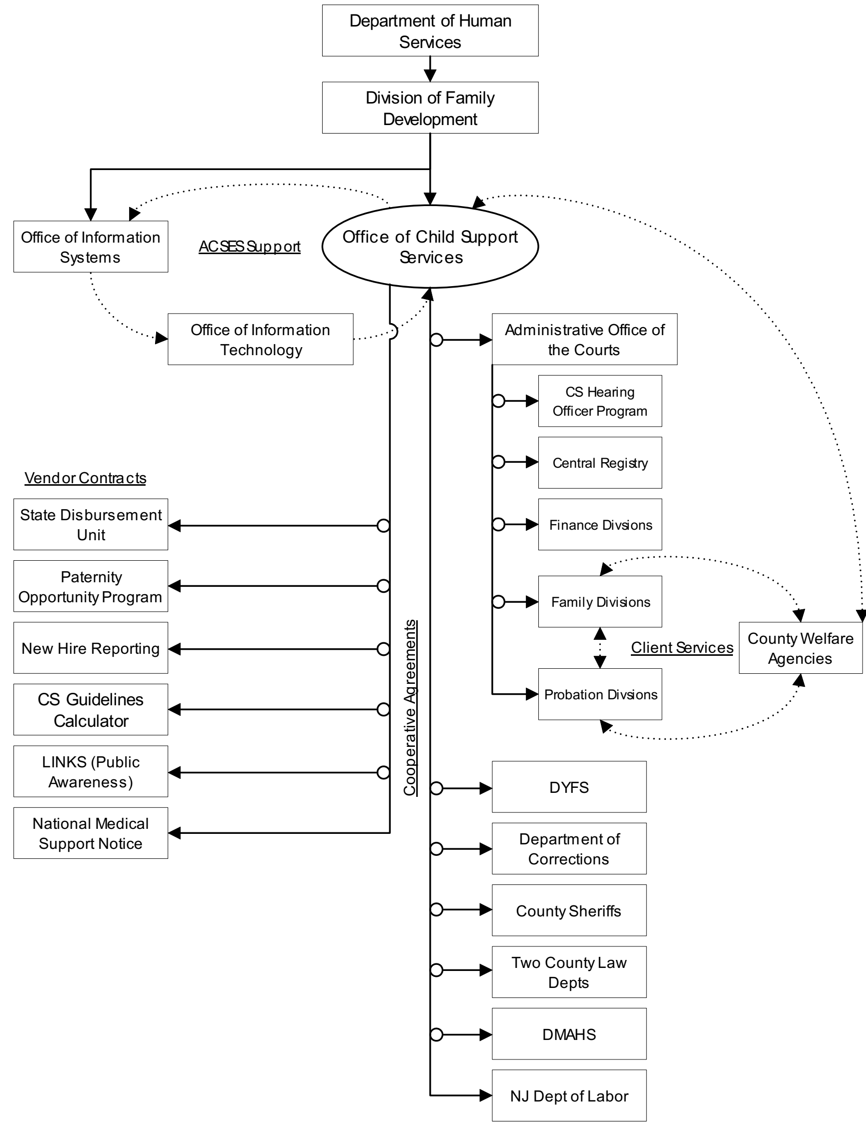
An OCSS organizational chart that is provided in contract documents, shown below, illustrates how the courts report to the state executive branch agency:[213]

211. *Id.* at § 1.2.

212. N.J. DEP'T OF TREASURY, PROJECT MANAGEMENT STRUCTURE, APPENDIX E, https://www.state.nj.us/treasury/purchase/bid/attachments/37829-e.pdf [https://perma.cc/E6QQ-84CN] (last visited Apr. 1, 2020).

213. *Id.*

Figure 1: OCSS Organization Chart



Similar to New Jersey, the Maryland judiciary enters interagency contracts with the state executive branch child support agency.

> Each year the Maryland Judiciary enters into a "Cooperative Reimbursement Agreement" (CRA) with the Maryland Child Support Enforcement Administration (CSEA). The

> CSEA is the entity in our State designated to receive and administer federal funds for child support. Through our CRA, the Maryland Judiciary receives federal funds to reimburse us for the work our courts do to establish, modify and enforce child support orders involving the Offices of Child Support Enforcement. . . .
>
> The Judiciary receives several million dollars each year under the CRA. . . . The Judiciary may include in the CRA costs associated with establishing, modifying and enforcing child support in cases involving the local support agency. Those costs may include salaries and benefits for clerk's office staff, Magistrates and non-judge employees.[214]

Thus, clear separation of powers concerns are again present. The executive branch child support agency in Maryland is contracting with and funding the courts—including paying the salaries of the judicial magistrates—before which the agency appears. Further, the contract language used as a template in these interagency agreements requires that the courts provide the child support program services, and turning the principle of judicial review of agency actions on its head, the courts' work is subject to supervision by the state executive branch agency:

> [S]ubject to the supervision of the DEPARTMENT OF HUMAN RESOURCES (DEPARTMENT) to include the Child Support Enforcement Administration (CSEA) and Local Department of Social Services or local office of child support enforcement and shall be in compliance with such rules and regulations as the DEPARTMENT may adopt covering operation of the PROGRAM. Supervision will consist of but not be limited to compliance reviews, case record reviews, statistical analysis, audits, monitoring of operational systems and procedures and any other reviews deemed necessary by CSEA . . . .[215]

The constitutional concerns with interagency agreements do not stop with the separation of powers violations. The next section sheds light on the ongoing due process violations that are occurring in juvenile justice systems across the country.

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214. MD. JUDICIARY, *supra* note 111. R

215. STATE OF MD., DEP'T. OF HUM. RES., CHILD SUPPORT ENF'T ADMIN., COOPERATIVE REIMBURSEMENT AGREEMENT, COURT AND LAW ENFORCEMENT AGENCIES, http://www.co.worcester.md.us/sites/default/files/meetings/Commissioner%20 Meeting/packet/2016/07-05-16.pdf [https://perma.cc/F895-ZRD2] (last visited July 29, 2020).

B. Due Process Concerns

"No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." James Madison, Federalist 10.

Linked to the separation of powers doctrine is the necessity of an independent and impartial judiciary. The right to an impartial tribunal is at the core of the due process protections guaranteed in the Constitution.[216] Due process requires both the reality of impartiality—that the judiciary is not actually biased—and the appearance of impartiality—that a reasonable person with full knowledge of the facts would not consider the tribunal to be biased.[217] The importance of impartial tribunals cannot be overstated, as U.S. Supreme Court Justice Robert Jackson explained: "The right to fair trial stands guardian over all other rights."[218]

The example state court structures resulting from the multiple interagency agreements discussed above are affronts to this crucial due process protection. Considering again the Ohio juvenile court interagency agreements, the resolution by the Ohio Judicial Conference Juvenile Law and Procedure Committee ignored Due Process Clause concerns that are present when the juvenile courts have a financial interest in the outcome of judicial hearings. The Ohio judges on the Committee did not consider long-standing U.S. Supreme Court precedent that originated in Ohio. First, in a case from the prohibition era, *Tumey v. Ohio*, the Supreme Court found the structure of the Ohio mayor's court to violate due process where the mayor (sitting as judge) received a financial incentive to convict defendants, and also his village received revenue upon each conviction:

> There, the mayor of a village had the authority to sit as a Judge (with no jury) to try those accused of violating a state law prohibiting the possession of alcoholic beverages. Inherent in this structure were two potential conflicts. First, the mayor received a salary supplement for performing judicial duties, and the funds for that compensation derived from the fines assessed in a case. No fines were assessed upon acquittal. The

216. *See generally* Mark A. Grannis, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382 (1987); ERIC T. KASPER, IMPARTIAL JUSTICE: THE REAL SUPREME COURT THAT DEFINE THE CONSTITUTIONAL RIGHT TO A NEUTRAL AND DETACHED DECISIONMAKER (2013).

217. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality 'Might Reasonably be Questioned'*, 14 GEO. J. LEGAL ETHICS 55, 58–59 (2000).

218. Dennis v. United States, 339 U.S. 162 (Jackson, J., concurring).

> mayor-judge thus received a salary supplement only if he convicted the defendant. . . . Second, sums from the criminal fines were deposited to the village's general treasury fund for village improvements and repairs. . . .
>
> The Court held that the Due Process Clause required disqualification "both because of [the mayor-judge's] direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village." . . . It so held despite observing that "[t]here are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it."[219]

Then, forty-five years later, the Supreme Court again found due process violations with the Ohio mayor's courts in *Ward v. Village of Monroeville*, where although the mayor-judge did not receive direct compensation for each conviction, his village did receive revenue for each conviction.[220] In finding the structure violated the defendants' due process guarantee to an impartial tribunal, Justice Brennan relied on the "possible temptation" standard from *Tumey*:

> [T]he test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused. . . ." Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court.[221]

Through the interagency agreements and separation of powers concerns discussed above, the juvenile court judges in Ohio face direct financial incentives—when they rule children are delinquent or unruly and order the children removed from their homes, the judges can maximize IV-E foster care funds for their courts. But the judges ignored the Supreme Court decisions of *Tumey* and *Ward* and instead simply claimed in their resolution that no conflict results from the contracts.[222]

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219. Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 877–78 (2009) (discussing and quoting Tumey v. Ohio, 273 U.S. 510, 520-35 (1927)).

220. Ward v. Village of Monroeville, 409 U.S. 57 (1972); *see generally* Grannis, *supra* note 216. **R**

221. Grannis, *supra* note 216 (internal citations omitted). **R**

222. OHIO JUD. CONF., RESOLUTION TO SUPPORT OPTIONAL JUVENILE COURT PARTICIPATION AS A TITLE IV-E PLACING AGENCY 7 (Nov. 17, 2006), http://

However, the interagency agreements reveal that both the state and the Ohio juvenile courts realize the conflict exists. In fact, due to the financial incentives, the state agency and the courts determined that a juvenile court party to the agreement must be admonished in the contract that it "agrees that it will not deliberately adjudicate a child unruly or delinquent for the sole purpose of receiving Federal Financial Participation (FFP) [federal IV-E funds]."[223] Also, a slide presentation prepared for the juvenile courts by the state human service agency's Bureau of Fiscal Operations also cautions the courts of this conflict, including a more direct bullet point warning: "No Cherry picking" children for removals in order to receive more funds.[224] Even more bluntly, an Ohio juvenile court judge from Franklin County explained his concern with the conflict that "the more kids that are placed out of their homes, the more money the court gets, which might lead some people to question the court's motivation: helping the youngsters or getting the money?"[225]

As further evidence of the financial conflict of interest, the juvenile court in Cuyahoga County (including Cleveland) signed such an interagency agreement in order to maximize IV-E funds after ordering children removed from their homes. The court then used the IV-E funds resulting from court-ordered child removals for over $1.8 million in juvenile court system salary increases in 2017. The county council explains the use of the funds: "To allow for the salary increases per County Council Resolution R2017-077 and the agreement that Juvenile Court pay for any 2017 salary increases in CY 2017. . . . Appropriations for this increase have been transferred in cash from Title IV-E Maintenance."[226] The large revenue

www.ohiojudges.org/Document.ashx?DocGuid=400faab0-352d-474a-bcb9-d85a82f81bd7 [https://perma.cc/U84L-6N4C].

223. SUBGRANT AGREEMENT G-1213-06-0242, *supra* note 57. **R**

224. OHIO DEP'T. OF JOB AND FAM. SERVS., BUREAU OF FISCAL OPERATIONS, OVERVIEW OF THE TITLE IV-E JUVENILE COURT PROGRAM 14, http://jfs.ohio.gov/ocf/overviewoftitleive.pdf [https://perma.cc/93Z6-NU6C] (last visited Apr. 14, 2020).

225. Pyle, *supra* note 154. **R**

226. CNTY. COUNCIL OF CUYAHOGA CNTY, RES. R2017-0142, 6 (2017). Budget maneuver illustrates how the salary increases were to be paid out the county general fund, but the juvenile court simultaneously transferred money from its IV-E revenue to pay the full amount back to the county general fund:

Fund Nos./Budget Accounts . . .

A. FROM: 20A635—title IV-E Juvenile Court JT1717052 JC517318—Title IV-E Juvenile Court FCM Transfer Out $ 1,830,389.04

TO: 01A001—General Fund JC372052—Juv Ctr—Judges Revenue Transfer $ 1,830,389.04

amounts illustrate that there is unfortunately no shortage of poor children in Cleveland from which the juvenile court can obtain IV-E payments after ordering child removals, with over half of the city's children living in poverty.[227]

Similar due process concerns are present in the other interagency agreements discussed above, again due to financial interests. In addition to the Ohio juvenile courts' IV-E foster care contracts, the courts also enter contracts with the state child support enforcement administration (part of the executive branch). Through these agreements, the courts work for the state child support agency to establish, modify, and enforce child support, in exchange for an hourly rate to be paid through the receipt of federal IV-D child support funding. Thus, the state child support agency is funding the courts before which the agency appears, and the courts are financially incentivized in ordering and enforcing the child support obligations. In Lucas County, the "IV-D contract" explains how the courts gain additional revenue of an hourly rate of $248.93, but which the courts only receive if they comply with the requirements for claiming the IV-D funds.[228] A resulting due process concern is present because the courts are supposed to decide whether to enter child support orders, and how and when to enforce those orders, based only on the best interests of the child. Particularly in cases where the child is in foster care, with any support owed to the state as a result, the court should consider whether ordering and enforcing child support could be contrary to case planning goals such as possible reunification with the parents.[229] However, the courts are financially incentivized to order as many child support obligations as possible and engage in enforcement efforts, because the more child support orders the courts decide to establish, the more the courts can charge their hourly rate to establish, modify, and enforce the orders.

The Pennsylvania courts provide another example of the due process concerns resulting from judicial financial incentives in the interagency agreements. As explained above, the domestic relations

> A cash transfer is requested to pay for the NCSC Juvenile Court Classification and Compensation Study completed in October 2015. Funding is coming from the Title IV-E Maintenance Fund, which as of June 30, 2017 had a cash balance of $5.8 million.

Id. at 10.

227. *Just the Facts: Poverty and Homelessness in Our Community*, NE. OHIO COAL. FOR THE HOMELESS (2017), https://www.neoch.org/poverty-stats-2017/ [https://perma.cc/8JBC-9XYJ].

228. *See* OHIO DEP'T OF JOB AND FAM. SERVS., *supra* note 57. R

229. *See* Hatcher, *supra* note 8, at 1136.

courts in Pennsylvania have entered into contracts with the state's executive branch Department of Human Services, through which the courts themselves have taken on the county child support enforcement agency functions.[230] In addition to being financially incentivized to enter and enforce child support obligations through the contractual ability to maximize federal IV-D funds, the courts are additionally incentivized by what are essentially bonus payments depending on how the courts enter and enforce the orders. Through the courts' contracts with the executive branch agency, the courts are able to share in the receipt of federal "incentive payments."[231] The contract explains:

> The DRS [domestic relations court] is entitled to earn a portion of the incentive monies paid to DHS by the federal government for performance in Title IV-D cases. . . . DRS's share shall reflect its relative score for each category of performance . . . .[232]

If the courts reach certain percentages in their "performance," they can reap more of these incentive funds. For example, "[t]he support order performance level for a DRS [court] for a FFY [fiscal year] is determined by dividing the number of court orders for support by the number of cases in the DRS caseload." Thus, in each case, the courts are financially incentivized to enter a child support order. Then, once the child support orders are entered, the courts are further incentivized to enforce the orders through any means possible.[233] And these incentives are also calculated for the courts' performance in paternity establishment, child support arrearages collections, and cost-efficiency.[234] Then, each court's incentive payments are pooled together, and the individual courts are contractually required to compete against each other on the same performance criteria to claim their percentage of the pooled funds:

> The incentive payment for a DRS for a fiscal year is equal to the total DRS incentive payment pool for the fiscal year, multiplied by the DRS incentive payment share for the fiscal year. The DRS incentive payment share for a fiscal year is the incen-

230. *See supra* notes 201-204 and accompanying text. **R**

231. *See* 42 U.S.C. § 658a.

232. *See* 2015-2020 PENNSYLVANIA TITLE IV-D COOPERATIVE AGREEMENT WITH SUMMERSET COUNTY DOMESTIC RELATIONS, *supra* note 202, at 23. **R**

233. *Id.* (explaining that "[t]he current support payment performance level for a DRS for a FFY is determined by dividing the current amount of total support collected during the FFY by the total amount of current support owed for the FFY").

234. *Id.*

> tive base amount for the DRS for the fiscal year divided by the sum of the incentive base amounts for all of the DRSs for the fiscal year.[235]

Of further concern, the courts' incentive payments are doubled when the courts order and enforce child support that is owed to the state (in "current assistance" or "former assistance" cases where the children have been in foster care or parents received public assistance), as opposed to cases where child support is actually owed to the custodial parents and children.[236] Thus, of all the potential cases appearing before the courts, the judges are incentivized at twice the amount to focus court resources and enter orders and enforcement actions on behalf of state-owed support debts, rather than potential child support payments for children.

> The DRS collections base for a fiscal year is equal to two times the sum of the total amount of support collected for current assistance cases plus two times the total amount of support collected in former assistance cases, plus the total amount of support collected in never assistance cases in the fiscal year, *i.e.*, 2 x (Current Assistance collections + Former Assistance collections) + all other Title IV-D collections.[237]

Moreover, the courts are further incentivized with a contingency fee arrangement to enter and enforce orders requiring impoverished parents to pay back the state cost of Medicaid. The courts receive a percentage of the collections by contracting into the federal incentive intended for the executive branch agency: "As long as provided by federal law, a 15 percent incentive shall be paid based on actual medical support payments collected by the DRS in TANF, IV-E, and Non-TANF Medicaid cases, representing reimbursement of title XIX Medicaid expenditures . . . ."[238]

Similar to Pennsylvania, the Michigan courts explain how they are motivated to use their "Friend of the Court" (FOC) divisions to pursue the child support incentive payments, even adding their

235. *Id.*

236. *Id.*

237. *Id.*

238. *See* PA. DEP'T OF HUM. SERVS., *supra* note 202; *see also* Memorandum from Steven D. Capps, Dir., Mich. Sup. Ct. Friend of the Ct. Bureau, to Michigan State Judges and Administrators 2, 6 (Aug. 26, 2015), https://courts.michigan.gov/Administration/SCAO/OfficesPrograms/FOC/Documents/Memoranda/IncentivePayments.pdf [https://perma.cc/H3CR-M2HK] (advising Michigan courts they should seek their share of the medical support incentive payments, and listing the total amount of the incentive payments for one year at over $1.4 million). R

own court-backed incentive competition, literally dividing the court into teams in the pursuit of the federal child support incentives:

> In these tough economic times, courts are financially strapped. Friends of the court must meet performance measures in order to maintain and increase funding and to protect against reductions because of decreased local revenue.
>
> . . . .
>
> In 2009, Michigan received a $27 million incentive payment because of its outstanding efforts in the five key performance measures. This payment was split between the state government and local funding units with FOCs and prosecuting attorneys receiving their share of funding based on the same formula that the federal government uses to distribute incentive payments to the states.
>
> . . . .
>
> In May 2011, a cooperative effort led by the Genesee County FOC implemented an 11-week program to increase its support collections . . . .
>
> . . . .
>
> FOC employees were split into teams and, as an additional personal incentive, FOC Director Jack Battles agreed to bring back previously terminated flex-time for the three top winning teams. The winning team received 12 weeks of flex-time, second place received 10 weeks, and third place received 8 weeks. The overall focus of the friendly competition was to help employees learn more about the various functions of the FOC and, ultimately, in that same manner, encourage employees to do their part to increase incentive payments . . . .[239]

The above examples and others in this article cross the constitutional line, to the point where the due process right to an impartial tribunal is violated. Two recent opinions support this conclusion, where the U.S. Court of Appeals for the Fifth Circuit found that practices of Louisiana state courts violated the Due Process Clause because of financial conflicts. In *Caliste v. Cantrell*, the Court held that the trial court violated defendant's due process rights when the court received fees every time a judge required a secured money bond as condition of release.[240] And in *Cain v. White*, the Court similarly held that the institutional financial inter-

239. *Incentive Payments: How to Maintain & Increase Funding*, 24 THE PUNDIT 5, 8 (Nov. 2011).

240. Caliste v. Cantrell, 937 F.3d. 525 (2019).

est of the courts from judges ordering court fines violated the Due Process Clause.[241]

C. *Judicial and Prosecutorial Ethics*

Considering the several example jurisdictions described in this article with clear structural due process and separation of powers violations, an ethical truism should be embraced: it is unethical for judges to carry out their judicial functions in justice systems where their independence and impartiality are undermined. A recent case from the State of Washington provides an example. In *Matter of Dependency of A.E.T.H.*, the Court of Appeals of Washington agreed with the juvenile court judge's decision to recuse herself because she concluded the juvenile court structure violated the due process right to an impartial tribunal.[242] The case involved a structure where the volunteer guardian ad litem program (VGAL) is an agency of the court. In her recusal decision, the trial court judge entered a 317-page memorandum decision explaining her concern with the structural due process violation, including explanation that "the acts of VGAL Program employees are the acts of the Superior Court, and judging or sanctioning the acts of VGAL Program employees is the Judge judging or sanctioning himself or herself."[243] As the Court of Appeals explained:

> Judge Farris concluded that the parents were "denied their due process constitutional right to an impartial judge by having a Snohomish County Superior Judge preside over this case." Judge Farris explained that "[t]he manner in which the [VGAL Program] was operated during this case creates doubt about the Snohomish County Superior Court's ability to be impartial in this case involving court employees directly participating in the litigation."

The Court of Appeals recognized that the "right to a fair trial before an impartial tribunal is a basic requirement of due process," which is "especially critical" in child welfare proceedings involving parental rights and the best interests of children.[244] The Court further explained how " 'even if there is no showing of actual bias in the tribunal, . . . due process is denied by circumstances that create the likelihood or the appearance of bias.' "[245] The court concluded:

241. Cain v. White, 937 F.3d. 446 (5th Cir. 2019).
242. Matter of Dependency of A.E.T.H., 446 P.3d 667, 670 (Wash. Ct. App. 2019).
243. *Id.*
244. *Id.*
245. *Id.*

> [U]nder the appearance of fairness doctrine . . . "The law requires more than an impartial judge; it requires that the judge also appear to be impartial.". . . . "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts."
>
> Here, Judge Farris displayed no personal bias and attempted to conduct an unbiased proceeding. But the sticky wicket is that the tribunal in which A.H.'s dependency and termination proceedings took place was biased because of the involvement of superior court employees working against the parents in this case. . . .
>
> . . . .
>
> In short, based on the above findings, Judge Farris correctly concluded that "[t]he Superior Court, its direct agents, and its own attorneys, all under the supervision of the judges repeatedly aligned with and literally became a party litigating this case against the parents . . . throughout the case." These circumstances, which existed before, during, and after the termination trial, resulted in a tribunal that was biased and violated both parents' right to due process and the appearance of fairness doctrine.[246]

If this reasoning is applied in the Ohio juvenile court IV-E contract structure and other similar examples addressed in this article, not only is there concern with the structural conflicts, but the courts are also directly financially incentivized in their judicial actions. Judicial ethical obligations are arguably violated when judges create or participate in such unconstitutional circumstances.[247]

Ethical concerns are also present in the interagency agreements with the offices of prosecutors and attorneys general, including where the contractual structure and incentives can conflict with prosecutorial discretion and the neutrality doctrine.[248] Similar to judicial decisions and actions, the exercise of prosecutorial discretion can be linked to constitutional due process concerns. The U.S. Supreme Court explained in *Marshall v. Jerrico, Inc.* that "the strict

246. *Id.* (internal citations omitted).

247. *See generally* Leslie W. Abramson, *What Every Judge Should Know about the Appearance of Impartiality*, 79 ALB. L. REV. 1579 (2016); Charles Gardner Geyh, *The Dimensions of Judicial Impartiality,* 65 FLA. L. REV. 493 (2013).

248. *See generally* Josh Gupta-Kagan, *Rethinking Family-Court Prosecutors: Elected and Agency Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases*, 85 U. CHI. L. REV. 743, 757 (2018); Bruce A. Green and Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463 (2017).

requirements of neutrality cannot be the same for administrative prosecutors as for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime."[249] However, despite the less rigid application of the neutrality doctrine for prosecutors, the Supreme Court cautioned:

> We do not suggest, and appellants do not contend, that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors. Prosecutors are also public officials; they too must serve the public interest. In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law.
>
> A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.[250]

The case involved the administrative prosecution of child labor violations, including potential financial incentives through the receipt of fines. The Supreme Court concluded that "here the influence alleged to impose bias is exceptionally remote" because the administrative prosecutors could not "profit economically" from the fine structure, and there was no realistic possibility that the prosecutors' judgment could be "distorted by the prospect of institutional gain as a result of zealous enforcement efforts."[251] In reaching its conclusion, the Court noted that the fines amounted to "substantially less that 1% of the budget" of the national Employment Standards Administration (ESA) of the Department of Labor,[252] and further explained:

> Unlike in *Ward* and *Tumey,* it is plain that the enforcing agent is in no sense financially dependent on the maintenance of a high level of penalties. Furthermore, since it is the national office of the ESA, and not any assistant regional administrator, that decides how to allocate civil penalties, such administrators have no assurance that the penalties they assess will be returned to their offices at all . . . .[253]

249. Marshall v. Jerrico, Inc., 446 U.S. 238, 250 (1980).
250. *Id.* (internal citations omitted).
251. *Id.*
252. *Id.*
253. *Id.*

Unlike the facts in *Marshall*, the amount of money prosecutors and attorney general's offices are pursuing through the interagency agreements described in this article is substantial, the money is being maximized directly for the offices in which the prosecuting attorneys work, and sometimes the prosecutors are even individually profiting. In Ohio, the Portage County Prosecutor's Office explains that its child support enforcement unit "is fully funded by Federal Title IV-D funds."[254] In Oregon, the Lane County District Attorney's office explains how "[w]e continue to be dependent on grants and other state and federal support," including the pursuit of child support IV-D funds: "This $1,538,552 grant is continuing, a 66% reimbursement of eligible expenditures spent on enforcing/establishing child support payments, plus 'Incentive' payments for exceeding specific benchmarks."[255] In Calhoun County, Michigan, the "IV-D Cooperative Reimbursement Contract" has been worth over $550,000 a year for the prosecutor's office, plus federal incentive payments,[256] which amounts to over twenty percent of the office's operating costs.[257] In Texas, the statewide attorney general's office estimates it could receive over $382 million in federal child support funds, which amounts to over thirty percent of its total funding.[258]

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254. PORTAGE CNTY. PROSECUTOR'S OFF., http://portageprosecutor.com [https://perma.cc/8RCJ-2F3A] (last visited Apr. 15, 2020).

255. LANE CNTY. DEP'T OF DIST. ATT'Y, FY 17-18 PROPOSED BUDGET, https://www.lanecounty.org/UserFiles/Servers/Server_3585797/File/Budget/FY%2017-18%20Proposed/District%20Attorney.pdf [https://perma.cc/28D3-EFHL] (last visited Apr. 3, 2020); *see also* OR. DEP'T. OF JUST., AGENCY BUDGET REQUEST 2019-21: DIVISION OF CHILD SUPPORT 8 (proposed Aug. 19, 2018) ("District Attorney Participation: The statewide Oregon Child Support Program represents the combined efforts of the DOJ Division of Child Support and the 23 Oregon county DA offices that contract with DOJ to provide child support services. These 22 counties receive the same federal matching funds as the Division of Child Support and share in the Program's federal incentive payments based on the county's performance.").

256. Letter from Susan K. Mladenoff, Prosecuting Att'y, to Calhoun Cnty. Bd. Of Comm'rs (Sept. 3, 2009), https://cms5.revize.com/revize/calhouncountymi/Agendas%20&%20Minutes/2009/090903_BOC_Agenda.pdf [https://perma.cc/46J7-E5RS].

257. CALHOUN CNTY., 2011 GENERAL FUNDS – 2011 ADOPTED BUDGET: PROSECUTING ATTORNEY 38, https://cms5.revize.com/revize/calhouncountymi/Finance/Budget%20Information/2011%20General%20Funds%20-%202011%20Adopted%20Budget.pdf [https://perma.cc/PB7G-8FYG] (last visited July 29, 2020) ($550,000 is over 20 percent of 2009 total operating expenditures of $2,524, 620).

258. Ken Paxton & John Montgomery, *Office of the Attorney General, Summary of Recommendations-Senate,* OFF. OF THE TEX. ATT'Y GEN. (Jan. 17, 2019) ($382.6 million in federal child support funding is over 30 percent of the AG's office total listed funding of $1.24 Billion).

In addition to being financially motivated and contractually required to prosecute and enforce child support orders to maximize federal IV-D child support funds,[259] the prosecutors' offices also are directly incentivized in how they prosecute and enforce the cases to seek federal "incentive payments" on top of the IV-D payments. In Indiana, a Lake County "IV-D Prosecutor" described the incentive payments as "gravy."[260] The Texas Attorney General's Office brags that it's Child Support Division leads the way in chasing these incentive payments:

> The CSD received more than $71.4 million in federal incentive payments in FY 2014—the most of any state in the nation in the latest federal reporting period. Texas has been the top recipient of federal incentive payments every year since federal FY 2006.[261]

In a slide presentation titled "Prosecutor's Budgets" for the Indiana Prosecuting Attorneys Council, child support incentives are listed as a key revenue stream and the slides explain that the amount in the incentive fund accounts as of 2014 was over $31 million, over a third of which is directed to county prosecutors' offices.[262] Once received, the prosecutor's offices can have wide discretion in how to use the child support funds: "Hardin County Attorney may expend reimbursements, allocations and/or incentive payments received pursuant to the IV-D contract at her discretion."[263]

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259. For an example of performance requirements imposed on prosecutors who have entered IV-D child support contracts, see MO. CODE REGS. ANN. tit 13, § 30-2.010 (2001).

260. Susan Brown, *Proper Use of Child-Support Bonuses in Question*, LAKE CNTY. NEWS (Mar. 8, 2010), https://www.nwitimes.com/news/local/lake/proper-use-of-child-support-bonuses-in-question/article_bb4a4364-506e-5083-8576-5a371aa4333b.html. [https://perma.cc/2DT2-P5AV].

261. OFF. OF THE ATT'Y GEN. OF THE STATE OF TEX., AGENCY STRATEGIC PLAN: FISCAL YEARS 2017-2021, 19 (June 21, 2016), https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/general-oag/AgencyStrategicPlan2017-2021.pdf [https://perma.cc/N4NQ-PL2P].

262. Steve Sonnega, *Prosecutor's Budgets*, IND. PROSECUTING ATT'Y COUNCIL 41, https://www.docslides.com/pamella-moone/prosecutor-s-budgets [https://perma.cc/A8UP-SYHL].

263. HARDIN CNTY. FISCAL CT., RES. 2014-23, (Mar. 11, 2014), http://hcky.org/wp-content/uploads/2017/08/2014-023.pdf [https://perma.cc/PC7L-LKY8]; *see also* DIST. ATT'Y OF THE TWENTY-FIRST JUD. DIST., AMITE, LA., ANNUAL FINANCIAL STATEMENTS (Dec. 31, 2014), https://app.lla.state.la.us/PublicReports.nsf/01EF760E7E434AD586257E820069192A/$FILE/00008EDD.pdf [https://perma.cc/2H5F-34B9] ("There are no restrictions on how incentive payments may be expended, except as may be required by state law for any other funds of the District Attorney.").

Further, not only are prosecutors influenced to pursue the substantial amounts of IV-D child support funds and federal incentive payments for their offices, some individual prosecutors have been rewarded directly when they prosecute and enforce IV-D child support cases. A court opinion in Kentucky recognized that: “In order to entice county attorneys to enroll in the program, . . . the Cabinet encouraged and assisted county attorneys in getting their local fiscal courts to pass resolutions allowing the incentive payments received from the federal government to be paid directly to the county attorneys.”[264] Similarly, an Indiana court addressed the pursuit of the federal child support incentive payments by a county prosecuting attorney, and ruled that the prosecutor “could be paid the incentive payments as additional salary.”[265] Prosecutors taking part in such unconstitutional arrangements are in conflict with their ethical obligations.

CONCLUSION

America’s juvenile court systems are contracting away their independence and impartiality. Through the interagency agreements discussed in this article, judicial impartiality and prosecutorial discretion are traded for money. Harm results as constitutional and ethical lines are crossed, and vulnerable children are monetized by the institutions intended to protect them.

History has witnessed the rise and fall of governments in relation to their treatment of justice and human rights for their inhabitants, especially of those who are in circumstances of heightened vulnerability. The United States was founded on knowledge of such history, thus recognizing the necessity of an independent and impartial judiciary. Around the world, member states of the United Nations similarly recognize this historical principle: “[T]he importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice . . . .”[266]

The necessary struggles to remember this learned history are constant, because the risks inherent in the human political struggle are also constant. Children need us to remember, because the principles of independence and impartiality are particularly crucial in judicial systems that exist to protect their welfare. When children

264. Kenton Cnty. Fiscal Ct. v. Elfers, 981 S.W.2d 553, 55 (Ky. Ct. App. 1998).
265. Plummer v. Hegel, 535 N.E.2d 568, 570 (1989).
266. U.N. Docs. ESCOR Res. 2006/23 (July 21, 2006).

are harmed, all of society is harmed. Juvenile court systems and trial courts serving vulnerable adults form the foundations of the judiciary, which in turn forms the foundation of democracy. Thus, the constitutional and ethical concerns present in the interagency agreements discussed in this article must be addressed, as they pose contractual threats to the independence and impartiality of America's juvenile court systems.

Remedying the concerns requires concerted effort. State and county representatives in the legislative and executive branches must be held accountable to better protect the integrity and independence of the judiciary by providing sufficient funding, so the courts do not feel pressure to seek alternative revenue strategies. Attorneys practicing in the juvenile court systems should consider challenges to unconstitutional and unethical practices that result from the interagency contracts, both through individual advocacy and by coordinated efforts of the organized bar. And ultimately, needed reforms should begin with juvenile court system judges, as "primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary . . . ."[267]

Justice for children is not a business. America's juvenile court systems will inevitably face ongoing tensions in their search for adequate state and county funding. But as the budget struggles continue, our juvenile court systems must not lose sight of why and for whom they exist—and always be on the side of serving children, not profiting from them.

267. *Id.*

PUTTING POVERTY LAW INTO CONTEXT: USING THE FIRST YEAR EXPERIENCE TO EDUCATE NEW LAWYERS FOR SOCIAL CHANGE

*ZOE NIESEL**

Introduction .... 98 R
I. Poverty Law and the Law School Curriculum .... 99 R
A. What is Poverty Law? .... 99 R
B. Poverty Law Within the Law School Curriculum . 107 R
II. ABA Standards and the Role in Poverty Law .... 113 R
III. The St. Mary's Experience .... 115 R
A. Housing the Experience .... 119 R
B. Poverty Law Exposure in the First Year .... 122 R
Conclusion .... 129 R

* Associate Professor of Law, St. Mary's University School of Law. It is a true privilege to write this article to celebrate the amazing work of Marian Wright Edelman. She is well-known for advocating for positive and progressive changes in communities to increase quality of life, end discrimination, and eliminate apathy. To help more law students find the same voice and skillset, law schools need to expose their students to the realities of local communities and how lawyers are instruments of change and social justice. This article examines the trends and proposes approaches that law schools can use to initiate discussions about poverty and social change from the beginning. Although I have the honor of writing this article, the work could not have been accomplished without the help of my colleagues whose ideas, contributions, and dedication made this possible. First, for the poverty law initiative described, I would be remiss not to thank: (1) former Assistant Dean of Admissions Shelli Soto and current Interim Dean of Admissions Cathy Casiano, (2) the amazing Director of Pro Bono, Greg Zlotnick, (3) the Director of the Law Success Program, Professor Afton Cavanaugh, who made many of the logistics possible, and the Law Success Instructors, who work tirelessly to support our students, (4) Assistant Dean of Career Strategy Robin Thorner, an advocate for pro bono and public service, and (5) the St. Mary's School of Law administration and faculty for allowing all of us named here to engage in this endeavor. Second, another huge thank you to the editorial team at the NYU Annual Survey of American Law. Finally, thank you to my research assistant Korin Lewis for her invaluable help.

INTRODUCTION

U.S. law schools increasingly emphasize teaching values, ethics, and social justice. Indeed, one of the most progressive aspects of modern legal education is the incorporation of discussions about justice, ethics, morality, and social consciousness in the classroom, especially when combined with opportunities for clinical education and real-world experiences.[1] However, despite this productive shift, many U.S. law schools are not initiating institutional discussions about the duty of the lawyer as an instrument of social change. Students and professors have too few conversations regarding the lawyer's role in fighting poverty and injustice.[2]

Against this background, law schools are increasingly interested in using practice-readiness simulations to teach and reinforce practice skills and concepts. In fact, the American Bar Association (ABA) has mandated the use of learning outcomes that include the development of professional skills, as well as established a greater focus on professional development and pro bono.

This article seeks to marry two problems in legal education—the problem of struggling to initiate more social justice and service-based learning, and the problem of attempting to place legal problems in their social context—into a harmonious solution. Specifically, this article proposes integrated learning experiences that identify issues surrounding poverty in the local community and encourage students to use legal analysis, communication, cultural competency, and writing skills to serve clients living in poverty. Hopefully, other law schools will consider adopting a similar approach.

1. *See* Vanita Saleema Snow, *The Untold Story of the Justice Gap: Integrating Poverty Law into the Law School Curriculum*, 37 PACE L. REV. 642, 643–44 (2017) ("In light of the American Bar Association's *MacCrate Report*, Clinical Legal Education Association's *Best Practices for Legal Education*, the Carnegie Foundation's *Educating Lawyers: Preparation for the Profession of Law*, and *Building on Best Practices: Transforming Legal Education in a Changing World* law schools are increasingly reassessing not only students' pro bono commitment, but other competency-based measures to determine whether the curriculum prepares students for practice.").

2. *See* Robert Hornstein, *Teaching Law Students to Comfort the Troubled and Trouble the Comfortable: An Essay on the Place of Poverty Law in the Law School Curriculum*, 35 WM. MITCHELL L. REV. 1057, 1060 (2009) ("Rather than being consigned to the margins of the law school curriculum, however, poverty law and social justice should be prominent fixtures in legal education and should be central institutional concerns of the nation's law schools. More precisely, poverty law should be a required and animating element of today's law school curriculum. The reasons why are drawn not from the classroom but from the pages of history and the pressing demands of civil society.").

Part I examines poverty law and discussions about poverty in the U.S. law school. Specifically, the article examines over fifty years of material on how poverty has been discussed in legal education. A shift occurs over time, with a renewed focus today on pro bono service and clinical education. What is critically important, however, is law schools' failure to produce attorneys with a culture of service and understanding of how to engage in social justice. Part II discusses the newer role of ABA standards in modern U.S. law schools, particularly the standards that would support a greater focus on issues of poverty and social justice.

Part III explores the use of an institutional, integrated approach to teaching students about poverty and the role of the lawyer in combating social injustice. The case study is drawn from St. Mary's University School of Law in San Antonio, Texas, where first year law students engage in a year-long "soft" simulation exercise addressing poverty in the local community. This approach exposes students to the issues of poverty and the role of the lawyer in multiple ways. First, class-wide readings and service projects tackle the problem from a social perspective and encourage students to think about their local community. Students then complete an integrated curriculum using legal writing, client interviewing, appellate advocacy, and legal research skills to represent, through various assignments, a homeless individual charged with aggressive panhandling. Part III also addresses the experience and goals in participating in this yearlong experience, including students becoming more informed about community issues, correcting assumptions about poverty and homelessness, and understanding the roles of law student and lawyer in social context.

I. POVERTY LAW AND THE LAW SCHOOL CURRICULUM

A. *What is Poverty Law?*

Many people in the United States live in poverty; often, they need legal services.[3] The scope of the problem is huge—in 2018, there were 38.1 million people, or 11.8% of the population, living in poverty in the United States.[4] Poverty is not evenly distributed

3. *See* Barbara Stark, *Theories of Poverty/The Poverty of Theory*, 2009 BYU L. REV. 381, 382; Amy L. Wax, *Musical Chairs and Tall Buildings: Teaching Poverty Law in the 21st Century*, 34 FORDHAM URB. L.J. 1363, 1364 (2007).

4. JESSICA SEMEGA ET AL., INCOME AND POVERTY IN THE UNITED STATES: 2018 1 (2019), https://www.census.gov/content/dam/Census/library/publications/

among different demographics of Americans.[5] For example, women are more likely to live in poverty than men, with 12.9% of women in 2018 living in poverty as compared to 10.6% of men.[6] Single-parent families are more likely to live in poverty than families with a married couple.[7] For single-parent families with no husband present, the poverty rate is 24.9%;[8] 25.7% of individuals with disabilities, one of the most affected groups, live in poverty;[9] and, sadly, 16.2% of all children in the United States live in poverty.[10]

For those 38.1 million people living in poverty, including women, children, and individuals with disabilities, the need for legal services is enormous.[11] The problem is compounded by the fact that an additional 17.1% of the population lives close to poverty, meaning their income is less than two times the poverty threshold for a family of that size.[12] For these families close to the poverty line, the need for legal services is just as significant.[13] In 2017, the

2019/demo/p60-266.pdf [https://perma.cc/Q8W9-XA2Y]. Whether or not someone is living in poverty is determined by using the government's poverty thresholds. In 2018, the poverty threshold, commonly called the "poverty line," was $12,784 for an individual. For a family of two, the poverty threshold was $16,247. For a family of three, the threshold was $19,985, and for a family of four it was $25,701. *Id.* at 49.

5. *See* Tim Henderson, *Poverty Grew in One-Third of Counties Despite Strong National Economy*, PEW CHARITABLE TR. (Dec. 19, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/12/19/poverty-grew-in-one-third-of-counties-despite-strong-national-economy [https://perma.cc/5SWT-6UP2] ("While 14 of the 20 counties with the biggest poverty increases were southern, some Native American-majority counties also saw big jumps.").

6. SEMEGA ET AL., *supra* note 4, at 13. **R**

7. *Effects of Single Parenthood on Poverty*, MARRIPEDIA, http://marripedia.org/effects_of_single_parents_on_poverty_rates [https://perma.cc/36UQ-T3V2] (last visited Oct. 5, 2020) ("In 2015, 49.8 percent of children under 18 who lived with a never married mother were in poverty.").

8. SEMEGA ET AL., *supra* note 4, at 14. **R**

9. *Id.* at 13.

10. *Id.*

11. *See, e.g.*, Mary Owens, *Enhancing Access to Legal Services for Youth Experiencing Homelessness*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Oct. 24, 2016), https://dev2.usich.gov/news/enhancing-access-to-legal-services-for-youth-experiencing-homelessness/ [https://perma.cc/FHH9-XW9P] (explaining that youth experiencing homelessness drastically need legal services in many aspects).

12. SEMEGA ET AL., *supra* note 4, at 52. **R**

13. *See, e.g.*, Paul Prettitore, *Does Legal Aid Reduce Poverty?*, BROOKINGS: FUTURE DEV. (June 23, 2015), https://www.brookings.edu/blog/future-development/2015/06/23/does-legal-aid-reduce-poverty/ [https://perma.cc/5Y6P-TJ46] ("Labor abuses (such as wrongful termination and failure to pay full wages), eviction from housing, debt, and family problems (such as divorce), can all produce insurmountable financial shocks to those near the poverty line.").

Legal Services Corporation reported that eighty-six percent of the civil legal problems reported by low-income individuals received little or no legal help.[14] The types of civil legal issues experienced by low-income individuals are vast—health care, domestic violence, disability access, housing, children and custody, income maintenance, landlord/tenant issues, and veteran's benefits.[15] Seventy-one percent of low-income Americans experienced a civil legal issue in the last year.[16] As such, there is a significant need for attorneys who practice poverty law to fill this demand.[17]

The term poverty law is difficult to define. The more one researches the concept, the more one realizes that poverty law is simply a study of the human condition within the U.S. system of legal justice.[18] It draws on aspects of almost all areas of practice but is ultimately about questioning why civil legal services are the least available to the people who often need them the most.[19]

Because the term is so tenuously defined, turning to the development of the field to search its parameters can be enlightening. The 1960s was the decade for the birth of much of the poverty law discussion, both within and outside of law schools.[20] The 1964 Eco-

14. LEGAL SERV. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017), https://www.lsc.gov/media-center/publications/2017-justice-gap-report [https://perma.cc/BAC7-M4RR].

15. *See* Henry Rose, *Law Schools Should Be About Justice Too*, 40 CLEV. ST. L. REV. 443, 450 (1992) ("Since [lower-income persons] often rely on government assistance for financial subsistence, they experience a higher incidence of legal problems than any other segment of society. Their legal problems are deeply imbedded in the most serious social issues of our time: discrimination, education, health, shelter, employment, and welfare.").

16. LEGAL SERV. CORP., *supra* note 14, at 6. **R**

17. There are certain types of civil legal issues that impact low-income households at a high rate. For example, civil issues relating to health care, including debt collection and billing, affect approximately forty-one percent of low-income households. *Id.* at 22. Thirty-seven percent of low-income households experienced civil legal issues relating to consumer and finance problems in the last year. *Id.* After that, other common issues include rental housing, children and custody, and education. *Id.*

18. *See Human Rights Dimension of Poverty*, U.N. HUM. RTS. OFF. HIGH COMM'R, https://www.ohchr.org/EN/Issues/Poverty/DimensionOfPoverty/Pages/Index.aspx [https://perma.cc/P6YM-6X7Z] (las visited Oct. 5, 2020) ("Poverty erodes or nullifies economic and social rights such as the right to health, adequate housing, food and safe water, and the right to education.").

19. *See* Snow, *supra* note 1, at 647 (noting that "[m]arginalized access to the courts and discriminatory laws create additional barriers to low-income households' abilities to end generational poverty"). **R**

20. That is not to say that before the 1960s the legal challenges faced by the poor were ignored or not discussed. Indeed, in 1923, John MacArthur Maguire published an article in the Harvard Law Review discussing "poverty and civil litiga-

nomic Opportunity Act created the Office of Economic Opportunity, which as a federal agency was charged with administering a multitude of programs to assist those living in poverty.[21] This included funding to 130 legal service programs, which allowed legal aid offices to open with the "the dual mission of eradicating poverty and increasing access to justice."[22] As such, the lawyers working within these funded programs had a two-fold mission: to attack poverty at the policy level and focus on mechanisms to eradicate poverty and to provide increased legal services to those in need.[23]

After the Economic Opportunity Act, the next major step in the United States' approach to the "poverty problem" was the creation of the Legal Services Corporation in 1974 through congressional passage of the Legal Services Corporation Act.[24] The Legal Services Corporation was significant in that it provided a mechanism to ensure that organizations providing civil legal assistance were funded.[25] The Legal Services Corporation Act noted that "there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program."[26] Further, it recognized that "providing legal assistance to those who face an eco-

tion." John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1923). The article discussed the history of legal assistance to the poor in civil litigation in England and the United States, dating back to the Magna Carta in 1215 and the 1495 English statute 11 Hen. VII, c. 12, which established proceedings in forma pauperis. In analyzing the negative historical relationship between those in poverty and civil litigation, the author specifically noted that importance of expert legal services: "It might seem, at first blush, that if we took the relatively simple step of abolishing costs and fees for poor men we should have done enough. Let the beneficiaries supply their own lawyers. That is fatally wrong. The leading cause of past and present breakdowns in well-meant schemes for solving this great problem has been the neglect properly to supply expert legal assistance." *Id.* at 363. Further, even in the 1920s, the author saw the opportunity for legal services organizations to lead the charge in helping persons in poverty navigate legal issues: "In the United States an efficient, inexpensive, and satisfactory method of meeting this difficulty has been known for years. Our thirty or more legal aid organizations in all our larger cities, if encouraged to develop and extend themselves, could, in cooperation with the assigned counsel system in smaller communities, provide a complete solution." *Id.* at 401–02.

21. *See Evaluating the Success of the Great Society*, WASH. POST https://www.washingtonpost.com/wp-srv/special/national/great-society-at-50/ [https://perma.cc/ELE2-J75Z] (last visited Oct. 11, 2020).

22. Snow, *supra* note 1, at 648. **R**

23. *See id.*

24. Legal Services Corporation Act of 1974, 42 U.S.C. § 2996.

25. *See generally id.*

26. *Id.* at § 2996(2).

nomic barrier to adequate legal counsel will serve best the ends of justice and assist in improving opportunities for low-income persons."[27] While these were lofty words, the overall aims were entirely more practical.[28] Low-income individuals and families are often unable to afford representation for necessary lawsuits, like landlord/tenant issues, health insurance or billing issues, probate matters, or consumer law issues.[29] The goal of the Legal Services Corporation was to provide funding to prevent families from falling into bankruptcy over these necessary lawsuits.[30]

To meet this mission, the Legal Services Corporation received the power to provide financial support to programs that furnished legal assistance to "eligible clients," defined as those who could not afford legal assistance.[31] The entities that the Legal Services Corporation could fund included individuals, firms, corporations, state and local governments, and other entities.[32] Much of the Corporation's work was to provide grants to these entities to ensure that they could continue to provide legal services to those who could not afford legal representation.[33] The Legal Services Corporation describes its work as follows:

> The Legal Services Corporation (LSC) [has] the mission to expand access to the civil justice system for low-income Americans. LSC supports civil legal aid organizations across the country, which in turn provide legal assistance to low-income Americans grappling with civil legal issues relating to essential human needs, such as safe housing and work environments, access to health care, safeguards against financial exploitation, and assistance with family issues such as protection from abusive relationships, child support, and custody.[34]

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27. *Id.*

28. *Id.*

29. *See* Jennifer S. Bard & Larry Cunningham, *The Legal Profession Is Failing Low-Income and Middle-Class People. Let's Fix That*, WASH. POST (June 5, 2017), https://www.washingtonpost.com/opinions/the-legal-profession-is-failing-low-income-and-middle-class-people-lets-fix-that/2017/06/02/e266200a-246b-11e7-bb9d-8cd6118e1409_story.html [https://perma.cc/V5Y4-22EL] ("[Eighty] percent of low-income individuals in the United States cannot afford the legal assistance they need to avoid the loss of their homes, children, jobs, liberty and even lives.").

30. *See* 42 U.S.C. § 2996.

31. 42 U.S.C. § 2996a.

32. 42 U.S.C. § 2996e.

33. *See id.*

34. LEGAL SERV. CORP., *supra* note 14, at 9. R

Despite the positive mission of the Legal Services Corporation Act, it soon faced significant challenges.[35] During the Reagan presidency, a narrative emerged that those living in poverty and using legal services were lazy or entitled. Fueled by this narrative, Reagan sought to defund the Legal Services Corporation completely.[36] Even though his proposal ultimately failed, the Legal Services Corporation faced a significant budget reduction, from $400 million to $278 million, a reduction which forced many LSC- funded offices to give up litigation initiatives and to remove their appellate divisions.[37] Some offices did not survive the cuts and were forced to close, leaving those living in poverty with fewer legal resources.[38]

Ultimately, the Reagan-era reduction in funding to legal service providers came to an end with a changed political climate.[39] During this period of renewal, LSC began assisting clients who faced poverty because of a variety of factors, including race, immigration status, education, and limited access to information on legal representation.[40] Further, organizations began to recognize that even for those individuals technically living above the poverty line, access to legal resources was still significantly limited.[41]

With people both below and technically above the poverty line struggling to receive legal services when needed, today's demand

35. *See* LEGAL SERV. CORP., LEGAL SERVICES CORPORATION STRATEGIC PLAN 2012-2016, 1-2 (2012), https://www.lsc.gov/sites/default/files/LSC/pdfs/BOD%208-31-(5)%20LSC%20Strategic%20Plan%20—%20August%20DRAFT%20(08202012%20DRAFT)(LSC%20MANAGEMENT%20EDITS%20—%20CLEAN%20VERSION).pdf [https://perma.cc/66GG-YCHF] (explaining the financial challenges that all civil legal assistance programs face with reduced funding).

36. *See* Stuart Taylor, *Legal Aid for the Poor: Reagan's Longest Brawl*, N.Y. TIMES (June 8, 1984), https://www.nytimes.com/1984/06/08/us/legal-aid-for-the-poor-reagan-s-longest-brawl.html [https://perma.cc/6KFT-H7ZY].

37. William Booth, *Attacked as Left-leaning, Legal Services Suffers Deep Cuts*, WASH. POST (June 1, 1996), https://www.washingtonpost.com/archive/politics/1996/06/01/attacked-as-left-leaning-legal-services-suffers-deep-cuts/caee36f5-114e-4068-899e-5e559ab7954a/ [https://perma.cc/9JM5-F895].

38. *See id.*

39. *See* Earl Johnson, Jr., *A Momentous Event in Legal Services History: ABA's 1965 Endorsement of the Federal Legal Services Program*, GEO. L. LIBR. (Feb. 27, 2015), https://blogs.commons.georgetown.edu/righton/2015/02/27/a-momentous-event-in-legal-services-history-abas-1965-endorsement-of-the-federal-legal-services-program/ [https://perma.cc/SRB6-ZWWN] ("In the 1980s, when the Reagan administration sought to defund the Legal Services Corporation, the ABA organized a 'march on Washington' with lawyers brought in from around the country to meet with their Senators and Congressman.").

40. LEGAL SERV. CORP., *supra* note 14. **R**

41. *See id.* at 6 (examining justice gap for those living at or below 125% federal poverty line).

for free or discounted legal services vastly exceeds the supply of attorneys who can assist.[42] Limited funding and staffing means that legal services organizations have to deny applications from low-income persons who seek their services, simply because they cannot meet the need.[43] Some of this great need is met by attorneys who may not work for legal service entities, but who are engaging in pro bono service.[44] After all, rule 6.1 of the American Bar Association Model Rules of Professional Conduct states that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year."[45]

Despite this language, and the adoption of the Model Rule 6.1 by forty-three states,[46] attorneys do not provide enough pro bono service to those living in poverty.[47] Private lawyers outnumber public interest lawyers on a scale of ten to one.[48] But despite their superior numbers, these private attorneys fail to provide assistance to those who need legal services—attorneys "at the one hundred most financially successful firms donate, on average, a mere 8 minutes per day annually to pro bono work."[49] Further, private attorneys provide less than half an hour of pro bono service per week, and most of that is to family, friends, or charitable causes that do not include low-income individuals.[50] Because of statistics like these,

42. As discussed below, the law schools must rise to help meet this staggering demand. *See* Sara K. Rankin, *The Fully Formed Lawyer: Why Law Schools Should Require Public Service to Better Prepare Students for Private Practice*, 17 CHAP. L. REV. 17, 20 (2013) ("The crippling lack of representation for non-profits and indigent populations-people and entities that typically cannot afford legal services-is well documented. . . . Law students and faculty are capable resources that can help to fill this gap.").

43. *See* Rebecca Buckwalter-Poza, *Making Justice Equal*, CTR. FOR AM. PROGRESS (Dec. 8, 2016, 9:03 AM), https://www.americanprogress.org/issues/criminal-justice/reports/2016/12/08/294479/making-justice-equal/ [https://perma.cc/6HN3-WJP6] ("In 2015, an individual had to make less than $14,713 per year – a family of four, less than $30,313 per year – to be eligible for Legal Services Corporation aid.").

44. *See* Standing Comm. on Pro Bono and Pub. Serv., *Pro Bono*, A.B.A. (July 26, 2018), https://www.americanbar.org/groups/legal_education/resources/pro_bono/ [https://perma.cc/766P-XQWH].

45. MODEL RULES OF PRO. CONDUCT r. 6.1 (AM. BAR ASS'N 2019).

46. *See* Leslie Boyle, *Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements*, 20 GEO. J. LEGAL ETHICS 415, 419 (2007).

47. *See id.* at 420.

48. *See id.* at 418.

49. *Id.* at 419.

50. *See id.*

four-fifths of the legal needs of low-income individuals remain unmet.[51] Low-income Americans approached legal services organizations for 1.7 million legal problems in 2017, and less than half of those problems could be fully addressed due to lack of resources.[52] More lawyers must bring their skills to poverty law, even if on a pro bono basis.[53]

Again, the definition of poverty law can be difficult to pin down, but it certainly embraces the representation of clients who cannot afford to retain legal services when presented with a situation that would normally require someone to do so.[54] Practice in poverty law can include a range of skills and practices for an attorney—litigation, counseling, policy advocacy, and negotiation.[55] As such, poverty law can include almost any traditional area of practice, but it largely focuses on "any area of law that touches the lives of individuals living in poverty."[56]

For those who practice poverty law, especially those entering from the private sector to do pro bono work, there are significant limitations on lawyers' ability to help low-income clients. First, private attorneys need to have a firm culture that is supportive of engaging in service.[57] Standards of behavior in this space are largely tied to firm culture, and while many firms are incentivized to encourage pro bono work, not all do.[58] Further, attorneys may lack

51. *See id.* at 420.

52. *See* LEGAL SERV. CORP., *supra* note 14, at 6. **R**

53. Boyle, *supra* note 46, at 418 ("The amount of free legal aid that is currently available from both public interest and private practice attorneys is far below what is needed to address the increasing legal needs of our growing indigent population."). **R**

54. *See generally What is Poverty Law?*, LEGAL CAREER PATH, https://legalcareerpath.com/poverty-law/ [https://perma.cc/59RA-53S3] (last visited Oct. 12, 2020).

55. *See id.*

56. Snow, *supra* note 1, at 652; *see also* Martha F. Davis, *The Pendulum Swings Back: Poverty Law in the Old and New Curriculum*, 34 FORDHAM URB. L.J. 1391, 1395 (2007) (discussing the difficulty of addressing the definition of poverty law, but noting that "poverty law is innately broad, global, interdisciplinary, and focused on social change"); Stephen Loffredo, *Poverty, Inequality, and Class in the Structural Constitutional Law Course*, 34 FORDHAM URB. L.J. 1239, 1241 (2007) ("[P]overty law might be understood as a reference to the substantive areas in which lawyers for the poor have carried on this new kind of practice, areas as diverse as welfare law, family law, housing law, consumer law, employment law, and education law—frequently intermixed with innovative theories of constitutional law and administrative law—and the distinctive approaches to those areas dictated by the needs and goals of economically distressed communities and individuals."). **R**

57. *See* Snow, *supra* note 1, at 660. **R**

58. *See id.* ("Building a firm culture of pro bono may help to reconcile the dual and conflicting demands of operating to increase firm value and fulfilling

the cultural competency or practical skills to deal with low-income clients.[59] Firms or the state bar would need to provide adequate training on the types of legal issues, and the skills, needed to be successful in representing low-income clients.[60] Actual legal services providers are already stretched to handle the sheer volume of work that comes their way;[61] thus, the profession cannot expect them to bear the financial and time costs of training private sector attorneys to handle cases.[62]

B. Poverty Law Within the Law School Curriculum

Poverty law within the law school curriculum is not a new concept—it has been in place since at least the 1960s,[63] when "law schools developed a growing range of poverty law-related courses in response to the external interests of foundations, potential law student employers, client activists, the legal profession, and policy makers."[64] These external pressures also resulted in external funding to drive poverty law programs forward; for example, from the late 1950s to the mid-1960s, the Ford Foundation provided $800,000 in funding to help nineteen law schools establish clinical programs to help underserved persons within local communities.[65] This grant, however, was largely focused on providing better skills training to burgeoning attorneys, rather than providing legal services.[66] The success of the program ultimately resulted in over one hundred clinical programs at various law schools, to the tune of over $13 million in grants from the Ford Foundation.[67]

While the Ford Foundation grants were critical to jumpstarting clinical education—which has the two-pronged mission of provid-

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societal obligations. Also, pro bono work is an effective recruitment tool and generates positive public relations for the firm.").

59. *See* Nelson Miller, *Beyond Bias–Cultural Competence as a Lawyer Skill*, MICH. BAR J., June 2008, at 38.

60. *See id.* at 38–39.

61. *See* Stephen Wizner, *Is Learning to "Think Like A Lawyer" Enough?*, 17 YALE L. & POL'Y REV. 583, 584 (1998) ("It is beyond dispute that there are not enough lawyers providing legal services to the growing numbers of the poor among us . . . most poor people are forced to deal with their legal problems without the benefit of any legal assistance.").

62. *See id.* at 584–85.

63. *See* Wax, *supra* note 3, at 1364 ("The presentation and design of these initial courses were strongly informed by left-leaning assumptions about the nature of poverty and its origins."). **R**

64. Davis, *supra* note 56. **R**

65. *Id.* at 1396.

66. *See id.*

67. *See id.* at 1397.

ing professional experiences to students and providing legal services to the community—were invaluable, additional initiatives focused on legal services created a "cross-over" between law schools and non-profit organizations.[68] For example, grants in the early 1960s by organizations like the National Institute for Mental Health and the President's Committee on Juvenile Delinquency created grassroots initiatives to work with people experiencing poverty at the local level, particularly with regards to social services.[69] The funded organizations came to realize the importance of including attorneys in the discussion in order to provide more full-fledged services.[70]

The role of attorneys was ultimately more formalized after Edgar and Jean Cahn[71] proposed neighborhood legal services offices in their article *The War on Poverty: A Civilian Perspective*. These neighborhood legal services offices were ultimately established and funded through federal grants.[72] The creation of widespread legal services offices incentivized additional training programs in the areas of poverty law and also provided employment opportunities to new lawyers in these areas.[73] This need for additional training and more practice to ready graduates to fill legal services opportunities reached the law schools, with more institutions providing clinical offerings, poverty law courses, and skills training.[74] Suspiciously absent, however, was a greater discussion of social justice and the role of the lawyer in addressing community concerns.[75] The lack of such

68. *See id.*

69. *See id.*

70. Davis, *supra* note 56, at 1397. **R**

71. The Cahns ultimately went on to found Antioch Law School, which had a mission to provide justice to the underserved and used clinical education as a cornerstone of the curriculum. *See* Linda Greene, *The Justice Mission of the Law Schools*, 40 CLEV. ST. L. REV. 353, 356 (1992) ("CUNY, Antioch, Washington, D.C., and the University of Maryland have programs that seek to integrate justice concerns throughout their curriculum."); Hornstein, *supra* note 2, at 1068–69 ("Social justice was the hallmark of Antioch Law School's educational mission."). **R**

72. *See* Davis, *supra* note 56, at 1398 ("Providing legal representation to poor people was not an innovation. The new network of federally-funded legal services offices nationwide augmented the existing nationwide patchwork of legal aid offices, staffed by an estimated four hundred lawyers operating under the auspices of local bar associations and other private or municipal sponsors."); *see also* Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1334 (1964). **R**

73. Davis, *supra* note 56, at 1398. **R**

74. *See id.* at 1392.

75. *See id.* at 1398 (noting that in response to this situation, "Patricia Wald wrote in her Working Paper for the 1965 National Conference on Law and Poverty, 'law schools . . . must be prepared to reconsider their traditional preoccupa-

conversations meant that it would be more difficult to address poverty law in its greater social context.[76] Community leaders and legal services providers of the 1960s firmly believed that the law could be an instrument of social change, and that lawyers should be trained not just to handle legal cases for persons in poverty, but rather to be agents in a larger movement to eradicate poverty and address its systemic roots.[77] That said, the numbers are still impressive. By 1969, U.S. law schools had responded to the increased federal funding and greater social spotlight put on poverty by offering more courses that touched on issues of social justice and poverty law.[78]

The rapid expansion of poverty law offerings in the 1960s were curtailed in the 1980s, only to reemerge after with a renewed sense of vigor.[79] Thanks again to funding from the Ford Foundation, an Interuniversity Consortium on Poverty Law composed of academics from Harvard, UCLA, and Wisconsin (and later additional universities) formed "to mobilize, increase and improve the commitment of law school resources to the critical task of attacking the root causes and tragic effects of poverty and disadvantage in America."[80] Courses and texts developed through the Consortium's efforts provided new experiences to law students, although the frustration of students and professors at initiating meaningful social change was noted.[81]

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tion with the world of corporate finance, taxes, and property and to accept a greater role in the administration of justice.' ").

76. *See id.* at 1399.

77. *See id.* ("[T]he new courses on poverty law were never intended to stop at teaching about the laws affecting poor people. Implicit in the very notion of poverty law was the social and political agenda of ending poverty."); *see also* Hornstein, *supra* note 2, at 1066 ("The analytical, technical, and practice skills that form the centerpiece of a legal education should be informed by a concern for justice."). R

78. Davis, *supra* note 56, at 1392. (citing the Proceedings of the National Conference on the Teaching of Anti-Poverty Law 3, App. 1 (1970); further, noting that once poverty law courses were established, specific casebooks in the area could be developed); *see also* PATRICIA M. WALD, LAW AND POVERTY: 1965, 91 (Abram Chayes & Robert L. Wald eds., 1965) ("In the past year, several major law schools—Harvard, Pennsylvania, California, Georgetown, and New York University—have introduced courses dealing specifically with Law and Poverty."). R

79. *See* Davis, *supra* note 56, at 1395–1402; *see also* Howard S. Erlanger & Gabrielle Lessard, *Mobilizing Law Schools in Response to Poverty: A Report on Experiments in Progress*, 43 J. LEGAL EDUC. 199, 199 (1993) ("Attention to poverty law, a prominent subject of legal study in the 1960s and early 1970s, faded during the late 1970s and 1980s. [In the 1990s], however, there has been a resurgence of interest."). R

80. INTERUNIVERSITY CONSORTIUM ON POVERTY L. & FORD FOUND., TOWARD THE MOBILIZATION OF LAW SCHOOLS FOR POVERTY LAW ADVOCACY 1 (1992).

81. Davis, *supra* note 56, at 1403. R

Also of note was the publication of the ABA Report of the Task Force on Law Schools and the Profession, a 1992 publication that encouraged the use of a practice-ready model for law school education.[82] But with the high need for competent attorneys to handle cases for low-income persons, it is perhaps no great leap to think that law school could provide an appropriate training ground for this type of skill.[83] The skills a successful attorney would need to handle cases in the poverty law context—legal reasoning, analysis, legal writing, issue spotting, cultural competency, empathy—are all skills that a law school curriculum should provide.[84]

Many applicants to law school are motivated by a desire to serve others.[85] Admissions committees often read about how a student is seeking admission to a J.D. program in order to help the underserved.[86] But despite this widespread sentiment, the law school curriculum and the law school experience do little to fully grow this desire[87] into skills and experiences that can lead to a practice focused on service and social justice.[88] Further, law schools that

82. *See id.* at 1404; AM. BAR ASS'N, TASK FORCE ON THE FUTURE OF LEGAL EDUC., REPORT AND RECOMMENDATIONS 24 (2014), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.pdf [https://perma.cc/UYR5-WY2D].

83. *See* Miller, *supra* note 59, at 39.

84. *See id.* at 38 ("A lawyer's cultural competence goes beyond avoiding bias. To serve diverse clients, lawyers should have special communication and interpersonal skills. Those skills can be taught and learned.").

85. Additionally, more law students are motivated by a desire for social change. *See* Erlanger & Lessard, *supra* note 79, at 210. ("More and more students are coming to law school with extensive life experience and sophisticated perspectives about social problems.").

86. *See* Hank Stout, *5 Reasons Why Law School Is Wrong For You (and 5 Reasons Why It's Right)*, ABA FOR L. STUDENTS: BEFORE THE BAR (June 28, 2017), https://abaforlawstudents.com/2017/06/28/5-reasons-law-school-wrong-5-reasons-right/ [https://perma.cc/U2G6-4TZ9] ("As a lawyer you will have countless opportunities to change the lives of others for the better."); *but see* Steven Chung, *4 More Types of People Who Should Not Go to Law School*, ABOVE THE L. (Mar. 23, 2016, 10:06 AM), https://abovethelaw.com/2016/03/4-more-types-of-people-who-should-not-go-to-law-school/ [https://perma.cc/PMC3-HZPT] ("Many people claim to want to go to law school because of some vague notion of helping people or making a difference in the world or their communities.").

87. *See* Rose, *supra* note 15, at 444–45 (noting that incoming law students "view a legal career as an opportunity to contribute to the advancement of social good. These altruistic aspirations are often subverted by the process of legal education . . . [and] the number of students who plan to pursue full-time careers in public interest work declines by half in law school."). R

88. *See* Snow, *supra* note 1, at 643 ("A traditional law school curriculum can effectively extinguish students' fire in the belly for social justice."). Many law R

have attempted to introduce this type of experience, usually by offering specialized courses on poverty law or various social justice issues, have met resistance from students, who may see these courses as not teaching "real law."[89] Limited exposure to real-world issues of poverty and community engagement moves students away from their initial desire to serve others and instead focuses them on the types of incentives rewarded during the law school experience, such as performance on black-letter tests.[90] As such, the lack of emphasis in this area reroutes students to a more traditional focus, despite their aspirational admission essays, and largely dries up interest in service or social justice.[91] Sadly, this dynamic has consequences that expand into practice and into larger professional concerns about the attorney's role in social change or public service.[92]

Indeed, U.S. law schools have generally been unsuccessful in creating a culture of pro bono service to extend into practice,[93] a

schools do offer excellent clinical opportunities that provide training in this area, but there is rarely a schoolwide initiative to create opportunities and training for students to represent low-income clients. *See id.*

89. Erlanger & Lessard, *supra* note 79, at 209 (noting that students enrolled in poverty-focused classes "complain[ed] that they were not learning 'real law' or that a specific political perspective was being imposed on them."). These complaints may be due to "students' insecurities about their emerging legal skills or professional goals. Students who have chosen to pursue legal careers have made an investment in the law as an institution and may feel threatened about that choice when it is suggested that the legal system perpetuates and legitimates social inequality." *Id.* R

90. *See id.* at 209 ("Acculturated law students learn to 'think like lawyers,' rejecting emotional and normative concerns in favor of specific rules and doctrinal approaches. This emphasis on rules clashes with attempts to identify broad theories of law or to locate law within social contexts."). Erlanger and Lessard note specifically that "[e]xperience has demonstrated that a significant number of students who enter law school with public interest career goals abandon those goals during law school. There are many reasons for this change. Some, such as the general legal culture, the market for legal jobs, students' work experience, and changes in family needs, are external to the law school. Others, including the formation of a student culture that devalues public interest employment, occur within the law school context." *Id.* at 225.

91. Wizner, *supra* note 61, at 589 (noting that a traditional law school curriculum "encourages [students] to suppress feelings, like compassion, and moral concerns, like the desire to work for social justice—feelings and moral concerns that they brought with them to law school, and that may, in fact, have brought them to law school"). R

92. *See id.*

93. *See* Erlanger & Lessard, *supra* note 79, at 208–09 ("Although most law students do not pursue public interest practice, many enter law school idealistic about the role of law in society and the potential for lawyer public service. While

problem that is especially significant considering that too few attorneys are engaging in pro bono service after they leave law school.[94] The ABA Standing Committee on Pro Bono and Public Service has written that "[w]hen society confers the privilege to practice law on an individual, he or she accepts the responsibility to promote justice and to make justice equally accessible to all people." As such, prospective law students should be mindful of whether a particular school will supply the necessary foundation for pro bono service.[95] In July 2018, the Standing Committee on Pro Bono Service reported that at least thirty-nine U.S. law schools require students to engage in pro bono or public service as a requirement for graduation.[96] The benefits of these programs are significant. They develop student skills in legal analysis, writing, research, professionalism, and community awareness and engagement.[97] Further, the opportunities for pro bono practice also expose students to different career paths and help them build a reputation in the local legal community.[98] But despite these rewards, very few actually engage unless mandated by the curriculum.[99] Further, even when mandated, there is a very real fear that students are completing hours

students may appear to abandon these values during law school, it is more likely that they simply de-emphasize them.").

94. *See* Rose, *supra* note 15, at 452; Snow, *supra* note 1, at 663 (quoting Chief Judge Lippman's 2012 remarks to law students: "How will you choose to benefit your fellow man and your community with your new skills? Will you use your legal acumen to foster equal justice in our state? Do you recognize that being a lawyer requires an understanding that access to justice must be available to all New Yorkers regardless of their station in life? From the start, these responsibilities of the profession must be a part of every lawyer's DNA—to support the values of justice, equality and the rule of law that make this state and this country great."). **R**

95. *See* Standing Comm. on Pro Bono and Pub. Serv., *supra* note 44 (noting that for "the law school setting, pro bono generally refers to student provision of voluntary, law-related services to people of limited means or to community-based nonprofit organizations, for which the student does not receive academic credit or pay"). **R**

96. *Id.* Hopefully, such initiatives will change the bleak statistics of the past, in which "[o]nly about a quarter to a third of their students participate in law-related pro bono programs. Average time commitments are quite modest and some seem intended primarily as resume padding." *See* Deborah L. Rhode, *The Pro Bono Responsibilities of Lawyers and Law Students*, 27 WM. MITCHELL L. REV. 1201, 1213 (2000).

97. *See generally* Standing Comm. on Pro Bono and Pub. Serv., *supra* note 44. **R**

98. *See id.*

99. *See* Rose, *supra* note 15, at 452 ("Only a small fraction of all lawyers perform pro bono work. Many lawyers perceive that pro bono work will diminish their economic opportunities. These lawyers have lost touch with the element of professionalism that is unique—the commitment to public service."). **R**

out of obligation, rather than with a full understanding of their meaning and role.[100]

II.
ABA STANDARDS AND THE ROLE IN POVERTY LAW

For decades, the goal of the U.S. legal academy has been to help students "think like lawyers."[101] This goal has merged components, including black letter law, legal writing, practice proficiency, and career-readiness.[102] However, as noted above, law schools have shown less interest in inculcating community and social responsibilities.[103]

This absence is potent against the background of American Bar Association (ABA) Standard 303(b), which requires law schools to provide substantial opportunities to students for: "(1) law clinics or field placement(s); and (2) student participation in pro bono legal services, including law-related public service activities."[104] In explaining this standard, the ABA has referenced Model Rule 6.1, noting that

> Rule 6.1 of the ABA Model Rules of Professional Conduct encourages lawyers to provide pro bono legal services primarily to persons of limited means or to organizations that serve such persons. In addition, lawyers are encouraged to provide pro bono law-related public service. In meeting the requirement of Standard 303(b)(2), law schools are encouraged to promote opportunities for law student pro bono service that incorporate the priorities established in Model Rule 6.1. In addition, law schools are encouraged to promote opportunities for law students to provide over their law school career at least 50

100. *See id.* ("One drawback of mandatory clinical work . . . is that the clinical work is generally awarded course credit and the donative aspect of such work is diminished.").

101. Henry Dahut, *Learning to Think Like a Lawyer*, BALANCE CAREERS (Jan. 25, 2019), https://www.thebalancecareers.com/careful-a-career-in-law-could-change-the-way-you-think-2164370 [https://perma.cc/GSW4-TVAW] ("Thinking like a lawyer demands thinking within the confines of inductive and deductive forms of reasoning.").

102. *See id.* ("I soon saw how thinking like lawyers actually meant altering our reasoning structures.").

103. *See, e.g.*, Wizner, *supra* note 61, at 583, 589.

104. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016-2017, Standard 303 (AM. BAR ASS'N 2017).

hours of pro bono service that complies with Standard 303(b)(2).[105]

As such, the ABA recognizes that a key part of legal education must be in promoting service.[106] Standard 303 recognizes the dearth of attorneys available to tackle legal issues for low-income persons and seeks to encourage the law school to serve as a change agent in providing these opportunities to students.[107] It is hoped that such a standard will provide increased attention to the role of pro bono in U.S. law schools.[108]

If a law school were to integrate additional conversations about poverty, pro bono, and service into its first-year curriculum, this discourse would hopefully at least help to meet the vision advanced by ABA Standard 303.[109] Currently, Standard 303 is largely aspirational, as it requires law schools to provide access to pro bono activities and encourage students to participate.[110] However, it does not formally require a pro bono requirement for graduation, nor does it tackle larger questions of culture surrounding service and social justice.[111] Indeed, one of the problems in this space is that there is a spectrum of what type of "substantial" pro bono offerings are required.[112] Some schools provide mandatory, faculty-led programs, while others have voluntary, student-led programs, creating a wide disparity in the quality and quantity of offerings.[113]

In addition to ABA Standard 303, ABA Standard 302 addresses the law schools' responsibility to establish learning outcomes that

105. *Id.* at Interpretation 303-3; *see also* MODEL RULES OF PRO. CONDUCT r. 6.1 (AM. BAR ASS'N 2019).

106. *See* Model Rules of Pro. Conduct r. 6.1 (AM. BAR ASS'N 2019)

107. *See, e.g.*, *Law Students Respond to Pro Bono Needs*, A.B.A. (Apr. 23, 2020), https://www.americanbar.org/groups/center-pro-bono/publications/pro-bono-exchange/2020/law-students-respond-to-pro-bono-needs/ [https://perma.cc/DEX4-P2SE] (showing different law schools' efforts of increasing pro bono).

108. *See id.*

109. *See* Brian Sites, *Experiential Learning: ABA Standards 303 and 304*, BEST PRAC. FOR LEGAL EDUC. (Sept. 13, 2015), https://bestpracticeslegaled.com/2015/09/13/experiential-learning-aba-standards-303-and-304/ [https://perma.cc/F94B-H3CU] ("[T]he ABA's new standards have brought it front and center by mandating that schools 'require each student to satisfactorily complete at least . . . one of more experiential course(s) totaling at least six credit hours.'"). *See generally* ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020-2021, Standard 303 (AM. BAR ASS'N 2020) [hereinafter ABA STANDARDS 2020-21].

110. ABA STANDARDS 2020-2021, Interpretation 303-3.

111. *See id.*

112. *Id.* at Standard 303(b).

113. *See* Snow, *supra* note 1, at 664 (discussing this problem and recommending that the ABA should measure the quality of law school pro bono offerings). R

include professional legal skills in an effort to produce attorneys ready for practice.[114] The interpretation of Standard 302 notes that the professional skills at issue may include "interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation."[115] Further, law schools must develop "[k]nowledge and understanding of substantive and procedural law; [and l]egal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context."[116]

The poverty law initiative used by St. Mary's in its first-year curriculum showcases that many of these professional legal skills become foundational when poverty law is introduced into the curriculum. The representation of low-income persons requires a myriad of skills, from knowledge of areas of substantive law, to legal writing and research, communication and interviewing, counseling, problem-solving, and many others.

III.
THE ST. MARY'S EXPERIENCE

St. Mary's University School of Law is located in San Antonio, Texas, which has the highest percentage of people living in poverty among the top twenty-five most populous metropolitan areas.[117] 18.6%, or 267,330 of 1.4 million residents, of the San Antonio-New Braunfels metropolitan area live below the poverty line.[118] Poverty in the city is especially likely to impact minority demographic groups.[119] For example, of 1.38 million Hispanic and Latino residents of San Antonio, 19.22% live below the poverty line.[120] Of the 64,511 Asian residents of San Antonio, 16.7% live below the poverty line, while 16.9% of African-American residents live below

114. ABA STANDARDS 2020-2021, Standard 302(c), (d).

115. Snow, *supra* note 1, at 644 n.12. R

116. ABA STANDARDS 2020-2021, Standard 302(a), (b).

117. Jackie Wang, *Census Data: San Antonio Region's Poverty Rate Rises, Tops Nation*, SAN ANTONIO REP. (Sept. 26, 2019), https://sanantonioreport.org/census-data-san-antonio-regions-poverty-rate-rises-tops-nation/ [https://perma.cc/7FHU-PF6P]. The poverty threshold for San Antonio for a family of four was $25,701 in 2018.

118. *Poverty in San Antonio, Texas*, WELFARE INFO, https://www.welfareinfo.org/poverty-rate/texas/san-antonio [https://perma.cc/R4GA-9VLY] (last visited Oct. 8, 2020).

119. *See id.* (showing in a chart how poverty in San Antonio affects different minorities within the city).

120. Wang, *supra* note 117.

the poverty line.[121] White non-Hispanics have the lowest poverty rate, with just above nine percent living below the poverty line.[122]

In addition to people living in poverty, San Antonio has a significant population of individuals experiencing homelessness.[123] To measure homelessness within the city, a "Point in Time" count is conducted to record the number of people experiencing homelessness during a single night. According to the South Alamo Regional Alliance for the Homeless:

> These one-night snapshot counts also provide local planners with data they need to understand the number and characteristics of persons who are homeless so they, in turn, can develop a thoughtful response. [This effort] allows communities to find out not just *how many* people are homeless, but *who* is homeless and more importantly, *why* they are homeless.[124]

During the Point in Time Count conducted on January 24, 2019, researchers found that just under 3,000 people in Bexar County, the county that houses the city of San Antonio, were homeless.[125] This included approximately 500 children and 128 individuals aged eighteen to twenty-four.[126] Equally as concerning is the 521 adults over age fifty found to be homeless, a population that suffers from poor nutrition, limited health care, and stress.[127] Further, while the overall number of people living homeless decreased

121. *Id.*

122. *Id.*

123. *See* Melissa Fletcher Stoeltje, *Number of People Living on the Streets of San Antonio up Dramatically*, SAN ANTONIO EXPRESS-NEWS (May 7, 2018, 5:24 PM), https://www.expressnews.com/news/local/article/Number-of-people-living-on-the-streets-of-San-12886184.php [https://perma.cc/4RNV-7H8U] (the number of people experiencing homelessness "zoomed from 441 in 2017 to 705 on Jan. 25, 2018").

124. S. ALAMO REG'L ALL. FOR THE HOMELESS, 2019 POINT IN TIME COUNT: SUMMARY REPORT 3 (2019) (emphasis added), https://www.sarahomeless.org/wp-content/uploads/2019/05/2019-PIT-Report_Digital-Copy.pdf [https://perma.cc/PV2J-MSX9]. The Point in Time Count is a national project that occurs during the last ten days in January. During this period, tens of thousands of volunteers gather across the country to help measure the scale of homelessness in over 3,000 cities and counties across the county. *See id.*

125. *See id.* at 6.

126. *Id.* at 12.

127. *Id.* at 17.

in San Antonio in 2019,[128] the number of homeless families increased by 18%.[129]

As the city of San Antonio's only law school, St. Mary's University School of Law ("School of Law") is home to a diverse population of students from a range of socioeconomic, ethnic, and cultural backgrounds.[130] As a Catholic and Marianist University, the mission of the School of Law is to educate future leaders for the common good through community, with an emphasis on service. Against this background, the School of Law realized an opportunity to expose its law school student body to the issues of poverty and homelessness in the local San Antonio community during the first year of law school.[131]

128. These decreases are to be celebrated and are largely the result of progressive housing programs available in the San Antonio metropolitan area. First, there was an overall six percent reduction in homelessness in San Antonio. *See id.* at 7. This decrease was attributed by the South Alamo Regional Alliance for the Homeless as the result of outreach efforts and the City of San Antonio's Department of Human Services' initiative to reach homeless individuals living in encampments. *See id.* at 4. Additional good news came in the reduction of the number of veterans experiencing homelessness. San Antonio has a significant number of military bases and the city is home to approximately 250,000 veterans and 80,000 active-duty personnel. Megan Rodriguez, *With 80,000 Active-duty Personnel, Bexar County Ranks Highest in Number of Military Deaths*, SA CURRENT (June 7, 2018, 11:44 AM), https://www.sacurrent.com/the-daily/archives/2018/06/07/with-80000-active-duty-personnel-bexar-county-ranks-highest-in-number-of-military-deaths [https://perma.cc/9JZ6-ZXTS]. In 2019, it appeared that the number of San Antonio veterans experiencing homelessness decreased by six percent thanks to non-profit partners and a $2.1 million gift from insurance company USAA. S. ALAMO REG'L ALL. FOR THE HOMELESS, *supra* note 124, at 4.

129. *See* S. ALAMO REG'L ALL. FOR THE HOMELESS, *supra* note 124, at 13.

130. *See* Maria Luisa Cesar, *St. Mary's Law School Named One of Most Diverse in U.S.*, MY SAN ANTONIO (Feb. 2, 2015, 5:40 PM), https://www.mysanantonio.com/news/education/article/St-Mary-s-law-school-named-one-of-most-diverse-6057520.php [https://perma.cc/4CNE-ZZLP] ("Of the student population at St. Mary's law school, 33.5 percent is Hispanic, 1.6 percent is American Indian; 3.1 percent is Asian or Hawaiian, and 3.6 percent is African-American.").

131. St. Mary's is lucky to have a robust clinical program, which assists students in gaining lawyering skills by acting as the attorney of record for low-income clients. The clinical program, housed as the Center for Legal and Social Justice, includes Civil and Criminal Justice Clinics and an Immigration and Human Rights Clinic. *See Clinical Program*, ST. MARY'S SCH. OF L., https://law.stmarytx.edu/academics/special-programs/center-legal-social-justice/clinical-program/ [https://perma.cc/UMW8-VQPZ] (last visited Oct. 8, 2020). These clinical offerings provide a much-needed resource for low-income residents in South Texas seeking legal representation and are a core component of the School of Law's mission. *See* Hornstein, *supra* note 2, at 1072 ("[I]t should indeed be noted and celebrated that many law school clinics have done and continue to do enormously important social justice impact work, and many clinical programs provide invaluable individual

The goals behind this exposure are twofold. First, in exposing students to issues of poverty and homelessness in their first year of law school, students would hopefully build skills in cultural competency and professionalism outside the traditional curriculum that would carry into their future practice. Second, early exposure to issues in the community would hopefully whet the appetite for student engagement in pro bono, clinical programs, and greater community service in a way that would build a culture of service that could last into practice. An ancillary goal was to show the impact of faculty modeling—the idea that faculty-led discussions about social justice and poverty would provide positive messages and instill values into the first-year class.[132]

With these goals in mind, the School of Law's Law Success Program developed an initiative to expose students in the first year of law school to community issues about poverty and homelessness, engage in simulations that required students to think about representing a low-income client, and hopefully build a culture of service and engagement that would last into practice. The initiative is designed to introduce students to diverse perspectives, particularly those identified as larger concerns in San Antonio, integrates opportunities to create awareness into skills work and further develop students into conscious lawyers. Further, this initiative would hopefully combat the view that poverty law issues were limited to specialized offerings and rather reinforce a message that social justice was a law school-wide concern.[133]

representation both civilly and criminally."). While an entirely separate article could be written about the innovative work of the School of Law's Clinical Program in addressing the needs of low-income persons, this Article focuses on an initiative to expose students to these issues in the first year of law school.

132. *See* Christine Cerniglia Brown, *The Integrated Curriculum of the Future: Eliminating A Hidden Curriculum to Unveil A New Era of Collaboration, Practical Training, and Interdisciplinary Learning*, 7 ELON L. REV. 167, 168 (2015) ("The role modeling of the professor is one of the most influential methods to communicate core values.").

133. *See* Spencer Rand, *Social Justice as a Professional Duty: Effectively Meeting Law Student Demand for Social Justice by Teaching Social Justice as a Professional Competency*, 87 U. CIN. L. REV. 77, 96 (2018) ("Except for a few law schools that require all students to take some form of poverty law course, many law students have no out-group class requirements and will not take many (or any) social justice focused courses. Limiting teaching of social justice to clinical and out-group classes leaves many students with little to no social justice instruction . . ."). By placing social justice and poverty law issues into the first-year curriculum, all students necessarily receive at least some training and exposure to these concepts early in their law school journey.

A. Housing the Experience

In making first year law student exposure to poverty law a part of the curriculum, the first question to be addressed was where to house the initiative. It can often be unclear in a law school curriculum where to place significant initiatives like this one. For St. Mary's, because part of the goal was to focus on skill building, it seemed clear that there were two significant opportunities—first year orientation, and the first year Legal Communication, Analysis, and Professionalism class.[134] Each of these presented an opportunity to create a culture around community awareness and poverty law. Additionally, both had connections to the St. Mary's Law Success Program, the School of Law's data-driven legal skills and professionalism program.[135]

The School of Law's First-Year Law Student Orientation ("First-Year Orientation") is the kickoff to any law student's academic experience. This two-day program accomplishes a number of important objectives to ready incoming first year (1L) students for their law classes. One of the most important goals of First-Year Academic Orientation is to introduce incoming 1L students to the basic skills

134. A rich body of scholarship exists exploring the placement of poverty law discussions within the first-year curriculum, including in doctrinal courses and specific poverty law courses. *See* Hornstein, *supra* note 2, at 1080 (discussing a poverty law seminar and the cases used; also, highlighting skills work done in the class, including asking students to conduct a voir dire examination—"[a] poverty law course offers virtually unbounded opportunities to examine questions of justice and equality within the crucible of practical lawyering concerns"); Susan Carle & Michelle Lapointe, *Short Notes on Teaching About the Micro-Politics of Class, with Examples from Torts and Employment Law Casebooks*, 56 BUFF. L. REV. 1129, 1152 (2008) ("Law school courses in torts, employment law, and employment discrimination offer ample opportunities for discussing issues of socioeconomic class . . . discussion of these issues in examining casebook materials can prevent students from accepting as natural or inevitable instances in which law reinforces or expresses ideas that actors possessing lower socioeconomic status have lower value and fewer dignitary rights."); Loffredo, *supra* note 56, at 1239–40 ("The relevance of poverty, economic inequality, and class to a constitutional law course dealing with individual rights ought to be readily apparent.").

135. *Support for Law Success*, ST. MARY'S SCH. OF L., https://law.stmarytx.edu/academics/special-programs/support-for-law-success/ [https://perma.cc/7MC5-382S] (last visited Oct. 12, 2020) (describing the Law Success program, which "takes an innovative, data-driven approach to student growth by using assessments and data-gathering to plan legal skills development, bar exam initiatives, and individual academic counseling. The data also forms the foundation of [a] rigorous legal skills curriculum, including [a] first-year writing and lawyering class, [a] second-year experiential writing course, and [a] third-year bar preparation for credit course, and involves significant writing development, practice readiness simulations, and individual student skill building.").

necessary to begin the study of law. Faculty guide students through exercises that ramp up in difficulty to ensure all students matriculate with a basic understanding of how to read legal materials and prepare for their classes. These exercises culminate in reading and briefing a case for a mock class that exposes all incoming 1L students to the basics of the Socratic method and case recitation. Finally, students work through a series of small group interactive exercises that create the foundations of legal analysis.

The Office of Law Success collects data and feedback on First-Year Orientation, and the data available to date shows that the incoming 1L class in 2017 greatly appreciated Orientation and its focus on skills preparation. The below chart shows how incoming students rated various components of the orientation experience:

Percentage of Incoming Class Responses Rating the Session as Helpful

Reading Legal Cases and Materials: 93.3%
Briefing a Legal Case: 89%
Mock Class: 97.1%
Crafting Legal Arguments: 94.7%

Because of its significant past success, and because it serves as the first moment that culture and mission are established at the law school, the First-Year Orientation seemed like an ideal place to begin discussions about community engagement and poverty in San Antonio.

Following Orientation, first-year students begin their required first semester curriculum. As part of this curriculum, students take three hours of Legal Communication, Analysis, and Professionalism ("LCAP"), a two-semester course that builds skills in the foundational areas of case analysis, legal research, legal writing, and professionalism. The purpose of LCAP is holistic. While it covers the traditional writing and research curriculum, it develops the "whole attorney" by focusing on simulated practice experiences, cultural competency, oral communication, and advocacy.

LCAP, which is taught in small sections of fifteen to eighteen students, seemed like an ideal place to create a culture of service.[136]

136. Excellent scholarship has been written on using the first-year skills and writing courses to stimulate pro bono and service. For some examples, see, e.g., Mary Nicol Bowman, *Engaging First-Year Law Students Through Pro Bono Collaborations in Legal Writing*, 62 J. LEGAL EDUC. 586 (2013); Rebecca A. Cochran, *Legal Research and Writing Programs as Vehicles for Law Student Pro Bono Service*, 8 B.U. PUB. INT. L.J. 429 (1999); *see also* Sara K. Rankin et al., *We Have a Dream: Integrating Skills Courses*

Additionally, LCAP houses several major skills capstones that could be used to expose students to the issue of poverty law. In the fall semester, students are required to interview a client in a simulated client meeting, and then write a final memo for the semester using the facts discovered in the client interview and law that the students had been researching for several weeks. The client interview is a cross-departmental success—St. Mary's drama students play the part of the client, while 1L students play the role of the attorney during the simulation. In the classes leading up to the simulation, LCAP instructors cover topics relating to oral communication, cultural competency, empathy, implicit bias, and questioning techniques. The client interview simulation goes well beyond a traditional legal writing curriculum by requiring students to practice critical thinking and analytical skills, while also honing skills such as communication, professionalism, and cultural awareness.

In the spring semester, LCAP provides an additional two capstone experiences. First, students participate in a senior partner meeting with members of the San Antonio legal community. As part of a simulated practice experience, students do legal research and analysis and report their findings to a member of the bar, who plays the student's supervising attorney on the case for purposes of the simulation. Like the client meeting in the fall, the senior partner meeting develops communication skills and professionalism. It is also an opportunity for students to practice intra-office meetings, cultural competency, notetaking, and professional interactions. Following the senior partner meeting, students end the semester with an appellate brief that requires their own independent legal research. After the brief is submitted, students then engage in mock oral argument to simulate the courtroom and advocacy experience.

In addition to the major capstone experiences, LCAP also utilizes a universal problem that has students follow a single client

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and Public Interest Work in the First Year of Law School, 17 CHAP. L. REV. 89 (2013). Many other schools have found the legal research and writing course to be an effective place to house social justice discussions. For example, Professor Bowman wrote in *Engaging First-Year Law Students Through Pro Bono Collaborations in Legal Writing*, "LRW classes provide a valuable opportunity for schools to engage law students with the practice of law, and more particularly with the practice of public interest law. The Carnegie Report noted that '[t]he teaching of legal writing can be used to open a window for students onto the full complexity of legal expertise.' LRW classes can more specifically introduce students to social justice practice, which can help students begin to realize the importance of legal writing and research to practitioners by being exposed to some of the types of writing attorneys engage in on behalf of their clients." Bowman, *supra* at 588 (some internal quotations omitted).

through multiple drafting exercises, including a client letter, multiple memos, and an appellate brief. The capstone experiences also use the same client and topic as the drafting exercises, creating a multi-faceted experience that has students follow the same case while their drafting and communication tasks grow in complexity. Because of this progression, LCAP presented a unique opportunity to attack issues of homelessness and poverty across a variety of practice simulations.

B. *Poverty Law Exposure in the First Year*

With Orientation and LCAP serving as the vessels for student exposure to poverty law in the first year, the next step was to design what experiences, information, and skills would be included in this experiment.[137] As discussed, the major goals of the initiative were to raise student awareness about poverty in San Antonio, increase sensitivity around socioeconomic issues, and train students to use their developing lawyering skills to make a difference for the underserved. Much of this work would be accomplished through various simulation exercises embedded in the first-year skills curriculum, with the idea that simulation problems would allow students to improve their skills in legal analysis, issue spotting, and writing, while also highlighting equally important skills like cultural competency, oral communication, professional interactions, and commitment to social change.[138]

The first major experience provided to students was a Pre-1L recommended reading. Students read *Evicted* by Matthew Desmond, a Pulitzer Prize winning book that explores the issues of homelessness in U.S. cities and the pipeline to homelessness.[139] The book richly describes the experience of living as a low-income American facing homelessness.[140] Desmond, a Harvard academic, wrote the book while living in a trailer park and other low-income

137. In addition to the Law Success Program's role in building out this initiative, the Office of Admissions was a critical partner in making this a reality. As discussed above, early introduction was a critical part of the goal, and Admissions' participation in bringing some of these experiences into first-year orientation was critical.

138. *See* Snow, *supra* note 1, at 698 (highlighting the benefits of using a poverty law simulation as part of a course, including the opportunities to "give meaning to the law, heighten students' motivation, deepen learning, build students' professional identity, and strengthen, instead of wilting, students' commitment to social justice"). R

139. MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016).

140. *See id.*

housing in Milwaukee, and the book details the stories of those living in poverty and on the verge of homelessness.[141] As part of the book, Desmond explores various personal stories, but he also touches on the root causes of poverty and homelessness, including the cycle of poverty, education, race, incarceration, and mental health.[142] Further, it relates poverty and homelessness to the importance of civil legal representation, reporting that low-income persons facing eviction almost always fared better when they had legal representation.[143] In eviction proceedings described in the book, attorneys often appear for the landlords and rarely appear for the tenants.[144] As one commentator noted:

> Desmond tentatively introduces the concept of "exploitation" — "a word that has been scrubbed out of the poverty debate." The landlord who evicts Lamar, Larraine and so many others is rich enough to vacation in the Caribbean while her tenants shiver in Milwaukee. The owner of the trailer park takes in over $400,000 a year. These incomes are made possible by the extreme poverty of the tenants, who are afraid to complain and lack any form of legal representation.[145]

The purpose of reading *Evicted* was to expose students, from a sociological perspective, to issues of poverty, and to generate their initial impressions of how lawyers could play a role in these situations. To further capitalize on this reading, students participated in small group meetings in the days prior to orientation to discuss the book, its content, their views on homelessness and poverty, and the role of lawyers in social justice.

141. *See* Jake Blumgart, *Why More Americans Are Getting Evicted*, SLATE (Mar. 17, 2016, 11:44 AM), https://slate.com/business/2016/03/an-interview-with-matthew-desmond-on-evicted-his-book-about-the-eviction-crisis-in-america.html [https://perma.cc/VE8X-BCNF] ("Desmond follows a moving crew as it works its way through the black neighborhoods of the North Side, the Latino communities of the near South Side, and that trailer park at the bottom of the city, where it kicks out one of Desmond's central characters out of her home.").

142. *See id.*

143. *See id.*

144. The phenomenon described in *Evicted* is very real and has been explored in the academic literature as well. *See* Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 554 (1992) (finding for Baltimore's housing court that unrepresented tenants lost virtually every case to represented landlords).

145. Barbara Ehrenreich, *Matthew Desmond's 'Evicted: Poverty and Profit in the American City'*, N.Y. TIMES (Feb. 26, 2016), https://www.nytimes.com/2016/02/28/books/review/matthew-desmonds-evicted-poverty-and-profit-in-the-american-city.html [https://perma.cc/B265-UJE8].

The *Evicted* small group discussions were the students' first substantive interaction with their academic law school experience, and their first chance to meet each other in the classroom setting. To make this experience positive, and provide some ground rules for discussing sensitive topics, each small group came up with a list of rules that would apply during the discussion. Students led the creation of the rules, suggesting items for inclusion on a list kept by the faculty group leader. The group-created rules largely centered around respect: for example, "don't assume where another person is coming from," "ask for clarification instead of making assumptions," "keep an open mind," and "listen carefully." Student participants came to the discussion from various backgrounds and experiences and were thoughtful and respectful. Faculty led the sessions with discussion questions, which included the following:

- What brought you to law school? What type of lawyer do you hope to become?
- What impact do you think lawyers could have in situations like those captured in this book? How might a lawyer change the outcome in some of these situations?
- What does the phrase "meet them where they are" mean to you? Do you think the education level and experiences of a client impacts how they interact with you?
- If you had very different life experiences than a client, how would you educate yourself so that you could adequately help the client? Do you think it is necessary to educate yourself?

Reflections on these questions were the first opportunities to discuss issues of cultural competence, and the lawyer's role in social justice. In addition to the pre-Orientation *Evicted* discussions, the First-Year Orientation had a number of other tie-ins to the book and the overall poverty law initiative. First, students attended a presentation about the legal services needs in San Antonio and the pro bono opportunities that they would have in law school to help meet this community need. Additionally, as the last portion of First-Year Orientation, students participated in a class-wide service project at a local charity that supported San Antonio's homeless population. The service project provided an opportunity for students to engage with the issues they read about in *Evicted* head on, and to spend time with each other before classes began.

Following First-Year Orientation, the next major portion of the poverty law initiative appeared in the LCAP course.[146] With the sociological and community factors surrounding poverty and homelessness introduced before classes began, LCAP then took over as the primary vehicle for discussions as students began working through a universal problem that involved a low-income client. In selecting the LCAP universal problem, faculty chose a scenario that lent itself to opportunities to introduce diverse perspectives. As such, the heart of the problem is the representation of the client, Mr. Strong—an Afghanistan War veteran who lost his job in 2016. Unable to find work, Mr. Strong was evicted from his home and had to turn to panhandling to survive. The ultimate legal issues in the universal problem are constitutional in nature; specifically, whether the city's aggressive panhandling statute ordinance violates the First Amendment, and whether a search of the client's tent and possessions in the local park violated the Fourth Amendment.

From this set of facts, a number of assignments grew to help students understand what it is like to represent a client experiencing homelessness. For example, in a written memo assignment, the student is placed into a pro bono organization that provides legal assistance to veterans and is helping Mr. Strong obtain unemployment benefits. In another memo, the student is an intern with the District Attorney's office and is crafting a memo regarding whether Mr. Strong can suppress the police search that occurred of his possessions.

Perhaps the most important simulation exercise of the LCAP experience comes from the combination of the client interview and final memo. For the final components of the fall semester, the students work for the public defender's office, which is representing Mr. Strong. The students are tasked with conducting a client meeting with Mr. Strong, who is played by actors composed of upper-level law students and students from the undergraduate drama department at St. Mary's. The drama department prepares the actors from a script to realistically represent the client, while the LCAP faculty train the first-year law students for the interview from both the legal and human perspectives.

146. The Law Success instructors, the faculty who lead the LCAP course, are also the assigned academic advisors for the first-year students. As such, in their one-on-one discussions with students they are able to reinforce the integration of skills and experiences that are described here, and they are able to connect students to resources to further their awareness and experiences. Finally, they can empower students to evaluate their perspective while discussing skills development. As such, they have been a huge partner in this project.

To prepare students for the experience of interacting with the client, the LCAP course uses an awareness-based training, which deals with helping people understand their prejudices and cultural assumptions about others. This facet is extremely important in the poverty law context. Clinicians and other faculty members who work with students in a pro bono or legal services context have reported that students often approach lower-income clients with a belief that such persons are wholly responsible for their situations and may not be worthy of representation.[147] For example, Professor Michelle Jacobs noted with regards to many of her students who represented low-income clients in clinical programs:

> I was sometimes disturbed by comments . . . Their voices would often be tinged with disrespect and, frankly, disgust towards their clients . . . [D]uring my tenure as a clinical professor I learned that many of the students believed their clients should be grateful for the students' willingness to take on their cases. On many levels, the students believed that the clients were not even worthy of having the students represent them.[148]

Such beliefs can be combated through awareness-based training,[149] which asks students to reveal their own internal prejudices and assumptions.[150] Such training, which is more unusual in the law school context,[151] includes discussions about unconscious bias and communication skills.[152] There is an increasing recognition

147. *See* Michelle S. Jacobs, *Full Legal Representation for the Poor: The Clash Between Lawyer Values and Client Worthiness*, 44 HOW. L.J. 257, 258–59 (2001).

148. *Id.*; *see also* Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 53 (1995) ("Most law students come to the course without significant exposure to the victims of injustice and almost none come to the course with experience representing a person trying to wring a just result from an often unresponsive legal system.").

149. *See* Anthony V. Alfieri, *(Un)covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805, 837 (2008) (noting that failing to train attorneys in cross-cultural competency, particularly in a way that challenges that attorneys' neutrality, "perpetuates stigma-induced marginalization in law and society").

150. *See id.* ("Cross-cultural training in lawyering is necessary because of the failure of client-centered clinical pedagogy to address lawyer-client cultural differences, an omission that impairs the representation of clients of color and clients in low-income communities.").

151. *See* Casey Schutte, *Mandating Cultural Competence Training for Dependency Attorneys*, 52 FAM. CT. REV. 564, 569 (2014) ("The legal profession is also behind other fields, particularly medicine, in emphasizing the importance of cultural competence as a core component of effective practice.").

152. Communication skills are an important component of cultural competency. "[W]e are often unaware of the actual causes (and unintentional consequences) of our own behavior, thinking, emotions, and perceptions. We are not

that this skill is a necessary one for a successful attorney.[153] For example, the California State Bar lists cultural competency as one of the nineteen competencies for an attorney.[154]

In sum, the St. Mary's initiative is largely based around a few key aspects. First, the initiative would not be complete without actual student exposure to the low-income person or persons experiencing homelessness. Early contact with these individuals through the Orientation Community Service Project helps to set the stage for later sensitivity and cultural training, and to ensure that the people referenced in the universal problem have real faces and stories. Other law schools have reported that such out-of-classroom exposure to real-world individuals is key to making a poverty law discussion purposeful in the law school classroom-context.[155]

Additionally, scholarship confirms that poverty law exposure is best early in the curriculum and in a mandatory course that reaches all students. Such placement, in a manner that reaches all students, reinforces that social justice and community concerns are a key part of lawyering, and that these are not elective-type experiences, but rather impact all future professionals as the "real business of lawyers."[156]

Further, because a major goal of the initiative at St. Mary's was to change views about the importance of service, placing discussions about social justice early creates an opportunity to change the way students think about the law. When discussions about policy,

sufficiently self-aware to realize how many of our patterns of acting and thinking are ingrained [or] unconscious. . ." Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, or Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225, 1241 (2004) (discussing the importance of training for communication skills in the law school environment). *See also* Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 41 N.Y.U. REV. L. & SOC. CHANGE 367, 398 (2017) ("It is important to note here that, in light of the many factors that shape culture—such as socioeconomic status, level of education, and race—even people who were born in the same country and speak the same language can come from vastly different cultures and can have trouble understanding one another.").

153. *See* Chopp, *supra* note 152.

154. *Id.* at 386, 394–95 (linking cultural competency and communication skills to attorneys' obligations under the Model Rules of Professional Conduct: "[A]dvancing a person's best interests requires understanding those interests; and interests are inextricably linked to culture, values, and identity.").

155. *See* Erlanger & Lessard, *supra* note 79, at 210–11. ("Personal contact with the lives of low-income persons has proved effective in sensitizing students to poverty issues. . . . These experiences were probably successful because they occurred outside of the classroom.").

156. *Id.* (examining three courses with facets of poverty law and social justice that were presented in either the first year or early in the legal curriculum).

community, and social impact are initiated early, students may see the law as more dynamic and social over the course of their entire law school journey.[157] Additionally, the use of social justice in a first-year skills class changes the way students view what is important in the profession. As discussed by Professor Christine Cerniglia Brown:

> The message sent to first-year students is one that emphasizes lawyering as a process of reading, writing, and analyzing. All of these are traits are [sic] imperative to lawyering. However, they are cast to the front of the stage as lone star qualities[.] If interpersonal skills are equal, why not integrate them into a course to assess such skills?[158]

Using poverty law as a basis for skills development forces the growth of these additional skills necessary to lawyering. Cultural competency, oral communication, and empathy are necessary requirements for a successful attorney.[159] Indeed, the practice of law is ultimately about dialogue with other people—clients, attorneys, and judges—who have different experiences, backgrounds, and motivations.[160] Teaching students to engage these professional skills[161] is just as critical as teaching them legal citation.[162]

While the goals of the St. Mary's initiative may not be realized or proven immediately, we hope that the simulations, skills, and faculty discussions on social justice over the first year of law school will impact students' views of poverty and community long-term. Students who have these experiences may be better equipped to talk about the law as a social force, and to continue their desire to use it as a force for reform and the greater good. "It is likely that students exposed to new ideas about the law, particularly if they are disturbed by the ideas, will continue to reflect on them over time, and their future experience will be affected."[163]

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157. *See id.* (extolling the virtues of early exposure to poverty law and noting that "[s]tudents just beginning their training are most open to new perspectives").

158. Brown, *supra* note 132, at 169.

159. *See* Serena Patel, *Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World*, 62 UCLA L. Rev. Disc. 140, 143 (2014).

160. *See id.*

161. Indeed, a more sophisticated experience than the one proposed here could teach additional core competencies for early-career attorneys. Brown, *supra* note 132, at 170 ("The ability to handle stress, build a social network, and operate as a team player rank high on the scale of important values . . . strong work and team relationships [and] good judgment/common sense/problem solving.") (internal quotations omitted).

162. *See id.*

163. Erlanger & Lessard, *supra* note 79, at 211.

CONCLUSION

The law school curriculum represents a rich resource for discussions about justice, social change, and community awareness—and there are more opportunities than ever before for an institution to engage these discussions across the curriculum.[164] Of course, these opportunities compete with other priorities, including preparing students for practice, focusing on a bar exam friendly-curriculum, and budget concerns.[165] However, a unique opportunity exists to merge the existing curriculum with discussion about social justice, homelessness, and poverty.

The benefits of this approach are many. In addition to being efficient with limited credit hours and student time, the approach transforms the law school classroom in a more holistic way. In the *Journal of Legal Education*, authors Howard Erlanger and Gabrielle Lessard expounded the benefits of incorporating poverty law into classroom teaching:

> [These professors] seek to do more than provide substantive legal knowledge: they focus on transforming the students' consciousness by sensitizing them to poverty and engaging them in critical thinking about the premises that underlie their perspectives and those of the law. These efforts extend the boundaries of the law school class by incorporating theoretical and nonlegal concepts and readings, and by teaching perspectives as well as rules.[166]

Incorporating poverty law and social justice into the curriculum answers other questions as well:

> What should law students be taught about the relationship between income and wealth distribution, and their professional responsibility as members of the legal profession to those unable to pay for legal services? Have legal educators been sufficiently explicit about the duty of lawyers to provide and

164. *See* Hornstein, *supra* note 2, at 1082–83 (noting that a goal of teaching around issues of poverty law and social justice is to "ensure that more students take what has traditionally been the road less travelled, and to ensure that all law students understand the direct and immediate relationship between poverty and injustice, including how both burden democracy"); *see also* Davis, *supra* note 56, at 1415 ("More than forty years after lawyers first began their aggressive efforts to address economic inequality through law, poverty persists. Four decades of poverty law courses and poverty lawyers have not succeeded in eradicating it."). R R

165. *See* Erlanger & Lessard, *supra* note 79, at 202 (noting that "[a]t best, law schools may see appeals for more attention to social problems as one of many competing demands").

166. *Id.* at 203.

support free or low-cost legal services for those who cannot afford to pay for them?[167]

Against this backdrop, "rather than being consigned to the margins of the law school curriculum, however, poverty law and social justice should be prominent fixtures in legal education."[168] This Article explores one school's attempt to do just that. By combining a pre-law school activity, orientation programming, and integration within the first-year writing and skills class, St. Mary's University has created a developed opportunity for using discussions about social justice in the first-year curriculum. Hopefully, this case study will inspire others to do the same.[169]

167. Wizner, *supra* note 61, at 583–84.

168. Hornstein, *supra* note 2, at 1060. **R**

169. Along with my colleague Professor Afton Cavanaugh, I had the privilege of presenting St. Mary's work at the 2019 Bi-Annual American Association of Academic Support Educator's Diversity Conference. In that session, we urged participants to think about the following questions in setting up their own plan for bringing social justice into the classroom:

What is the biggest concern surrounding socioeconomic status or diversity in your community?

What views do students have about socioeconomic status or diversity as it relates to lawyers, their clients, and their community?

What assignments could be designed to incorporate that concern as a vehicle for implementing diversity training?

How might the implementation or use of those assignments look different for one-on-one use vs. in classroom use?

What other methods might you use to engage students in this training?

THE WAY WE DO THINGS AROUND HERE: WHAT PROGRESSIVE PROSECUTORS CAN LEARN FROM CORPORATE COMPLIANCE

*YELENA NIAZYAN***

Introduction .... 133 R
I. Identifying And Defining Prosecutorial Misconduct .. 136 R
A. Defining Misconduct .... 136 R
1. Legally-Defined Misconduct.......... 137 R
2. Violations Of Office Norms .... 138 R
B. The Causes Of Misconduct .... 140 R
1. Deliberate Misconduct.......... 140 R
2. Negligent Misconduct .... 143 R
3. Culture's Role In Enabling Misconduct ...... 145 R
II. A Renaissance Of Progressive Prosecution .... 146 R
A. Misconduct And Prosecutorial Practice Prior To Reform .... 146 R
B. The Pernicious Consequences Of Misconduct And Calls For Reform .... 149 R
C. Progressive Prosecutors Respond.......... 151 R
D. The Rough Road To Reform .... 154 R
III. Lessons From Corporate Compliance .... 156 R
A. An Introduction To Corporate Compliance ...... 156 R
B. Parallels To Prosecutorial Reform .... 160 R
IV. Case Studies: Misconduct In The Offices Of Three Progressive Prosecutors .... 161 R
A. Kimberly Foxx And The Charging And Pleading Of Jussie Smollett .... 161 R
1. The Case Of Jussie Smollett .... 161 R
2. Scrutinizing The Actions Of State's Attorney Foxx: A Compliance-Based Perspective....... 166 R
B. Larry Krasner And A Plea Deal For Jovaun Patterson .... 178 R
1. The Case Of Jovaun Patterson .... 178 R

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2. Scrutinizing The Actions Of District Attorney Krasner: A Compliance-Based Perspective .... 181 R
C. Eric Gonzalez And The Exoneration Of Bladimil Arroyo .... 187 R
1. The Case Of Bladimil Arroyo .... 187 R
2. Scrutinizing The Actions Of District Attorney Gonzalez: A Compliance-Based Perspective .. 191 R
V. Hurdles To The Successful Implementation Of Compliance Systems In Prosecutors' Offices .... 197 R
A. The Expense .... 197 R
B. Hiring A Chief Ethics Officer.................... 199 R
C. Change Takes Time .... 201 R
Conclusion .... 203 R

Recent years have witnessed the election of "progressive prosecutors"—individuals who have pledged to use their power and discretion to reform local prosecutors' offices from the top down. While it remains too early to say whether their efforts will bring permanent change, it is evident that reform is not easy. This is because reform must take place within complex organizations, governed by pre-existing and entrenched norms. The challenges here are not unique to district attorneys' offices. Corporations have long been aware of the fundamental structural challenges to reforming ailing organizational cultures and have expended considerable resources studying how best to create "cultures of compliance." This note argues that prosecutorial reformers would be well-served to study the corporate movement's successes and failures, and to implement these hard-learned best practices in their own pursuit of change.

The note begins by defining and exploring the causes of prosecutorial misconduct. It then surveys the rise of the "progressive prosecutor," and posits that reform efforts have been complicated and sometimes stymied by internal organizational realities. It introduces the practices and methodologies of corporate compliance and explains their applicability in reforming prosecutorial cultures. The note then runs several case studies through the lens of corporate compliance. Each case study suggests that the absence of effective compliance practices and procedures risks undermining reform efforts. Finally, the Note discusses and responds to a number of hurdles to progressive prosecutors' successful adoption of the corporate compliance model.

INTRODUCTION

In cities and counties across the country, avowed progressive reformers have increasingly won local prosecutors' races. This cohort of "progressive prosecutors" promised across-the-board changes: they committed to combating mass incarceration and racial disparities, righting past wrongs, and rehabilitating their offices from the top down.[1]

Kim Foxx, the State's Attorney in Cook County, Illinois, pledged "transformative" change.[2] Larry Krasner, Philadelphia's District Attorney (DA), set himself on a "radical path to remake the criminal justice system."[3] Eric Gonzalez, Brooklyn's DA, "promis[ed] to make [his office] a national model of what a progressive prosecutor's office can be."[4]

It remains too early to say whether their efforts will succeed. Prosecutorial policies have undoubtedly changed in many of these offices. But the on-the-ground reality of reform is messier—the outcomes at times inconsistent and its hard-fought changes unsteady. Through the first year of Krasner's tenure, it remained unclear whether his "guidelines [on charging decisions] . . . were being followed consistently in court . . . by the prosecutors who were supposed to be making them."[5] Likewise, "[d]espite [Foxx's] rhetoric to the contrary . . . [her] line prosecutors have taken no action to prevent the use of cash bail in the vast majority of felony cases"[6] and her office "has not reduced the volume of petty drug cases."[7] In Brooklyn, the rate of marijuana possession prosecutions undoubtedly dropped in the years after the DA's office committed to re-

1. *See infra* Part II.

2. Micah Uetricht, *The Criminal-Justice Crusade of Kim Foxx*, CHI. READER (Mar. 9, 2016), https://www.chicagoreader.com/chicago/kim-foxx-bid-unseat-anita-alvarez-cook-county/Content?oid=21359641 [https://perma.cc/6XQV-3V38].

3. Steve Volke, *Philadelphia DA Larry Krasner on Radical Path to Remake Criminal Justice System*, NEWSWEEK (Nov. 9, 2018), https://www.newsweek.com/philadelphia-da-larry-krasner-radical-path-remake-criminal-justice-system-1194093 [https://perma.cc/6RB4-9MVD].

4. ERIC GONZALEZ, JUSTICE 2020: AN ACTION PLAN FOR BROOKLYN 5 (Mar. 2019), http://www.brooklynda.org/wp-content/uploads/2019/03/Justice2020-Report.pdf [https://perma.cc/2LZW-L7KT].

5. Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power — and Learns the Limits — of His Office*, N.Y. TIMES (Oct. 30, 2018), https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html [https://perma.cc/6QBW-BZFU].

6. Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform"*, 128 YALE L.J. F. 848, 926 (2019).

7. Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. L. 411, 417 (2019).

fraining from such prosecutions, yet court observers continued to see possession cases "whenever they [were] in court."[8]

The gap between the reform rhetoric espoused by these new leaders and the sometimes incongruent actions taken by line prosecutors speaks to the difficulty of the undertaking. The task of a progressive prosecutor is an arduous one. Not because, as some commentators have reasoned, progressive prosecution is a hopeless "*paradox*" that "fail[s] to deliver on the transformative demands of a fundamentally rotten system."[9] But rather because this reform must take place *within* complex organizations, governed by pre-existing and entrenched norms.[10] The largest prosecutors' offices "employ hundreds of lawyers, investigators, and support staff, and even the smallest have cultures that are difficult to change."[11]

These are all serious impediments to institutional reform, but they are not unique. Corporate leaders have been facing similar hurdles for decades. They have learned that reforming ailing corporate cultures requires sincere "buy-in" to the organization's ethical ideals from employees at all levels.

Progressive prosecutors typically present their commitment to these ideals in their policy pronouncements—pledges to not pursue possession of marijuana charges, to increase diversion efforts, and to investigate police officer shootings of unarmed individuals.[12]

8. John Pfaff, *Why Public Defenders Matter More than Ever in a Time of Reform*, THE APPEAL (Apr. 18, 2018), https://theappeal.org/why-public-defenders-matter-more-than-ever-in-a-time-of-reform-9b018e2184fe/ [https://perma.cc/G3WC-3G7U]; *See also* Mary Frost, *Brooklyn DA: Prosecution of Low-Level Marijuana Cases Down 98 Percent*, BROOKLYN EAGLE (Feb. 20, 2019), https://brooklyneagle.com/articles/2019/02/20/brooklyn-da-prosecution-of-low-level-marijuana-cases-down-98-percent/ [https://perma.cc/YH8E-DHCV] (reporting that the number of low level drug possession cases dropped in 2018, by approximately 10 percent).

9. Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748, 750 (2018); *See also* David E. Patton, *A Defender's Take On "Good" Prosecutors*, 87 FORDHAM L. REV. ONLINE 20, 24 (2018) ("A generation from now, when people fairly ask who did what to fight against and change [this "extraordinarily harsh and punitive" system], will the young prosecutors of today come to mind? Time will tell. Count me a skeptic."); Karakatsanis, *supra* note 6, at 925 (arguing that, despite a change of rhetoric, "it is largely business as usual so far" inside progressive prosecutors' offices).

10. David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 27 (2017) (noting that prosecutors' offices are "complicated organizations").

11. *Id.*

12. *See, e.g.*, Maura Ewing, *A 'Completely Unelectable' Progressive Will Probably Win Philadelphia's DA Race*, ATLANTIC (Nov. 6, 2017), https://www.theatlantic.com/politics/archive/2017/11/larry-krasner-philadelphia-da/544937/ [https://perma.cc/6XQV-3V38] (describing Larry Krasner as a progressive, reform-minded

But if the modern compliance movement has anything to teach, it is that impassioned policy statements are not sufficient to stimulate real cultural change.[13]

Corporations—long aware of the fundamental structural challenges to compliance and increasingly wary of the public condemnation and costly criminal and regulatory litigation that follows corporate misconduct—expend considerable resources studying how best to create a "culture of compliance" within their organizations and then implementing these "best practices."[14] For progressive prosecutors, this modern corporate compliance movement presents a wellspring of guidance. Prosecutorial reformers would be well-served to study the corporate movement's successes and failures, and to implement these hard-learned best practices in their own pursuit of change.

This note proceeds in five parts. Part I begins by identifying the problem and causes of prosecutorial misconduct. Part II then surveys the rise of the "progressive prosecutor." After detailing the history of prosecutorial misbehavior in each of the three jurisdictions highlighted throughout this note—Cook County, Illinois; Philadelphia, Pennsylvania; and Brooklyn, New York—the note discusses the pernicious consequences of misconduct and reviews calls for reform. This section then introduces the three progressive prosecutors prominently featured in this note—Kim Foxx, Larry Krasner, and Eric Gonzalez, as well as the progressive prosecution movement writ large. Finally, the section posits that reform efforts have been challenged as much by internal factors as by external pressures. Part III introduces the practices and methodologies of corporate compliance and explains their applicability in reforming prosecutorial cultures. Part IV runs several recent case studies in the aforementioned cities through the lens of corporate compliance. Foxx's handling of the Jussie Smollett case, Krasner's prosecution of Jovaun Patterson, and the exoneration of Bladimil Arroyo by Gonzalez's Conviction Review Unit are all discussed. Each of the case studies presents unique compliance lessons, ultimately suggesting that the absence of effective compliance practices and procedures risks undermining progressive reform. Finally, in Part V,

prosecutor because he "says he will prioritize keeping people out of prison and improving access to services for low-income residents and those with drug addiction and mental illness,"); Uetricht, *supra* note 2 (noting that Kim Foxx would describe her progressive policies as bringing "transformative" change to the Cook County prosecutor's office). **R**

13. *See infra* Part II, B.

14. *Id.*

the note discusses and responds to a number of hurdles to progressive prosecutors' successful adoption of the corporate compliance model.

I.
IDENTIFYING AND DEFINING PROSECUTORIAL MISCONDUCT

A. Defining Misconduct

Misconduct, as conceptualized in this Note, encompasses behavior that violates both legal precepts *and* an organization's policies and ethical values. Academic literature has historically focused on the former.[15] However, growing public concern with the role of prosecutors in perpetuating mass incarceration and facilitating police misconduct has stimulated a renewed interest in what ethical prosecution looks like.[16] Progressive reformers aim for more than simply following the law: they seek to transform the practices and mindsets of the offices they lead. As such, the latter definition of misconduct will become increasingly salient.

15. *See, e.g.*, Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833 (1997); Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51 (2016).

16. *See, e.g.*, Terry Gross, *'Charged' Explains How Prosecutors and Plea Bargains Drive Mass Incarceration*, NAT'L PUB. RADIO (Apr. 10, 2019), https://www.npr.org/2019/04/10/711654831/charged-explains-how-prosecutors-and-plea-bargains-drive-mass-incarceration [https://perma.cc/DV2G-785Q] (discussing Emily Bazelon's book, *Charged*, and how plea bargains and prosecutorial focus on convictions have contributed to mass incarceration); *Prosecutors Can Help End Mass Incarceration*, FORBES (Mar. 12, 2020), https://www.forbes.com/sites/ashoka/2020/03/12/prosecutors-can-help-end-mass-incarceration/#fb5c8a55d574 [https://perma.cc/G9KR-KCJT] (discussing the power that prosecutors wield in the context of mass incarceration and what humane prosecution looks like); *The Power Of Prosecutors*, ACLU, https://www.aclu.org/issues/smart-justice/prosecutorial-reform/power-prosecutors?redirect*sues/mass-incarceration/smart-justice/power-prosecutors [https://perma.cc/9BBK-S24L] (last visited Sept. 21, 2020) ("Prosecutors have the power to flood jails and prisons, ruin lives, and deepen racial disparities with the stroke of a pen. But they also have the discretion to do the opposite. This video explores the power of prosecutors to continue to drive mass incarceration — or end it.").*

1. Legally-Defined Misconduct

Prosecutors' ethical obligations spring from a number of sources, including legal precedent, statutory guidelines, court rules, and dictates of professional responsibility.[17]

The U.S. Supreme Court has been instrumental in defining the obligations of prosecutors. According to the Court, prosecutors must (among other duties) disclose materials that pertain to the credibility of government witnesses (*Giglio v. United States*) or that could exculpate the defendant (*Brady v. Maryland*),[18] make only appropriate arguments to the judge or jury (*Caldwell v. Mississippi*),[19] and refrain from knowingly using perjured testimony (*Pyle v. Kansas*).[20]

Local prosecutors are likewise bound to obey the commands of legal codes and state common law, which may circumscribe behavior in a variety of ways. For instance, prosecutors may be obligated to inform victims of various case developments.[21]

State prosecutors are also beholden to ethics guidelines encoded in the American Bar Association's Model Rules of Profes-

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17. As an aside, some of the transgressions identified above—Hynes's campaign finance violations, Williams's bribery charges—have nothing to do with conduct undertaken in the courtroom. As such, they fall outside of the scope of this note's primary focus: misconduct occurring *during* the course of criminal prosecution. Nonetheless, it bears noting that these transgressions still qualify as ethical transgressions and, as such, raise concerns about how prosecutors guilty of such misconduct manage the everyday business of the office.

18. *See* Giglio v. United States, 405 U.S. 150, 154 (1972); Brady v. Maryland, 373 U.S. 83, 87 (1963). Examples of *Giglio* materials might include information that the witness was previously dishonest in legal proceedings or on a job application, was previously convicted of a crime, or has made inconsistent statements about the case. *See* Memorandum from Donald A. Davis, U.S. Attorney, on Criminal Discovery 15-18 (2010), https://www.justice.gov/sites/default/files/usao/pages/attachments/2015/04/01/miw_discovery_policy.pdf [https://perma.cc/NL84-DDJ7] (providing examples of *Giglio* materials). Examples of *Brady* materials include evidence tending to show "that someone else committed the criminal act," or "that the defendant did not have the requisite knowledge or intent," or the existence of an affirmative defense. *Id.* at 12.

19. 472 U.S. 320, 332-34 (1985).

20. 317 U.S. 213, 215-16 (1942).

21. *See, e.g.*, GA. CODE ANN. § 17-17-11 (2020) (stating that "[t]he prosecuting attorney shall offer the victim the opportunity to express the victim's opinion on the disposition of an accused's case"); HAW. REV. STAT. § 801D-4(a)(1) (2020); NEB. REV. STAT. 29-120 (2020); N.Y. EXEC. LAW § 642(1) (McKinney 2019); DEL. CODE ANN. tit. 11, § 9405 (2019) (stating that "the prosecutor shall confer with a victim before amending or dismissing a charge or agreeing to a negotiated plea or pretrial diversion").

sional Conduct.[22] The ABA's Model Rules contain only one rule specifically devoted to prosecutorial conduct: Model Rule 3.8.[23] Most prominently, Rule 3.8 requires that prosecutors refrain from bringing charges unsupported by probable cause, reaffirms a prosecutor's *Brady* obligations, and expands this ethical responsibility to the post-conviction period.[24] Of course, prosecutors—as licensed attorneys—are not otherwise immune from adhering to the rest of the Rules. Mandates to provide competent representation and to avoid conflicts of interest may be particularly pertinent to local criminal law practitioners.[25]

Court-made rules further restrain prosecutors from, among other things, making improper comments during opening statements and closing arguments, misstating the law, eliciting improper testimony, disparaging the accused, or vouching for the victim or a government witness.[26]

2. Violations of Office Norms

In addition to this traditional understanding, this paper conceptualizes misconduct as encompassing a different sort of misbehavior—activities that violate norms of conduct established by a head prosecutor.

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22. *See Alphabetical List of Jurisdictions Adopting Model Rules*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ [https://perma.cc/72X4-2E99] (last visited Sept. 21, 2020) (indicating that, with the exception of California, all states have adopted the ABA's Model Rules of Professional Conduct).

23. MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR. ASS'N 2018).

24. MODEL RULES OF PRO. CONDUCT r. 3.8(A)-(H) (AM. BAR. ASS'N 2018).

25. *See generally* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR. ASS'N 2018) (detailing a duty to provide competent representation); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment In The Regulation Of Prosecutors*, 89 B.U. L. REV. 1, 30 (2009) (arguing that Rule 1.1 of the Model Code could be applied to a prosecutor's duty to avoid wrongful convictions); *See also* MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR. ASS'N 2018) (detailing conflicts-duties to current client); MODEL RULES OF PRO. CONDUCT r. 1.8 (AM. BAR. ASS'N 2018) (detailing conflicts-related duties to current clients in specific situations); MODEL RULES OF PRO. CONDUCT r. 1.11 (AM. BAR. ASS'N 2018) (detailing conflicts-related duties for current and former government officials). Conflicts of interest might arise, for instance, in police-involved shootings, where a victim is also a defendant within the same jurisdiction.

26. *See* Harry Mitchell Caldwell, *Everybody Talks About Prosecutorial Conduct but Nobody Does Anything About It: A 25-Year Survey of Prosecutorial Misconduct and a Viable Solution*, 2017 U. ILL. L. REV. 1455 (2017) (detailing thirteen different types of prosecutorial misconduct).

The norms established by progressive reformers generally reflect the public's mounting concern with discretionary prosecutorial decision-making. In particular, reformers are responding to a growing public sense "that prosecutors' decisions about whom to charge, what plea bargains to offer, or what sentences to pursue may be not simply unwise, but abusive, reflecting wrongdoing in an ordinary, if not legal, sense."[27] Failures to indict unscrupulous police officers and resolutions to pursue severe sentences for low-level drug crimes both fall into this category.[28] Even though these decisions are well within a prosecutor's discretion, they are precisely the kinds of decisions progressive prosecutors have committed to re-orienting.[29]

Norms should not be thought of as bright line rules, but rather as ethical guideposts delineating preferred standards of behavior. As such, there can be healthy disagreement on what justice requires in an individual case. For instance, line prosecutors may reasonably disagree about whether diversion is appropriate in a particular case, even as office norms urge prosecutors to make "jail the 'alternative'" (i.e. to seek non-jail resolutions whenever possible).[30]

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27. Green & Yaroshefsky, *supra* note 15, at 71. **R**

28. *See, e.g.*, Green & Yaroshefsky, *supra* note 15, at 72 ("The [public] sentiment was that prosecutors abused their investigative and charging discretion by treating the police officers [involved in the killings of Eric Garner and Michael Brown] more leniently than similarly situated low-income people, presumably because of racial bias or sympathy to the police."); David Baumwoll, *INSIGHT: Prosecutors Using Charging Discretion Can Reform the Criminal Justice System*, BLOOMBERG L. (Dec. 6, 2019), https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-prosecutors-using-charging-discretion-can-reform-the-criminal-justice-system [https://perma.cc/NS4R-KGFF] (discussing how prosecutors can use discretion to reform the criminal justice system and mentioning Seattle DA Daniel Satterburg's decision "not to charge crimes involving possession of 1 gram or less of drugs, including heroin"). **R**

29. *See, e.g.*, Sheryl Gay Stolberg & Jess Bidgood, *Baltimore Wrestles with the Way Forward After a Mistrial*, N.Y. TIMES (Dec. 17, 2015), https://www.nytimes.com/2015/12/18/us/freddie-gray-baltimore-william-porter-jury-deadlock.html [https://perma.cc/UU56-2HST] (discussing the commitment of Marilyn Mosby—Baltimore's progressive State's Attorney—to indicting officers involved in the arrest and subsequent death of Freddie Grey); Maura Ewing, *America's Leading Reform-Minded District Attorney Has Taken His Most Radical Step Yet*, SLATE (Dec. 4, 2018), https://slate.com/news-and-politics/2018/12/philadelphia-district-attorney-larry-krasner-criminal-justice-reform.html [https://perma.cc/LEE7-8VGK] (explaining that Larry Krasner characterized the practice of overcharging as "coercive" and committed his office to only "proceed[ing] on charges that are supported by the facts in the case, period").

30. *See* Gonzalez, *supra* note 4, at 12 (committing to making "jail the 'alternative'" and to "[c]hanging the office culture so that ADAs *consider* non-jail resolutions at every juncture of a case") (emphasis added). **R**

The emphasis here is not on some generalized understanding of what constitutes ethical prosecutorial decision-making, but rather on each head prosecutor's espoused values for their office. Once a lead prosecutor has asserted that some behavior contravenes office norms, this behavior constitutes a cognizable kind of "misconduct"—one that can be tracked and prevented. This usage of the word "misconduct" is admittedly more expansive than traditional prosecutorial understandings of the concept. However, broadening the term's meaning to include deviations from office norms allows this note to position prosecutorial reforms alongside corporate compliance models, which embrace this more expansive meaning.[31] As such, activities that violate norms of conduct instituted by the head prosecutor will also be considered "misconduct" for the purposes of this note.

B. The Causes of Misconduct

Understanding why prosecutors engage in misconduct—whether deliberate or inadvertent—is essential to preventing misconduct in the first instance.

1. Deliberate Misconduct

For decades, "the media and judiciaries focused primarily on *intentional* violations of law."[32] Deliberately committed misconduct might be explained by a number of conditions common to prosecutors' offices. First, some academic commentators postulate that deliberate unethical conduct is the inevitable result of the adversarial system.[33] In this view, prosecutors are consumed by the first rule of lawyering: "zealous advocacy" for the "client."[34] To be sure, a prosecutor's client is "the People."[35] However, such abstract representation is difficult to operationalize. As such, the very nature of the

31. *See infra* Part III.

32. Green & Yaroshefsky, *supra* note 15, at 52 (emphasis added). R

33. *See, e.g.*, H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1702 (2000) (observing that "even the best of the prosecutors—young, idealistic, energetic, dedicated to the interests of justice—are easily caught up in the hunt mentality of an aggressive office").

34. *See generally* Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419 (2018) (discussing a prosecutor's dual roles as "partisan advocate" and "minister of justice" and arguing that the former has a corruptive force).

35. *See* ABA STANDARDS FOR CRIMINAL JUSTICE § 3-1.3 (4th ed. 2017) ("The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim."); Carol A. Corrigan, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L. Q. 537, 537 (1986) ("The prosecutor

adversarial system drives prosecutors to zealously fight for the *government*'s position. In their drive to win cases, prosecutors might intentionally fail to disclose *Brady* or *Giglio* information or deliberately ignore troubling inconsistencies in a defendant's confession.

This "win at all costs" mentality is exacerbated by a second condition that begets intentional misconduct: the conviction-focused imperatives of most prosecutors' offices. Historically, convictions have been "the lodestar by which prosecutors [are] judged."[36] A low conviction rate might lose a prosecutor their promotion, jeopardize their annual bonus, or ruin their chance at election to the highest post in the office.[37]

Even offices that have moved away from conviction-focused measures of success must contend with a third condition that motivates deliberate misbehavior: the moral certainty that often drives prosecutorial decision-making.[38] Prosecutors "believe that it is their responsibility to exercise discretion in cases, to be the razor of morality in our society, to discern between the acceptable and unacceptable."[39] Undoubtedly, this "trait is essential to doing the job well."[40] After all, achieving justice means making moral—not just

does not represent the victim of a crime, the police, or any individual. Instead, the prosecutor represents society as a whole.").

36. Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2091 (2010).

37. *See, e.g.*, DAVID A. HARRIS, FAILED EVIDENCE: WHY LAW ENFORCEMENT RESISTS SCIENCE 104 (2012) ("[P]rosecutors' careers advance according to their conviction rates. The higher the rate, the better they do."); MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS 24 (1999) ("It soon seems clear to the new guy that the only way he's ever going to move on to the more challenging cases—and the only way he's going to squeeze the maximum amount of money out of the state to feed his family and his psyche—is to win as many cases as he can . . . ."); Jessica Fender, *DA Chambers offers bonuses for prosecutors who hit conviction targets*, DENVER POST (Mar. 23, 2011), https://www.denverpost.com/2011/03/23/da-chambers-offers-bonuses-for-prosecutors-who-hit-conviction-targets/ [https://perma.cc/7SX2-8FE6] (reporting that District Attorney Carol Chambers "created an unusual incentive for her felony prosecutors, paying them bonuses if they achieve a predetermined standard for conviction rates at trial"); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 442 n.164 (1992) ("Elected state prosecutors often face bitter contests in which their win-loss record becomes a campaign issue.").

38. *See* Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 398 (2017) (noting that prosecutors "often share a sense of moral certainty in what they do").

39. *Id.*

40. *Id.* (explaining why DOJ prosecutors may find it difficult to "admit mistakes or critique the power structure" they operate within).

legal—decisions. However, this same attribute may drive some prosecutors to eschew the dictates of a new behavioral regime. Habituated to determining what justice requires, some practitioners may intentionally reject calls to fall into a new progressive line.[41]

Then there is the low likelihood that any given indiscretion will be exposed.[42] A number of factors make discovery unlikely. First, "prosecutors who engage in willful misconduct presumably do not want to be discovered and therefore take steps to conceal their misdeeds."[43] Second, "the vast majority of known instances of prosecutorial misconduct come to light only during the course of a drawn-out trial or appellate proceeding[,]" and most criminal cases never make it to that stage.[44] Third, misconduct is most often reported to professional associations by disgruntled clients—that is, individuals who are intimately familiar with an attorney's conduct vis-à-vis a given case.[45] "[S]ince prosecutors don't have clients in the traditional sense—they represent 'the people'—this backstop fails."[46] Fourth, even if the misconduct is uncovered by *someone*, that someone is unlikely to report the infraction. Other attorneys, such as judges, fellow prosecutors, or defense counsel—who may well be best positioned to identify misconduct for what it is—may fail to report "out of a fear of retribution."[47] Finally, randomized case audits—which could spot misconduct—are unknown to the profession.[48]

41. *See, e.g.*, Austen, *supra* note 5 (discussing experiences of progressive reformer Kim Ogg, who stated that "line prosecutors had worked actively against her when she was taking over . . . even deleting electronic files on a controversial case" and reporting on anonymous Twitter accounts started by ADAs purportedly working under Krasner, which "blamed Krasner's reforms for abetting crime and defended the work of the city's past district attorneys"); *The Paradox of "Progressive Prosecution"*, *supra* note 9, at 761 (discussing the "subtle acts of defiance" available to line prosecutors opposed to reform). **R**

42. *See* Barkow, *supra* note 36, at 2094 (observing the low chances of getting caught and the important role the likelihood of detection plays on deterrence). **R**

43. David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 209 (2011).

44. *Id.* at 210.

45. *See* Parker Yesko, *Why Don't Prosecutors Get Disciplined?*, AM. PUB. MEDIA REP. (Sept. 18, 2018), https://www.apmreports.org/story/2018/09/18/why-dont-prosecutors-get-disciplined [https://perma.cc/B6KG-9GS3] (noting that because "lawyers usually don't file complaints [against prosecutors], it's mostly their perturbed clients who do").

46. *Id.*

47. *Id.*

48. *See generally* Christina Parajon, Comment, *Discovery Audits: Model Rule 3.8(d) and the Prosecutor's Duty To Disclose*, 119 YALE L.J. 1339, 1348 (2010) (recom-

The fact that, historically, prosecutors have not faced serious disciplinary consequences for their actions—whether from judges or from supervisors—further facilitates deliberate wrongdoing.[49] For instance, a 2003 study found that in 2,012 cases in which a conviction was reversed or a sentence reduced because of prosecutorial misconduct, only 44 prosecutors faced state disciplinary proceedings.[50]

Likewise, prosecutorial immunity, which effectively insulates individual prosecutors and their offices from civil liability for decisions made in the course of executing their duties, also facilitates deliberate misconduct.[51]

2. Negligent Misconduct

However, misconduct is not always, and perhaps not even mostly, the result of deliberate wrongdoing. Instead, misconduct can often be attributed to negligence. Local prosecutors' offices "have large caseloads and are often poorly funded and understaffed."[52] This can lead to "overlooked evidence or insufficient documentation about promises made to witnesses or their prior records

mending prosecutors' offices begin to conduct case audits in order to improve internal compliance with discovery requirements).

49. *See, e.g.*, Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 FORDHAM L. REV. 537, 569 (2011) (noting that discovery materials obtained in *Zahrey v. City of New York*, No. 98 Civ. 4546 (S.D.N.Y. filed June 26, 1998), revealed that the Brooklyn District Attorney's Office had "no formal disciplinary rules and procedures, and no history of disciplining prosecutors found to have engaged in misconduct, including the withholding of *Brady* material"); Brief for National Ass'n of Criminal Defense Lawyers et al. as Amici Curiae Supporting Respondents at 31, Pottawattamie County v. McGhee, 547 F.3d 922 (8th Cir. 2008) (No. 08-1065) (noting that discovery from a civil rights lawsuit in Queens, New York found that not a single prosecutor was disciplined in the eighty-four cases that involved prosecutorial misconduct resulting in the reversal of a conviction).

50. *See* Neil Gordon, *Misconduct and Punishment*, CTR. FOR PUB. INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS (June 26, 2003), https://publicintegrity.org/politics/state-politics/harmful-error/misconduct-and-punishment/ [https://perma.cc/EUV3-25PP] (reporting also that seven of these disciplinary cases were eventually dismissed); Steve Weinberg, *Breaking the Rules*, CTR. FOR PUB. INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS (JUNE 26, 2003), https://publicintegrity.org/politics/state-politics/harmful-error/breaking-the-rules/ [https://perma.cc/79ER-CGN8].

51. *See, e.g.*, Connick v. Thompson, 563 U.S. 51 (2011) (holding that prosecutor's office could not be held liable for the illegal conduct of one of its prosecutors, even if that violation resulted from deficient training); Imbler v. Pachtman, 424 U.S. 409 (1976) (holding that prosecutors have full immunity from civil suits resulting from their government duties).

52. Barkow, *supra* note 36, at 2092. R

or statements."[53] Prosecutors buckling under the strain of hundreds of individual cases may inadvertently miss the presence of *Brady* evidence or lack the time to follow up on every lead in a relatively minor misdemeanor. Complicated power dynamics with police officers—on whose investigatory work ADAs depend—and inadequate information sharing, both within the office and between law enforcement agencies, exacerbate the risks.[54] Unconscious biases, most notably confirmation bias, also help to explain negligent misbehavior.[55] Confirmation bias can make assessments of whether a piece of information satisfies *Brady* unclear and may cause prosecutors who earnestly believe in a defendant's guilt to keep certain evidence back or to fail to sufficiently question law enforcement's narrative.[56]

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53. *Id.* at 2093.

54. *See, e.g.*, Wil S. Hylton, *Baltimore vs. Marilyn Mosby*, N.Y. TIMES MAG. (Sept. 28, 2016), https://www.nytimes.com/2016/10/02/magazine/marilyn-mosby-freddie-gray-baltimore.html [https://perma.cc/C9BZ-C3HQ] (discussing the Baltimore State's Attorney's reliance on the city police department to investigate cases, even when those cases involve police misconduct); Jon Swaine et al., *Ties that Bind*, THE GUARDIAN (Dec. 31, 2015, 8:00 AM), https://www.theguardian.com/us-news/2015/dec/31/ties-that-bind-conflicts-of-interest-police-killings [https://perma.cc/4JYL-QA6Z] (discussing prosecutors' reliance on police work).

55. An actor succumbing to confirmation bias will, after "examining the information available, . . . tend to see a confirmation of his previous expectations, even if the evidence is more consistent with a different state of affairs." Geoffrey P. Miller & Gerald Rosenfeld, *Intellectual Hazard: How Conceptual Biases in Complex Organizations Contributed to the Crisis of 2008*, 33 HARV. J.L. & PUB. POL'Y 807, 814 (2010). *See generally* BROOKLYN DISTRICT ATTORNEY ET AL., 426 YEARS: AN EXAMINATION OF 25 WRONGFUL CONVICTIONS IN BROOKLYN, NEW YORK (July 9, 2020), http://www.brooklynda.org/wp-content/uploads/2020/07/KCDA_CRUReport_v4r3-FINAL.pdf [https://perma.cc/9LFT-ZFKN] [hereinafter 426 YEARS] (discussing role of confirmation bias in wrongful convictions throughout the report, including as it pertains to false confessions and eyewitness identifications).

56. "[Confirmation] bias is defined as the 'inclination to retain, or a disinclination to abandon, a currently favored hypothesis.'" DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 23 (2012) (quoting Joshua Klayman, *Varieties of Confirmation Bias*, 32 PSYCH. LEARNING AND MOTIVATION 385, 386 (1995)). *See also* Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 488 (2009) (noting that prosecutors may have a difficult time accurately assessing the value of exculpatory evidence because "tunnel vision" may make them prone to view such evidence "through the lens of one's preexisting expectations and conclusions"); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1611 (2006) (citing Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 396 (1984)) ("The prosecutor's application of *Brady* is biased not merely because she is a zealous advocate engaged in a 'competitive enterprise,' but because the theory she has developed from that enterprise might

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3. Culture's Role in Enabling Misconduct

Ultimately, whether misconduct is deliberate or inadvertent, its root cause can often be attributed to the office culture in which it occurred. The insight that bad culture breeds bad behavior is not a recent one.[57] For years, legal academics (and more recently the public) have "push[ed] blame up the ladder in the prosecutors' office, perceiving low-level prosecutorial wrongdoing as symptomatic of bad culture."[58] Relevant literature most frequently invokes two inveterate facets of that "bad culture": a lack of back-end "accountability" (i.e. punishment) and a myopic focus on securing convictions.[59] But while punishment and thoughtful goal-setting may mold an office culture, they are only two attributes of an invariably complex office environment.

For reformers, the crucial question is not whether culture plays a role in enabling misconduct, but rather how to effectively transform that culture. Recommendations to increase ex-post punishment (usually through external misconduct review boards or increased judicial oversight) or to reconsider conviction-based success measures, while commendable, are unlikely to transform prosecutorial cultures. A brief perusal of corporate wrongdoing, which occurs in highly regulated environments, often in the face of nominally aligned employee incentives, confirms this.[60] Something more is necessary: a deeper and more granular understanding of why misconduct occurs and what features of a given cultural environment facilitate deviation from legal rules *and* office policies and

trigger cognitive biases, such as confirmation bias and selective information processing.").

57. *See, e.g.*, Alafair S. Burke, *New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?: Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2127 (2010) (attributing legally-defined misconduct to a "deeply flawed prosecutorial culture").

58. Green & Yaroshefsky, *supra* note 15, at 70. **R**

59. *See, e.g.*, Green & Yaroshefsky, *supra* note 15 (supporting efforts to increase accountability via judicial oversight); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 962 (2009) (noting that "most [scholars] favor external regulation of prosecutors by other institutions" as a means of curtailing abuse of discretion); Fish, *supra* note 34, at 1479 (urging prosecutors to move away from using conviction rates as a metric of success). **R** **R**

60. *See, e.g.*, Todd Haugh, *The Power Few of Corporate Compliance*, 53 GA. L. REV. 127, 175 (2018) (stressing that Wells Fargo "senior managers' bonuses were not tied to cross selling or products-per-household, so there were no direct compensation incentives for encouraging fake accounts" and yet, even in the highly regulated banking industry, and with seemingly correctly aligned incentives, fraud was perpetuated on a massive scale).

norms. And, conversely and concomitantly, what features promote ethical decision-making.

II.
A RENAISSANCE OF PROGRESSIVE PROSECUTION

A. *Misconduct and Prosecutorial Practice Prior to Reform*

The exact occurrence rate of prosecutorial misconduct is unknown, and legal misconduct is undoubtedly of greater concern in some offices than in others.[61] That said, prosecutors' violations of legal rules and ethical precepts is a troubling reality.[62] Consider the history of prosecutorial misconduct in the three cities discussed in this note.

In Chicago, an investigation by the *Chicago Tribunal* at the turn of this century "found that prosecutor misconduct [was] commonplace in felony cases brought in Cook County."[63] The newspaper cited chronic prosecutorial misconduct by county assistant prosecutor Scott Arthur, who "broke" the "rules of engagement," but "continued to move up the office's rank," as indicative of a larger cultural problem in the State's Attorney's Office.[64] More recently, Anita Alvarez, the State's Attorney from 2008 to 2016, was accused of endorsing a variety of unethical behaviors, primarily relating to poor use of discretion—from undercharging police officers accused of civilian shootings to charging a recanting witness with per-

61. *See, e.g.*, Keenan et al., *supra* note 43, at 209 (noting that a number of "empirical problems hamper efforts to provide an accurate assessment" of the incidence of prosecutorial misconduct); Fish, *supra* note 34, at 1479 ("Different prosecution offices also have different cultural norms, which can vary from aggressive and adversarial to moderate and managerial.") (citing Pamela J. Utz, *Two Models of Prosecutorial Professionalism*, *in* THE PROSECUTOR 99, 103-14 (William F. McDonald ed., 1979) (contrasting the adversarial culture of San Diego County's DAO with the managerial culture of Alameda County's DAO). R R

62. For instance, "[a] 2003 study by the Center for Public Integrity . . . found over two thousand appellate cases since 1970 in which prosecutorial misconduct led to dismissals, sentence reductions, or reversals." Keenan et al., *supra* note 43, at 211. This presents over sixty distinct cases of misconduct a year. And that is only the misconduct that was egregious enough to be contested in an appellate case. R

63. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 465 (2001) (citing Ken Armstrong & Maurice Possley, *Trial and Error: How Prosecutors Sacrifice Justice to Win* (pts. 1-5), CHI. TRIB. (Jan. 10-14, 1999), https://www.chicagotribune.com/chi-020103trial-gallery-story-gallery.html [https://perma.cc/JFV6-3XL2]).

64. Ken Armstrong & Maurice Possley, *Reversal of Fortune*, CHI. TRIB. (Jan. 13, 1999), https://www.chicagotribune.com/investigations/chi-020103trial4-story.html#nt=storygallery [https://perma.cc/X2UZ-4LM8].

jury.[65] The latter case prompted a host of prominent attorneys, judges, and the Governor of Illinois to pen a letter requesting that Alvarez drop the perjury charge as it would dissuade future witnesses from recanting false testimony.[66]

Misconduct was common in Philadelphia as well. In the mid-1990s, during Jack McMahon's campaign for DA, a training tape for Philadelphia prosecutors on which McMahon encouraged racial discrimination in jury selection came to public attention.[67] In 2013, the Assistant Chief of the Homicide Unit resigned and surrendered to state prosecutors after she was accused of ethical and criminal misconduct.[68] In 2015, media outlets reported that Philadelphia prosecutors were protecting police officers accused of misconduct.[69] Finally, on June 29, 2017, the sitting District Attorney, Rufus Seth Williams, pled guilty to federal bribery charges.[70]

In Brooklyn, the 23-year long tenure of Charles Joseph Hynes, who left office in 2013, was marred by a number of misconduct allegations. Perhaps most prominent was the case of Jabbar Collins, who spent 16 years in prison for the 1994 murder of a rabbi.[71] In

65. *See* Josie Duffy Rice, *The Horrifying Behavior of Anita Alvarez, Chicago's Head Prosecutor*, DAILY KOS (Nov. 24, 2015), https://www.dailykos.com/stories/2015/11/24/1453982/-The-horrifying-behavior-of-Anita-Alvarez-Chicago-s-head-prosecutor [https://perma.cc/VJ2P-YASW].

66. Frank Main, *Former Judges, Ex-prosecutors Urge Alvarez: Drop Perjury Case*, CHI. SUN TIMES (May 5, 2014), https://chicago.cbslocal.com/2014/05/05/former-judges-ex-prosecutors-urge-alvarez-to-drop-perjury-case/ [https://perma.cc/U9A9-44WZ].

67. *See Prosecutor's Tape on Juries Results in Mistrial*, N.Y. TIMES (Apr. 4, 1997), https://www.nytimes.com/1997/04/04/us/prosecutor-s-tape-on-juries-results-in-mistrial.html [https://perma.cc/L7GS-YY5C].

68. *See* Karen Araiza, *Prosecutor Accused of "Revenge" Crime Resigns, Charged*, NBC PHILA. (Oct. 4, 2013), https://www.nbcphiladelphia.com/news/local/Prosecutor-Lynn-Nichols-Surrenders-Resigns-Charged-Philadelphia-226473041.html. [https://perma.cc/PUH2-GWQ8] (adding that though this prosecutor left the DA's office, the DA's office noted that "none of her cases or casework have been called into question or review," suggesting that the charges against her did not prompt an internal review).

69. *See* Daniel Denvir, *How Philadelphia Prosecutors Protect Police Misconduct: Cops Get Caught Lying—and Then Get off the Hook*, SALON (Dec. 28, 2015), https://www.salon.com/2015/12/28/how_philadelphia_prosecutors_protect_police_misconduct_cops_get_caught_lying_and_then_get_off_the_hook/ [https://perma.cc/Z8WK-2VLC].

70. Press Release, U.S. Attorney William E. Fitzpatrick, Philadelphia District Attorney Rufus Seth Williams Pleads Guilty To Federal Bribery Charge (June 29, 2017), https://www.justice.gov/usao-nj/pr/philadelphia-district-attorney-rufus-seth-williams-pleads-guilty-federal-bribery-charge [https://perma.cc/3A9M-LEKJ].

71. Anthony C. Thompson, *Retooling and Coordinating the Approach to Prosecutorial Misconduct*, 69 RUTGERS L. REV. 623, 633 (2017).

2010, a federal judge granted Collins's petition for habeas corpus relief after he was presented with evidence that the lead prosecutor in the case, Michael Vecchione, withheld *Brady* materials and coerced witnesses into testifying against Collins.[72] Despite the judge castigating Vecchione for his "shameful" conduct,[73] as well as Vecchione's role in several other high-profile office scandals,[74] District Attorney Hynes remained steadfast in his support of the prosecutor, who rose to head of the Homicide Bureau, the Trial Division, and the Rackets Bureau.[75] Additional allegations of prosecutorial misconduct on the part of other borough prosecutors surfaced in 2012 and 2013.[76] Eventually, Hynes himself was judged to have engaged in unethical conduct in relation to a reelection campaign.[77]

72. One witness reported that he had agreed to supply false testimony in exchange for prosecutors dropping a probation violation; another alleged that detectives threatened to charge him as an accessory to a robbery if he didn't testify for the government; a third reported that the prosecutor handling the case had threatened to hit him with a coffee table or to jail him for perjury and then did jail him before the witness finally agreed to testify. *Id.* at 632–39.

73. A. G. Sulzberger, *Facing Misconduct Claims, Brooklyn Prosecutor Agrees to Free Man Held 15 Years*, N.Y. TIMES (June 9, 2010), https://www.nytimes.com/2010/06/09/nyregion/09vecchione.html [https://perma.cc/CBC2-SMH4].

74. *See* Joaquin Sapien, *A Prosecutor, a Wrongful Conviction and a Question of Justice*, PRO PUBLICA (May 23, 2013), https://www.propublica.org/article/a-prosecutor-a-wrongful-conviction-and-a-question-of-justice [https://perma.cc/ZE6P-SZRU] (chronicling Vecchione's participation in a number of problematic prosecutions).

75. Vivian Yee, *Under Fire, Brooklyn Deputy Prosecutor Will Retire*, N.Y. TIMES (Nov. 14, 2013), https://www.nytimes.com/2013/11/15/nyregion/under-fire-brooklyn-deputy-prosecutor-will-retire.html [https://perma.cc/C4JL-PTEW].

76. *See* Brad Hamilton, *Lawyer Accuses Brooklyn DA Charles Hynes' Office of Manipulating Witnesses, Evidence*, N.Y. POST (Dec. 3, 2012), https://nypost.com/2012/12/03/lawyer-accuses-brooklyn-da-charles-hynes-office-of-manipulating-witnesses-evidence/ [https://perma.cc/QF47-K25B] (alleging that prosecutors under Hynes "knowingly elicited contradictory identification testimony from the same two key witnesses before two separate grand juries"); Michael Powell, *A Prosecutor Loath to Say 'Not Guilty*,' N.Y. TIMES (Jan. 28, 2013), https://www.nytimes.com/2013/01/29/nyregion/brooklyn-district-attorney-clings-to-discredited-cases.html [https://perma.cc/4SCV-JQYT] (detailing the case of William Lopez, which involved disclosure violations and "flimsy" evidence).

77. *See* Julianne Cuba, *Ethics Board Deals Record Fine to Former DA for Abusing Office During Campaign*, BROOKLYN PAPER (Mar. 30, 2018), https://www.brooklynpaper.com/stories/41/14/all-hynes-pays-largest-campaign-fine-in-history-2018-03-30-bk.html [https://perma.cc/Q7VT-CMX7] ("Ethics watchdogs slapped Brooklyn's embattled former top prosecutor with the highest fine ever dealt by the city for illegal campaign-related activities.").

B. The Pernicious Consequences of Misconduct and Calls for Reform

The consequences of legally-defined prosecutorial misconduct can be tragic for defendants.[78] Those unlucky enough to be on the other side of an unscrupulous or negligent prosecutor may be denied a chance at a fair trial, convicted of a crime they did not commit, and condemned to suffer the million indignities and torments of prison, sometimes for decades.[79]

The pernicious consequences of violations of office norms may be more subtle. For progressive prosecutors, undertaken reforms reflect a growing public concern about the direct and collateral consequences of discretionary prosecutorial decisions. More and more, prosecutors face public condemnation for their perceived overcharging of certain defendants,[80] such as MIT fellow Aaron

78. *See* 426 YEARS, *supra* note 55 (examining 26 wrongful convictions in Brooklyn, some of which were attributable to prosecutorial misconduct, and quoting Eric Gonzalez in report's introductory letter as follows: "[t]he magnitude of years lost to wrongful imprisonment in these cases is almost unbearable—together, they add up to 426 years spent in prison. And each case described in these pages is itself a complete tragedy, for the person who was wrongfully convicted and incarcerated, for his or her community, for the victims and survivors of these cases, and indeed for all of us"). **R**

79. *See, e.g.*, *id.* at 60–68 (discussing role of prosecutorial misconduct in several wrongful convictions occurring in Brooklyn, some of which resulted in defendants serving decades long prison sentences); Samantha Melamed, *A 'Perfect Storm' of Injustice*, PHILA. INQUIRER (Jan. 21, 2020), https://www.inquirer.com/news/philadelphia-da-larry-krasner-conviction-integrity-unit-exoneration-theophalis-wilson-christopher-williams-20200121.html [https://perma.cc/GZK8-PDFY] (reporting that the Philadelphia DA's office had exonerated Theophalis "Bilaal" Wilson—who spent 28 years behind bars—after discovering that the prosecutors pursuing his case had committed various kinds of misconduct); Joaquin Sapien, *He Went to Prison After a Prosecutor Hid Evidence. Seven Years After Our Story, He Walked Free.*, PROPUBLICA (Feb. 20, 2020), https://www.propublica.org/article/he-went-to-prison-after-a-prosecutor-hid-evidence-seven-years-after-our-story-he-walked-free [https://perma.cc/GBM2-FQD5] (reporting on parole release of Tyronne Johnson, who spent 20 years in prison after the prosecutor in his case hid evidence and noting the same prosecutor had his license suspended by a disciplinary committee for committing other misconduct); Laurel Wamsely, *After 36 Years in Prison for 'Georgetown Jacket' Murder, 3 Men Are Exonerated at Last*, NAT'L PUB. RADIO (Nov. 26, 2019), https://www.npr.org/2019/11/26/782941770/after-36-years-in-prison-for-georgetown-jacket-murder-3-men-are-exonerated-at-la [https://perma.cc/YE9X-DAV4] (reporting on the 36-year-after-the-fact exoneration of three men erroneously convicted of murder after the prosecutor in their case failed to hand over potentially exculpatory evidence).

80. It should be noted that the professional responsibility rules do not appear to address the problem of overcharging or undercharging. Rule 3.8's admonition that prosecutors bring only those charges that are supported by probable cause is "inadequate to address overcharging because probable cause is a minimal threshold that is well below what is required to convict" and inadequate to address under-

Swartz—who committed suicide after federal prosecutors charged him with 13 counts for downloading academic articles en masse from JSTOR[81]—and the perpetual undercharging of others, such as police officers accused of killing unarmed persons and wealthy perpetrators of sexual assault.[82] Progressive reformers strive to establish policies and norms that address these public concerns. As such, stark deviations from new office norms may undermine public trust in these reforms and in prosecutors in general.

Ultimately, both kinds of prosecutorial misconduct thus present a threat to the health of civil society, most obviously by depressing public confidence in our criminal justice system.[83] Generally speaking, "the more confident people are that . . . members [of a

charging because there is no mandate that individuals be charged for every criminal act. H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 63 (2013).

81. *See* Superseding Indictment of Aaron Swartz, United States v. Swartz, No. 1:11-CR-10260-NMG (D. Mass. Sept. 12, 2012); Alex Stamos, *The Truth About Aaron Swartz's "Crime*," UNHANDLED EXCEPTION (Jan. 12, 2013), http://unhandled.com/2013/01/12/the-truth-about-aaron-swartzs-crime/ [https://perma.cc/UH7K-Q89A] (asserting that Aaron Swartz was "massively overcharged," since his downloading of journal articles was from an open university network that provided access to a website offering unlimited free downloads); Stephen L. Carter, *The Overzealous Prosecution of Aaron Swartz*, BLOOMBERG VIEW (Jan. 17, 2013), https://www.bloomberg.com/opinion/articles/2013-01-17/the-overzealous-prosecution-of-aaron-swartz [https://perma.cc/7S3A-XEJF].

82. *See, e.g.*, Nadia Prupis, *Ferguson Prosecutor Hit with Ethics Complaint*, COMMON DREAMS (Jan. 6, 2015), http://www.commondreams.org/news/2015/01/06/ferguson-prosecutorhit-ethics-complaint [https://perma.cc/6GCE-YE8L] (reporting that the Ethics Project had filed a complaint with a state disciplinary body against the Ferguson Prosecuting Attorney and some of his staff, after the police shooting death of Michael Brown); Jonathon Sizemore, *Eric Garner's Death: No Justice No Peace*, CITYLAND (Mar. 16, 2017), https://www.citylandnyc.org/eric-garner-death-no-justice-no-peace/ [https://perma.cc/3ZWG-YPL7] (reporting that the NAACP petitioned Kings County Supreme Court to compel the State Grievance Committee to bring ethics charges against Staten Island District Attorney Daniel Donovan following his alleged misconduct in the investigation of the police killing of Eric Garner); Erin Durkin, *Sexual Assault Survivors Call on Cy Vance Jr. to Resign*, POLITICO (Jan. 23, 2020), https://www.politico.com/states/new-york/albany/story/2020/01/23/sexual-assault-survivors-call-on-cy-vance-jr-to-resign-1253915 [https://perma.cc/W9ZC-XMNL] (reporting on calls for Manhattan District Attorney Cy Vance to resign following allegations that he had mismanaged the prosecution of wealthy and well-connected sexual predators, such as Harvey Weinstein and Robert Hadden).

83. *See, e.g.*, John Hollway, Opinion, *Reining in Prosecutorial Misconduct*, WALL ST. J. (July 4, 2016), https://www.wsj.com/articles/reining-in-prosecutorial-misconduct-1467673202 [https://perma.cc/4AVX-D7F6] ("These cases are not the norm. But they persist, and they make the job of good-faith prosecutors harder by undermining the legitimacy of the criminal-justice system.").

particular government group] behave unethically, the less likely they are to have confidence in other aspects of that group's performance."[84] With prosecutors, the relationship between ethical conduct and job performance is clear. After all, "[t]he primary duty of the prosecutor is to seek justice within the bounds of the law."[85] How can a prosecutor who has acted unethically be trusted to exercise their discretion in pursuit of that duty?

In the wake of increased public scrutiny, academics, legislatures, and even conservative news outlets have all issued calls to hold prosecutors to account.[86] This heightened awareness of the prevalence and harmful consequences of prosecutorial misconduct has engendered an interest in reforming District Attorneys' offices across the United States.

C. Progressive Prosecutors Respond

A wave of "progressive prosecutors" has emerged in the wake of these calls for reform[87]: Marilyn Mosby in Baltimore, Scott Colom in Mississippi, James Stewart in Louisiana, Mark Gonzalez—a former defense attorney with "not guilty" tattooed across his chest—in Texas, Marco Serna in New Mexico, and others, including the three prosecutors highlighted in this note: Kim Foxx in Chi-

84. Claire Gecewicz & Lee Rainie, *Americans' Perceptions About Unethical Behavior Shape How They Think About People in Powerful Roles*, PEW RESEARCH CTR.: FACT-TANK (Sept. 19, 2019), https://www.pewresearch.org/fact-tank/2019/09/19/americans-perceptions-about-unethical-behavior-shape-how-they-think-about-people-in-powerful-roles/ [https://perma.cc/Q2HT-AMVD]. Though public confidence polls typically ask about faith in the police, Congress, or the courts, rather than local prosecutors' offices, the logical inferences made by survey participants likely translates to trust in district attorneys.

85. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.2 (Am. Bar Ass'n, 4th ed. 2017).

86. *See, e.g.*, Caldwell, *supra* note 26 (detailing 13 different types of prosecutorial misconduct); Keenan et al., *supra* note 43, at 203; Jillian Jorgensen, *Settlement Squashes NY State Panel Probing Prosecutorial Misconduct*, N.Y. DAILY NEWS (Dec. 10, 2018), https://www.nydailynews.com/news/politics/ny-pol-prosecutorial-conduct-commission-hold-lawsuit-20181210-story.html [https://perma.cc/E8G6-A7Z9] (detailing failed efforts of New York legislature to assemble a new body charged with investigating prosecutorial misconduct); Kevin D. Williamson, *When District Attorneys Attack,* NAT'L REV. (May 31, 2015), http://www.nationalreview.com/article/419110/when-district-attorneys-attack-kevin-d-williamson [https://perma.cc/Q654-Y7QM]. *See also Prosecutors Burn Down the Law: How Fire Investigators Distorted Evidence to Loot a Company*, WALL ST. J. (Jan. 2, 2015), http://www.wsj.com/articles/prosecutors-burn-down-the-law-1420242330 [https://perma.cc/4URZ-2PQE].

87. *The Paradox of "Progressive Prosecution"*, *supra* note 9, at 750.

cago, Larry Krasner in Philadelphia, and Eric Gonzalez in Brooklyn.[88]

Foxx was the earliest of this group to win a local election and assumed her post in December 2016.[89] Prior to her election, she had served as the "Chief of Staff for the Cook County Board President, where she was the lead architect of the county's criminal justice reform agenda to address racial disparities in the criminal and juvenile justice systems."[90] Krasner, who likes to describe himself as "a prosecutor with *com-passion*. Or a public defender with *pow-er*,"[91] worked as a criminal defense and civil rights attorney for thirty years before being elected to Philadelphia's top prosecutorial post in 2017. Since becoming district attorney, Krasner "ha[s] become a model for other progressives seeking office—for outsiders with grass-roots support and uncompromising platforms for change, for D.A. candidates proclaiming themselves the next Larry Krasner."[92] In contrast, Gonzalez devoted his professional career to the Brooklyn District Attorney's Office.[93] It was the untimely death of his immediate predecessor, Kenneth Thompson—whose election was arguably the "turning point" for the progressive prosecution movement in the first place[94]—that spurred Gonzalez to seek office.[95] After the election, Gonzalez named Jill Harris, a former public defender, the Chief of Policy and Strategy and tapped a cohort of 70 individuals—including "community members, criminal justice re-

88. *See* David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 648 (2017) (identifying the first six of these individuals as progressive prosecutors); Austen, *supra* note 5 (identifying Larry Krasner as a "progressive DA"); Press Release, Office of Kings Cty. Dist. Att'y, Brooklyn District Attorney Eric Gonzalez Unveils Sweeping Reforms His Office is Implementing as Part of the Justice 2020 Initiative, Establishing a National Model of a Progressive Prosecutor's Office (Mar. 11, 2019), http://www.brooklynda.org/2019/03/11/brooklyn-district-attorney-eric-gonzalez-unveils-sweeping-reforms-his-office-is-implementing-as-part-of-the-justice-2020-initiative-establishing-a-national-model-of-a-progressive-prosecutors [https://perma.cc/NLV6-79DX] (identifying the office as providing a "national model" for progressive prosecutors). R

89. *Kimberly M. Foxx*, COOK COUNTY ST'S ATT'Y, https://www.cookcountystatesattorney.org/about/kimberly-foxx [https://perma.cc/FB6M-UDSU].

90. *Id.*

91. Austen, *supra* note 5. R

92. *Id.*

93. *See Eric Gonzalez*, BROOKLYN DISTRICT ATT'Y'S OFF., http://www.brooklynda.org/eric-gonzalez/ [https://perma.cc/C7J3-YCZV] (last visited Nov. 2, 2020) (stating that Gonzalez "began his legal career in the Brooklyn District Attorney's Office upon his graduation from law school in 1995").

94. Sklansky, *supra* note 88, at 651. R

95. *See Eric Gonzalez*, *supra* note 93 (stating that Gonzalez was appointed as Acting DA after Ken Thompson's death). R

form experts and advocates, faith leaders, [and] formerly incarcerated people"—to draft an "action plan" for reform.[96]

These three reformers and their larger, contemporaneous cohort collectively represent the "first major shift in the politics and incentives of American prosecution in decades."[97] For the three progressive prosecutors highlighted in this note—Kim Foxx, Larry Krasner, and Eric Gonzalez—this shift reflects a dual concern with countering both "legal misconduct" and the sort of "violations of office norms" outlined in *Part I*.[98] Their efforts to combat the former are evident, for instance, in their support of robust "Conviction Review Units" and commitments to increasing ethics training for line prosecutors.[99] Their efforts to forestall the latter can be seen in

96. *See* Gonzalez, *supra* note 4, at 11. **R**

97. EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION, at xxvii (2019).

98. *See, e.g.*, Frederic Block, *Let's Put an End to Prosecutorial Immunity*, THE MARSHALL PROJECT (Mar. 13, 2018), https://www.themarshallproject.org/2018/03/13/let-s-put-an-end-to-prosecutorial-immunity [https://perma.cc/9PN4-GNPR] (stating that the Jabbar Collins case "animated a crusading civil rights lawyer named Ken Thompson to campaign against and defeat [incumbent District Attorney Charles Hynes]"); Sklansky, *supra* note 88, at 652 nn.33–38 (citing a number of articles in support of the assertion that "Thompson's campaign focused on allegations of prosecutorial misconduct under Hynes's watch"); Holly Otterbein, *Meet the D.A. Candidate Who's Defended Black Lives Matter and Occupy in Court*, PHILA. MAG. (Feb. 22, 2017), https://www.phillymag.com/news/2017/02/22/larry-krasner-district-attorney-race/ [https://perma.cc/9L62-7RC2] (reporting that Krasner's experiences combatting prosecutorial overcharging and apparent *Giglio* violations were the high points of his legal career and stating that he believed it was time for the DA's Office to head in a "different direction"); Kim Foxx for Cook County State's Attorney, FACEBOOK (Feb. 4, 2016), https://www.facebook.com/watch/?v=1561430014184994 [https://perma.cc/P3FM-UVZX] (depicting advertisement in which Kim Foxx criticizes Anita Alvarez for taking over 400 days to indict the police officer responsible for shooting Laquan McDonald—an unarmed, Black teenager). **R**

99. Conviction Review Units are internal divisions dedicated to investigating erroneous convictions. In his campaign to permanently assume the DA's position, Eric Gonzalez identified the Conviction Review Unit started by his progressive predecessor Ken Thompson as one of his priorities. *See* Jon Schuppe, *Brooklyn District Attorney Ken Thompson's Death Leaves Exoneration Movement Mourning*, NBC (Oct. 11, 2016), https://www.nbcnews.com/news/us-news/brooklyn-district-attorney-ken-thompson-s-death-leaves-exoneration-movement-n663966 [https://perma.cc/TX9R-TEEX]. A key feature of Gonzalez's comprehensive reform plan—named Justice 2020—was the creation of an Office of Professional Responsibility and Ethics. *See* Gonzalez, *supra* note 4, at 8. Kimm Foxx likewise promised to "beef[ ] up the division that investigates wrongful prosecution," and to hire an "ethics officer to train attorneys and investigate ethical lapses." *See* Steve Schmadeke, *Kim Foxx Promises "New Path" of Transparency as Cook County State's Attorney*, CHI. TRIB. (Dec. 1, 2016), https://www.chicagotribune.com/news/local/breaking/ct-kim-foxx-states- **R**

commitments to re-orienting office norms pertaining to low-level offenses, overcharging, and police misconduct.[100]

D. The Rough Road to Reform

All three reformers—Foxx, Krasner, and Gonzalez—have eschewed conviction-based metrics and understood from the beginning of their tenures that the culture of their offices needed to change.[101] Avowals to effect change are, of course, not commensu-

attorney-met-20161201-story.html [https://perma.cc/U85Z-SBSH]; Steve Schmadeke, *Newly Elected Kim Foxx Details Plans to Reshape State's Attorney's Office*, CHI. TRIB. (Dec. 6, 2016), https://www.chicagotribune.com/news/local/breaking/ct-kimm-foxx-interview-met-20161205-story.html [https://perma.cc/Z9DU-MWEF]. *See also* Chris Palmer & Samantha Melamed, *Philly DA Larry Krasner Promised an Aggressive Conviction Integrity Unit. Judges Have Pushed Back*, PHILA. INQUIRER (Jan. 29, 2019), https://www.philly.com/news/larry-krasner-conviction-integrity-unit-philadelphia-district-attorney-judges-20190129.html [https://perma.cc/2Q63-ZCU2] (reporting Larry Krasner promised to form an "aggressive" Conviction Integrity Unit).

100. *See, e.g.*, Gonzalez, *supra* note 4, at 19, 29 (Mar. 2019) (noting that the "DA may decline to prosecute certain charges through diversion programs, or even with no intervention at all" and recommending "the DA develop protocols to ensure independent investigations with no special treatment for police officers suspected of misconduct"); RECLAIM CHICAGO ET AL., IN PURSUIT OF JUSTICE FOR ALL: AN EVALUATION OF KIM FOXX'S FIRST YEAR IN OFFICE 11 (2017), https://www.thepeopleslobbyusa.org/wp-content/uploads/2017/12/Equal-Justice-for-All-A-Report-on-Kim-Foxxs-First-Year-ForPrint.pdf [https://perma.cc/4LTJ-BKQD] (describing Kim Foxx's efforts to combat overcharging); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 U.C.L.A. CRIM. JUSTICE L. REV. 1, 8–9 (2019) (noting that Foxx announced "her office would not charge retail thefts as felonies unless the value of the property was at least $1,000 or the defendant had ten or more prior felonies" and "would no longer prosecute individuals for driving with licenses suspended for financial reasons"); Philadelphia DAO, *DA Larry Krasner Slaps Down Hundreds of Marijuana-Buying Cases*, MEDIUM (Aug. 9, 2018), https://medium.com/philadelphia-justice/da-larry-krasner-slaps-down-hundreds-of-marijuana-buying-cases-d1e12306bf4e [https://perma.cc/5VZ8-YDYU] ("Since DA Larry Krasner issued a groundbreaking policy in March, our office has declined to prosecute over 293 marijuana purchase cases."). *See* Samantha Melamed & Chris Palmer, *Rethinking Murder Charges; DA Krasner Shifts Focus from "Wins" in Homicide Prosecutions*, PHILA. INQUIRER (Nov. 14, 2018), https://www.philly.com/philly/news/larry-krasner-murder-cases-philadelphia-district-attorney-20181114.html [https://perma.cc/2AGC-65DX] (identifying an office-wide policy to either seek lesser charges from the start or reduce charges in homicide cases. "The new strategy aligns with Krasner's oft-expressed belief that former prosecutors were out for wins - in the form of excessive prison sentences - rather than for justice.").

101. *See* Sarah Schulte, *Kim Foxx Plans Big Changes in Cook County State's Attorney's Office*, ABC 7 CHI. (Dec. 5, 2016), https://abc7chicago.com/kim-foxx-sworn-in-states-attorney-election/1641062/ [https://perma.cc/DN79-G8W2] (quoting Foxx as follows: "We really want to change the culture of the office, change busi-

rate with change-in-fact. And for these progressive prosecutors, the road to reform has, at times, been difficult.[102] The reasons that particular reforms fail to yield their anticipated results are idiosyncratic. Outside forces, including interference from legislatures, hostile judges, and recalcitrant police forces, play an indelible role.[103] But, as this note's case studies will illustrate, *internal* failures to bring about promised cultural change are instrumental in explaining why misconduct continues to occur and reform efforts stumble.[104]

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ness within the office."); Adeshina Emmanuel, *Electing Progressive Prosecutors Isn't Enough. Now, Activists Are Holding Them Accountable*, IN THESE TIMES (Mar. 26, 2018), https://inthesetimes.com/article/21014/kim_foxx_larry_krasner_chicago_philadelphia_prosecutors_progressive [https://perma.cc/Z9Q7-JVGY] (reporting that Foxx has had difficulty getting prosecutors to "shift away from the idea that a high conviction rate is the marker of success"); Otterbein, *supra* note 98 (quoting Krasner as follows: "The culture of the District Attorney's office has brought us to this situation of having drastic injustice, especially focused on poor people and black and brown people. That culture needs to change. That culture can change."); Gonzalez, *supra* note 4, at 9 ("The recommendations of Justice 2020, taken together, represent an enormous culture shift for the Brooklyn DA's office, one that DA Gonzalez is eager to undertake."); *id.* at 19 (stating that convictions should no longer be the "main measure of success" for ADAs).

102. *See* Smith, *The Prosecutors I Like: A Very Short Essay*, *supra* note 7, at 417–18 (discussing the difficulties Krasner and Foxx have faced in actualizing their reform vision); Ali Watkins, *As Shootings Spike in Northern Brooklyn, N.Y.P.D. and Prosecutors Collide*, N.Y. TIMES (Aug. 8, 2019), https://www.nytimes.com/2019/08/08/nyregion/brooklyn-shootings-da-nypd.html [https://perma.cc/FAM5-FPJF] (discussing "feud" between NYPD and Gonzalez in the face of Gonzalez's commitment to diverting certain gun possession cases); BAZELON, *supra* note 97, at 273 (discussing intransigence of some Brooklyn line prosecutors to change and stating that "[t]he everyday machinery of prosecution ground on, impervious to change at the top. It would take serious patience and stamina to change the system on a large scale"); Davis, *Reimagining Prosecution: A Growing Progressive Movement*, *supra* note 100, at 3 (stating that while some progressive prosecutors have made "modest improvements, . . . many have faced serious challenges from within and outside of their offices").

103. *See, e.g.*, Smith, *supra* note 7, at 417 (noting that Kim Foxx has faced "county budget cuts, hostility from some judges, and hostility from the Fraternal Order of Police"); Davis, *supra* note 100, at 16–17 (discussing conflicts between Larry Krasner and the Philadelphia police); Tina Moore et al., *Brooklyn DA Coddling Gun-Toters: NYPD Chief*, N.Y. POST (July 8, 2019), https://nypost.com/2019/07/08/brooklyn-da-coddling-gun-toters-nypd-chief/ [https://perma.cc/PW4F-GC66] (reporting NYPD Commissioner was "grous[ing] that the Brooklyn DA is going too easy on gun-possession cases" and that the DA's diversion policy was responsible for an uptick in crime).

104. *See also* Davis, *supra* note 100, at 15–21 (discussing some of the pushback progressive prosecutors have received from within their offices); Heather L. Pickerell, *Critical Race Theory & Power: The Case For Progressive Prosecution*, 36 HARV. BLACKLETTER L.J. 73, 83 (2020) ("Some of the most obstinate actors who are re-

Academics and corporations, through the study and implementation of ethics and compliance programs, have devoted considerable resources to understanding similar problems: namely how to stimulate compliance with ethical rules and standards. As such, corporate compliance best practices and innovations may prove useful for head prosecutors aiming to change their own office culture.

III.
LESSONS FROM CORPORATE COMPLIANCE

For corporations, expensive teaching moments—the collapse of Enron, the more recent Wells Fargo fraudulent accounts scandal, and many others, as well as a prodigious expenditure of resources—have spurred a wealth of academic research and practical experimentation with what it takes to create a culture of compliance.[105] A comparable expenditure of resources and experimentation with compliance initiatives has not been made in prosecutors' offices. As such, progressive prosecutors could well benefit from corporate experience.

A. An Introduction to Corporate Compliance

Corporate compliance can generally be conceptualized as "a system of policies and controls that organizations adopt to deter violations of law and to assure external authorities that they are taking steps to deter [such] violations."[106] Compliance programs have two aims: (1) to deter law and rule breaking and (2) to generate and enforce norms.[107] The latter objective is embodied in compa-

sponsible for stymieing progressive prosecutors' agendas are subordinate, line prosecutors who subvert their boss's agenda.").

105. *See, e.g.*, Ronald R. Sims & Johannes Brinkmann, *Enron Ethics (Or: Culture Matters More Than Codes)*, 45 J. BUS. ETHICS 243 (2003) (arguing Enron's misdeeds demonstrate that corporate culture has a greater impact on compliance than codes of conduct); Haugh, *supra* note 60, at 129 (utilizing the Wells Fargo fake accounts scandal "as a backdrop" to explain a theory of compliance); Stan Silverman, *5 Lessons from the Report Analyzing Wells Fargo's Fake Account Scandal*, BIZ JS. (Apr. 25, 2017), https://www.bizjournals.com/bizjournals/how-to/growth-strategies/2017/04/5-lessons-from-the-report-analyzing-wells-fargos.html [https://perma.cc/LF56-TZTZ] (pulling out key compliance lessons for banks in the wake of the Wells Fargo scandal). *See also infra* Section III.A and sources cited therein. R

106. *See* Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 958 (2009).

107. *See* Haugh, *supra* note 60, at 139–40 (identifying two areas of focus for compliance programs: deterring violations of law and "norm generation"); ETHICS & COMPLIANCE CERTIFICATION INST., PRINCIPLES AND PRACTICES OF HIGH-QUALITY ETHICS & COMPLIANCE PROGRAMS 12 (2016) [hereinafter ETHICS & COMPLIANCE R

nies' commitment to creating an "ethical culture"—now viewed by the majority of corporations as the "supreme goal" of their compliance program.[108]

There is no "rigid formula" for achieving these aims.[109] Rather, effective compliance programs are built around a company's particular risk profile.[110] As such, "risk assessments are the foundation upon which [high quality compliance programs] are built."[111] An organization's history, maturity, size, the industry in which it operates, and the attendant regulatory environment "drive the design and function" of its compliance program. Specifically, the identified risks inform company decisions about the best way to use the wide set of "tools" commonly employed across compliance programs.[112]

At minimum, every compliance program is devoted to employee education and training.[113] Here, the "main instrument is the company code of conduct . . . that memorializes for employees what they can and cannot do."[114] A "code of conduct" or manual typically includes a clear mission statement as well as more granular directives geared toward addressing the diverse risks faced by various sub-groups of workers.[115] The mechanisms for training are also

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CERTIFICATION INSTITUTE] ("Ethics and Compliance" programs achieve their aims by "[c]ontinuously assess[ing] and abat[ing] the organization's legal, ethics and other compliance risks . . . [and by e]stablish[ing] and perpetuat[ing] an organizational culture that prizes ethical decision-making and the raising of concerns without fear of retaliation").

108. Haugh, *supra* note 60, at 140 (internal citations omitted). **R**

109. Criminal Div., *Evaluation of Corporate Compliance Programs*, U.S. DEP'T OF JUST. 1 (Apr. 2019, updated June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download [https://perma.cc/F9VK-YWA5] [hereinafter *Evaluation of Corporate Compliance Programs*] (stating that the effectiveness of a program is not assessed according to any "rigid formula").

110. *Evaluation of Corporate Compliance Programs*, supra note 109, at 1 ("[R]ecogniz[ing] that each company's risk profile and solutions to reduce its risks" must drive determinations about programmatic effectiveness). **R**

111. ETHICS & COMPLIANCE CERTIFICATION INST., *supra* note 107, at 21. **R**

112. Haugh, *supra* note 60, at 141 (noting that these tools "are almost uniformly applied and adopted within and across firms"). **R**

113. *See, e.g.*, Haugh, *supra* note 60, at 141 ("The main instrument is the company code of conduct (alternatively called an employee manual or handbook) that memorializes for employees what they can and cannot do."); Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 939 (2017) ("The common structural framework for compliance includes . . . firm-wide education and training about both the substance and process of compliance . . . ."). **R**

114. Haugh, *supra* note 60, at 141. **R**

115. Pamela H. Bucy, *Corporate Criminal Liability: When Does It Make Sense?*, 46 AM. CRIM. L. REV. 1437, 1448–49 (2009) ("[E]ach business should have multiple,

varied in their turn and can include "group sessions, one-on-one meetings, and web-based tutorials."[116] Significantly, employees' training is not limited to admonitions to "'do the right thing.' [Rather, m]odern compliance programs gear their training to the areas where the employees are most likely to face compliance issues."[117] That is, those in accounting departments receive training on the Generally Accepted Accounting Principles, while those whose job it is to identify overseas business opportunities learn about the limits set by the Foreign Corrupt Practices Act.[118]

Next, no robust compliance program would be complete without a monitoring function, which can include "certifications, sign-off procedures, and supervisory review," as well as ethics hotlines, employee surveys, and audits.[119] Vitally, compliance programs require an enforcement function, for no program will be "fully living and breathing unless it has teeth."[120] Enforcement can take many forms, from private or public reprimand to additional training to demotion, but the "most likely punishment for a significant compliance violation is termination."[121] Finally, industry experts have increasingly understood that creating a culture of compliance requires an understanding of behavioral ethics and a more thoughtful use of measurement tools.[122]

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short, specific, codes of conduct tailored to particular employment duties" which should each be "specific" as exactly what conduct is prohibited).

116. Haugh, *supra* note 60, at 142. **R**

117. John T. Boese, *Do Corporate Compliance Programs Really Prevent Corporate Wrongdoing? Of Course They Do*!, 4 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 9, 13 (2016).

118. Langevoort, *supra* note 113, at 939–40 ("[Compliance programs are customized in] recogni[tion of] the great range of motives, opportunities, and types of violations most likely to be a problem at a given firm."). **R**

119. Haugh, *supra* note 60, at 142–43. **R**

120. Gretchen A. Winter & David J. Simon, *Code Blue, Code Blue: Breathing Life into Your Company's Code of Conduct*, 20 ACCA DOCKET, Nov.-Dec. 2002, at 85. It bears noting that compliance programs must maintain a capacity to *investigate* misconduct allegations—an undeniable prerequisite to imposing sanctions.

121. Haugh, *supra* note 60, at 143. **R**

122. *See* Donald C. Langevoort, *Behavioral Ethics, Behavioral Compliance, in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 263, 263 (Jennifer Arlen ed., 2018); Hui Chen & Eugene Soltes, *Why Compliance Programs Fail—and How to Fix Them*, HARV. BUS. REV., Mar.-Apr. 2018, https://hbr.org/2018/03/why-compliance-programs-fail [https://perma.cc/W6BP-JVQ2]. *See also* Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J.L. & BUS. 965, 971 (2018) (critiquing widespread corporate failure to measure compliance program success and noting that "[a]mong firms who try to measure their programs' effectiveness, only

As mentioned above, compliance professionals recognize that there is no single template for a successful compliance program.[123] That said, industry studies and, importantly, the Department of Justice—the body primarily responsible for prosecuting white collar crime—have sought to clarify the qualities distinguishing a robust program from an inadequate one.[124] DOJ issued guidance—collated in a 2019 document entitled *Evaluation of Corporate Compliance Programs* and updated in June 2020—is comprehensive in its scope, delineating the markers of good programs in areas as diverse as "Risk Assessment" and "Commitment by Senior and Middle Management."[125] The document is a reflection of an understanding long held by federal prosecutors: that a "paper program"—that is one "that exists on paper but is not supported by the corporate culture and therefore does not meaningfully influence employee behavior"[126]—is an inadequate substitute for a "real program 'designed, implemented, reviewed, and revised . . . in an effective manner."[127]

The best compliance programs are those that move beyond "check the box" exercises to foster a "strong ethical *culture*."[128] Culture may seem like an elusive concept, but can be understood simply as "the way we do things around here."[129] It encompasses the "values and behaviors" that define an organization's activities and is "built over time, the sum of behaviors that are initiated and rein-

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half are reasonably confident that they are measuring it appropriately" and suggesting possible reforms).

123. *See, e.g.*, ETHICS & COMPLIANCE CERTIFICATION INST., *supra* note 107, at 15 (noting that all programs must be tailored to account for the idiosyncrasies of a given company and the environment it operates in); Geoffrey P. Miller, *An Economic Analysis of Effective Compliance Programs, in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 247 (Jennifer Arlen ed., 2018) (summarizing the disparate guidance provided by various government regulators). R

124. *See generally Evaluation of Corporate Compliance Programs*, *supra* note 109; ETHICS & COMPLIANCE CERTIFICATION INST., *supra* note 107 (reporting on the findings of a "blue ribbon panel" dedicated to identifying the common characteristics of successful compliance programs). R R

125. *See generally* U.S. DEP'T OF JUST., *supra* note 109. R

126. David Hess, *Ethical Infrastructures and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence*, 12 N.Y.U. J.L. & BUS. 317, 320–21(2016).

127. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-28.800, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS (2015), https://www.justice.gov/archives/usam/archives/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.010 [https://perma.cc/4M6N-ZRB2].

128. ETHICS & COMPLIANCE CERTIFICATION INST., *supra* note 107, at 13, 24. R

129. *Id.* at 25.

forced on a daily basis."[130] Exemplary compliance programs are those that not only aim to stave off rule breaking, but also endeavor to "[e]stablish[ ] and perpetuat[e] a high standard of integrity that becomes part of the DNA of the organization."[131]

Effective compliance programs are steered by "senior leaders . . . [who] personally demonstrat[e] an organization-wide commitment to ethics and compliance."[132] But while proper "tone at the top" is necessary, it is not sufficient alone to stimulate effective compliance. The most effective compliance programs recognize that because "[e]mployees are keenly attuned to the actions of their direct supervisors and to the extent to which they walk their talk," managers and supervisors play an integral role in creating cultures of compliance.[133] Effective programs accordingly equip and support "managers and supervisors . . . to help them connect the [company's core] values to priorities and decisions in *daily operations*."[134] The ultimate aim is to create an organization where even the lowest-rung employee feels empowered to raise ethics "concerns without fear of retaliation."[135]

B. Parallels to Prosecutorial Reform

It may not be obvious, at first blush, that lessons learned from corporate compliance can be readily applied to local prosecutors' offices. After all, corporate compliance is the brainchild of a world defined by bottom-lines and profit margins, while prosecutors' offices are, at least ostensibly, staffed by public interest-oriented attorneys motivated by a mandate to seek "justice."

And yet, in the most important ways, corporations and state prosecutors' offices are remarkably alike. Broadly speaking, the dual aims of compliance—(1) to deter law and rule breaking and (2) to generate and enforce norms—apply to both corporate and prosecutorial reformers. Like corporate compliance leaders, progressive reformers seek to curtail not only illegal conduct, but also "violations of office norms," as defined earlier in this note.[136] Put

130. *Id.*

131. *Id.* at 17.

132. *Id.* at 25.

133. *Id.*

134. ETHICS & COMPLIANCE CERTIFICATION INST., *supra* note 107, at 25 (emphasis added). **R**

135. *Id.* at 12.

136. *See infra* Section I, A.

simply, in both arenas, leaders nurse comparable ambitions: cultural change.[137]

Moreover, like business leaders, head prosecutors must grapple with the "principal-agent" problem.[138] CEOs rely on agents (i.e. employees) to accomplish office tasks and goals, just as head prosecutors rely on assistant district attorneys (ADAs) to handle individual prosecutions. The "problem" manifests when the agent's interests diverge from those held by the principal. In the absence of adequate controls or "buy in" on the part of the agent, the principal's interests—in corporate compliance or prosecutorial justice—will inevitably lose out.[139] At its core, it is this problem that the corporate compliance model seeks to combat.

Furthermore, the compliance model aims to forestall violations that are the product of both intentional and negligent conduct, which, as explained above, are both endemic to prosecutors' offices.

Finally, one of the chief goals of compliance programs is to improve the detection of wrongdoing—an objective shared with lead prosecutors.[140]

IV.
CASE STUDIES: MISCONDUCT IN THE OFFICES OF THREE PROGRESSIVE PROSECUTORS

The following case studies demonstrate how and where the newest cohort of progressive prosecutors could benefit from the lessons offered by corporate compliance.

A. Kimberly Foxx and the Charging and Pleading of Jussie Smollett

1. The Case of Jussie Smollett

On January 29, 2019, Jussie Smollett, a star of the television show *Empire*, reported that he had been attacked on the streets of

137. *See* Barkow, *supra* note 36, at 2105–06 (arguing that corporate compliance can be useful for reforming *federal* prosecutor's offices). R

138. *The Paradox of "Progressive Prosecution"*, *supra* note 9, at 760 ("[H]ead prosecutors cannot run every case (if they could, line prosecutors would not be necessary). Given this reality, there is significant potential for noncompliance from those on the lower rungs of the hierarchy due to a lack of buy-in to the goals of the head prosecutor."). R

139. *See generally* Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through The Principal-Agent Model*, 40 PUB. CONT. L.J. 63, 64-66 (2010) (explaining agency theory).

140. *See* Barkow, *supra* note 36, at 2105–06. R

Chicago.[141] Smollett, who is gay and Black, told police officers that he was walking home after a late-night meal when two unidentified assailants began yelling "racial and homophobic slurs" at him.[142] The attackers allegedly physically battered Smollett, covered him in an unknown chemical substance, and threw a noose around his neck, all while shouting "MAGA Country"—a reference to Donald Trump's presidential campaign slogan.[143]

The alleged assault sparked national interest and the Chicago police expended considerable resources to identify the perpetrators of the apparent hate crime.[144] In the weeks following the attack, however, leads generated by the police "shifted the trajectory of the investigation."[145] On February 20, 2019, the Cook County State's

141. *See* Sopan Deb, *Jussie Smollett, Star of 'Empire,' Attacked in What Police Call a Possible Hate Crime*, N.Y. TIMES (Jan. 29, 2019), https://www.nytimes.com/2019/01/29/arts/television/empire-jussie-smollett-attacked.html [https://perma.cc/NR4V-LFMM].

142. *See* Colin Dwyer & Laurel Wansley, *Police Say 'Empire' Actor Jussie Smollett Attacked In Possible Hate Crime*, NPR (Jan. 29, 2019), https://www.npr.org/2019/01/29/689758253/police-say-empire-actor-jussie-smollett-attacked-in-possible-hate-crime [https://perma.cc/EVF7-DQNN].

143. *See* Nader Issa & Luke Wilusz, *'Empire' Star Victim of Racist, Homophobic Attack in Streeterville, Police Say*, CHI. SUN-TIMES (Jan. 29, 2019), https://chicago.suntimes.com/news/jussie-smollett-rope-tied-around-neck-empire-star-racially-charged-homophobic-slurs-streeterville-attack/ [https://perma.cc/3LT2-PE9N]. MAGA is an abbreviation of Donald Trump's campaign slogan: Make American Great Again—a sentiment characterized as inherently racist by some. *See* Issac Bailey, *Why Trump's MAGA Hats Have Become a Potent Symbol of Racism*, CNN (Mar. 12, 2019), https://www.cnn.com/2019/01/21/opinions/maga-hat-has-become-a-potent-racist-symbol-bailey/index.html [https://perma.cc/2TNT-989B].

144. *See, e.g.*, Deb, *supra* note 141 (citing "tweets" of support from presidential candidates Cory Booker and Kamala Harris); Laura Bradley, *Ellen Page Tearfully Condemns Jussie Smollett Attack—And the Trump Administration*, VANITY FAIR (Feb. 1, 2019), https://www.vanityfair.com/hollywood/2019/02/ellen-page-jussie-smollett-colbert-late-show [https://perma.cc/34Q2-C2QM]; Katie Galioto, *Trump Condemns 'Horrible' Attack on Actor Jussie Smollett*, POLITICO (Jan. 31, 2019), https://www.politico.com/story/2019/01/31/trump-condemns-attack-jussie-smollett-1140398 [https://perma.cc/J9AD-3E3H]. $130,106.15 in overtime was paid to police investigators. Michael Tram, *Chicago to Sue Jussie Smollett for Costs of Investigation*, ASSOCIATED PRESS (Apr. 4, 2019), https://www.apnews.com/03bfce3e4ecf44b1bdc5849970da79bc [https://perma.cc/2FYQ-KZA8]. R

145. Sopan Deb, *Chicago Police Seeking to Interview Jussie Smollett Again After Questioning Two Brothers*, N.Y. TIMES (Feb. 16, 2019), https://www.nytimes.com/2019/02/16/arts/television/jussie-smollett-police-interview.html?rref=collection%2Fbyline%2Fsopandeb&action=click&contentCollection=undefined®ion=stream&module=inline&version=latest&contentPlacement=1&pgtype=collection [https://perma.cc/2X3L-BHJV]. Concurrently, the FBI was investigating whether Smollett had also sent himself a threatening, white powder filled letter, a week prior to the alleged assault. *See* BET Staff, *FBI And USPS Reportedly Still Investigating*

Attorney's Office (CCSAO) charged Smollett with disorderly conduct for filing a false police report.[146] On March 8, Smollett was charged with 16 counts of disorderly conduct for staging the hate crime hoax.[147]

But then, on March 26, in what the *New York Times* characterized as a "startling about-face," Joe Magats, the prosecutor heading the case, dropped every one of those 16 charges.[148] Magats asserted that this disposition was warranted in light of Smollett's community service and his agreement to relinquish his $10,000 bond.[149] Magats justified the decision by pointing to the office's prioritization of "violent crime and the drivers of violent crime."[150] Highlighting Smollett's lack of felony or violent criminal history, Magats stated that he "[didn't] see Jussie Smollett as a threat to public safety."[151]

Some, including the city's police chief and mayor, saw the decision to drop the charges as a miscarriage of justice.[152] Some saw it as a triumph.[153] Most were simply perplexed.[154]

The troubling tale *behind* the Smollett prosecution revealed itself at a much slower pace—dribbled out in media articles, FOIA

Who Sent the Letter to Jussie Smollett, BET (Feb. 22, 2019), https://www.bet.com/news/national/2019/02/22/fbi-and-usps-reportedly-still-investigating-who-sent-the-threate.html [https://perma.cc/7BVC-S8MH].

146. Andy Grimm & Sam Charles, *Jussie Smollett Charged with Felony Disorderly Conduct, Prosecutors Say*, CHI. SUN-TIMES (Feb. 20, 2019), https://chicago.suntimes.com/entertainment/empire-actor-jussie-smollett-suspect-criminal-investigation-chicago-police-department/[https://perma.cc/6BMD-TPD6].

147. Andy Grimm, *'Empire' Actor Jussie Smollett Indicted on 16 Counts of Disorderly Conduct*, CHI. SUN-TIMES (Mar. 8, 2019), https://chicago.suntimes.com/news/empire-actor-jussie-smollett-indicted-on-16-counts-disorderly-conduct/[https://perma.cc/6BMD-TPD6].

148. Julie Bosman & Sopan Deb, *Jussie Smollett's Charges are Dropped, Angering Mayor and Police*, N.Y. TIMES (Mar. 26. 2019), https://www.nytimes.com/2019/03/26/arts/television/jussie-smollett-charges-dropped.html?rref=collection%2Fbyline%2Fsopan-deb&module=inline [https://perma.cc/XBM6-QXB4].

149. *Id.*

150. Bosman & Deb, *supra* note 148. **R**

151. *Id.*

152. *See* Chicago Tribune Staff, *Read Mayor Emanuel, Chicago Top Cop's Comments About Jussie Smollett Charges Being Dropped*, CHI. TRIB. (Mar. 26, 2019), https://www.chicagotribune.com/news/local/breaking/ct-met-jussie-smollett-emanuel-johnson-transcript-20190326-story.html [https://perma.cc/8D2H-ZXK6] (noting that the Mayor and Police Chief called the dropped charges a "whitewash of justice").

153. *See Twitter Reacts to Prosecutor's Decision to Drop All Charges Against Jussie Smollett*, REVOLT TV (Mar. 26, 2019), https://revolt.tv/stories/2019/03/26/twitter-reacts-jussie-smollett-charges-dropped-0700ad9ef0 [https://perma.cc/96AG-AKK5] (aggregating Twitter comments on the case, including statements characterizing the dismissal as vindication of Smollett's innocence).

requests, and public statements made by departing employees. Records obtained by the *Chicago Sun Times* revealed that, in the days after the alleged attack, Kim Foxx, the State's Attorney, was put in touch with one of Smollett's family members, who expressed concerns that "police sources" were leaking information about the investigation and expressed hope that the "FBI would have a tighter lid on the information."[155] Though the Chicago Police Department disputes the account, Foxx allegedly endeavored to persuade Police Superintendent Eddie Johnson to turn the case over to the FBI.[156] The State's Attorney then informed Smollett's relative that she had spoken with the superintendent and that he was "going to make the ask [of the FBI]."[157] On February 19, 2019, the day before Smollett was charged with disorderly conduct, a CCSAO spokesperson announced that "Foxx had recused herself from the investigation."[158] The announcement was oblique, noting only that the recusal was intended to "address potential questions of impartiality based upon familiarity with potential witnesses in the case."[159] But on March 28, two days after the office dropped all of the charges against Smollett, the CCSAO walked back the recusal, asserting that: "[t]he State's Attorney did not *formally* recuse herself or the Office based on any actual conflict of interest."[160] According to an office spokeswoman, the term "recusal" was used in its "colloquial" rather than legal sense.[161] Finally, on April 16, it was revealed that Foxx had continued to communicate with the prosecutor overseeing Smollett's case even after the recusal had been made public, which included con-

154. *See, e.g.*, *id.* (aggregating Twitter comments on the case, including tweet by a Senior Writer for Rolling Stone, who stated "I just want to know what actually happened").

155. Andy Grimm, *Records: Former Michelle Obama Aide, Smollett Relative Reached out to Kim Foxx*, CHI. SUN-TIMES (Mar. 13, 2019), https://chicago.suntimes.com/2019/3/13/18404894/records-former-michelle-obama-aide-smollett-relative-reached-out-to-kim-foxx [https://perma.cc/HFS7-T8AL].

156. *See id.*

157. *Id.*

158. Sam Charles, *CPD: Brothers Previously Suspected in Smollett Case Meet with Cops, Prosecutors*, CHI. SUN-TIMES (Feb. 19, 2019), https://chicago.suntimes.com/entertainment/jussie-smollett-empire-actor-attacked-hate-crime-streeterville/ [https://perma.cc/SQV4-LTLG].

159. *Id.*

160. Katelyn Caralle, *Embattled Chicago Prosecutor Kimberly Foxx Never Legally Recused Herself from Jussie Smollett Case*, WASH. EXAM'R (Mar. 28, 2019) (emphasis added), https://www.washingtonexaminer.com/news/embattled-chicago-prosecutor-kimberly-foxx-never-legally-recused-herself-from-jussie-smollett-case [https://perma.cc/5V2S-BV8U].

161. *Id.*

veying her concerns about the charging decision to Magats shortly after the 16-count indictment was announced.[162]

These behind-the-scenes revelations would prompt condemnation of a different kind, as public figures and private citizens questioned Foxx's integrity. Local police chiefs and law enforcement union leaders called for Foxx's resignation,[163] and two separate private citizens, a former appellate judge and a former prosecutor,[164] filed petitions requesting that a special prosecutor reconsider the case.[165] A state court judge eventually acquiesced and the appointed special prosecutor, Dan K. Webb, re-indicted Smollett in February 2020.[166]

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162. Shannon Heffernan & Miles Bryan, *State's Attorney Closely Followed Smollett Case After Recusal, Text Messages Show*, NAT'L PUB. RADIO (Apr. 17, 2019), https://www.npr.org/2019/04/17/714187032/states-attorney-closely-followed-smollett-case-after-recusal-text-messages-show [https://perma.cc/D6W5-FVXR]. It was also revealed that Foxx was involved in other aspects of the case. *Newly released texts, emails show behind-the-scenes of Smollett fallout*, FOX5 (Apr. 17, 2019), https://www.fox5ny.com/news/newly-released-texts-emails-show-behind-the-scenes-of-smollett-fallout [https://perma.cc/AU5A-GKV5] (noting that, after the recusal, Magats informed Foxx that he had given her number to Michael Avenatti, a celebrity lawyer coming to the office in his capacity as a representative of the brothers who had allegedly helped Smollett stage the attack).

163. Zachary Halaschak, *Police Chiefs Call on Chicago Prosecutor to Resign Amid Smollett Controversy*, WASH. EXAM'R (Apr. 4, 2019), https://www.washingtonexaminer.com/news/police-chiefs-call-on-prosecutor-kim-foxx-to-resign-amid-jussie-smollett-controversy [perma.cc/3G4B-7H2L] (quoting Chicago FOP president as follows: "Ms. Foxx needs to resign and she should do it quickly . . . . This is not just about Jussie Smollett. This is about many cases in the Cook County system that have gone unprosecuted or having charges reduced").

164. Eric Zorn, *Citizen Sheila O'Brien Shows That You, Too, Can Demand a Special Prosecutor*, CHI. TRIB. (May 3, 2019), https://www.chicagotribune.com/columns/eric-zorn/ct-perspec-zorn-jussie-smollett-kim-foxx-sheila-obrien-trump-impeachment-20190502-story.html [https://perma.cc/RC5Y-EQ3Z] (explaining that O'Brien was acting as a private citizen and that any private citizen in Chicago can petition for a special prosecutor).

165. *See* Megan Crepeau, *Second Call for Special Prosecutor to Investigate Kim Foxx's Handling of Jussie Smollett Investigation*, CHI. TRIB. (Apr. 5, 2019), https://www.chicagotribune.com/news/local/breaking/ct-met-kim-foxx-jussie-smollett-special-prosecutor-20190405-story.html [https://perma.cc/XFQ2-FP6Y]; Megan Crepeau, *One of Two Petitions Withdrawn to Appoint Special Prosecutor to Look Into Dismissal of Jussie Smollett Charges*, CHI. TRIB. (Apr. 29. 2019), https://www.chicagotribune.com/news/local/breaking/ct-met-jussie-smollett-kim-foxx-special-prosecutor-20190429-story.html [https://perma.cc/4EX9-6NG2].

166. *See* Gabrielle Fonrouge, *Jussie Smollett Could Be Charged Again, Says Chicago Judge*, PAGE SIX (June 21, 2019), https://pagesix.com/2019/06/21/jussie-smollett-could-be-charged-again-says-chicago-judge/?_ga=2.228429397.970304192.1561030512-80825762.1554746509 [https://perma.cc/W9W8-D6LC] (reporting on the appointment of a special prosecutor in

The scandal eventually impelled two official investigations into the CCSAO's handling of the case, one by the Cook County Inspector General, requested by Foxx herself,[167] and the second by the aforementioned special prosecutor.[168]

2. Scrutinizing the Actions of State's Attorney Foxx: A Compliance-Based Perspective

The Smollett saga suggests that the CCSAO failed to institute effective compliance measures to govern decisions about (1) if and when to recuse the head prosecutor or the office writ large, (2) how to charge non-violent offenders, and (3) when and how to offer plea agreements and outright dismissals.

a. The Decision to Recuse

First, there is the matter of Foxx's recusal. Once Smollett became a suspect, the communications between Foxx and a member of Smollett's family seem like valid grounds for recusal.[169] It was also procedurally feasible. Under Illinois law, a state's attorney can "file a petition to recuse himself or herself from a cause or proceeding for any . . . reason he or she deems appropriate."[170] If the peti-

the case); Julia Jacobs, *Jussie Smollett Indicted Again in Attack That Police Called a Hoax*, N.Y. TIMES (Feb. 11, 2020), https://www.nytimes.com/2020/02/11/arts/television/jussie-smollett-indicted-chicago.html [https://perma.cc/PN4L-TSVC] (reporting that a grand jury had indicted Smollett for disorderly conduct and filing false police reports).

167. Gregory Pratt, *Cook County Inspector General to Review Prosecutors' Handling of Jussie Smollett Case*, CHI. TRIB. (Apr. 13, 2019), https://www.chicagotribune.com/news/local/politics/ct-met-kim-foxx-jussie-smollett-20190412-story.html [https://perma.cc/29TH-D4JY] (announcing inspector general's plan to investigate).

168. The Inspector General's investigation was ongoing as of August 1, 2020. The Special Prosecutor's report was released on August 17, 2020. *See* Information Release, Special Prosecutor Dan K. Webb of Winston & Strawn LLP Concludes Investigation into Cook County State's Attorney's Office and Chicago Police Department's Handling of the Jussie Smollett Case (Aug. 17, 2020), https://news.wttw.com/sites/default/files/article/file-attachments/Winston%20and%20Strawn%208.17.2020%20Information%20Release%20re%20Special%20Prosecution.pdf [https://perma.cc/3AML-Q8D6] [hereinafter Webb Announcement].

169. *See* Grimm, *supra* note 155 (opinion of defense lawyer and Chicago-Kent College of Law professor Richard Kling as follows: "I don't think it is odd or rare for prosecutors to talk to police, or for (Foxx) herself to ask what is going on in a particular case . . . . And, once she realized she had talked to a family member who may have given her information about a pending case, recusing herself was exactly the right thing to do"). **R**

170. Megan Crepeau & Jason Meisner, *Kim Foxx Defends Jussie Smollett Decision as Office Says she 'did not Formally Recuse Herself*,' CHI. TRIB. (Mar. 28, 2019), https://www.chicagotribune.com/news/local/breaking/ct-met-jussie-smollett-kim-foxx-interview-20190327-story.html [https://perma.cc/3JMM-AZAU].

tion is granted, the law calls for the judge to appoint a special prosecutor either through the attorney general's office, another county prosecutor's office, or a private attorney.[171] But Foxx never filed such a petition.[172]

When it was made, Foxx's walk-back of her recusal appeared to be a response to calls for a special prosecutor to take over the case. If Foxx had never actually recused herself, she didn't "*have* to seek the appointment of a special prosecutor."[173] But after her continued involvement with the case was revealed, another explanation seemed just as probable: the walk-back might have been a preemptive effort to deflect criticism for Foxx's patent failure to honor the recusal.[174] In light of these revelations, the March 28, 2019 announcement of non-recusal begins to look like a preemptive justification for Foxx's failure to adhere to her public commitment to recuse herself.

The entire affair reveals an office without a formal, written recusal policy.[175] The CCSAO, lacking a game plan for real or perceived conflicts of interest, was reduced to public waffling on the meaning of the word "recusal."

Written policies form the keystone of any robust corporate compliance program.[176] Formally outlining rules forces drafters to more carefully consider what the rules should be and makes it far

171. *Id.*

172. *Id.*

173. Caralle, s*upra* note 160 (emphasis added). R

174. Foxx's failure to honor the recusal was manifest in her post-recusal interactions with Magats and continued interactions with counsel for involved parties. *See* Heffernan & Bryan, *supra* note 162 (reporting that shortly after the recusal, Foxx conveyed her concerns about the charging decision to Magats); Crepeau, *supra* note 162 (noting that, after the recusal, Magats informed Foxx that he had given her number to Michael Avenatti, a celebrity lawyer coming to the office in his capacity as a representative of the brothers who had allegedly helped Smollett stage the attack). R R

175. The fact that Alan Spellberg conducted a review of applicable laws in mid-February 2019 strongly suggests the office lacked a formal policy before that time. *See* Ben Bradley, *Top Foxx Official Said Recusal Wasn't Right*, WGN TV (Apr. 17, 2019), https://wgntv.com/2019/04/17/top-foxx-official-said-recusal-wasnt-right/ [https://perma.cc/P8AS-JLP4]. After all, a written, pre-existing policy would have obviated the need for research on the mechanics of recusal.

176. *See Evaluation of Corporate Compliance Programs*, *supra* note 109, at 4 (stating that "as a threshold matter, prosecutors should examine whether the company has a code of conduct"). Written codes of conduct have long been seen as the foundation on which corporate compliance programs are built. *See generally* Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559 (1990) (describing the prevalence and usefulness of written codes of conduct). R

more likely that the rules will be followed in the face of on-the-job pressure.[177] In the corporate space, written *conflict-of-interest* policies are—"as one might expect—critically important."[178] A robust corporate policy "detail[s] how employees can disclose potential conflicts of interest, explain[s] the process for reviewing and ruling on reported relationships, and set[s] clear ramifications for employees who fail to report a conflict."[179] That is, the best policies explain the mechanisms for reporting and "recusal," rather than merely defining what constitutes a conflict. Admittedly, that policies and procedures should be made manifest in writing may seem like a facile or banal point. And yet, this case illustrates what results in the absence of written guidance: namely unseemly and arguably unethical decision-making.[180]

However, even the best outlined compliance program will fail in the face of C-suite contempt, and, worryingly, Foxx appears to have been repeatedly contemptuous of recommendations offered by her Chief Ethics Officer, April Perry.

Foxx's text messages reveal that she first decided to recuse herself only at Perry's urging.[181] Perry may have recommended recusal in the wake of Foxx's communications with Smollet's family or because of (false) rumors that Foxx was related to Smollett.[182] Whatever the case, Foxx—who privately characterized the recusal

177. Heather G. White, *A Little Help From Our Friends: Moving Beyond Enforcement To Improve State And Local Government Compliance With Federal Securities Laws*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 129, 187 (2019) ("Formalized, written rules tend to be more effective than informal, unwritten practices because the rules are more carefully considered during the process of writing them, and because they are more likely to be followed.").

178. Jeff Kaplan & Rebecca Walker, *Assessing Conflict of Interest Compliance Programs*, CORP. COMPLIANCE INSIGHTS (June 3, 2020), https://www.corporatecompli anceinsights.com/assessing-conflict-interest-compliance-programs/ [https:// perma.cc/KL63-LFSH].

179. ROOTING OUT CONFLICTS OF INTEREST, COMPLIANCE WEEK 7, https:// www.complianceweek.com/download?ac=6005 [https://perma.cc/5LVY-4JNU].

180. *See* Webb Announcement, *supra* note 168, at 5 (determining that "[t]he CCSAO engaged in a substantial abuse of discretion and breached its obligations of honesty and transparency by making false and/or misleading statements to the public regarding State's Attorney Foxx's recusal"). R

181. Madeline Holcombe & Ray Sanchez, *Smollett Case Prosecutor Called Pressure to Recuse Herself 'Racist,' Documents Show*, CNN (June 1, 2019), https:// www.cnn.com/2019/06/01/us/kim-foxx-smollett-recusal-texts/index.html [https://perma.cc/932F-HRYC] (quoting a text message in which Foxx stated that "April told me I had to do it" [i.e. to recuse herself]).

182. *See id.* (quoting text message in which Foxx asserts that this was the reason for Perry's recusal recommendation). *See also supra* Section IV.A.1 (discussing communications between Foxx and Tchen).

recommendation as "dumb"[183]—seems to have discounted a fundamental tenant of compliance best practice: one should avoid not only actual impropriety, but also the *appearance* of impropriety.[184]

Foxx's low regard for Perry's recommendation is evident in her decision not to seek formal recusal or the appointment of a special prosecutor. Email correspondence records reveal that Alan Spellberg, the supervisor of the CCSAO Criminal Appeals Division, conducted a review of the applicable case law and concluded that "[w]hile the State's Attorney has complete discretion to recuse herself from any matter, she cannot simply direct someone (even the First Assistant) to act in her stead."[185] That is, Magats could not simply step in to handle the case.[186] Shortly thereafter, Perry sent Magats a draft motion and order requesting court approval of the recusal and the appointment of a special prosecutor.[187] According to Perry, Foxx, apparently without consulting Perry, "determined that the motion and order should not be filed."[188] Perry allegedly learned of Foxx's decision from Magats, rather than from Foxx her-

183. Holcombe & Sanchez, *supra* note 181 (quoting text messages sent by Foxx to a colleague as follows: "I told [Perry] that wasn't true. She said it was pervasive among CPD and that I should recuse. I thought it was dumb but acquiesced. It's actually just racist.") R

184. *See, e.g.*, Michael W. Peregrine & Bernadette M. Broccolo, *"Independence" and the Nonprofit Board: A General Counsel's Guide*, 39 J. HEALTH L. 497, 498 (2006) (discussing the importance of maintaining the independence of a governing board in "both fact and appearance"); Philip A. Wellner, Note, *Effective Compliance Programs and Corporate Criminal Prosecutions*, 27 CARDOZO L. REV. 497, 502 (2005) (stating that, "in the wake of several ethical missteps," Boeing issued new compliance guidance that recommended "prohibiting new employees who had recently worked for Boeing's competitors from working in positions that give the *appearance* of impropriety") (emphasis added).

185. Bradley, *supra* note 175. R

186. Foxx later asserted that she never received this email from Alan Spellberg. *See id.* However, Perry asserted that she was following Spellberg's advice when she recommended a formal court recusal and the appointment of a special prosecutor. *See* Robert Chiarito & Julia Jacobs, *Jussie Smollett Case to Be Investigated by Special Prosecutor*, N.Y. TIMES (June 21, 2019), https://www.nytimes.com/2019/06/21/arts/television/jussie-smollett-special-prosecutor.html [https://perma.cc/G5R3-TDXC] (discussing the actions in question).

187. Ben Bradley, *Mysterious 'Special Prosecutor Order' Email in Smollett Case, Records Show*, WGN TV (Apr. 19, 2019), https://wgntv.com/2019/04/19/mysterious-special-prosecutor-order-email-in-smollett-case-records-show/ [https://perma.cc/H6TZ-Q4GS] ("The subject line of one email sent February 20 at 4:04pm read: 'Magats recusal petition.' A second email was sent from Perry to Magats six minutes later labeled: 'Magats special prosecutor order.'").

188. Gabrielle Fonrouge, *Ex-ethics Officer Puts Kim Foxx on Blast Over Smollett Case*, PAGE SIX (June 21, 2019), https://pagesix.com/2019/06/21/ex-ethics-officer-puts-kim-foxx-on-blast-over-smollett-case/[https://perma.cc/2W6M-6YFS].

self.[189] Soon after, Foxx's Chief Ethics Officer submitted a letter of resignation.[190] While the reasons for Perry's departure were never made public, Foxx's attempts to blame Perry for the botched recusal and Perry's public refutation of the accusation suggest this conflict played a role.[191]

All of this was avoidable. Corporations are increasingly cognizant of the risks posed by recalcitrant CEOs.[192] Recent business scandals, such as the Wells Fargo fraudulent accounts scandal, during which bank employees opened thousands of fraudulent accounts to meet sales targets, have reemphasized the specific dangers posed by leaders who cloister themselves from compliance warnings.[193] The DOJ, for its part, has stressed that the compliance function should have "sufficient autonomy from management."[194] Chief Compliance Officers (CCOs) have responded to the threat by, among other things, regularly scheduling "alone time" with in-

189. *Id.* (quoting Perry, who asserted that "the First Assistant advised [her] that State's Attorney Foxx determined that the motion and order should not be filed").

190. *See* Gabrielle Fonrouge, *Kim Foxx Deputies Resigning After Jussie Smollett Scandal*, PAGE SIX (Apr. 18, 2019), https://pagesix.com/2019/04/18/kim-foxx-deputies-resigning-after-jussie-smollett-scandal/?_ga=2.30788215.970304192.1561030512-80825762.1554746509 [https://perma.cc/69JF-PWAD] (reporting that Perry handed in her resignation letter on April 15, 2019).

191. Chiarito & Jacobs, *supra* note 186 ("Ms. Foxx said in a statement on Friday that she disagreed with the judge's conclusion that a special prosecutor was required. She said that she had followed the advice of her chief ethics officer, April Perry, when deciding to recuse herself. That prompted a rebuke from Ms. Perry, who left the office soon after the charges were dropped."). **R**

192. *See, e.g.*, Michael Volkov, *When Your CEO Just Does Not Get It*, VOLKOV: CORRUPTION, CRIME & COMPLIANCE (June 21, 2018), https://blog.volkovlaw.com/2018/06/when-your-ceo-just-does-not-get-it/ [https://perma.cc/NU88-CQKR] (discussing a CCO's responsibility to educate the CEO on compliance matters); Kimberly Boatwright, *5 Ways to Convince Management that Compliance is Important*, TRUPOINT PARTNERS (Nov. 15, 2017), https://www.trupointpartners.com/blog/how-to-communicate-with-management-about-compliance [https://perma.cc/AH47-BZEW] (suggesting strategies for securing "buy in" from company CEOs and senior management).

193. Carrie Tolstedt, the head of Wells Fargo's community banking division, habitually "maintain[ed] 'an "inner circle" of staff that supported her, reinforced her views, and protected her.'" Brian Tayan, *The Wells Fargo Cross-Selling Scandal*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 6, 2019), https://corpgov.law.harvard.edu/2019/02/06/the-wells-fargo-cross-selling-scandal-2/ [https://perma.cc/ZZJ8-23WY]. Perhaps relatedly, she also refused to escalate sales practices concerns to the board of directors. *See id.*

194. U.S. DEP'T OF JUST., *supra* note 109, at 11. **R**

dependent members of a company's audit committee or board of directors.[195]

But at present, district attorneys' offices lack independent boards that could serve a similar backstop function. The risks presented by unidirectional reporting to a district attorney with ultimate final authority may be mitigated in other ways, however. For instance, progressive prosecutors might consent to multi-directional reporting lines for their ethics officers. In the event the DA ignores important recommendations, office policy might give the officer an opportunity to discuss the matter with a specific executive staff member or require an "all executives" meeting—thereby giving the ethics officer a clear way to escalate careful review of important ethics issues. Another way to ensure that ethics officers operate with "adequate authority and stature" in the office is to ensure that important decisions—like Foxx's recusal—are decided after an in-person meeting.[196] Face-to-face meetings facilitate discussion, allowing compliance officers to more clearly stress the severity of foreseeable consequences and avoid miscommunications that could otherwise result. Such meetings could head off what happened in Chicago—namely, Perry's learning of Foxx's recusal decision only second hand.

Above all, "leaders must not transmit the idea that compliance is a 'necessary evil.'"[197] Characterizations of compliance recommendations as "dumb" increases the odds that employees will view compliance obligations as merely perfunctory and "for show."[198] If

195. GEOFFREY PARSONS MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE 148 (3d ed. 2020). *See also* ETHICS & COMPLIANCE CERTIFICATION INST., *supra* note 107, at 19 (finding that high quality compliance programs ensure ethics and compliance officers have "regular access to the board and/or the audit committee"). **R**

196. U.S. DEP'T OF JUST., *supra* note 109, at 11. **R**

197. Thomas Sehested, *Creating a Culture of Compliance: Why All Successful Businesses Must Do This and Where to Begin*, FORBES (Sept. 17, 2018), https://www.forbes.com/sites/forbestechcouncil/2018/09/17/creating-a-culture-of-compliance-why-all-successful-businesses-must-do-this-and-where-to-begin/#4860a8035050 [https://perma.cc/XE9V-U6TJ].

198. Stephen M. Culter, Speech by SEC Staff: Second Annual General Counsel Roundtable: Tone at the Top: Getting it Right (Dec. 3, 2004), https://www.sec.gov/news/speech/spch120304smc.htm [https://perma.cc/5SJF-HEVY] (admonishing corporate leader to refrain from "double talk": "You can't say to the broad audience that ethics, integrity and honesty are important, but ignore them (or worse yet, joke about them or dismiss them) when you're in a social setting, or 'off line,' or off the record, or when you're talking to smaller groups. At Enron, we know that senior managers conducted a skit in which one of the themes was deceiving the SEC. That probably didn't help create a culture of respect for the law.").

compliance efforts are to be successful, the CEO, "as the corporation's chief compliance officer in effect if not in title," must "personally lead compliance."[199] That leadership was absent on the issue of recusal.[200]

b. The Decision to Charge

Separate and distinct from the subject of recusal, there is the matter of how exactly Magats charged Smollett. A 16-count indictment for what amounts to the filing of a false police report—essentially a victimless non-violent crime—suggests that Smollett was "overcharged." As such, the indictment is out of step with the progressive prosecution movement, which views overcharging as a form of "coercion" intended to pressure defendants into a plea deal.[201] Vitally, it was also out of step with Foxx's own preferred charging practices.

Indeed, this apprehension was at the crux of the post-recusal message Foxx sent to Magats: "Sooo. . . I am recused, but when people accuse us of overcharging cases. . . 16 counts on a class 4 [felony] becomes exhibit A."[202] Magats replied that he could "see where that can be seen as excessive."[203] Foxx then compared Smollett's case to that of R. Kelly, the musician facing sex abuse charges: "Pedophile with 4 victims 10 counts. Washed up celeb who lied to cops, 16. On a case eligible for deferred prosecution I think it's indicative of something we should be looking at generally."[204] In his response, Magats wrote that he would meet with other office attor-

199. Ben W. Heineman, Jr., *The Chief Compliance Officer Debate: Focus on Function Not Form*, AM. BAR ASS'N (July 20, 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/07/06_heineman/ [https://perma.cc/2XGQ-YRLD].

200. Without adopting the language of compliance, Cook County judge Michael Toomin—who assigned a special prosecutor to review the Smollett matter—recognized the absence of effective leadership here, opining that "the ship of the State ventured from its protected harbor without the guiding hand of its captain. There was no master on the bridge to guide the ship as it floundered through uncharted waters. And it ultimately lost its bearings." Fonrouge, *supra* note 166. **R**

201. *See, e.g.*, Ewing, *supra* note 29 (explaining Larry Krasner characterized the practice of overcharging as "coercive"); Jason Rosenberg, *Can a Prosecutor Ever Truly Be Progressive? Ferguson May Be the Ultimate Test Case*, MOTHER JONES (Apr. 17, 2019), https://www.motherjones.com/crime-justice/2019/04/progressive-prosecutors-ferguson-wesley-bell-kamala-harris-kim-gardener/ [https://perma.cc/U2TF-P6KS] (reporting that on his first day in office, progressive prosecutor Wesley Bill instructed his staff to stop "overcharging" defendants). **R**

202. Heffernan & Bryan, *supra* note 162. **R**

203. *Id.*

204. *Id.*

neys and "take a hard look at how we charge the cases and get it to something that covers what needs to be covered without being excessive and ultimately pointless."[205]

As a very public deviation from Foxx's preferred progressive policy, the indictment falls into the "discretionary" bucket of misconduct defined in Part I of this note. If progressive prosecutors are to succeed in their mission, they must combat departures from the spirit, as well as the letter, of their reform. It is no surprise then, that Foxx felt compelled to reach out to Magats to "discuss reviewing office policies to assure consistencies in our charging and our use of appropriate charging authority . . . ."[206] However, the very fact that Magats, when left to his own devices, included 16 counts in Smollett's indictment indicates that Foxx's progressive mission is not deeply ingrained in office practice.

Here again, the office appears to lack sufficient formalized guidance on how to charge cases. The pertinent legal industry ethics rule—namely Rule 3.8 from the Model Rules of Professional Conduct and its admonition that prosecutors bring only those charges that are supported by probable cause—is "inadequate to address overcharging because probable cause is a minimal threshold that is well below what is required to convict."[207] Something more refined is required.

Compliance experts warn that employees need granular guidance because nobody can be expected to remember every office initiative or law at every given moment.[208] Guidance need not take the form of brow beating. In the corporate space, guidance increasingly looks like "behavioral ethics nudging."[209] Nudges, or "small design elements that structure the context in which choice is made," may take the form of "reminders, warnings, prompts, anchors, frames, and default rules."[210] One particular sort of framing device could have worked well in Foxx's case: a form that prompts line prosecutors to justify each charge, both with a higher evidentiary bar (beyond a reasonable doubt) and vis-à-vis the office's progressive vision.

205. *Id.*

206. *Id.*

207. Caldwell, *supra* note 80, at 63. **R**

208. *See* Haugh, *supra* note 60, at 192–93 (discussing the usefulness of a simple checklist to promote compliance when "temptation is highest"). **R**

209. Todd Haugh, *Nudging Corporate Compliance*, 54 AM. BUS. L.J. 683, 710 (2017) ("Companies with cutting edge corporate compliance programs are currently, and increasingly, instituting behavioral ethics nudging in an attempt to prevent employee wrongdoing.").

210. Haugh, *supra* note 209, at 683, 690. **R**

Formal guidance can also take shape through training exercises. Compliance officers know that "[t]o ensure unethical employee decision-making is properly targeted, companies 'need to frame [their] training around . . . specific, risky job tasks'"[211]—here, the ubiquitous and perpetually tricky task of charging out an indictment. Moreover, *all* staff—even and indeed especially senior staff such as Magats—should be required to attend relevant trainings because the absence of top tier leadership from compliance trainings is a "sure way to trivialize the workshops."[212] Ultimately, a properly instituted compliance program is one designed to produce "acceptance and identification" among staff members, such that "people act in role-appropriate ways simply because they experience such roles as consistent with their own identities."[213] If the program is successful, the CEO, CCO, or district attorney will not need to send the kinds of text messages that Foxx sent to Magats.

The indictment is even more concerning in light of the fact that Magats is the chief of CCSAO's Criminal Prosecutions Bureau[214]—that is, the man with final say over most of the charging decisions made by the office.[215] This implies that Foxx failed to generate genuine adoption of her progressive policies among the executive-level staff. Behavioral ethics—"the study of how individuals make ethical decisions and judge the ethical decisions of others"—suggests that "[c]ompliance efforts should target those individuals within the company whose unethical decision-making pose the greatest risk" of influencing others.[216] Magats, as a

211. Haugh, *supra* note 60, at 192. **R**

212. J.D. Wallace, *Ethics in Training Methods*, *in* BUSINESS AND CORPORATE INTEGRITY: SUSTAINING ORGANIZATIONAL COMPLIANCE, ETHICS, AND TRUST 118, 130 (Robert C. Chandler ed., 2014) (quoting an Executive Leadership Coach).

213. MILLER, *supra* note 195, at 197. **R**

214. *See* David Thomas, *Foxx's Team Takes Shape with Hires*, CHI. DAILY L. BULL. (Jan. 24, 2017), https://www.chicagolawbulletin.com/archives/2017/01/24/kim-foxx-civil-bureau-1-24-17 [https://perma.cc/8JC7-8TNF] (reporting that Foxx had promoted Magats to the head of the Criminal Prosecutions Bureau).

215. *See* Criminal Prosecutions Bureau, Cook County State's Attorney, https://www.cookcountystatesattorney.org/criminal-prosecutions-bureau [https://perma.cc/H9ZX-7FLV] (last visited Sept. 24, 2020) (stating that the bureau is the CCSAO's largest and that its prosecutors handle over 30,000 felonies and several hundred thousand misdemeanors every year).

216. Haugh, *supra* note 60, at 137. Haugh argues that, rather than merely focusing on promoting ethical culture generally, companies should identify employees who, by dint of their "job task, leadership role, propensity to rationalize wrongdoing, and social and organizational networks" disproportionately impact that culture. *See id.* at 137. For instance, Haugh argues that regional managers were the key players in creating conditions conducive to fraudulent accounts generation at Wells Fargo. *See id.* at 176–79. **R**

respected, career professional with direct managerial oversight of a significant swath of CCSAO's operations, is exactly such a person.[217]

c. The Decision to Dismiss

Finally, there is a concern with the disposition of Smollett's case. The office had apparently agreed to drop all of the charges in exchange for "community service" and an agreement that the television star forfeit his $10,000 bond payment.[218]

Foxx and her staff may well have thought that the office would be hailed for "not wasting the time of judges, jurors and prosecutors on a minor, nearly pathetic offense allegedly committed by a B-list star desperate for attention . . . ."[219] After all, diversion—i.e. the pursuit of alternatives to conviction and incarceration—is a mainstay of the progressive prosecution movement,[220] and "[v]ery few people thought Smollett should serve time for [the alleged offense of hiring acquaintances to rough him up and then lying about it]. Cutting a deal to let him walk would illustrate how measured and fair [Foxx was]."[221]

Unfortunately, the mechanics of disposition here—the particulars of Smollett's "diversion" deal and how it came about—are cause for concern. As former appellate judge Sheila O'Brien stated, the case resolution created "an appearance of impropriety, a perception that justice was not served here, that Mr. Smollett received special treatment."[222] Foxx blamed the public confusion on the fact that most people "don't understand the intricacies of the justice

217. Following Haugh's insights, *see* Haugh, *supra* note 60, at 137, it was not Magats position in the highest levels of the office that made his adherence to office positions essential to cultural reform at CCSAO. That is, this wasn't simply a matter of "tone at the top." *Id.* Instead, it was his years of experience *in* the office—and the status in the organization's social network this tenure conferred—as well as his role in directly overseeing office prosecutions, that mattered. **R**

218. *See* Bosman & Deb, *supra* note 148. **R**

219. Eric Zorn, *Since Kim Foxx Won't Tell You What Really Happened in the Jussie Smollett Case, Let Me Try*, CHI. TRIB. (Feb. 12, 2020), https://www.chicagotribune.com/columns/eric-zorn/ct-column-jussie-smollett-dan-webb-kim-foxx-james-comey-zorn-20200212-d4zak6p4urgwnelbdcdauhto5m-story.html [https://perma.cc/7MHB-ZH6W].

220. *See The Paradox of "Progressive Prosecution"*, *supra* note 9, at 753–54 (describing diversion as an essential tenant of the movement). *See also* Gonzalez, *supra* note 4, at 14–17 (aiming to "make jail the 'alternative'" in Brooklyn). **R** **R**

221. Zorn, *supra* note 219. **R**

222. Megan Crepeau, *Kim Foxx Subpoenaed to Appear at Hearing on Appointment of Special Prosecutor in Jussie Smollett Case*, CHI. TRIB. (Apr. 27, 2019), https://www.chicagotribune.com/news/local/breaking/ct-met-jussie-smollett-kim-foxx-special-prosecutor-20190426-story.html [https://perma.cc/KJ44-ZYH7].

system . . . don't understand alternative prosecution or diversion or alternate outcomes outside of prison or lengthy probation . . . ."[223] She asserted that the disposition here was not so different from other class 4 felonies the office had handled.[224]

But while it may be true that the public is not well versed in the finer mechanics of diversion, the trouble is that Smollett's case does not look like other diversions or dismissals handled by the office. Smollett was not formally required to participate in a court-ordered program, his progress in any community service would not be tracked, and no conditions for dropping the charges were set.[225]

The special prosecutor Dan K. Webb agreed that Smollett's case disposition did not conform with typical CCSAO case outcomes. In a statement accompanying his decision to indict Smollett, Webb asserted that further prosecution of Smollett was "in the interests of justice" precisely because Smollett's case disposition was out of sync with the general practices of the office.[226] Vitally, Webb found that Smollett was not required to participate in the "CCSAO Deferred Prosecution Program [DPP]," even though he was eligible.[227] The special prosecutor eventually concluded that "[t]he terms of Mr. Smollett's resolution do not track the requirements of the DPP."[228]

Moreover, according to Webb's statement, the CCSAO was unable to provide "documentary evidence" that the office had resolved similar cases in a like manner.[229] Webb found this lack of

223. *WBEZ News: Prosecutor Kim Foxx Defends Jussie Smollett Decision In WBEZ Interview*, WBEZ (Mar. 27, 2019), https://www.wbez.org/shows/wbez-news/prosecutor-kim-foxx-defends-jussie-smollett-decision-in-wbez-interview/ddc80843-d6ee-4c25-a635-02ad49c325e6 [https://perma.cc/KR9J-9Y7U].

224. *Id.*

225. Janell Ross, *Other Cases are Dismissed in Chicago, But Not Like Jussie Smollett's Was*, NBC (Mar. 29, 2019), https://www.nbcnews.com/news/nbcblk/other-cases-are-dismissed-chicago-not-jussie-smollett-s-was-n988591 [https://perma.cc/ZD22-VVTH].

226. Press Release, Winston & Strawn LLP, Special Prosecutor Dan K. Webb of Winston & Strawn LLP Announces New Criminal Charges Against Jussie Smollett (Feb. 11, 2020), https://www.prnewswire.com/news-releases/special-prosecutor-dan-k-webb-of-winston—strawn-llp-announces-new-criminal-charges-against-jussie-smollett-301003303.html [https://perma.cc/BD8Y-9HZN][hereinafter Webb Statement].

227. Webb Statement, *supra* note 226. This latter point was not well publicized at the time of the case disposition, but was eventually revealed by the special prosecutor appointed to review the case. **R**

228. Webb Announcement, *supra* note 168, at 4. **R**

229. *See* Webb Statement, *supra* note 226 (noting that the special prosecutor sought to obtain pertinent evidence, but received none). *See also* Webb Announce- **R**

evidence particularly troubling because the CCSAO had publicly justified the Smollett disposition by asserting that the case was resolved "under the same criteria that would be available for any defendant with similar circumstances."[230] In the end, the issue was not one of the public's misunderstanding, but of internal inconsistency. Indeed, Webb ultimately found that "CCSAO decision-makers on the Initial Smollett Case have significantly and meaningfully divergent explanations for how the resolution was reached."[231] If the office had formalized mechanisms for deciding who qualifies for diversion and processes for ensuring compliance with existing diversion policies, much of Foxx's scandal could have been avoided.

Ultimately, if the "progressive" outcome here was diversion for Smollett, then Foxx's compliance failures had the perverse effect of making it more likely that Smollett would face jail time for his non-violent crime. The lack of firmly established compliance-based procedures drove staff to leapfrog to the intended result (diversion for a non-violent offender), thereby creating an appearance of impropriety and assuring that outside—and likely less progressive—forces would step in to pursue charges against Smollett.

* * *

In the wake of the Smollett scandal, Foxx asserted that she "was elected to bring criminal justice reform and that includes intentionality, consistency, and discretion" and that she would "continue to uphold these guiding principles."[232] However, the prosecution of Jussie Smollett suggests that a lack of formalized compliance-based procedures could continue to hamper her efforts to transform the office. To be sure, the media spectacle surrounding the case was atypical and may partially explain the office's chaotic decision-making. But this is precisely the point of compliance programs: they provide guidance amidst the chaos of the unexpected.

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ment, *supra* note 168, at 4 ("CCSAO did not rely upon any specific similar CCSAO cases when resolving the Initial Smollett Case."). R

230. Webb Statement, *supra* note 226. Webb would go on to call the CCSAO's statement's so "misleading" as to constitute a breach of the office's obligations of "honesty and transparency." Webb Announcement, *supra* note 168, at 4–5. R R

231. Webb Announcement, *supra* note 168, at 4. R

232. Heffernan & Bryan, *supra* note 162. R

B. Larry Krasner and A Plea Deal for Jovaun Patterson

1. The Case of Jovaun Patterson

On May 5, 2018, Jovaun Patterson, a 29-year-old Black man, attempted to rob a Philadelphia deli store owner.[233] Patterson found Mike Poeng, the 50-year-old deli owner, washing his car on the street.[234] Brandishing an AK-47, Patterson ordered the man inside, telling him: "This is a robbery."[235] Poeng did not go inside.[236] Instead, presumably fearing for his wife and child, who were in the store, Poeng resisted.[237] In the ensuing altercation, Patterson shot Poeng.[238] As Patterson fled, Poeng bled out from a severed femoral artery before being rushed to the emergency room, where he died and was subsequently resuscitated.[239] The rifle round fired by Patterson rendered Poeng unable to walk without assistance.[240] As a consequence of his injuries, Poeng lost his store and livelihood.[241]

The Philadelphia District Attorney's Office initially charged Patterson, who surrendered two months after the incident,[242] with attempted murder, aggravated assault, robbery–threat of immediate serious injury, possession of a firearm by a prohibited person, possession of a firearm on a street in Philadelphia, possession of an instrument of crime, simple assault, and recklessly endangering another person.[243]

233. Julie Shaw, *Man, 29, Surrenders in AK-47 Shooting of West Philly Beer Deli Owner*, PHILA. INQUIRER (July 2, 2018), https://www.philly.com/philly/news/crime/jovaun-patterson-arrested-west-philadelphia-beer-deli-owner-shooting-ak47-20180702.html [https://perma.cc/B95Q-XXJG].

234. *Id.*

235. George Parry, Opinion, *Whose Side is Philly District Attorney Larry Krasner Really On?*, PHILA. INQUIRER (Dec. 13, 2018), https://www.philly.com/opinion/commentary/larry-krasner-district-attorney-philadelphia-crime-victims-20181213.html [https://perma.cc/6DH3-969J].

236. Shaw, *supra* note 233. **R**

237. *See* Parry, *supra* note 235 (noting that Poeng sprayed Patterson with a water hose). **R**

238. *Id.*

239. *Id.*

240. *Id.*

241. *See Feds: Philadelphia DA Too Easy on Man Convicted in Shooting*, FOX NEWS (Feb. 28, 2019), https://www.foxnews.com/us/feds-philadelphia-da-too-easy-on-man-convicted-in-shooting [https://perma.cc/HU6A-WMJP].

242. *See* Shaw, *supra* note 233. **R**

243. *See* Press Release, U.S. Att'y William M. McSwain, U.S. Attorney's Office Brings Federal Charges After the Philadelphia District Attorney's Office Agrees to a Lenient Plea Deal in a Violent Robbery (Feb. 28, 2019), https://www.justice.gov/usao-edpa/pr/us-attorney-s-office-brings-federal-charges-after-philadelphia-district-attorney-s [https://perma.cc/K8T4-GA2F] [hereinafter McSwain Press Release].

An unidentified witness reportedly told police that, the night before the attempted robbery, Patterson took his AK-47 to a neighbor's house and stated that "he was tired of [Poeng's] mouth and something had to be done about him."[244] Despite the suggestion that the violence may have been premeditated, Patterson's substantial criminal history,[245] and video evidence of Patterson's actions,[246] the line prosecutor dropped the attempted-murder charge and allowed Patterson to plead guilty to aggravated assault, robbery, and possession of an instrument of crime.[247] Consequently, Patterson faced a prison sentence of 3.5 to 10 years in prison.[248]

News of the plea deal was met with shock and derision.[249] Media outlets reported that Poeng was "stunned" by the news. The former deli-owner told reporters that "[Patterson] changed my life forever . . . I can't do anything. I can't take care of myself anymore. I have three kids. Who is going to support them? He's going to be

244. Parry, *supra* note 235. **R**

245. As a juvenile, Patterson was arrested four times on charges of vandalism, assault, and drug possession. As an adult, Patterson had been arrested ten times. Including the most recent plea deal, four of these arrests resulted in convictions. While all of these convictions were for misdemeanor offenses, he "had faced felony charges including attempted murder, gun charges, and robbery. In some cases, the more serious charges were dismissed after key witnesses failed to appear in court to testify." Julie Shaw, *Krasner Now Seeks to Vacate Plea Deal for AK-47 Gunman Who Critically Wounded West Philly Beer Deli Owner*, PHILA. INQUIRER (Dec. 7, 2018), https://www.inquirer.com/news/district-attorney-larry-krasner-seeks-reversal-plea-deal-ak-gunman-west-philly-20181208.html#:~:text=district%20Attorney%20Larry%20Krasner's%20office,administration%20of%20the%20former%20defense [https://perma.cc/55HR-S7Q9].

246. Julie Shaw, *Video Shows Man with AK-47 Attacking West Philly Beer Deli Owner*, PHILA. INQUIRER (May 8, 2019), https://www.philly.com/philly/news/crime/police-video-ak47-assault-rifle-beer-deli-owner-shooting-west-philly-20180508.html [https://perma.cc/8CGR-4ZUA] (providing footage of the attack as captured by surveillance cameras).

247. *See id.*

248. *See id.*; Parry, *supra* note 235. **R**

249. *See The District Attorney Who Doesn't Take Gun Violence Seriously*, PHILADELINQUENCY (Nov. 16, 2018), https://www.philadelinquency.com/2018/11/16/the-district-attorney-who-doesnt-take-gun-violence-seriously/ [https://web.archive.org/web/20190331220614/https://www.philadelinquency.com/2018/11/16/the-district-attorney-who-doesnt-take-gun-violence-seriously/]; Julie Shaw, *West Philly Beer Deli Owner Stunned by Plea Deal for Gunman Who Shot Him*, PHILA. INQUIRER (Nov. 15, 2018), https://www.philly.com/philly/news/crime/philly-beer-deli-owner-shooting-gunman-krasner-plea-sentence-20181115.html [https://perma.cc/KX6M-W8X5] (noting that the victim's nephew characterized the plea as "pretty outrageous").

in jail three to 10 years—that's it? I'll be handicapped the rest of my life."[250]

Though the District Attorney's Office initially stood by the plea deal,[251] less than three weeks later the office reversed course, filing a motion to vacate the plea.[252] The motion was parried by Patterson's defense attorney and criticized by retired State Supreme Court Chief Justice Ronald D. Castille, who served as the city's DA from 1986 to 1991, as a "public relations response" to public criticism.[253] In a final ruling issued in April 2019, Judge Rayford Means refused to vacate the plea deal or to hear a victim impact statement, citing concerns about the precedent it would set.[254]

In a penultimate twist, William M. McSwain, the U.S. Attorney for the Eastern District of Pennsylvania, announced on February 28, 2019 that he would bring federal charges against Patterson.[255] McSwain's indictment included two charges: (1) one count of attempted robbery and (2) one count of using, carrying and discharging a firearm during and in relation to a crime of violence.[256] McSwain announced the charges in a press conference in which he issued a blistering critique of Krasner's handling of the case and embrace of progressive policies, even blaming the DA for a rise in the city's homicide rate.[257]

The federal indictment prompted Patterson's defense counsel to file a motion to vacate the plea deal and sentence.[258] This time,

250. *Id.*

251. *See id.*

252. Max Marin, *Philly DA Moves to Reverse Controversial Plea Deal for Gunman in AK-47 Shooting*, BILLY PENN (Dec. 7, 2018), https://billypenn.com/2018/12/07/da-krasner-to-reverse-controversial-plea-deal-for-gunman-in-ak-47-shooting/ [https://perma.cc/64MS-RNR2].

253. Julie Shaw & Jeremy Roebuck, *DA's Move to Rescind Plea Deal is Fought*, PHILA. INQUIRER, Dec. 12, 2018, at B01.

254. Julie Shaw, *Judge to Shooter: A Deal's a Deal, but Meddling Feds Are a Concern*, PHILA. DAILY NEWS, Apr. 30, 2019, at 2.

255. *See* McSwain Press Release, *supra* note 243. **R**

256. Indictment of Jovaun Patterson, United States v. Patterson, No. 2:19-cr-00125-MSG (E.D. Pa. Feb. 28, 2019).

257. *See* McSwain Press Release, *supra* note 243 ("The Philadelphia District Attorney's Office isn't putting fear into the hearts of anybody who is contemplating a life of violent crime. Instead, what's even worse, is that the District Attorney's Office is putting fear into the hearts of law-abiding citizens who have to deal with the terror of homicide and other violent crime in their neighborhoods."). **R**

258. *See* Julie Shaw, *Philly Judge Lets AK-47 Gunman Withdraw Guilty Plea in Shooting of Beer Deli Owner*, PHILA. INQUIRER (Aug. 19, 2019), https://www.inquirer.com/news/philadelphia-judge-rayford-means-district-attorney-larry-krasner-jovaun-patterson-ak47-gunman-plea-withdrawal-20190819.html [HTTPS://PERMA.CC/AZ7R-QHGQ].

Judge Means acquiesced and vacated the deal.[259] Ironically, the District Attorney's Office not only opposed the motion[260]—a mere four months after seeking their own vacate order—but also appealed the decision.[261]

As of August 13, 2020, the appellate court has not issued a decision on the matter.[262] Patterson eventually pled guilty to the federal charges.[263] Following the terms of his federal agreement, Patterson was sentenced to 14 years and three months in federal prison—significantly more than he faced under his state-level plea deal.[264]

2. Scrutinizing the Actions of District Attorney Krasner: A Compliance-Based Perspective

The initial decision to drop some of the charges against Patterson, as well as to recommend a relatively short sentence,[265] was very much in line with Krasner's progressive goals.[266] Indeed, Krasner's

259. *Id.* In both April and August, Judge Means was concerned with the finality of adjudication. In April, Judge Means was concerned with the double jeopardy implications of vacating the plea. In August, his concern was with the implications of federal prosecution for the very same acts at issue in the state prosecution. *Id.* (quoting Judge Means as follows: "It derails our whole system of plea bargaining if there is no finality").

260. *See* Shaw, *supra* note 258. R

261. ADA Orem asserted that the judge lacked jurisdiction over the case and a spokesman from the office reported that the DA's Office would be appealing. *See id.*

262. *See* Julie Shaw, *After 'Sweetheart' Deal from Philly DA, Gunman Gets 14 Years in Federal Prison for Shooting a Store Owner with an AK-47*, PHILA. INQUIRER (Aug. 13, 2020), https://www.inquirer.com/news/jovaun-patterson-ak-47-shooting-sentencing-william-mcswain-larry-krasner-20200813.html [https://perma.cc/MW8H-KJX9] (noting that the DA's office appealed the decision to the state Superior Court, which has yet to rule).

263. *See* Julie Shaw, *AK-47 Gunman Pleads Guilty in Federal Court in 2018 Shooting of West Philly Beer Deli Owner*, PHILA. INQUIRER (Dec. 17, 2019), https://www.inquirer.com/news/ak-47-gunman-jovaun-patterson-guilty-plea-federal-court-us-attorney-william-mcswain-district-attorney-larry-krasner-20191217.html [https://perma.cc/7VKV-AQ85].

264. *See* Shaw, *supra* note 262; Shaw, *supra* note 263. R

265. Whether 3½ to 10 years for attempted murder constitutes a "short" prison sentence is a matter of perspective. Certainly, as noted above and below, some politicians and victims' advocacy groups believed the sentence should have been longer.

266. *See* Melamed & Palmer, *supra* note 100 (identifying an office-wide policy to either seek lesser charges from the start or reduce charges in homicide cases. "The new strategy aligns with Krasner's oft-expressed belief that former prosecutors were out for wins - in the form of excessive prison sentences - rather than for justice. The way Krasner sees it, what looks like a radical shift is merely restoring balance - moving away from overcharging, which he called a 'gutless' abdication of responsibility."). R

desire to alter the criminal justice system's response to violent criminals is part of what places him at the forefront of progressive reformers.[267] Moreover, the decision not only reflected the *spirit* of Krasner's reforms, but also harmonized with Krasner's stated office policy, which stressed that line prosecutors should refrain from reflexively seeking the highest charge possible.[268] Instead, prosecutors were instructed to "utilize the spectrum of possible homicide charges, and proceed [only] on what [they] think[ ] the evidence supports."[269] This likely explains why, in response to initial media inquiries, Ben Waxman, a spokesperson for Krasner, asserted that both the withdrawal of the attempted-murder charge and the sentence were "wholly appropriate."[270]

The trouble, from a professional responsibility perspective, was the fact that Poeng had not been informed of the plea prior to its announcement.[271] Under the Pennsylvania Crime Victims Act, prosecutors must notify victims in personal-injury crimes of a plea deal in order to provide the victim with an opportunity to comment.[272] This failure, and the public scrutiny it engendered—rather than the substance of the (relatively) short sentence itself—was likely the reason that the office attempted to vacate the plea. From the get-go, Waxman apologized that Poeng had not been notified of the plea hearing, noting that "[w]e strongly believe that every victim has a right to be heard."[273]

Krasner had already faced significant criticism from victims' family members and victims' rights groups.[274] Part of the criticism

267. *See, e.g.*, JAMES FORMAN JR., LOCKING UP OUR OWN 221 (2017) (criticizing reformers, including President Barack Obama, for their endorsement of the "nonviolent offenders only" approach to criminal justice reform).

268. *See* Melamed & Palmer, *supra* note 100 (describing Krasner policy initiatives with respect to individuals who kill). **R**

269. *Id.*

270. Shaw, *supra* note 249. **R**

271. *See id.*

272. *See* Crime Victims Act, 18 Pa. Cons. Stat. § 11.213(b) (1997). *See also* Office for Victims of Crime, Victim Notification, https://ovc.ojp.gov/topics/victim-notification [https://perma.cc/9PR7-KBC9] (stating that victims' right to notification is supported by both federal law and the law of each state).

273. Shaw, *supra* note 249. **R**

274. *See, e.g.*, Helen Ubiñas, *Hey, DA Krasner, Remember the Crime Victims*, PHILA. INQUIRER (Jan, 12, 2018), https://www.philly.com/philly/columnists/helen_ubinas/larry-krasner-homicide-victims-movita-johnson-harrel-20180111.html [https://perma.cc/8FLE-LVB7]; Chris Palmer, *Parents of Rittenhouse Square Stabbing Victim Assail DA Larry Krasner*, PHILA. INQUIRER (Aug. 2, 2018), https://www.philly.com/philly/news/breaking/linda-schellenger-mother-sean-schellenger-michael-white-rittenhouse-square-stabbing-larry-krasner-20180802.html [https://perma.cc/7J3J-LNLE].

was rooted in fundamental disagreements about what charges were appropriate for particular crimes, but family members repeatedly expressed dissatisfaction with how office and case developments were communicated to victims and their loved ones.[275]

In response, Krasner assembled a Crime Victims' Advisory Committee in April of 2018.[276] In addition to providing support and grief services,[277] the Committee was tasked with helping the DA's Office communicate with victims and their families.[278]

From a compliance perspective, this effort was inadequate as evidenced by the failures of communication that continued to occur in homicide cases *after* the April 2018 creation of the Committee. Consider, for example, the exoneration of Dontia Patterson, who had been convicted of stabbing Antwine Jackson in 2007.[279] Though Waxman stated that the office had tried repeatedly to reach the victim's family (by phone, email, and in-person), the victim's sister alleged that, other than a vaguely worded letter requesting that she contact the DA's Office for "updates about the case," Krasner's staff made no efforts to reach her.[280] Neither had Krasner's office notified Steven Bernstein, the brother of a different murder victim, when it reduced the death sentence of his brother's killer to life in prison.[281] Similarly, in the matter of Philadelphia Police Sgt. Robert Wilson's murder, the DA's Office had failed to inform the family of a plea deal "until it was too late for any meaningful discussion."[282] The office's repeated failures suggest that,

275. *See* Ubiñas, *supra* note 274 (detailing the hurt and anxiety felt by individuals who were not contacted before or soon after the firing of prosecutors handling the homicides of their loved ones); Palmer, *supra* note 274 (detailing Linda Schellenger's criticism of Krasner's communication methods and decision to charge her son's killer with only second, rather than first, degree murder). R R

276. Chris Palmer, *Philly DA Larry Krasner Unveils Victims' Advisory Panel*, PHILA. INQUIRER (Apr. 6, 2018), https://www.philly.com/philly/news/crime/philadelphia-district-attorney-larry-krasner-victims-committee-movita-johnson-harrell-20180406.html [https://perma.cc/2D9Z-XE9F].

277. *See* Julie Shaw, *Murder Victims' Kin to Get Support*, PHILA. INQUIRER, Aug. 2, 2018, at B02.

278. *See* Palmer, *supra* note 276. R

279. *See* Chris Palmer, *After Philly DA's Office Clears Man of Murder, Victim's Family Feels 'Disrespected*,' PHILA. INQUIRER (May 21, 2018), https://www.philly.com/philly/news/crime/dontia-patterson-antwine-jackson-larry-krasner-philadelphia-murder-conviction-overturned-20180521.html [https://perma.cc/GNM8-6RQU] (providing some background on the murder).

280. *See id.*

281. Volke, *supra* note 3. R

282. *Id.*

contrary to compliance best practices,[283] Krasner's office was not monitoring the success of the Crime Victims' Advisory Committee initiative. Perhaps if it had been watching more closely, the errors in Patterson's case could have been avoided.

In response to media inquiries, Waxman stated that an office review of the matter found that the prosecuting assistant district attorney, Lori Edelman Orem, "made two mistakes. First, she did not contact the victim prior to the plea, which is against DAO policy as well as state law. Second, she did not get authorization from her supervisor to convey the plea offer."[284] While Orem's actions might well be conceptualized as "mistakes," they should also be recognized as products of specific compliance failures.

Waxman asserted that contacting victims is "DAO policy."[285] But, as the DOJ has explained to corporations, "paper program" alone will not create a culture of compliance.[286] Regular training and granular guidance on obligations are also required.[287]

Checklists are one way to prompt employee compliance. For instance, Texas Instruments provides employees with a checklist that asks employees to answer a series of ethically more expansive questions: "(1) is the action legal, (2) does it comply with our values, (3) if you do it, will you feel bad, (4) how will it look in the newspapers?"[288] If Orem had been aware of the state law, then a checklist may have prompted her to hold off on charging or to see a supervisor at step 1; if she was not aware of the law, she may nevertheless have reconsidered her actions at step 4—how would it look to proceed without contacting an attempted homicide victim?

Moreover, checklists do not have to take a 1000-foot approach to ethics, they may instead function as task-specific nudges. In this way, they are particularly helpful as bulwarks against "ethical fading"—the reality that "psychological factors can cause ethical (and

283. *See Evaluation of Corporate Compliance Programs*, *supra* note 109, at 4-5 (recommending that training address lessons learned from prior compliance incidents and asking prosecutors to consider "[w]hat efforts has the company made to monitor and implement policies and procedures that reflect and deal with the spectrum of risks it faces"). **R**

284. Shaw, *supra* note 245. **R**

285. *Id.*

286. *Evaluation of Corporate Compliance Programs*, *supra* note 109, at 9. **R**

287. A review of publicly available records on January 1, 2020 do not reveal what, if any, training Philadelphia's prosecutors received on their obligations under the Pennsylvania Crime Victims Act.

288. *See* Gillian Flynn, *TI Gives Employees a Quick Test*, WORKFORCE (June 1, 1995), https://www.workforce.com/news/ti-gives-employees-a-quick-test [https://perma.cc/Q6XY-8FTE] (citing checklist and its contents).

legal) considerations to fade from view, leading people to almost unconsciously engage in . . . misconduct."[289] Here, for instance, a plea-bargaining checklist might ask prosecutors to confirm that they have spoken with the victim or their family. Because it is not always feasible to reach victims, the checklist might serve as a reminder to formally memorialize attempts to contact the family—precisely because failures to do so may become a point of contention. They might also prompt line prosecutors to obtain authorization from a supervisor before charging out cases with unreachable victims.

Though not obvious from the public record, it is possible that prosecutors in Philadelphia receive some kind of training on their obligations under the Pennsylvania Crime Victims Act.[290] But even assuming that Orem was sufficiently cognizant of her obligations under the Act, the situation likely presented her with a set of competing pressures: (1) awareness that she had a responsibility to contact the victim and (2) consciousness of the office's new homicide charging priorities.

Krasner made his commitment to reforming homicide-related charging decisions manifest from his first days in office, when he spearheaded "reducing charges to third-degree murder or manslaughter in at least six cases initially filed as 'murder generally'—an umbrella that encompasses first-, second-, and third-degree."[291] This commitment was reinforced in the aforementioned office policy and in media interviews conducted throughout 2018.[292]

He does not appear to have made a similar push for adherence to the Pennsylvania Crime Victims Act. The law is not explicitly mentioned in coverage of the Committee. Neither is there any press coverage of Krasner discussing the law in 2018.[293] This is not to say that Krasner *should have* been talking about the law. Rather, the discrepancy in the relative attention given to each topic—presumably both inside and outside of the office—frame, and may explain, Orem's actions.

289. Robert A. Prentice, Comment, *Beyond Temporal Explanations of Corporate Crime*, 1 VA. J. CRIM. L. 397, 415 (2013).

290. A review of publicly available records on January 1, 2020 did not reveal any mentions of internal use of a checklist.

291. Melamed & Palmer, *supra* note 100. **R**

292. *See, e.g.*, Melamed & Palmer, *supra* note 100; Bobby Allyn, *Philly DA Says He's Striving for Justice Not Harshest Sentence in Homicide Cases*, WHYY (Nov. 19, 2018), https://whyy.org/articles/philly-da-says-hes-striving-for-justice-not-harshest-sentence-in-homicide-cases/ [https://perma.cc/6QQJ-FWHH]. **R**

293. Based on a Google and LexisNexis review of archived news stories.

Orem had a responsibility to contact the victim, but encountered a situation well-examined in the field of corporate compliance—one in which "the pressure of the moment" causes "definitions of responsibility [to be] renegotiated downward to accommodate those pressures."[294] The Wells Fargo "fake accounts" crisis provides the most recent example of how a deeply ingrained cultural objective—generating sales—can "drown[ ] out any explicit compliance measures," such as trainings and explicit employee handbook guidance.[295]

In the Patterson case, the pressure to charge according to the new policy may well have prompted Orem to "downgrade" her obligation to contact the victim. This is why behavioral ethicists urge the display of ethical reminders (which may take the form of a checklist or other "nudge") as close to the time of temptation as possible.[296] It is also why leaders must not neglect to foster a "culture of compliance," even as they encourage a realignment of the organization's end goals.[297]

Ideas common to compliance also have something to say about the second "mistake." Namely, compliance officers and programs

294. John M. Darley, *How Organizations Socialize Individuals into Evildoing*, *in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 13, 19 (David M. Messick & Anne E. Tenbrunsel eds., 1996).

295. *See* Todd Haugh, *The Trouble With Corporate Compliance Programs*, MASS. INST. TECH. SLOAN MGMT. REV. (Sept. 6, 2017), https://sloanreview.mit.edu/article/the-trouble-with-corporate-compliance-programs/ [https://perma.cc/XW97-97RC]. The bank maintained an industry-typical compliance program prior to the scandal. *See* Janine Yancey, *What We Learned from Wells Fargo About Checks and Balances*, EMTRAIN (Sept. 28, 2016), https://emtrain.com/blog/code-of-conduct/wells-fargo-checks-balances/ [https://perma.cc/MD8J-SV4Q] ("Like any other bank, Wells Fargo has a robust compliance training program and compliance team."). The company's employee handbooks "explicitly stated that 'splitting a customer deposit and opening multiple accounts for the purpose of increasing potential incentive compensation is considered a sales integrity violation.'" Moreover, this "paper" code was supplemented with training and monitoring. *See* Haugh, *supra* note 60, at 173–74. Nonetheless, a company culture that emphasized sales drove employees to value results over ethical means. *See* Tayan, *supra* note 193 (noting that the board of director's report on the scandal found that "employees who engaged in misconduct most frequently associated their behavior with sales pressure"). The comparison is particularly salient because, in so far as Wells Fargo employees did not personally reap financial rewards for meeting their sales targets, the scandal was "more about managing employee ethicality than incentivized law breaking" and therefore closer in kind to prosecutorial misconduct. Haugh, *supra* note 60, at 176. **R** **R** **R**

296. *See* Langevoort, *supra* note 122, at 277. **R**

297. Haugh, *supra* note 60, at 171 (noting that experts, including the author of the article, agreed that a defective compliance *culture* was the ultimate cause of the Wells Fargo scandal). **R**

must account for the reality that "[i]n a corporation, to wait to do something until one is ordered to do so can be thought of as a failure of initiative . . . . Many subordinates, in those circumstances, can be expected to intuit what orders they would be given and 'follow them in advance.'"[298] The situation cannot be so different in a fast paced, inevitably understaffed prosecutor's office. Compliance programs must account for such realities. The best programs "consider the behavioral implications of the compliance program at every turn, particularly how company policies might foster or defeat employee rationalizations."[299]

McSwain eventually castigated Krasner for failing to take responsibility for the plea deal and heaping the blame on his ADA:

> It tells us that nobody in leadership at the District Attorney's Office even knows what's going on in plea negotiations or in the courtroom in significant violent crime matters. In the absence of supervision, however, the assistant district attorneys certainly know that they are to pursue deals that will please the District Attorney or they risk losing their jobs, and there is no doubt that the assistant district attorney in the Patterson case did exactly that . . . .[300]

This may be unduly harsh, but it is not wholly inaccurate. If Orem was the "experienced and dedicated prosecutor"[301] she was described as, then Patterson's case suggests that the office has failed—on a structural level—to institute sufficient controls to ensure that homicide plea deals are run by supervisors or only finalized after discussions with victims.

In the end, as in the case of Smollett, there is a bitter irony here. Once again, the absence of sufficient compliance measures drove line prosecutors to hasty action and resulted in a sentence arguably out of sync with the DA's progressive vision.

C. Eric Gonzalez and the Exoneration of Bladimil Arroyo

1. The Case of Bladimil Arroyo

On February 22, 2019, prosecutors in Kings County, New York moved to vacate Bladimil Arroyo's 18-year old murder conviction.[302] Arroyo's exoneration was not an endorsement of his inno-

298. Darley, *supra* note 294, at 24–25. **R**
299. Haugh, *supra* note 295. **R**
300. *See* McSwain Press Release, *supra* note 243. **R**
301. Shaw, *supra* note 245. **R**
302. *See* Jennifer Vasquez, *NYC Man in Prison Since 2001 in Connection with Botched Robbery Killing Has Murder Conviction Vacated*, NBC N.Y. (Feb. 22, 2019),

cence. Indeed, District Attorney Gonzalez explained that "we cannot say that Mr. Arroyo was not involved in this crime."[303] Instead, Arroyo's release resulted from the Conviction Review Unit's conclusion that Arroyo had been "deprived of a fair trial."[304] The procedural errors in the case included disclosure violations and the prosecutor's knowing introduction of a confession built on a "false fact."[305]

The murder at the heart of this matter occurred in the early morning hours of September 16, 2001.[306] The murder victim, Gabor Muronyi, and his friend were walking away from Sweet Cherry strip club in Sunset Park, Brooklyn when they were attacked.[307] His friend, Cary Greene, engaged one of the assailants in combat and managed to stab his attacker before escaping.[308] He then flagged down two police officers, telling them that he had heard gun shots as he ran away.[309] The officers returned to the scene of the crime to find Muronyi lying in a pool of his own blood.[310] Arroyo was apprehended by police officers who followed a vehicle fleeing the scene and then a trail of blood to Arroyo's mother's apartment.[311] At the precinct after his arrest, Arroyo stated that he'd been at Sweet Cherry with Eddie Lorenzo and that Lorenzo had been stabbed.[312]

The details of the attack, including the race and number of the attackers, were a matter of dispute. Greene initially reported that three Black men had attempted to rob the two friends, even going

https://www.nbcnewyork.com/news/local/New-York-City-Man-Prison-Connection-Botched-Robbery-Killing-Murder-Conviction-Vacated-Set-Free-506221141.html [https://perma.cc/5VV8-FQSY].

303. Press Release, Office of Kings Cty. Dist. Att'y, Brooklyn DA Moves to Vacate Murder Conviction, in Connection with 2001 Killing Outside Sunset Park Strip Club (Feb. 22, 2019), http://www.brooklynda.org/2019/02/22/brooklyn-da-moves-to-vacate-murder-conviction-in-connection-with-2001-killing-outside-sunset-park-strip-club/ [https://perma.cc/9E7X-SYVV].

304. *Id.*

305. *See* Vasquez, *supra* note 302. **R**

306. *See* CONVICTION REVIEW UNIT, KINGS CTY. DIST. ATTY'S OFFICE, REPORT ON THE CONVICTION OF BLADIMIL ARROYO 1 (Feb. 2019), http://www.brooklynda.org/wp-content/uploads/2019/02/bladimil-arroyo-conviction-report-2.20.pdf [https://perma.cc/4CRL-H3L3].

307. Vasquez, *supra* note 302. **R**

308. *See* CONVICTION REVIEW UNIT, *supra* note 306, at 1. **R**

309. *See id.*

310. *See* THE NATIONAL REGISTRY OF EXONERATIONS: BLADIMIL ARROYO, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5518 [https://perma.cc/M7CV-58BV].

311. *See* CONVICTION REVIEW UNIT, *supra* note 306, at 4. **R**

312. *See id.* at 5.

so far as to positively identify Nicolas Johnson, a Black man, as his attacker.[313] After Johnson was arrested, Greene reneged, saying that "if the guy did not have a stab wound then this would not be the guy."[314] In a later police line-up, Greene positively identified Eddie Lorenzo but was never able to identify Arroyo as one of the attackers.[315] Moreover, at trial, Greene testified that there had been only two assailants.[316]

The case against Arroyo also relied on the testimony of police officer Michael Monteverde. Monteverde had been near the strip club when he heard gunshots and saw a car speeding from the direction of the shots.[317] Though Monteverde initially reported seeing three individuals flee from the car, he later testified that there were only two, identifying Lorenzo as the driver and Arroyo as a passenger.[318]

Arroyo's confession—secured during his second interview—was integral to his eventual conviction. In his first interview, Arroyo did not confess to the murder. Instead, he admitted only that Lorenzo had become angry at the two victims after they bumped into him at the strip club.[319] When the pair noticed the victims walking outside the club, Lorenzo and Arroyo both exited their vehicle to confront Greene and Muronyi.[320] Arroyo initially stated that by the time Lorenzo had fired his gun Arroyo was already back inside the vehicle.[321] In the hours after this initial statement, Detective David Gilbert, who had been at the hospital when Muronyi was pronounced dead, returned to the precinct and reported that a physician told him that Muronyi had died of a stab wound to the chest.[322] Vitally, Detective Robert Keating—who would conduct Arroyo's second interview—learned of the physician's pronouncement.[323]

Approximately five to six hours after Arroyo's initial statement, and after Detective Gilbert's report on the cause of death, Detective Keating asserted that Arroyo spontaneously "asked to speak with [me] and then stated, 'I did not tell you the whole story

313. *See id.* at 3.
314. *See id.*
315. *See id.* at 8.
316. *See id.* at 1.
317. *See* Conviction Review Unit, *supra* note 306, at 1. **R**
318. *See id.*
319. *See id.* at 6.
320. *See id.*
321. *See id.*
322. *See id.* at 18, 31.
323. *See* Conviction Review Unit, *supra* note 306, at 17. **R**

before . . . .' "[324] During this second interrogation, Arroyo confessed that he had stabbed Muronyi in the "upper body area."[325]

It was only the following day that the official autopsy report revealed that Muronyi had died from a single gunshot wound. What the emergency room physician had identified as a stab wound was in fact the slit out of which the fatal bullet had exited the victim's body.[326]

Finally, police officers apprehended another individual near the scene of the crime: James Ortiz.[327] Ortiz, who approached officers to ask what had happened, had cuts on his hand and was "clutching a bloody napkin."[328] Greene also identified Ortiz during a lineup "as possibly one of the persons that attacked [the deceased]."[329] Ortiz's arrest appears to have been voided at the precinct; he was never charged in relation to the crime and police do not appear to have investigated him as a suspect after Greene's initial identification.[330]

Instead of probing the various inconsistencies evident in the police report, the lead prosecutor proceeded on the theory that Arroyo had shot the victim. The ADA introduced Arroyo's confession at trial and suggested to the jury that the defendant's confession to a stabbing was an attempt to minimize his culpability by "putting a knife in his hand where there was a gun."[331]

Brooklyn's Conviction Review Unit (CRU) eventually determined that "[w]ithout defendant's confession, the circumstantial evidence . . . was insufficient to establish guilt beyond a reasonable doubt."[332] In addition, the CRU determined that the prosecutor had failed to turn over exculpatory materials, in violation of *Brady* and *Giglio*.[333] These materials included detectives' notes about Greene's identification of Ortiz and about Monteverde's initial beliefs concerning the number and race of passengers in the fleeing

324. *See id.* at 7, 17.
325. *See id.* at 9.
326. *See id.* at 15, 27.
327. *See id.* at 3–4.
328. *See id.* at 3.
329. *See* CONVICTION REVIEW UNIT, *supra* note 306, at 20 n.46. **R**
330. *See id.* at 3 n.10.
331. *See id.* at 22.
332. *See id.* at 1 n.1.
333. *See id.* at 40. The CRU also determined that the ADA had violated his *Rosario* obligations. People v. Rosario, 9 N.Y.2d 286 (1961), *cert. denied,* 368 U.S. 866 (1961) mandates that the government disclose all of a prosecution witness' prior recorded statements, so long as they are material to that witness' testimony. N.Y. CODE CRIM. PROC. §§ 240.44(1), 240.45(1)(a).

car, as well as evidence about Greene's past conviction for hindering prosecution.[334]

2. Scrutinizing the Actions of District Attorney Gonzalez: A Compliance-Based Perspective

Arroyo's release marked the 25th exoneration out of Brooklyn's CRU.[335] Unlike the previous exonerations, this one was paired with a 43-page report detailing the CRU's findings.[336] The last 2.5 pages of this report present a barebones "root cause analysis," identifying three primary bases for the miscarriage of justice that occurred: (1) not all of Arroyo's interrogations had been recorded, (2) the prosecutorial team appeared to suffer from confirmation bias, and (3) the office lacked a uniform discovery practice.[337]

Though subtitled "Recommendation," this section of the report is markedly light on actionable steps for the future. The first and last issues identified by the CRU were effectively deemed to be no longer of concern, given changes in applicable law and in office-wide discovery practices implemented after Arroyo's conviction.[338] Meanwhile, the appeal for confirmation bias training was limited to just that: eight words calling for instruction on the matter.[339] Moreover, nowhere in the report was there a recommendation that the lead prosecutor be disciplined. Perhaps such a report is not the best venue for disciplinary recommendations. However, it bears noting that while the report pointedly refrained from identifying the prosecuting ADA by name,[340] the ADA in question was not only still employed by the office, but, in fact, headed the office division re-

334. *See* Conviction Review Unit, *supra* note 306, at 2. The latter of these constitutes *Giglio* matter as it pertains to the credibility of a witness. **R**

335. *See* Post Conviction Justice Bureau, http://www.brooklynda.org/the-post-conviction-justice-bureau/#conviction [https://perma.cc/QGB4-RCSE].

336. *See* Christina Carrega, *New York Man's Conviction Overturned After Discovery of 'False Confession' for Murder in Botched Robbery*, ABC News (Feb. 23, 2019), https://abcnews.go.com/US/york-mans-conviction-overturned-discovery-false-confession-murder/story?id=61246612 [https://perma.cc/NFH7-NR2V].

337. *See* Conviction Review Unit, *supra* note 306, at 40–42. **R**

338. *See id.* (stating that the interrogation recording issue was "largely mooted by the statutory requirement to record by video interrogations of persons accused of . . . certain serious crimes . . . " and that, in the years since Arroyo's conviction, the office had instituted an "open file" system and was moving to electronic discovery).

339. *See id.* at 41 ("The CRU recommends training prosecutors on this issue.").

340. *See generally id.* (referring to the prosecuting attorney as either "the prosecutor" or the "trial ADA" throughout).

sponsible for prosecuting homicides.[341] Timothy Gough, who had been a practicing line attorney for over a decade when he prosecuted Arroyo's case, was now Chief of Brooklyn's Homicide Bureau.[342]

In the press release announcing the exoneration, Gonzalez stated the he was "confident that policy changes that have been made over the ensuing years and additional recommendations by the CRU will ensure that these mistakes are not repeated."[343] As explained below, it is less likely that a corporate compliance officer or a DOJ prosecutor would have considered this an adequate response to serious ethical violations.

a. Failure to Propose Specific Recommendations

First, a marker of a compliance program's effectiveness is whether its policies and procedures have been updated "in light of lessons learned."[344] In this, the CRU report presents a missed opportunity.

The CRU did not recommend seizing the moment as a chance to refresh line prosecutors' training on their *Brady* and *Giglio* obligations. Instead the report focused on explaining how the office's institution of "Open File Discovery Policy for most cases" and the recent commitment to electronic discovery "surely reduce the chances that paper is lost or mismanaged."[345] While as a practical matter that is likely true, this assessment does little to mitigate the risks of disclosure-related misconduct *now*. The DA's Office "should be looking for *any* opportunity to influence ethical decision-making through education and training."[346]

The CRU report did suggest renewed training on confirmation bias. However, it failed to outline what this training should look

341. *See* Theodore Hamm, Opinion, *More Transparency Needed on Brooklyn's Tainted Convictions*, CITYLIMITS (Mar. 1, 2019), https://citylimits.org/2019/03/01/opinion-more-transparency-needed-on-brooklyns-tainted-convictions/ [https://perma.cc/Z7CB-2HLX] (noting that Timothy Gough was identified as the trial ADA in an Appeals Court opinion (citing Arroyo v. Conway, 2010 U.S. Dist. LEXIS 107337, at *11 (E.D.N.Y. Oct. 7, 2010))).

342. *See Brooklyn DA Gonzalez Names New Homicide Chief and Three New Heads Of Trial Bureaus*, BKLYNER (Feb. 3, 2017), https://bklyner.com/brooklyn-ada-gonzalez-names-new-homicide-chief-three-new-heads-trial-bureaus/ [https://perma.cc/UGY2-6KZW].

343. Press Release, Off. of Kings Cty. Dist. Att'y, Brooklyn DA Moves to Vacate Murder Conviction, *supra* note 303. **R**

344. *See Evaluation of Corporate Compliance Programs*, *supra* note 109, at 3. **R**

345. CONVICTION REVIEW UNIT, *supra* note 306, at 42. **R**

346. Haugh, *supra* note 60, at 192. **R**

like. This is disappointing because *how* confirmation bias training is carried out determines whether or not it is effective. Behavioral science research suggests, for instance, that reminding individuals to be "fair and impartial" does next to nothing in counteracting naturally held biases—something more is required.[347] Admittedly, it is not the job of the CRU to develop training programs. Nevertheless, in the field of compliance, a robust root cause analysis is one that suggests "*specific* changes" to reduce risks.[348] Here, the absence of specific guidance on the issue of confirmation bias presents a lost chance to advance office trainings on the matter.

Moreover, the CRU could have recommended that the report or a summarized version of the report be used in future trainings. Compliance industry experts have long advocated for the use of real case studies in education efforts,[349] and corporations have increasingly used "sanitized" case studies—i.e. "anonymized stori[es] that really happened in the organization"—in compliance trainings.[350] Indeed, mining "failures, near misses, and all investigations" for "lessons learned to protect or prevent future issues" is a key feature of high quality compliance programs.[351] Buttressing this focus on intra-organizational wrongdoing is the sense that staff find grappling with the realities of actual misconduct more engaging than watching PowerPoints or answering hypotheticals.[352]

347. *See* Tom Stafford, *How to Get People to Overcome Their Bias*, BBC NEWS (Jan. 31, 2017), https://www.bbc.com/future/article/20170131-why-wont-some-people-listen-to-reason [https://perma.cc/G763-QQTT] (discussing study conducted by Charles Lord, which found that asking study participants to be "as objective and unbiased as possible," and to consider themselves "as a judge or juror asked to weigh all of the evidence in a fair and impartial manner" had no effect on biased outcomes).

348. *Evaluation of Corporate Compliance Programs*, *supra* note 109, at 18 (emphasis added). **R**

349. *See, e.g.*, Bruce Zagaris, *A Brave New World: Recent Developments in Anti-Money Laundering and Related Litigation Traps for the Unwary in International Trust Matters*, 32 VAND. J. TRANSNAT'L L. 1023, 1040 (1999) (urging regulators to make sanitized case studies available to reporting institutions for education purposes).

350. Mary Bennett, *That Really Happened? Using Sanitized Cases to Make Ethics & Compliance Concepts Real*, NAVEX GLOBAL (June 17, 2015), https://www.navexglobal.com/blog/article/really-happened-using-sanitized-cases-make-ethics-compliance-concepts-real/ [https://perma.cc/3EYH-UC9Q].

351. ETHICS & COMPLIANCE CERTIFICATION INST., *supra* note 107, at 20. **R**

352. *See* Bennett, *supra* note 350 (outlining the likely benefits of using sanitized cases in training). **R**

b. Failure to Discipline

Of course, one of the reasons that sanitized case studies are effective is that they allow employees to see "organizational justice in action."[353] Here, the responsible ADA was never penalized for the misconduct in question.[354]

Reasonable minds may differ as to what kind of discipline Gough should have faced for the misconduct. The corporate compliance standard of "zero tolerance" may be inappropriate for a number of reasons.[355] First, a spokesman for the office stressed that officials were not able to determine "when or even if [Gough] received the missing documents."[356] Second, and vitally, Gough did not make the decision to prosecute unilaterally, but only after extensive discussions with supervisors, who approved of the prosecution plan.[357] Gough's apparent "long track record of professional and highly ethical conduct" may also weigh against dismissal.[358] Finally, the confirmation bias and arguably the disclosure failures here fall into the *inadvertent* misconduct bucket. The CRU explicitly stated that it did not believe "that any of the errors recounted . . . were deliberate."[359] Furthermore, the investigation and prosecution of Gabor Muronyi's alleged murderer occurred in the fall of 2001—that is, in the weeks and months after the chaos of 9/11 and at a time when the city's homicide rate was approximately twice what it was in 2019.[360] While an overwhelming caseload does not excuse

353. *Id.* (quoting Bruce Anderson, Chief Compliance Officer of Health Net Inc.).

354. Gough was the Chief of the Homicide Bureau as of the date of this note. *See also* Hamm, *supra* note 341 (discussing the Brooklyn DA's apparent decision not to publicly name or discipline Gough). **R**

355. Haugh, *supra* note 60, at 143 (noting that many compliance consultants advocate for "zero tolerance" as the "standard in every organization"). **R**

356. Hamm, *supra* note 341. **R**

357. CONVICTION REVIEW UNIT, *supra* note 306, at 41 (describing Gough's conversations with colleagues and supervisors and noting that none of these individuals appear to have raised vital, pertinent questions, and noting that they may have all been suffering from confirmation bias). The degree to which a line prosecutor should be punished may depend, at least in part, on the prosecutor's good faith effort to seek guidance and approval from supervisors. **R**

358. Hamm, *supra* note 341. **R**

359. CONVICTION REVIEW UNIT, *supra* note 306, at 39. **R**

360. *See* N.Y. POLICE DEP'T, *Seven Major Felony Offenses 2000-2019*, *at* https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/historical-crime-data/seven-major-felony-offenses-2000-2019.pdf [https://perma.cc/2GEN-7NAD] (reporting 649 cases of murder and non-negligent manslaughter in 2001, compared with 319 cases in 2019); *New York City Population by Borough, 1950 – 2040*, NYC OPEN DATA, https://data.cityofnewyork.us/City-Government/New-York-City-Population-by-Borough-1950-2040/xywu-7bv9 [https://perma.cc/4XZJ-W34V]

misconduct, the unreasonable working conditions of the time might mitigate an individual ADA's culpability.

DOJ guidance provides that disciplinary procedures should be "commensurate with the violations."[361] It is entirely possible that a "commensurate" punishment in this case would not include traditionally punitive measures (such as firing or demotion). Perhaps individual ADAs should not be fired for conduct that was not deliberate or resulted from an unrealistic caseload and other structural errors, particularly as discovery standards and office culture was markedly different 20 years ago. However, "discipline" can take many forms, including re-training for the wrongdoer or the limited-duration onboarding of a compliance-focused supervisor to the offender's bureau.

Regardless, it is important that *some* kind of discipline be meted out for misconduct resulting in such a profound miscarriage of justice. Punishment can serve many purposes and here one of its aims must be to demonstrate to ADAs that "unethical conduct will not be tolerated and will bring swift consequences, regardless of the position or title of the employee who engages in the conduct."[362] If line prosecutors are to "buy in" to a compliance program, they must believe that the program is legitimate. Impartial treatment of every employee—regardless of their standing in the office hierarchy—is essential to generating faith in the legitimacy of management's compliance goals.[363]

Effective compliance programs are defined by "clear disciplinary procedures" that are "enforce[ed] . . . consistently across the organization."[364] Well-defined and consistently applied disciplinary standards are urgently needed in this particular area because of the relatively high risk that a similar situation surfaces in the future. Brooklyn's CRU has a full docket of old cases to review, many of which may well have been handled by prosecutors still employed by

(last visited Sept. 24, 2020) (reporting NYC's population grew by approximately half a million people between 2000 and 2020). *See also* CONVICTION REVIEW UNIT, *supra* note 306, at 41 (noting that "discovery in this case may have been complicated by the events of September 11, 2001, and the ensuing strains on the New York Police Department"). R

361. *Evaluation of Corporate Compliance Programs*, *supra* note 109, at 13. R

362. *Id.*

363. *See, e.g.*, Tom Tyler et al., *The Ethical Commitment to Compliance: Building Values based Cultures*, 50 CAL. MGMT. REV., 31–51 (2008) (demonstrating that procedural fairness, a primary aspect of organizational legitimacy, is critical in promoting employee commitment and compliance).

364. U.S. DEP'T OF JUST., *supra* note 109, at 13. R

the office.[365] As long as veteran prosecutors staff the office's middle and executive rungs, the office will need clear procedures for handling comparable accusations and CRU results.

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The Brooklyn CRU is widely recognized as one of the country's foremost conviction integrity review units.[366] And the unit's report places Brooklyn on the vanguard of classically progressive reform initiatives in so far as the decision to vacate was based on a commitment to procedural justice rather than actual innocence and in so much as the decision-making behind this conclusion was made available to the public.[367] However, the case study also presents a

365. Consider, for instance, the assessment of an appellate judge, in 2014, that the "Brooklyn district attorney's office was responsible for 'burying' evidence" that contradicted police testimony in the 25-year old murder conviction of Everton Wagstaffe. Jim Dwyer, *Cleared After Nearly 23 Years in Prison, but Not Free*, N.Y. TIMES (Sept. 23, 2014), https://www.nytimes.com/2014/09/24/nyregion/cleared-after-nearly-23-years-in-prison-but-not-free.html [https://perma.cc/35SX-AR76]. The lead prosecutor in that case, Anne M. Gutmann, is now an "Executive Assistant District Attorney" with the office. *See* Joaquin Sapien, *Watching the Detectives: Will Probe of Cop's Cases Extend to Prosecutors?*, PROPUBLICA (June 21, 2013), https://www.propublica.org/article/watching-the-detectives-will-probe-of-cops-cases-extend-to-prosecutors [https://perma.cc/PRS7-76H5]. This note takes no position on the validity of Guttman's decades-old conduct. Rather, the point is that Gough's position is not unique.

366. *See, e.g.*, Barry Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 714 (2017) (identifying Brooklyn as one of the two offices whose procedures most closely track the "best practices" of conviction review and that has "generated the greatest number of exonerations"); Ronald S. Sullivan, Jr., Op-Ed, *How Brooklyn's Conviction Review Unit Became a National Model*, KINGS CTY. POLITICS (Aug. 25, 2017), https://www.kingscountypolitics.com/op-ed-brooklyns-conviction-review-unit-became-national-model/ [https://perma.cc/Z5CA-MJDM] (arguing that Brooklyn's CRU has become a "national model").

367. Exonerations based on procedural injustices, rather than DNA evidence, are rare. Conviction review units across the country have largely focused on correcting injustices through DNA review. *See, e.g.*, Leslie Minora, *Beyond DNA, Difficult Tests for the Justice System*, DALL. OBSERVER (Dec. 29, 2011), https://www.dallasobserver.com/news/beyond-dna-difficult-tests-for-the-justice-system-6424258 [https://perma.cc/A5UV-SJ6H] (reporting that the Dallas, TX conviction integrity unit took the DNA cases first, because they were "easiest," and has exonerated only four individuals without the aid of DNA evidence). Transparency is not a defining characteristic of many conviction review units. *See, e.g.*, Eleanor Mueller & Christopher Huffaker, *Prosecutors Look to Free the Innocent – but Won't Release Findings*, MCCLATCHY DC (Aug. 18, 2016), https://www.mcclatchydc.com/news/crime/article96424972.html [https://perma.cc/NC79-WBH3] (criticizing conviction review units across the country for failing to publish even basic information about the units and their findings).

missed compliance opportunity and suggests to staff that the office may not apply its disciplinary policies uniformly. While correcting the injustices of the past is commendable, preventing future misconduct is equally important. Embracing the lessons of corporate compliance is essential to creating a culture where even negligent misconduct is less likely to occur.

V.
HURDLES TO THE SUCCESSFUL IMPLEMENTATION OF COMPLIANCE SYSTEMS IN PROSECUTORS' OFFICES

Several obstacles stand in the way of implementing compliance programs and reforms, even in offices where progressive prosecutors have committed to implementing them.

A. The Expense

To begin with, there is the cost. Given public discussions about exorbitant corporate expenditures on compliance programs, reformers might well be wary of the perceived expense of starting a compliance program.[368]

Corporations spend millions of dollars on compliance every year,[369] but even public bodies find compliance expensive. For instance, the California Commission on Judicial Performance—an independent state agency with the responsibility of investigating complaints of judicial misconduct and disciplining judges who engage in such misconduct—cost $4,085,406 to administer in 2014.[370]

Even the largest district attorneys' offices would be stymied by such significant expenses. A $4 million expenditure could eat up approximately 2, 4, and 7.5 percent of the annual budgets of each

368. *See, e.g.*, David Trainer, *Morgan Stanley's $28 Billion Opportunity in the Future of Wealth Management*, FORBES (July 26, 2017), https://www.forbes.com/sites/greatspeculations/2016/07/26/morgan-stanleys-28-billion-opportunity-in-the-future-of-wealth-management/#26ed77bb722a [https://perma.cc/YZG3-QAVW] ("The six biggest U.S. banks—J.P. Morgan (JPM), Bank of America (BAC), Citigroup (C), Wells Fargo (WFC), Goldman Sachs (GS), and Morgan Stanley—spent over $70 billion on regulatory compliance in 2013.").

369. *See* PONEMON INST., THE TRUE COST OF COMPLIANCE: A BENCHMARK STUDY OF MULTINATIONAL ORGANIZATIONS 5 (2011), https://www.ponemon.org/local/upload/file/True_Cost_of_Compliance_Report_copy.pdf [https://perma.cc/EYU4-N4YJ] (finding that multinational corporations spent an average of $3.5 million on compliance efforts every year).

370. Caldwell, *supra* note 26, at 1485 (noting that the annual cost of the California Commission on Judicial Performance was $4,085,406). R

of the CCSAO, Brooklyn District Attorney's Office, and Philadelphia DAO respectively.[371]

Fortunately for progressive reformers, there is good reason to think that a robust compliance program could be established at a substantially lower cost point. As a preliminary matter, the price tag of independent ethics organizations—like the California Commission on Judicial Performance—include overhead (rental fees, office supplies etc.) and employee costs (support staff salaries) that DAs offices already provide.[372]

Likewise, as a practical matter, corporate compliance expenditures offer a poor point of comparison. Large corporations typically operate in highly regulated industries, often across national lines. As such, they are obligated to maintain sophisticated control environments, both to satisfy regulatory requirements and to monitor work forces numbering in the thousands.

Prosecutors' offices do not operate in comparably complex regulatory environments. Neither are they responsible for monitoring and educating thousands or tens of thousands of employees across national boundaries. The sort of sophisticated technologies and data professionals that are essential to corporate compliance programs—and that make up close to a third of a multinational's average compliance outlay—are not necessary in the prosecution space.[373]

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371. These percentages are based on the following assumed annual budgets. OFF. OF THE PRESIDENT, BD. OF COMM'RS OF COOK CNTY., COOK COUNTY FISCAL YEAR 2020 76 (2020), https://www.cookcountyil.gov/sites/default/files/service/volume-1-web-adopted-2020.pdf [https://perma.cc/MM8C-V7HJ] (reporting a proposed budget of $161.3 million for CCSAO in 2020); COUNCIL OF THE CITY OF N.Y., REPORT OF THE FINANCE DIVISION ON THE FISCAL 2019 PRELIMINARY BUDGET FOR THE DISTRICT ATTORNEYS AND OFFICE OF SPECIAL NARCOTICS PROSECUTOR 2 (Mar. 12, 2018) (reporting a preliminary budget of $97.4 million for the Brooklyn District Attorney's Office in 2019); OFF. OF THE DIR. OF FIN., MAYOR'S FISCAL YEAR 2020: BOOK I 1176 (2020), https://www.phila.gov/finance/pdfs/budgetdetail/Mayor's%20FY%202020%20Operating%20Budget%20Detail%20-%20Book%201.pdf [https://perma.cc/C8TN-9SHZ] (reporting a proposed budget of approximately 53 million for the Philadelphia District Attorney's Office in 2020).

372. *See, e.g.*, OFF. OF THE PRESIDENT, BD. OF COMM'RS OF COOK CNTY., *supra* note 371, at 19 (including operations and rental and leasing costs in the annual budget); OFF. OF THE DIR. OF FIN., *supra* note 371, at 1178–82 (including rents, repair and maintenance, and support staff charges in DA's budget). **R** **R**

373. *See* PONEMON INST., *supra* note 369, at 7 (examining compliance budgets of 46 multinational corporations and finding that "Corporate IT" costs account for over $1 million of the average outlay of $3.5 million); Tom Groenfeldt, *Taming The High Costs Of Compliance With Tech*, FORBES (May 22, 2018), https://www.forbes.com/sites/tomgroenfeldt/2018/03/22/taming-the-high-costs-of-compliance-with- **R**

At their core, many of the essential tasks performed by effective compliance departments require sustained effort on the part of committed individuals, but are not in and of themselves that expensive to administer. Creating policy guidebooks, crafting checklists, holding training sessions, facilitating group ethics discussions—none of this necessarily involves expensive technology or resorting to the services of expensive outside consultants.

All told, there is ample reason to think exorbitant price tags need not strangle the compliance efforts of progressive reformers.

B. Hiring a Chief Ethics Officer

Local prosecutors will also have to face another problem that is less of a challenge for corporate leaders: a dearth of professional expertise. In the corporate world, an entire industry—with its own trade publications, professional associations, and international conferences[374]—alerts would-be CCOs to the possibility of a career in compliance, educates those individuals, and clarifies what companies should be looking for in their hires: a professional degree—often, though not necessarily, a juris doctor—followed by years of experience as an audit professional or white collar federal prosecutor.[375] There is nothing comparable for district attorneys looking to identify worthy candidates to fill chief ethics officer positions.

tech/#39730dcc5d3f [https://perma.cc/4LR4-LTEU] (discussing technological upgrades that must be made in light of new and complex financial regulations).

374. *See, e.g.*, COMPLIANCE WEEK, https://www.complianceweek.com/ [https://perma.cc/SXQ8-T5GC]; INT'L ASS'N OF RISK & COMPLIANCE PROFESSIONALS, https://risk-compliance-association.com/ [https://perma.cc/T3GV-SNFL] (certifying Certified Risk and Compliance Manager Professionals and Certified Information Systems Risk and Compliance Professionals); UNITED BANKERS ASS'N, https://www.aba.com/training-events/certifications/certified-regulatory-compliance-manager [https://perma.cc/7UZZ-SS9S] (providing professional certification as a Certified Regulatory Compliance Manager); *The Ultimate List of Compliance Conferences and Events*, ASCENT (Feb. 19, 2020), https://www.ascentregtech.com/blog/the-ultimate-list-of-compliance-conferences-and-events/ [https://perma.cc/6KYZ-PPQ7] (aggregating list of corporate compliance conferences held in 2020).

375. *See, e.g.*, MILLER, *supra* note 195, at 147 (noting that, in general, for the CCO position: a "Bachelor's Degree [is] required; Masters Degree desired. [And] JD [is] preferred"); Michael Volkov, *Do Compliance Professionals Have to Be Lawyers?*, VOLKOV BLOG (Apr. 6, 2014) [hereinafter Volkov, *Compliance Professionals*], https://blog.volkovlaw.com/2014/04/do-compliance-professionals-have-to-be-lawyers/ [https://perma.cc/EW6Z-ZP8H] (arguing that though some "companies are requiring compliance professionals to be trained attorneys," a law degree is not essential to the position); Michael Volkov, *Do Former Prosecutors Make Good CCOs?*, VOLKOV BLOG (May 30, 2019) [hereinafter Volkov, *Former Prosecutors*], https://blog.volkovlaw.com/2016/05/prosecutors-make-good-ccos/ [https://perma.cc/ R

This, coupled with the relative dearth of financial incentives common to public service, may explain why a post seeking a "Chief Professional Responsibility and Ethics Officer" for the Brooklyn DA's Office remained up for months.[376]

But the task is not hopeless. CCSAO filled its chief ethics officer position first with a federal prosecutor and later with a 19-year veteran of a professional disciplinary body.[377]

Even in the corporate world, it is a matter of debate whether litigators with experience in prosecution are best suited to head office-wide ethics efforts.[378] What is clear is that, in seeking to fill these positions, prosecutors' offices must first clarify the duties and expectations of the position. They may find that the position requires more in the way of managerial know-how and creativity than disciplinary experience.

Ultimately, if compliance programs are to be effective, the chief ethics officer at a progressive district attorney's office should fulfill duties similar to those carried by the most dedicated CCOs.

DEY7-3S7F] (noting that several companies have made experience as a federal prosecutor a prerequisite to the CCO position).

376. The position appears to have been originally posted sometime in early 2019. KCDA's official hiring website listed the position as of May 17, 2019. However, the position was no longer on the website as of October 1, 2020. *See* LEGAL RECRUITING, BROOKLYN DISTRICT ATTORNEY'S OFF., http://apply.brooklynda.org/videsktop/virecruitselfapply/ReDefault.aspx?Tag=1f699100-8b5e-4fcc-a9ea-c8f647d30f66 [https://perma.cc/K4QC-GJD7]. The position was advertised on other hiring websites as recently as January 2020. As of August 1, 2020, the office does not have a Chief Compliance Officer. *See Executive Leadership*, BROOKLYN DIST. ATTY'S OFF., http://www.brooklynda.org/executive-leadership/ [https://perma.cc/V8N3-366W] (listing all executive level staff, but not a "Chief Compliance Officer").

377. *See* Andy Grimm, *2 Top Deputies of State's Attorney Foxx, One Tied to Smollett Case, to Resign*, CHI. SUN TIMES (Apr. 18, 2018), https://chicago.suntimes.com/2019/4/18/18619800/2-top-deputies-of-state-s-attorney-foxx-one-tied-to-smollett-case-to-resign [https://perma.cc/Q5M9-5DV7] (describing Perry as a former federal prosecutor); Meriel Coleman, LINKEDIN, https://www.linkedin.com/in/meriel-coleman-7a5b0413/ (last visited Feb. 20, 2020) (stating that Meriel Coleman assumed the CEO position in June 2019 and that she had previously spent 19 years as an "attorney" for the Attorney Registration and Disciplinary Commission ('ARDC') of the Illinois Supreme Court). Publicly available information suggests that Coleman worked as a litigator representing the ARDC in proceedings against attorneys. *See, e.g.*, *Attorney Registration And Disciplinary Commission Of Supreme Court Of Illinois Issues Complaint Filed Regarding Raymond Henehan*, TARGETED NEWS SERV. (July 16, 2007) (identifying Coleman as counsel for the ARDC); *Attorney Registration Commission of Illinois Issues Complaint Filed Regarding O'Malley*, TARGETED NEWS SERV. (Aug. 12, 2016) (identifying Coleman as counsel for the ARDC).

378. *See, e.g.*, Volkov, *Former Prosecutors*, *supra* note 375 (discussing the merits and demerits attendant to installing federal prosecutors as CCOs). R

Ethics officers, as conceptualized in this note, should be more than mere purveyors of ethics opinions. Like modern CCOs, their "core job [should be] to operationalize formal rules."[379] Their task is to formulate a "uniform set of policy guidelines"; to institute education and training for employees; to "map out" the key processes of the organization, assess where the risk of misconduct lies in each, and then determine how best to mitigate those risks; and finally to audit the entire program, "to ensure that it is operated fairly, promptly, and without retaliation."[380] While they should serve as a resource for whistleblowers and line prosecutors seeking ethics guidance, these activities should not define the sum total of their duties. Their days should be filled with granular considerations: how best to effectuate the policies and reform efforts of the district attorney, what specific procedures must be in place to increase the odds of compliance, and what programs, check-ins, and incentives should be instituted to ensure that line prosecutors "buy in" to the larger reform effort.

As a final point on this issue, it bears noting that only the largest prosecutors' offices are likely able to devote a salaried position entirely to compliance. Smaller offices might consider hiring a part-time chief ethics officer, assigning specific compliance duties to one or several executive staff members, convening periodic compliance audit committees, or looking for other creative ways to adopt compliance best practices.[381]

C. Change Takes Time

Finally, compliance research suggests that corporate reform takes time—from four years at medium-sized firms to ten years at large ones.[382] Unfortunately for progressive prosecutors, elected

379. Heineman, *supra* note 199. *See also* Volkov, *Compliance Professionals*, *supra* note 375 (arguing that while a company's attorneys are responsible for defining the boundaries of legal and illegal conduct, CCOs are "dedicated to defining processes to ensure that the company stays within the defined lanes and legal boundaries"). R R

380. Heineman, *supra* note 199. R

381. Prosecutors heading smaller offices must work even harder to ensure that part-time compliance officers or periodic audit committees retain the "authority and stature" necessary for effective compliance oversight to occur. *See* U.S. DEP'T OF JUST., *supra* note 109, at 11 (discussing importance of compliance function autonomy). R

382. *See* JOHN P. KOTTER & JAMES L. HESKETT, CORPORATE CULTURE AND PERFORMANCE 104–05, 110 (1992).

terms are typically just four years long.[383] As such, progressive prosecutors face a real risk of losing reelection before their reforms can take hold.

As a preliminary point, singular scandals—such as the Smollett case—can dominate re-election campaigns, to the detriment of all the other good the prosecutor has accomplished.[384] To some degree, however, such scandals are the least of a progressive prosecutor's problems. As Rachel Barkow deftly explained in a recent symposium paper, prosecutorial elections are unlike other local elections in that they "focus on criminal justice alone."[385] This means that an increase in violence, or a surge in media coverage of a "new" threat—for instance a novel drug epidemic—could spell disaster for a reform candidate's campaign. "People concerned with violence want immediate action, and there is no sign that there is enough voter support to invest in communities to get at the structural decay that causes so much criminal activity and drug use in the first place."[386]

On the other hand, and as a last hopeful point, the hiring of an ethics officer and public commitment to compliance best practices may play well with an electorate tired of political corruption and vague promises for reform.

383. *See, e.g.*, N.Y. County Law, Art. 24 § 927 (delineating four year-terms for New York City DAs); District Attorney, Office of the City of Philadelphia, https://www.phila.gov/phils/Docs/Inventor/graphics/agencies/A006.htm [https://perma.cc/4PA6-ZXXZ] (reporting that the DA's "term was extended to four years under the State Constitution of 1874"); *What is a Prosecutor?*, CAL. DIST. ATTYS' ASS'N, https://www.lakecountyca.gov/Assets/Departments/DistrictAttorney/docs/Whats+a+Prosecutor.pdf?method=1 [https://perma.cc/4F9Z-WWWN] (stating that "[e]lections for the office of district attorney are held every four years at the same time as elections for the Governor, with the exception of Los Angeles and San Francisco counties").

384. For instance, Kim Foxx's reelection campaign has been largely defined by her handling of the Smollett case. *See, e.g.*, Ray Sanchez, *Jussie Smollett Case Overshadows Reelection bid of Chicago's Top Prosecutor*, CNN (Mar. 17, 2020), https://www.cnn.com/2020/03/17/us/chicago-kim-foxx-cook-county-states-attorney/index.html [https://perma.cc/Z33T-XVZF]; Rachel Hinton, *Webb Report Ensures Kim Foxx has Re-election Running Mate — Jussie Smollett*, CHI. SUN TIMES (Aug. 17, 2020), https://chicago.suntimes.com/politics/2020/8/17/21372810/webb-report-kim-foxx-re-election-obrien-republican-jussie-smollett [https://perma.cc/UWT6-WDAA].

385. Rachel E. Barkow, *Three Lessons for Criminal Law Reformers from Locking Up Our Own*, 107 CALIF. L. REV. 1967, 1970 (2019).

386. *Id.* at 1971.

CONCLUSION

The corporate compliance movement does not have all the answers. Its programs have been known to fail in spectacular fashion,[387] and surveys reveal that, despite largescale investment in compliance efforts, disturbingly high percentages of executives "could justify unethical behavior to meet financial targets."[388] But, this does not mean that corporate compliance has nothing to teach. At minimum, corporate compliance studies and industry guides provide a wealth of data on what does not work and what, with sufficient effort, just might.

The cases outlined here cry out for increased and careful consideration of how to engender cultural change. Academics have noted that "[t]here are no generally agreed-upon 'best practices' for prosecutors' offices . . . ."[389] In the face of that void, progressive prosecutors should look to the corporate compliance space for guidance. Without the support of a robust ethical culture made manifest in comprehensive codes of conduct, trainings, monitoring, and consistently meted discipline and rewards, reform efforts in individual offices may fail. Ultimately, even the most charismatic and innovative progressive prosecutors need compliance from their agents in order to succeed. In the worst case, misconduct in the offices of the vanguard class of progressive prosecutors—misconduct that could have been prevented by a well-crafted compliance program—could jeopardize the public's faith in the progressive movement overall. Good intentions alone never saved a corporation. Neither will they save the promise of progressive prosecution.

387. *See, e.g.*, Haugh, *supra* note 60 (discussing the failures of Wells Fargo's compliance program); Jaclyn Jaeger, *Five Compliance Lessons from Walmart's FCPA Settlement*, COMPLIANCE WEEK (July 22, 2019), https://www.complianceweek.com/anti-corruption/five-compliance-lessons-from-walmarts-fcpa-settlement/27438.article [https://perma.cc/2AGV-23CF] (discussing compliance failures related to Walmart's FCPA-related scandal in Mexico). R

388. Chen & Soltes, *supra* note 122 (citing a 2016 Ernst & Young Global Fraud Survey, which found that 42 percent of surveyed executives could so justify unethical behavior). R

389. Sklansky, *supra* note 10, at 27. R