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ARTICLES

NOTES

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ABOUT THE JOURNAL

The Arkansas Journal of Social Change and Public Service is a vehicle for identifying and addressing the pressing needs of our society. It examines issues lying at the intersection of policy, public interest, academia, and the law, raising awareness of topics insufficiently examined in traditional scholarly publications.

The Journal seeks contributions in a variety of formats not only from academics, but also from advocates, students, and members of the general public in an effort to provide the broadest possible array of analysis and opinion. This approach fosters dialogue that reaches beyond a single discipline or perspective.

Reflecting the fact that world events do not occur in semi-annual installments, the Journal's content is dynamic, with frequent updates occurring through the efforts of its staff and outside contributors.

The Journal will serve as a gathering place and a rallying point for those committed to public service, public policy, and public advocacy. A candid and open exchange of ideas will provide guidance in the formation of initiatives not only in Arkansas but throughout the world.

See ualr.edu/socialchange for more information on the Journal.

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EDITOR'S PREFACE

Rylee Sullivan

It is with great pleasure that the 2023-2024 Editorial Board presents Volume 13, Issue 1 of the Arkansas Journal of Social Change and Public Service. As we proudly present the latest installment of the Journal, we are thrilled to reflect on the transformative journey the Journal has embarked upon this semester. The winds of change have swept through our pages, leaving behind a trail of innovation and growth that we are eager to share with our readers. One of the most visible transformations is the refreshing update to our artwork, a testament to our commitment to staying dynamic and engaging in the ever-evolving landscape of academia. In addition, this semester marks a significant milestone with the expansion of our Editorial Board. We are delighted to welcome a cadre of talented and diverse individuals who bring a wealth of expertise and passion to our collective pursuit of social change and public service. The expanded Editorial Board is a strategic move to foster inclusivity and ensure that the Journal remains at the forefront of scholarly discourse. As we navigate through this exciting chapter in the history of the Arkansas Journal of Social Change and Public Service, we invite our readers to join us in celebrating the spirit of evolution and the power of collective intellect that propels us forward.

In her powerful article *Living with the Dying: Visitation Rights of Children Whose Parents Have Been Condemned to Death*, Jessica Terkovich highlights the trauma, confusion, and social stigma faced by children who lose a parent to state-sanctioned execution. She argues for reform, advocating for children's rights to maintain positive relationships with their parents on death row, proposing changes to policies, and increasing access to resources to address the unique challenges faced by these children.

Ainslee Johnson-Brown discusses the multifaceted role of prosecutors and the significance of language and communication in the criminal justice system in her note, *Justice in Language: The Prosecutor's Duty to Transgender Victims, Jurors, and Defendants*. By focusing on the impact language has on marginalized populations such as transgender individuals, she urges prosecutors to use inclusive language both on and off the record.

In *Slave Codes & Jim Crow Laws as a Basis for State Truth Commissions in the United States*, William H. Bowen School of Law student Taylor Toombs explores transitional justice methods as a means of addressing the historical human rights abuses in the United States. She argues for the application of truth commissions as a method of holding states accountable for past discriminatory laws and practices.

Finally, in his note, *An Uncomfortable Pause: A Historical Perspective on Legislative Deference to Animal Agriculture and Arkansas's Ag-Gag Fight*, Ryan Lynn explores the impact of agricultural gag laws and argues that such laws are unconstitutional restrictions on free speech that hinder activists from exposing the truth about the inner workings of slaughterhouses and research facilities. He argues that these laws, implemented in five states, must be repealed to protect fundamental First Amendment rights.

We extend our heartfelt gratitude to our contributors for their insightful perspectives and groundbreaking research that have enriched the pages of Volume 13, Issue 1 of the Arkansas Journal of Social Change and Public Service.

LIVING WITH THE DYING: VISITATION RIGHTS OF CHILDREN WHOSE PARENTS HAVE BEEN CONDEMNED TO DEATH

*Jessica Terkovich**

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INTRODUCTION

Losing a parent is deeply traumatic and profoundly impactful at any age, but when that loss is the result of a state-sanctioned execution, it is even more confusing and frightening – especially for young children who are left behind to grapple with their parent's crime and the repercussions of actions beyond their control.[1] This loss often comes after years of separation during

* Jessica Terkovich is an Assistant Commonwealth Attorney serving the City of Norfolk, Virginia. She earned both her Bachelor's degree in

which the parent and child rarely, if ever, have the chance to see each other, and usually have no absolute right to visit at all.[2] This separation is far worse than when a parent receives a lengthy prison sentence: The child is left to deal with the reality of a horrible crime (even if their remaining parent or guardian tries to conceal it from them), exposure to an overwhelming judicial process of which they understand very little, the social stigma of having a parent on death row, and the lifelong trauma of having a parent being permanently taken from them by the state. Even if the child's family tries to visit the parent on death row, there are a myriad of factors that can prevent the child from regularly seeing their incarcerated parent, including travel costs and time, restrictions on the number and frequency of visitors, and many institution-specific limits placed on visitation, which are the most restrictive when the inmate is on death row. Children in this situation need support, compassion,

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Criminology and Law and her Juris Doctor at the University of Florida. In both her scholarship and practice, she aims to analyze, address, and remedy the disparities in outcomes of the criminal justice system and advocate for equal justice under law.

[1] Martra Pais, *The Rights of the Child When A Parent Is Sentenced To The Death Penalty Or Executed*, THE UNITED NATIONS (Oct. 2017), https://violenceagainstchildren.un.org/news/rights-child-when-parent-sentenced-death-penalty-or-executed.

[2] *See* Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 461 (1987) ("The denial of prison access to a particular visitor "is well within the terms of confinement ordinarily contemplated by a prison sentence," and therefore is not independently protected by the Due Process Clause. (quoting Hewitt v. Helms, 459 U.S. 460, 486 (1983)).

and age-appropriate but accurate information about their incarcerated parent, yet they rarely receive it.[3]

Furthermore, children need access to their incarcerated parent to encourage a positive relationship, let alone share a hug or spend quality time together. Long prison sentences bring difficulty in maintaining the parent-child relationship, but a capital sentence almost certainly spells disaster for any hope of consistent involvement in the child's life. Even children who do not face travel or cost-related obstacles can be barred from seeing their parent when they need them the most, as there is no constitutionally protected right to visit a parent on death row.[4]

This problem is compounded by the fact that in some states, a capital sentence is justification for the termination of parental rights, even if the parent did not commit any offense against the child or any other minor.[5] Depending on the laws of the state, parental rights can be terminated if the parent is serving a sentence long enough that it would prevent them from

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[3] Pais, *supra* note 1.

[4] Thompson, *supra* note 2, *at* 454. *See also* Conway v. Wilkinson, 8-9 (S.D. Ohio Mar. 26, 2007) (finding no protected liberty interest in parental visitation rights). This raises some concerns, as protected liberty interests have been found in childrearing. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (finding a fundamental liberty interest in deciding how one's child is educated.) and Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (finding a liberty interest in determining the upbringing and schooling of one's child).

[5] State ex rel. J.T.C., 895 So. 2d 607, 614 (La. Ct. App. 2005).

being able to care for the child for an extended period of time, citing the fact that the child's best interest in having stable, long-term care is affected by having a parent sentenced to death.[6]

A parent's long-term detention, even on death row, should be no independent cause for terminating their parental rights. Instead, institutions should prioritize maintaining a positive parent-child relationship if possible. Having positive outside relationships has benefits for offenders, even if they will never integrate back into society. In addition, there are positive benefits for the child, even if the parent's involvement in their life is limited: Children need regular contact with parents to grow and flourish and should be allowed to maintain their relationships with incarcerated parents even if the relationship is going to be limited by the very nature of the parent's incarceration.

This article argues for that very concept; that children should be allowed to maintain a relationship with their parent on death row in as open, consistent, and positive a manner as possible, not only taking into account the security interests of the facility and the interests of the child in *not* being exposed to the fundamentally traumatic judicial process, but also accounting for the interests of the child in maintaining that relationship despite the

[6] *Id*; *See also* In re Garcia, No. 347162, 2019 Mich. App. LEXIS 4999, 12 (Ct. App. Aug. 27, 2019).

difficult circumstances the family is facing. Section I of this article provides a brief roadmap and outlines the issues faced by children whose lives have been fundamentally altered by a parent's capital sentence.

Section II of this article focuses on the limited rights to visit a parent on death row that have been carved out by case law in some states despite the lack of such right in the Due Process Clause of the Constitution. Section III details a survey of all states currently imposing the death penalty and their policies on parent-child visitation on death row. Section IV discusses the repercussions that these limitations have on children and families. Section V concludes by offering proposals for reform that would keep families together as much as possible during the death row process.

I. A LACK OF CONSTITUTIONAL RIGHTS TO VISITATION

One loses a lot of rights when convicted of a crime. In many jurisdictions, felons cannot vote while in custody or for a period after release,[7] cannot serve on juries,[8] and cannot own firearms.[9] Those behind bars also

[7] The Sentencing Project, *Felony Disenfranchisement* (Mar. 2010), https://www.prisonpolicy.org/scans/sp/Felony-Disenfranchisement-Laws-in-the-US.pdf. Only Maine and Vermont allow inmates to vote while in custody. A total of thirty-five states exclude parolees and thirty exclude probationers from being able to vote. Nine states require a waiting period for the restoration of voting rights after release, and two fully bar convicted felons from voting no matter how much time has passed since their release.
[8] United States Courts, *Juror Qualifications* (Jan. 2023), https://www.uscourts.gov/services-forms/jury-service/juror-qualifications.
[9] Restoration of Rights Project, *50-State Comparison: Loss & Restoration of Civil/Firearms Rights* (accessed Jan. 2023),

lose a lot of privileges that seem fundamental to life outside of correctional institutions, such as spending time with their children. There is no constitutional right to visitation in prison, and the warden can deny the privilege for almost any reason.[10] Though the Supreme Court of the United States has been hesitant to hold that *any* right to associate with others on the outside is terminated by incarceration, restrictions pass constitutional muster so long as they bear a "rational relation to legitimate penological interests."[11]

The unique security concerns on death row can easily be cited as reason enough to prevent visits from family and friends. However, there is a caveat to this rule that is critical for those in the penal system, that being if state laws or prison regulations have affirmatively created a liberty interest in visitations, a prisoner's visitation privileges cannot be revoked without due process.[12] In simple terms, there is no general constitutional right to visitation in prison, but if a right has been created by state statute or prison rules, the

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https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/. In some states, a felon convicted of possessing a firearm without having their rights restored is subject to a mandatory minimum sentence, such as in Virginia, where a non-violent felon convicted within ten years of their original felony faces a mandatory minimum two years and a violent felon convicted within ten years of their original felony faces a mandatory minimum five years. See Va. Code § 18.2-308.2(A).

[10] Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 461 (1987).

[11] *See* Overton v. Bazzetta, 539 U.S. 126, 132-33 (2003).

[12] Patchette v. Nix, 952 F.2d 158, 161 (8th Cir. 1991).

right cannot be taken away without notice and a hearing in which the affected inmate is allowed to state their case for keeping their visitation privileges.

Multiple circuit courts embrace this idea. In *Patchette v. Nix*, the Eighth Circuit held that prison visitation rules created a liberty interest in enjoying weekend visits, and that prison officials could not modify or deny this privilege without due process.[13] Similarly, the Ninth Circuit in *Mendoza v. Blodgett* found that the visitation rules at the Walla Walla State Penitentiary created a liberty interest for both inmates and visitors alike, and that visitations could only be barred after a "finding of guilt pursuant to a regular disciplinary hearing."[14] In *Long v. Norris*, the Sixth Circuit echoed the same sentiment, holding that because Tennessee prison regulations required good cause to be shown before an inmate's visitation rights could be removed and that the regulations created an expectation of visits being allowed, the prison had created "liberty entitlements" under the Fourteenth Amendment that could not arbitrarily be taken away.[15]

When visitation privileges come with the liberty entitlements referenced in *Long*, those entitlements -- and the corresponding due process interest -- do not only vest in the inmate regarding their family members. Some courts have held that they extend to significant others, even when there

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[13] *Id*.
[14] Mendoza v. Blodgett, 960 F.2d 1425, 1433 (9th Cir. 1992).
[15] Long v. Norris, 929 F.2d 1111, 1117 (6th Cir. 1991).

is no marital relationship and when, as is the case on many death row blocks, the number of visitors an inmate can have is severely restricted.[16] However, if no state law or prison policy creates a liberty interest, due process is not required to terminate a prisoner's visitation privileges,[17] meaning that visitation privileges can vary state-by-state and even institution-by-institution. Inmates have little legal recourse where no liberty interest has been created, as courts have been historically reluctant to get involved with issues in prisons and instead defer to the judgment of the warden when at all possible.[18]

Within prisons, and even in those that have created a liberty interest in visitations, wardens are relatively free to proscribe restrictions on visits so long as they do not extinguish the right entirely. When it comes to death row, wardens are even more cautious, instituting different types of limitations on who is allowed to visit, what is allowed to happen during a visit, and seemingly any other factor within their control.

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[16] Van Poyck v. Dugger, 779 F. Supp. 571, 576 (M.D. Fla. 1991).

[17] Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454 (1989). (The regulations at issue here did not establish a liberty interest, and thus the lack of notice and hearing before terminating prisoners' visitation rights was not unconstitutional).

[18] *See, e.g.*, Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 126 (1997) (which stated that courts are, "ill-equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism").

A. Contact v. Non-Contact Visits

A hug from a parent can make all the difference in a child's life. When that parent is behind bars, especially on death row, hugs are few and far to come by. Contact visit rules are entirely up to the warden's discretion, as contact visits can cause a whole host of safety concerns in a high security facility, such as the introduction of contraband into the institution or the rare hostage-taking situation.

In *Block v. Rutherford*, the Supreme Court held that a blanket prohibition on contact visits is a reasonable, nonpunitive response to legitimate safety concerns and that such blanket bans do not run afoul of the Fourteenth Amendment.[19] Wardens' safety concerns are multidimensional: The safety of the prison itself can be jeopardized by visitors bringing illicit items into the facility, but the visitors also run the risk of being exposed to violent individuals whose behavior is not always predictable. Additionally, the opportunity to smuggle weapons, drugs, or other contraband into correctional facilities is increased when contact visits are allowed, as does the potential for a visitor's injury or a hostage situation to occur.[20]

While safety concerns are paramount on death row, contact visits are extremely important for the well-being and development of children. Not

[19] Block v. Rutherford, 468 U.S. 576, 577 (1984).
[20] *Id*. at 586.

being able to receive a hug from a parent whom the child rarely has the chance to see or talk to punishes the child as much as the parent. Scientifically, hugs and physical contact promote bonding between the parent and child and reduce stress and anxiety.[21] This is critical for both the parent and child, especially when in such a high-stress situation as being on death row, fighting appeals, and learning to adapt to having a parent largely absent from one's life because of a state-sanctioned intervention. Regular physical contact promotes physical and emotional well-being which are critical in the formative years of a child's life.[22]

Although the carceral system prides itself on punishment, its rehabilitative functions cannot be fully served if children cannot hug their parents, inmates cannot hold their newborns, and positive social relationships with family members outside of the facility are not fostered. Even on death row, where the odds of leaving the prison alive are miniscule, prosocial attitudes should be encouraged. Allowing familial contact visits is a step in a positive direction, even if there are criteria a death row inmate must meet to

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[21] Poehlmann, J., Dallaire, D., Loper, A. B., & Shear, L. D. (2010). Children's contact with their incarcerated parents: Research findings and recommendations. American Psychologist, 65(6), 575–598. https://doi.org/10.1037/a0020279

[22] Francis McGlone & Susannah Walker, *Four Ways Hugs Are Good for Your Health*, GREATER GOOD MAGAZINE, (2021), https://greatergood.berkeley.edu/article/item/four_ways_hugs_are_good_for_your_health.

qualify for them, such as having no history of family abuse, demonstrating good behavior inside the facility, and being subject to capital punishment for a crime not committed against a family member or child.

B. Visitation Rights that Vary by Offense

Several prisons, such as Corcoran State Prison, the Correctional Training Facility in California, and Michigan Department of Corrections institutions, restrict visitations based on the type of crime that the inmate committed.[23] This results in restrictions being placed on those who are allowed to visit the inmate, to the point that even close family members, including the inmate's children, are barred from visiting. This is most often the case with sexual offenses or capital cases where a sexual crime was part of the acts that led to the commission of murder. Sexual offenses can result in limitations on visitation with one's children even if the offenses were not perpetrated against a child.[24]

Courts have also upheld bans on visits from minors, including the inmate's own biological children, when rules are broken or inmates amass further charges while in the facility.[25] In *Dunn v. Castro,* the Ninth Circuit

[23] *See* Lambirth, *infra* note 24; Dunn, *infra* note 25; Overton, *infra* note 29.
[24] *See* In re Lambirth, 5 Cal. App. 5th 915 (2016) (inmate able to appeal after child visitation limits were placed on him even though his history of sexual offenses never involved children; decided on procedural grounds, but no further challenge to the policy has occurred).
[25] See Dunn v. Castro, 621 F.3d 1196 (9th Cir. 2010).

dismissed an inmate's challenge to an 18-month ban on visits from minors, including his own minor children, because the right to visits by one's own minor children was not clearly established at the time it was taken away and thus, it was a privilege that could be revoked after an infraction.[26] It is important to note, however, that the infraction Dunn was accused of was having a sexual conversation with a minor over the phone.[27] Dunn claimed that he believed he was talking to his wife and not his minor child at the time, but his claims did not help his case.[28]

Thus, where there is a rational relation to legitimate penological interests, restrictions on visitation in general will be upheld.[29] The onus to show that there is no rational relation between a legitimate penological interest and the restriction placed on the inmate's visitation privileges rests on the inmate, who must demonstrate it on the face of their complaint.[30] With few legal resources inside prisons, inmates are left to petition a system made

[26] *Id*. at 1205. It is important to note that Dunn raised a qualified immunity challenge against the officials enforcing the policy, which set him up for a losing battle, as the "clearly established" prong of the qualified immunity test is extremely narrow and requires almost an exact fact-for-fact situation to have occurred and been ruled on previously.
[27] *Id.*
[28] *Id.*
[29] Overton v. Bazzetta, 539 U.S. 126, 131-33 (2003). Bazzetta fell victim to a Michigan prison's policy that prevented those found guilty of two substance abuse violations from having contact with minors, including minor family members.
[30] Desper v. Clarke, 1 F.4th 236, 245 (4th Cir. 2021).

up of those who are far more experienced and hold far more power, which means that their odds of success are low. Deference to wardens means that those in charge of the penal system, not the courts, essentially become the final arbiters of what truly constitutes a "rational relation" to penal interests. With a court's stamp of approval, wardens are left with discretion that remains largely unchecked.

Abrogating an inmate's visitation privileges based on the offense committed may be a reasonable reaction in some cases, but in others, it puts undue strain on inmates and indirectly punishes their families for infractions as simple as being up past lights-out or not keeping a bunk up to cleanliness standards. Wardens should be attentive to the concerns raised by some offenses and infractions but must also be able to discern which offenses and infractions merit placing limits on visitation. Although courts prefer to defer to the wardens who have knowledge and experience in the penal system, this deference comes at the cost of neutrality. While wardens can and should be able to educate the courts and inform them of their concerns, the final decision making must rest fully with the courts in order to keep the system of punishment fair and afford inmates a real chance at making their cases.

II. SURVEY OF POLICIES

A total of twenty-four states are still actively using capital punishment.[31] The author conducted a survey of the death row visitation policies in these states, finding that a surprising amount have little variation between regulations for visiting an inmate on death row and visiting an inmate who is held in a maximum-security unit. Each state with an active death row, however, places limitations on child visitors. These limitations break down into three general categories: (1) the number of visitors allowed; (2) the frequency and extent of visits; and (3) whether contact is allowed between the incarcerated parent and their children. Some facilities consider other factors designed to promote the best interests of the child when drafting their visitation policies, but these three factors weigh the most heavily across the board.

A. Number of (Child) Visitors Allowed

Facilities often limit the number of visitors due to security concerns. This limitation is logical in theory -- after all, each facility only has a certain number of personnel to oversee visitation rooms and control what happens during visits -- but problems arise when an inmate's family tries to visit and is too numerous to abide by the policy. This means that larger families are

[31] *State by State*, DEATH PENALTY INFORMATION CENTER (2023), https://deathpenaltyinfo.org/states-landing.

forced to choose who visits their incarcerated family member and when, if at all, each child can see their parent.

Some states have very strict limits on how many visitors an inmate can have. In Louisiana, women on death row are restricted to one approved visitor during each visit, presumably with a chaperone if the child is very young.[32] While there is no limit on the number of one's own children that can visit maximum security female inmates, the death row policy does not make this distinction.[33] North Carolina is a similar case: only two people are allowed to visit a death row inmate per week, with no carve-out for larger families trying to visit an incarcerated loved one as a family unit.[34]

Though not as restrictive as Louisiana, Alabama allows only four children to visit at a time, and four adults are welcome to visit as well.[35] Alabama's regulation provides no guidance on whether or not a larger family, such as one with six children, would be allowed to visit as a group, as it would surpass the four-child limit but remains within the total of eight persons

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[32] *Louisiana Correctional Institution for Women*, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, (Dec. 6, 2022), https://doc.louisiana.gov/location/louisiana-correctional-institute-for-women/#:~:text=Contact%2FNon%2DContact%20Visits&text=Women%20on%20death%20row%20generally,2.

[33] *Id.*

[34] *Death Penalty,* NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, (Dec. 6, 2022), https://www.ncdps.gov/our-organization/adult-correction/prisons/death-penalty.

[35] *Visitation,* STATE OF ALABAMA DEPARTMENT OF CORRECTIONS, (Aug. 7, 2012), http://www.doc.state.al.us/docs/AdminRegs/AR303.pdf.

entering the facility. Decisions on somewhat unclear policies such as this one are largely left up to the discretion of the warden.

However, many states have moved in the opposite direction, allowing for more flexible numbers of visitors to promote family unity and inmates' participation in their children's lives. Arkansas, for example, states that, "[f]our visitors are allowed during any one visit, including children. However, your spouse and all your children, regardless of the number, may visit at the same time."[36] Nebraska takes a similar approach, allowing four adults per visit, accompanied by a "reasonable number of children" of any age, so long as they are accompanied by an adult.[37] The most liberal of these policies comes out of Wyoming, where children do not count towards the number of approved visitors an inmate is allowed.[38]

While safety and control of the facility is always a concern, and an especially pressing one in maximum security prisons and on death row, these

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[36] *Inmate Handbook*, ARKANSAS DEPARTMENT OF CORRECTION, (Nov. 2022), https://doc.arkansas.gov/wp-content/uploads/2022/10/Arkansas-Division-of-Correction-Inmate-Handbook-Revised-November-1-2022-Director-approved.pdf.

[37] *Schedule an In-Person Visit at TSCI*, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, 1 (2023), https://www.corrections.nebraska.gov/facilities/tecumseh-state-correctional-institution/visiting-hours/schedule-person-visit-tsci.

[38] *Policy and Procedure #5.400: Inmate Visiting*, WYOMING DEPARTMENT OF CORRECTIONS, (Nov. 2021), https://drive.google.com/file/d/1OoVdH1Fs4nLpJjM09QDErTE3yVgmn6s8/view.

more liberal policies allow incarcerated parents to be part of their children's lives to the fullest extent. There is little chance that these inmates will ever leave the facility, and thus there is only so much rehabilitation that will be effective for them. They may never be able to attend talent shows, school dances, or graduations, but they can still be active in their children's lives and contribute positively to the next generation. Flexible policies like those in place in Wyoming, Nebraska, and Arkansas both acknowledge and encourage such beneficial bonding without forcing families to decide on who can visit each time.

B. Frequency and Extent of Visits

To bond with an incarcerated parent, children need frequent, regular contact and positive interactions with that parent when at all possible. This is hard to do when a parent is incarcerated. Most of the parent's time is spent away from the child, possibly not even in the same state. In-person visits are often limited either by the prison's policies or by the time and cost of travel with the only other option being video visitation. In facilities that do not have the capacity for video visits, old-fashioned phone calls are the only way incarcerated parents can maintain a presence in their children's lives. However, even phone calls in prison can create financial difficulties; JPay, the leading system for transferring money to inmates' accounts in correctional institutions, charges transfer fees as high as 45% in certain

facilities.[39] Inmates' families are forced to pay exorbitantly high fees to add money to their loved ones' accounts, and often their incarcerated loved ones cannot use the majority of that money for phone or video visits, as they also need to purchase even basic toiletries and other necessities from the commissary on their limited budgets.[40] The wages inmates earn behind bars does little to offset these costs,[41] and oftentimes death row inmates are not allowed to work like those in the general population[42] -- meaning that they have no option but to pay for video visits or phone calls, or hope that their families can come up with the money to visit frequently.

The number of visits allowed per month among death row institutions varies vastly. In Mississippi, for example, death row inmates can have a single hour-long visit with family twice a month, but these visits are always scheduled for Tuesdays,[43] which makes it difficult for families with school-aged children, especially when travel time and costs are factored in. Even

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[39] Eleanor B. Fox & Daniel Wagner, *Time is Money: Who's Making a Buck Off Prisoners' Families?*, THE CENTER FOR PUBLIC INTEGRITY (Sept. 30, 2014), https://publicintegrity.org/inequality-poverty-opportunity/time-is-money-whos-making-a-buck-off-prisoners-families/.
[40] *Id*.
[41] Wendy Sawyer, *How Much Do Incarcerated People Make in Each State?*, PRISON POLICY INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/.
[42] *A Death Before Dying: Solitary Confinement on Death Row*, American Civil Liberties union (July 2013), https://www.aclu.org/wp-content/uploads/legal-documents/deathbeforedying-report.pdf.
[43] *Visitation*, MISSISSIPPI DEPARTMENT OF CORRECTIONS (accessed Dec. 2022), https://www.mdoc.ms.gov/family-friends.

more restrictive, Montana suspended in-person visits for those on death row on October 31, 2022, with a short exception for the Christmas holiday.[44] Now the only visitation option is a video visit, at a cost of $4 for 25 minutes.[45] With the added JPay transfer fees, the cost of these calls adds up quickly.

Other states, such as Florida, allow weekend visitation and the option for video visits during the week.[46] This allows for families with school-aged children to travel to see loved ones together, which is especially important given the size of the state and the distance of many major cities from Florida State Prison's death row. Driving from Miami, for example, would mean a trip of five and a half hours before factoring in traffic, rest stops, or time to re-fuel. A trip like this would be impossible for a family looking to take a single day off work or school to visit their incarcerated loved one. Allowing for weekend visits and video visits on weekdays helps to alleviate travel-related burdens.

While weekend visitation is a popular option for families and favorited by wardens trying to control the flow of traffic in and out of their facilities, some correctional institutions offer death row prisoners a number of hours or a number of visits per month to be used at the inmate's discretion.

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[44] *Visitation*, MONTANA DEPARTMENT OF CORRECTIONS (accessed Dec. 2022), https://cor.mt.gov/FriendsandFamily/Visitation.
[45] *Id.*
[46] Death Row, Fla. Admin. Code R. §33-601.830

This discretion allows inmates to pick easier times for their families to travel and allowing for visits on birthdays or anniversaries that otherwise may have been missed if visits were only allowed on weekends. In Wyoming, death row inmates are allowed 32 visitation hours per month -- a sizable amount of time that allows for families to be together for an extended period and gives children the opportunity to regularly see their incarcerated parent throughout the month.[47] South Carolina takes a similar approach, allowing eight visits per month, which would allow families to visit every weekend or multiple times per week.[48] Additionally, South Carolina guarantees that "[a]s many family members will be scheduled to visit prior to the inmates [sic] scheduled day of execution as is practical."[49] While it is up to the warden to determine how the facility defines "practical", this policy allows for families to say their last goodbyes, no matter how many children they have coming to visit, providing important closure for both the parent and child.

C. Contact and No-Contact Visits

Anyone who has spent an extended time far away from a loved one knows the impact of a reunion hug. Hugs are especially important for

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[47] *Policy and Procedure #5.400: Inmate Visiting*, WYOMING DEPARTMENT OF CORRECTIONS, (Nov. 22, 2021), https://drive.google.com/file/d/1OoVdH1Fs4nLpJjM09QDErTE3yVgmn6s8/view.

[48] *OP-22.16: Death Row*, SOUTH CAROLINA DEPT. OF CORRECTIONS (Mar. 2022), https://www.doc.sc.gov/policy/OP-22-16.htm.pdf.

[49] *Id.*

children: They help to decrease stress, promote bonding, secure attachment, and trust, and can even help promote health and healing.[50] On death row, however, physical contact visits are often limited in the interest of security. Incarcerated parents are already not able to hug their children daily, so security concerns should be heavily scrutinized before banning all physical contact with visitors.

Some states have policies so restrictive that a parent on death row is not allowed to even sit within arm's reach of their child. In Arkansas, a parent on death row must visit from behind Plexiglass.[51] Parents on death row in Georgia are also separated from their children by glass panes and are required to talk on the phone rather than through a small opening in the glass.[52] These kinds of policies rarely do much good for prisoners, and they certainly have a negative impact on the children who can no longer even briefly hug their incarcerated parent.[53]

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[50] *The Benefits of Hugging Your Child, First Five California*, https://www.first5california.com/en-us/articles/the-benefits-of-hugging-your-child/.

[51] *Inmate Handbook*, ARKANSAS DEPARTMENT OF CORRECTION, (Nov. 2022), https://doc.arkansas.gov/wp-content/uploads/2022/10/Arkansas-Division-of-Correction-Inmate-Handbook-Revised-November-1-2022-Director-approved.pdf.

[52] Christopher Reinhart, *Prison Conditions for Death Row and Life Without Parole Inmates*, OLR RESEARCH (Apr. 2011), https://www.cga.ct.gov/2011/rpt/2011-R-0178.htm.

[53] *See* Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, National Institute of Justice (Mar. 2017),

A few states, such as Arizona, allow brief hugs and kisses at the beginning and end of each visit.[54] While not ideal, this allows for at least some form of physical contact between parents and their children. Missouri allows for this and more: Children under six years old can sit in an incarcerated parent's lap or be held by their parent while visiting.[55] In addition, the Missouri correctional system offers "a variety of family programs available throughout the department's institutions, which may include Storylink, 4-H Life, Inside Out Dad, etc., that are designed to encourage parent and child interaction during incarceration."[56] Though not all of these programs are available on death row, Missouri's commitment to offering opportunities for incarcerated parents and their children to connect is admirable.

Physical contact during visits will always raise security concerns, but wardens should take extra care when deciding what, if any, physical contact is allowed between a parent on death row and their child, because the security

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https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children.

[54] *Arizona Department of Corrections Visitor Guidelines*, ARIZONA DEPT. OF CORRECTIONS (Feb. 2017), https://aztownhall.org/resources/Documents/111%20Criminal%20Justice/Arizona%20Department%20of%20Corrections%20Visitor%27s%20Guidelines.pdf.

[55] *For Family and Friends*, MISSOURI DEPT. OF CORRECTIONS, https://doc.mo.gov/sites/doc/files/2018-01/Family_Friends_Handbook.pdf.

[56] *Id.*

of the child and the security of the institution are both very important factors and serious concerns to contemplate.

D. Other Factors in the Child's Best Interest

When designing their visitation policies, wardens must consider a lot of factors, especially when it comes to security. Security is often paramount over all other concerns, but the best interests of the children of incarcerated parents must be considered when deciding who can visit, when visits can happen, and what restrictions can be placed on parent-child visitation. Some facilities actively encourage visits with family, stating that only reasonable guidelines are needed even at the highest of security levels.[57] Other facilities have policies in place that specifically try to increase the number of visits an incarcerated mother has with her newborn child, no matter the security level she is in.[58] Some facilities even provide play areas and toys for children in certain visitation rooms.[59]

One of the biggest factors in determining if visiting a specific inmate is in the best interests of their child is the inmate's history of sex offenses.

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[57] Immediate Relative Visits, Ind. Admin. Code §1-8-6: (current through Dec. 2022).
[58] *OP-030118: Visitation*, OKLAHOMA DEPT. OF CORRECTIONS (Sept. 2022), https://oklahoma.gov/content/dam/ok/en/doc/documents/policy/section-03/op030118.pdf.
[59] *Visitation Handbook: Riverbend Maximum Security Institution*, TENNESSEE DEPT. OF CORRECTIONS (Jan. 2021), https://www.tn.gov/content/dam/tn/correction/documents/RMSIVisitationHandbook.pdf.

Some states have blanket bans on children visiting sex offenders, even if the child is the biological child of the offender.[60] Other states are slightly less restrictive, only preventing visits if the inmate has a history of sex offenses against minors.[61] Of course, almost every facility would logically ban visits between a child and a parent who has offended against them, but if the child or a sibling was not the victim of the parent's crimes, some form of visitation should be allowed, even if it is strictly no-contact or required to take place with the parent behind glass.

Oklahoma takes an even more vague approach, stating that "[v]isitation may be restricted if documentation is received from a court, Department of Human Services (DHS), legal guardian, district attorney, or other source showing that visitation by a child is prohibited or not in the best interest of the child."[62] Arguably this is the best approach. Wardens are not able to make the decision independently, requiring documentation of an issue from an outside source, but visits can also be limited for any reason that is in the child's best interest, not just the criminal history of the incarcerated

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[60] Carol Pitts, *Visiting,* KANSAS DEPT. OF CORRECTIONS (Jan. 2022), https://www.doc.ks.gov/facilities/faq/visits.
[61] *Louisiana Correctional Institution for Women*, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, (Dec. 6, 2022), https://doc.louisiana.gov/location/louisiana-correctional-institute-for-women/#:~:text=Contact%2FNon%2DContact%20Visits&text=Women%20on%20death%20row%20generally,2.
[62] OKLAHOMA DEPT. OF CORRECTIONS, *supra* note 57.

parent. Ironically the vaguest approach with the most red tape involved actually seems to strike the best balance: Both guardians and prison wardens are required to look at the best interests of the child, which forces the matter into consideration in a situation where otherwise it may not be at the forefront of the warden's mind when creating or updating the facility's visitor policy. Although legal guardians may make the decision out of an emotional reaction to the parent's crime, this approach also allows for reconsideration without an appellate process or approval from those within the prison. Thus, the incarcerated parent would not be forced to argue on legal grounds or deal with the failure of an appeal if no affirmative right to visitation had been created by law or prison policy.

In every state, the ultimate ability to visit a loved one behind bars rests with the legal guardian of the child. No matter how permissive the prison visitation rules may be, it is up to that guardian to bring the child to visit. However, the Oklahoma model helps to keep wardens in check by forcing an outside entity to be the one who makes the decision about the child's interests and prevents the prison itself from unnecessarily barring parent-child visitation for minor disciplinary infractions or other nearly arbitrary reasons. Placing the best interests of the child at the forefront of visitation policies ultimately promotes family bonding and prevents needlessly harsh restrictions for inmates.

III. REPERCUSSIONS FOR CHILDREN & FAMILIES

The death penalty polarizes families as much as the debate over capital punishment polarizes society. The death penalty's added punishment — even over life without parole, which carries some similar challenges for families — affects the family as much as it affects the inmate. After an execution is carried out, the full brunt of the punishment and the lifelong stigma associated with it lands squarely on the family members left behind. This added impact disproportionately affects women and children, and arguably undermines the long-held legal principle that the criminal justice system punishes only the guilty.[63]

The loss of a parent to a state-sanctioned execution is traumatic at any age, but even more so for children who do not fully understand the flurry of court proceedings, appeals, and media attention surrounding their loved one. Research has consistently shown that a parent's death sentence, even if it has yet to be carried out, has major psychological impacts for children.[64] Children

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[63] *Studies: Death Penalty Adversely Affects Families of Victims and Defendants*, DEATH PENALTY INFORMATION CENTER (Oct. 2016), https://deathpenaltyinfo.org/news/studies-death-penalty-adversely-affects-families-of-victims-and-defendants. (discussing Professor Michael Radelet of the University of Colorado at Boulder's research into the effects of the death penalty that radiate through the family unit and have far-reaching consequences).

[64] *Children of Parents Sentenced to Death or Executed*, CHILD RIGHTS CONNECT, 3 (Aug. 2013) https://quno.org/sites/default/files/resources/English_Children%20of%20parents%20sentenced%20to%20death%20or%20executed.pdf.

are far less able than adults to understand why their parent suddenly disappeared from their lives, and even with the best of explanations and resources, they exhibit a range of reactions. Reactions that often result in loss of interest in friends and school, poor academic performance, loss of sleep, increased anger, frustration, and embarrassment, and sleep disturbances, all of which increase as a parent's execution date approaches and the death sentence is ultimately carried out.[65]

Swiftly and violently removing a parent from a child's life arguably amounts to a violation of the rights enshrined in the Convention of the Rights of the Child, a 1989 declaration by the United Nations which gives children the right to have special protections when government actions cause them to be deprived of their right to appropriate social development and their normal family environment.[66] In the Convention, the U.N. specifically spoke on the matter of parental incarceration, stating that the children of incarcerated parents should have access to their parent "throughout judicial proceedings and the period of detention, including regular and private meetings [. . .] and, wherever possible, contact visits for younger children, subject to the best

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[65] *Id. See also* Elizabeth Beck et al., *Seeking Sanctuary: Interviews With Family Members of Capital Defendants*, 88 CORNELL L. REV. 382, 394-95 (2003).

[66] Martra Pais, *The Rights of the Child When A Parent Is Sentenced To The Death Penalty Or Executed*, THE UNITED NATIONS (Oct. 2017), https://violenceagainstchildren.un.org/news/rights-child-when-parent-sentenced-death-penalty-or-executed.

interests of the child, taking into account the need to ensure the administration of justice."[67] When a parent is on death row or otherwise slated for execution, the U.N. states that both the inmate and their family be provided with "adequate information about a pending execution, its date, time and location, [in order to] to allow [for] a last visit or communication [. . . and . . .] the return of the body to the family [. . .] or to inform on where the body is located" unless it is not in the child's best interests to do so.[68]

Some countries honor this principle by keeping families informed and allowing death row inmates access to information about their impending execution so they can keep in touch with their families, make the proper arrangements, and have time to say goodbye. Others, such as Japan[69] and Saudi Arabia[70], keep families in the dark, not notifying them until the day of the execution, and sometimes not notifying anyone until after it has already been carried out. Though the United States honors many of its provisions and

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[67] U.N. HRC, 19th Sess. 1st plen. Mtg. at 3, U.N. Doc. A/HRC/RES/19/37 (April 19, 2012).
[68] *Id*.
[69] *Japan Death Row Inmates Sue Over Inhumane 'Same-Day' Notification*, Reuters for NBC News (Nov. 5, 2021, 3:53AM), https://www.nbcnews.com/news/world/japan-death-row-inmates-sue-over-inhumane-same-day-notification-n1283304.
[70] Caroline Hawley, *Secretive Saudi Executions Leave Families In the Dark*, BBC News (Jan. 31, 2023), https://www.bbc.com/news/world-middle-east-64338876.

signed onto the Convention, it has not ratified the Convention.[71] Thus, the United States has signaled its willingness to uphold the Convention but is not legally bound to follow the Convention.

Despite the security concerns on death row, children deserve the right to visit their parents and say their goodbyes when all appeals have been exhausted and execution is imminent. They deserve to be informed in an appropriate manner and afforded the same dignity and respect that adult family members are given when grieving. The Convention's protections for the children of parents on death row have not been enshrined in American law, leaving children to suffer from a lack of support that can be compounded by other factors.

A. Additional Repercussions When One Parent Kills the Other

Over 40% of female homicide victims are killed by an intimate partner or family member.[72] These tragic cases often leave children behind, suffering an even more crushing loss when one parent is arrested, convicted, and sentenced for the death of the other. When capital punishment applies, these children are effectively made orphans by the State. Though the appeals process may see the children grow into adults before an execution is actually carried out or a sentence is commuted to life in prison, the child is

[71] Treaty Ratification, ACLU (Aug. 2023), https://www.aclu.org/issues/human-rights/treaty-ratification.
[72] Pais, *supra* note 66.

immediately left to the care of family members or the foster care system and thrown into an uncertain environment while grieving the loss of the deceased parent while still grappling with their feelings about the other. Even the most well-equipped family members, foster care workers, or guardians cannot be prepared for the emotional tumult that comes with such an unimaginable scenario.

In cases where domestic violence results in death, the child may also be required to testify against the perpetrator parent in a criminal trial.[73] This leads to tremendous stress on the child, who is forced to navigate the emotional minefield of testifying against someone they love. Even children who consciously know that one parent committed an act of violence against the other can develop an overwhelming sense of guilt if their testimony contributes to the perpetrator parent being convicted and sentenced, even when capital punishment is not on the table.[74]

B. Family Resources Devoted to Appeals Instead of the Child

The capital process, from a trial that may take years to come about to the numerous appeals before an execution, is taxing on even the strongest adults. The family experiences waves of anxiety as a trial date is set, moved, and set again. Then there is the long wait between trial and sentencing,

[73] *Id.*
[74] *Id.*

followed by years of appeals when an execution date is moved back with each new court filing. With family energy and resources focused on the appeals process and trying to stop the execution and commute the sentence, children may not receive the support they need to understand the process and come to terms with what is happening and why things seem so uncertain all the time.[75]

If most of the family's monetary resources are being spent on appellate lawyers and filing fees, older children may feel pressured into finding employment in order to help cover court costs, especially if the principal breadwinner of the family was either the victim or the one put on death row.[76] While some children are privileged enough to not have to work during their high school years, those with family members on death row will likely feel the extra pressure to find a job to help support their family while also balancing school, a disrupted home life, and the social life of a teenager.

As economic resources and social support are focused on the person behind bars, children experience a sense of loneliness and isolation from their family, be it the family member on death row, those who spend much of their free time working on appeals, or those working to pay for attorney's fees.[77] Hopelessness sets in as the execution date looms, and with a lack of familial

[75] *Id.*
[76] *Id.*
[77] *Id.*

support, children are left to deal with these difficult emotions by themselves.[78]

Having a parent subject to execution brings about a unique kind of grief. "Disenfranchised grief", a term coined by scholar Kenneth Duka, describes the feeling of being denied the right to grieve the loss of a family member to a state-sanctioned execution, something which families of the condemned acutely feel as a subliminal push from society.[79] Disenfranchised grief occurs when one feels that the loss cannot be openly acknowledged or mourned in public, occurring without a lack of wider social support.[80] Frequently the prosecution only recognizes the grief of the victim's families, paying no mind to the grief of the inmate's family. Several families of death row inmates surveyed by Sandra Jones and Elizabeth Beck in their comprehensive study of the effects of a death sentence on the family stated that while victims' loved ones are handed tissues and supported through the

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[78] Martra Pais, *The Rights of the Child When A Parent Is Sentenced To The Death Penalty Or Executed*, THE UNITED NATIONS (Oct. 2017), https://violenceagainstchildren.un.org/news/rights-child-when-parent-sentenced-death-penalty-or-executed.

[79] Hedwig Lieback, *Who Speaks? The Effect of the Death Penalty On Family Members of Both Victims and the Accused,* COLUMBIA CENTER FOR CONTEMPORARY CRITICAL THOUGHT (Jan. 2021), https://blogs.law.columbia.edu/abolition1313/hedwig-lieback-who-speaks-the-effect-of-the-death-penalty-on-family-members-of-both-victims-and-the-accused/.

[80] *Id.*

court process, death row inmates' families are often dismissed or treated with contempt when they express their grief.[81]

Refusing to acknowledge the grief of the condemned person's family fails to recognize the fact that there are no unharmed parties on a capital trial and sentence. When providing care and support for every family involved, guilt by association often colors how the defendant's family is treated by the prosecution and the media. This is compounded by the highly public nature of capital trials. Such trials are followed by the media and defendants' family members often become targets for the media even in their own time of grieving. They are left to deal with their disenfranchised grief on their own, but also in full view of the public that is clamoring for every detail, no matter how invasive.

In the wake of an execution, the trauma of the years since the crime occurred all bubbles to the surface. Unresolved trauma, compounded by grief, has a lasting, and oftentimes intergenerational impact.[82] After years of being forced to come to terms with the crime, of being separated from a parent and unable to visit very often if at all, of having a lack of familial resources, and of often being unable to understand what is happening to their loved one and

[81] Sandra Jones & Elizabeth Beck, *Disenfranchised Grief and Nonfinite Loss as Experienced by the Families of Death Row Inmates*, 54(4) Omega 281, 293 (2006).
[82] Pais, *supra* note 78.

their family as a whole, children are left mourning the loss of a parent they hardly knew. Often it seems like the media knows the parent better than their own child does, with every detail of their lives being put on display for the public every time a major event happens in their case. The family is put under a microscope at one of the worst times in their lives, when they just want to grieve in private. Instead, every action is scrutinized, and every person is stigmatized, even if they had no bearing on the case and no impact on the offender's choices that led them to death row.

C. Social Stigma and the Varying Effects of Early-in-Life Trauma

Ending up on death row means one has been convicted of a horrible crime, but that person remains someone's child, spouse, partner, or parent. They leave behind families who deserve respect and dignity as they mourn the loss of their loved one. While systems exist to support the victims of crimes and their families, the children of capital offenders have few resources that are willing to address their needs.[83] Because children and families of perpetrators are not seen as victims by any of the fifty-eight countries still employing capital punishment, no support is available for counseling or mental health services and expenses.[84] Even when a homicide results from

[83] *Children of parents sentenced to death or executed*, *supra* note 64 at 2.
[84] Rachel King, *Capital Consequences: Families of the Condemned Tell Their Stories*, at 10 (2005).

domestic violence, where the child is both that of the victim and of the offender, traditional victim support networks are ill-equipped to handle their unique needs,[85] most often viewing them foremost as the child of the offender and therefore less deserving of help. The lack of support and incredible social stigma faced by children with a parent on death row is often compounded by other forms of prejudice and discrimination, as the death penalty is disproportionately applied to poor defendants and persons from racial and ethnic minorities.[86]

While trying to heal from the loss of a parent or their condemnation to death row, children can be stigmatized by the media because of their parent's actions, something far beyond their control. When an execution makes the news, the public eye returns to the offender's family. Their grief becomes public and is often seen as far less valid than the grief of the victim's family, although both suffered an irreparable loss due to the actions of others.

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[85] *Children of parents sentenced to death or executed*, *supra* note 64 at 2.
[86] *Id. See also, Race and the Death Penalty*, AMERICAN CIVIL LIBERTIES UNION. (Feb. 2003), https://www.aclu.org/documents/race-and-death-penalty. A study by the American Civil Liberties Union in the early 2000s revealed that since the death penalty had been reinstated in 1976, only 12 white defendants with Black victims had been executed, while 178 Black defendants with white victims had been executed, despite minority victims accounting for half of all murder victims. Researchers at the University of North Carolina concluded that defendants are 3.5 times more likely to be sentenced to death if they have killed a white person than if their victim was a person of color.

Children of capital offenders suffer even after they have finished the acute grief in the wake of an execution. Some are harassed by the media for years because of a crime they did not commit, and some are hounded to the point that they must change their names to protect themselves from the media attention and social stigma surrounding their infamous parent.[87]

A death row inmate's family experiences these social harms in waves. First and foremost is the tidal wave engulfing the family when they learn of the horrific crime their loved one is accused, that washes back over them during the trial and as the sentence is declared.[88] During the sentencing phase, offender's families are often forced to allow themselves to be seen as abusive or neglectful in order to make an argument for mitigation, stating that the

[87] *See e.g.,* Anne Rule, *The Stranger Beside Me* (W.W. Norton & Co., 2008), (1980). Rose Bundy, the alleged daughter of serial killer Ted Bundy (supposedly fathered while he was in prison), whose mother chose to change her name in an effort to keep her out of the spotlight after her father's execution and hopefully set her up for a normal life. Very few details about Rose Bundy's life have been made public, but some reliable facts can be found in true crime author Ann Rule's book. Rule was intimately involved in the case, as a friend and coworker of Bundy's during some of his murders. She eventually left the job they shared and went on to research his life and crimes. *See also* Susan Sharp, *Hidden Victims: The Impacts of the Death Penalty On Families of the Accused*, Rutgers University Press (2005) at 8. Sharp details how family members can be media targets, stating that Timothy McVeigh's father was followed by the media, which detailed everything from his golfing habits to his church activities.

[88] Elizabeth Beck et al., *Seeking Sanctuary: Interviews with Family Members of Capital Defendants*, 88 CORNELL L. REV. 382, 394-95 (2003).

offender had a harsh upbringing even when it is not true.[89] Then there are the smaller waves of the criminal justice process that shake the family, from children being forced to testify against a parent to the repeated appeals, losses, stays, and execution dates being declared.[90] There is nowhere for the family to turn: Pressures from the media and ostracization from social groups that once supported them add to the pain.[91] After the execution is carried out, these waves are unrelenting. The family is hounded by the media and receives little support in their grief.[92] The effects of all this uncertainty and pain can manifest itself physically and psychologically, leading to depression, anxiety, and post-traumatic stress disorder in both children and adults.[93]

When one suffers from anxiety, depression, or PTSD, they are also more likely to have a lower quality of life, a shortened overall life span, and increased odds of substance abuse disorders.[94] The earlier the onset of such

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[89] *See* Sharp, *supra* note 87, at 12.
[90] Beck et. al., *supra* note 88.
[91] *Id. See also* Susan Sharp, *Hidden Victims: The Effects of the Death Penalty on Families of the Accused*, at 63 (2005). (Susan Sharp's account of her family being exposed to media pressures throughout her brother's entire trial, appeal process, and execution and its effects on her family: "There were blurbs on the television for the entire ten years. I can't tell you the hell it put my mother through and is still putting her through.").
[92] *See* Beck et. al., *supra* note 88; Race and the Death Penalty, *supra* note 86.
[93] Beck et al., *supra* note 88 at, 397.
[94] Haomiao Jia, *Impact of Depression On Quality-Adjusted Life Expectancy (QALE) Directly As Well As Indirectly Through Suicide*, NATIONAL INSTITUTES OF HEALTH (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4590980/.

conditions, the greater the lifetime burden.[95] The loss of a parent, especially in such a drawn-out, public, and traumatic way, can easily result in early-onset depression and decrease a child's overall quality of life. This has far-reaching effects: Children with depression, anxiety, and trauma disorders are at a higher risk for poor academic performance and poor social outcomes when compared to their peers, which can lead to further withdrawal, isolation, and negative outcomes later in life.[96]

Some children react to trauma by developing violent or anti-social tendencies themselves, which creates additional problems for them in school and out in their community.[97] When a parent is condemned or executed, children often lose faith in the government as a protector[98] and logically start to view the criminal justice system in a negative light. Developing violent tendencies in reaction to the state-sanctioned removal of a parent, in addition to feeling unsupported and unprotected by the government, can lead children

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[95] *Id*.
[96] Stephanie Frieze, *How Trauma Affects Student Learning and Behavior*, 7 B.U. J. OF GRAD. STUDIES IN EDUC. 27, 29 (2015), https://files.eric.ed.gov/fulltext/EJ1230675.pdf.
[97] *Id*.
[98] Hedwig Lieback, *Who Speaks? The Effect of the Death Penalty on Family Members of Both Victims and the Accused*, COLUMBIA CENTER FOR CONTEMPORARY CRITICAL THOUGHT (Jan. 2021), https://blogs.law.columbia.edu/abolition1313/hedwig-lieback-who-speaks-the-effect-of-the-death-penalty-on-family-members-of-both-victims-and-the-accused/.

to continue in their parent's violent footsteps.[99] At very least, this can lead to conflicted relationships with police, the justice system, and the state; causing children to be less trusting of the state, thus growing into adults who are less likely to take part in civic activities, such as voting or serving on city councils.[100] When a parent is placed on death row, children see one protector figure killed by another, causing them a considerable amount of internal conflict as they grapple with a fact that the criminal justice system seems unable or unwilling to admit: The death penalty is ultimately state-sanctioned premeditated murder.[101]

A childhood spent away from a parent on death row, waiting and watching for the moment of their execution or the commutation of their sentence, creates multi-generational trauma. The inmate's child is forced to deal with the effects of the trauma they incurred at the hands of the justice system, and if it is not addressed in a healthy manner, the child runs the risk of traumatizing their own children. Depressed and anxious parents show more negative and unpredictable parenting behaviors, are often more

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[99] Helen Kearney, *Children of Parents Sentenced to Death*, QUAKER UNITED NATIONS OFFICE, 17 (2012), https://quno.org/sites/default/files/resources/ENGLISH_Children%20of%20parents%20sentenced%20to%20death.pdf.

[100] *Id.*

[101] *Id.* This unspoken truth is glaringly obvious in many states, where the official manner of death of any executed prisoner is listed as "homicide".

irritable, less supportive, and less equipped to meet their children's needs.[102] Parents suffering from depression and anxiety also experience more conflict in their marriages than other couples, which can also negatively impact their children.[103]

Without necessary support, children of those on death row are almost predestined to deal with the effects of trauma on their own, which often results in them unintentionally inflicting the trauma that comes with having a depressed, anxious, absent, or violent parent on their own children. The state traumatizes far more than an offender's immediate family when it doles out death sentences, though it has yet to acknowledge the slew of trauma it leaves in its wake.

CONCLUSION

Given no constitutionally guaranteed right to visitation on death row, even with one's own children, inmates and their families are left with a lot of uncertainty, as visitation privileges are left up to the whims of the warden. Although courts have found a right to due process if an inmate's visitation

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[102] M.J. England & L.J. Sim, Depression in Parents, *Parenting, and Children: Opportunities to Improve Identification, Treatment, and Prevention*, NATIONAL RESEARCH COUNCIL & INSTITUTE OF MEDICINE COMMITTEE ON DEPRESSION, PARENTING PRACTICES, AND THE HEALTHY DEVELOPMENT OF CHILDREN (2009), https://www.ncbi.nlm.nih.gov/books/NBK215128/.

[103] *Id.*

privileges are to be taken away, they have yet to grant a general right to visit in the first place.

Visiting a loved one in prison involves a lot of time, money, and energy. Those concerns are compounded when the loved on is on death row, often many miles away from their family – or in a different state entirely. Visits are likely to be few and far between when a family must travel across the state and rent a hotel room to see a loved one. Security concerns on death row are heightened, which means more rigorous screening procedures, even for children. Taken together, all these inconveniences can add up to a prohibitive cost for many families, especially in light of the fact that the death penalty disproportionally affects those in poverty.[104]

There are a myriad of ways to increase children's access to parents on death row. The most glaring and all-encompassing would be to abolish the death penalty entirely. This would address the most serious concerns about depriving a child of a parent and their normal family environment, the right to adequate social development, and adding the trauma of losing a loved one

[104] *Death Penalty Disproportionately Affects the Poor, UN Rights Experts Warn*, UNITED NATIONS (Oct. 2017), https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22208&LangID=E#:~:text=People%20living%20in%20poverty%20are,death%20penalty%20for%20many%20reasons.&text=They%20may%20also%20face%20bias,of%20receiving%20the%20death%20sentence..

to a State-sanctioned execution expressed by the United Nations and other groups.

As of 2021, twenty-three states have either imposed a moratorium on the death penalty or abolished capital punishment entirely.[105] Approximately half of those states have imposed a moratorium or abolished the death penalty in the last ten years.[106] That is not to say that the fight to end the death penalty is easy. Many states face opposition from political leaders, their own courts, or courts of appeal. Washington State, for example, has declared capital punishment unconstitutional in some form a total of four times since the 1970s, yet it was never ruled *per se* unconstitutional. In Washington, courts have held the death penalty unconstitutional only in its application, which largely affects racial minorities.[107] Technically, so long as the State carried out its trials and executions in a race-neutral manner, there would be no constitutional issue with capital punishment. Despite decades of effort, Washington did not agree to end the death penalty entirely until 2018, when

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[105] *State by State*, THE DEATH PENALTY INFORMATION CENTER, (2021), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.
[106] *Id.*
[107] *See* State v. Gregory, 427 P.3d 621, 626 (Wash. 2018) (holding the death penalty, as applied by the State of Washington violated the State Constitution protection against cruel and unusual punishment, as it was applied in an arbitrary and racially-biased manner and did not serve legitimate penological goals); State v. Baker, 501 P.2d 284 (1972); State v. Green, 588 P.2d 1370 (1979); State v. Frampton, 627 P.2d 922 (1981).

case law and political pressures left capital punishment effectively abolished.[108]

The fight to end the death penalty nationwide has and will continue to take a concentrated effort over an extended period. The "next best thing", commuting death sentences to life in prison without the possibility of parole, would allow children to grow up with an incarcerated parent in their lives with no threat of an execution, but this still leaves open the issues involved in traveling to visit a parent in a maximum-security institution. There is no easy solution. The State has a clear interest in punishment and protecting society, but that interest must be balanced with children's rights to have their parents involved in their lives as much as possible.

A. Increasing Children's Access to Incarcerated Parents

A much more balanced approach for all involved would be to reform the methods of access that families have to their loved ones on death row and in prison as a whole. Although traveling to visit often may not be feasible, increasing access to telephone and video visits can, at least in theory, help bridge that gap. *In theory* technology in prisons should be able to better connect inmates with their families, but in reality, the cost of phone calls and video visits can be prohibitively high for many behind bars.

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[108] *See* Gregory, 427 P.3d at 642. Though this ruling still allows for the death penalty to be invoked, a combination of the ruling and political pressures resulted in the effective end of the death penalty in Washington state.

Per-minute rates are set by the institution, but the mere ability to make any calls at all (as well as access a host of other services and items) may involve an astronomical surcharge. Inmates' families must send the inmate money to cover the costs of calls, video chats, and other privileges, as inmates themselves do not earn enough working behind bars to cover the cost.[109] These transfers are not as easy as normal bank transfers. JPay, the leading system for electronic money transfers in the correctional system at all levels, routinely overcharges for its services.[110] Some families report being forced to pay transfer fees of up to 45% when using JPay.[111] Sending a loved one $100 to cover phone call privileges and commissary essentials could cost the family up to $145 – money which many families, especially those whose resources are being used to pay appellate attorneys and court filing fees, simply do not have.

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[109] *See* Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State*?, PRISON POLICY INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/. Sawyer's research concludes that inmates made between 33 cents and $1.41 per hour, if they are paid at all.

[110] Ariel Schwartz, *Here's the Real Story Behind the Apple of Prison Tech*, BUSINESS INSIDER (July 29, 2015), https://www.businessinsider.com/apple-of-prison-techs-real-story-2015-7.

[111] Eleanor B. Fox & Daniel Wagner, *Time is Money: Who's Making a Buck Off Prisoners' Families?*, THE CENTER FOR PUBLIC INTEGRITY (Sept. 30, 2014), https://publicintegrity.org/inequality-poverty-opportunity/time-is-money-whos-making-a-buck-off-prisoners-families/.

Sending a simple email message – free in the outside world – is much more costly behind bars. To send an email, an inmate must first purchase virtual "stamps", with the price being fixed by the correctional institution.[112] These "stamps" can then be applied to emails or used to purchase video message credits. Florida State Prison at Raiford, which houses the second-largest death row in the country,[113] charges $4.40 for ten stamps, plus the additional JPay service fee.[114] Each email sent costs one stamp per page, plus an extra stamp per file (such as a picture) attached.[115] A video message costs four stamps,[116] for a total cost of $1.76 per message. A fifteen-minute video call costs $2.95,[117] but this cost can quickly add up too - a fifteen-minute video call home every day for a month would cost $88.50, not including the JPay transfer fee. JPay is currently the only option available to transfer money to Florida State Prison inmates.[118]

Phone and Internet bills must be paid by *someone*, but communication is hindered by tying them to a system that massively overcharges for services while remaining the only option for many inmates. Allowing inmates to

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[112] Schwartz, *supra* note 110.
[113] *Death Row USA*, DEATH PENALTY INFORMATION CENTER (Apr. 2022), https://deathpenaltyinfo.org/death-row/overview/death-row-usa.
[114] *Florida State Prison*, JPAY (Mar. 2023), https://www.jpay.com/Facility-Details/Florida-State-Prison-System/Florida-State-Prison.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*

correspond with their families at the current rates as someone using the standard postal service (and charging reasonable amounts, if anything at all, for video calls) is a good first step. An excellent approach in theory, but families will encounter significant roadblocks, as JPay and similar services are central to the for-profit prison system.

B. Reframing the Issue

Framing the situation as a children's rights issue instead of an inmates' rights issue will likely garner the much-needed support that can help bring about incremental changes in the way the correctional system is set up. Ensuring children's healthy relationships with their families is an issue even the strongest advocates for punishment should be able to agree with. Children can and should be placed at the forefront of the movement to connect families of death row inmates, which would help increase their access to their incarcerated parent and to critical resources that currently are not available to them.

Expending access to resources already available to victims of crime would offset the burden placed on the families of those on death row. Having access to the same level of support that victims and their families receive will help children process the difficult emotions caused by having a parent (or sometimes both parents) so suddenly removed from their lives, the trauma of the unknown as appeals are heard and denied, the media exposure, and, of course, the trauma of the ultimate execution.

Providing the remaining parent or guardian the resources to explain what is happening to the offending parent in an age-appropriate way, and the resources to help them cope themselves, will encourage positive outcomes. Though much of this trauma is unavoidable when a parent is arrested, tried, and sentenced to death, having resources available to help address that trauma will do nothing but help all those left watching, waiting, and hoping for an appeal in their loved one's favor or the commutation of their sentence.

There is no doubt that legitimate penological concerns must be considered. However, there are many ways the justice system can begin to address the rights of death row inmates' children and give them the ability to access both their parent and resources critical to the support of their own needs. By looking at the entire picture of those affected by a capital crime and the ultimate punishment – not just the inmate and the victim – we as a society can better serve the needs of the children who are often overlooked when a death sentence is pronounced. Our children are our future, and by advocating for the interests of all of them, even those society looks at in the shadow of their parents' actions, we can ensure a better future for those children and for ourselves.

THERE'S JUSTICE IN LANGUAGE: THE PROSECUTOR'S DUTY TO TRANSGENDER VICTIMS, JURORS, AND DEFENDANTS

*Ainslee Johnson-Brown**

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INTRODUCTION

The role of a prosecutor is broad. It is not just to protect victims but also to protect other individuals, including jurors and defendants, involved in the criminal justice system.[119] Because the role of the prosecutor is largely undefined, the American Bar Association Criminal Justice Prosecution Standards (ABA Prosecution Standards) set the simplest guidelines: "The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim."[120] Untethered

* The University of Akron School of Law, J.D., 2023; Fellow, The Center for Constitutional Law. I am grateful for the time and knowledge contributed by Steve Arrington.

[119] *See, e.g.*, Bruce A. Green, *Why Should Prosecutors "Seek Justice?"*, 26 FORDHAM URB. L.J. 627–28 (1999).

[120] A.B.A, CRIMINAL JUSTICE STANDARD FOR PROSECUTION FUNCTION § 3-1.3 (4th ed. 2017).

from any entity or person, prosecutors are required to dedicate themselves to seeking justice despite the interests of these and other stakeholders.[121] But how do we know that justice has been achieved? That answer varies depending on the jurisdiction, the case, or the defendant.

The juror plays a significant role in defining and administering justice in a criminal trial.[122] The victim and defendant usually have very different ideas about what outcomes are just.[123] As the ABA Prosecution Standards suggest, a prosecutor is not beholden to those opinions.[124] When a prosecutor is elected by voters, votes are often cast based on a localized concept of justice outlined by campaign promises and the donated dollars that support them.[125]

It is common to think of justice in terms of case outcomes and dispositions.[126] But there is also justice in the way we interact with those who are forced to engage with the criminal system—whether as a victim or the

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[121] Alex B. Long, Of Prosecutors and Prejudice *(Or "Do Prosecutors Have an Ethical Obligation Not to Say Racist Stuff on Social Media?")*, 55 U.C. DAVIS L. REV. 1717, 1725 (2022).

[122] Andrew Guthrie Ferguson, *Instructions as Constitutional Education*, 84 U. COLO. L. REV. 233, 237–38 (2013).

[123] See Jennifer J. Stearman, An Amendment to the Constitution of the United States to Protect the Rights of Crime Victims: Exploring the Effectiveness of State Efforts, 30 U. BALT. L.F. 43, 43 n.4 (1999).

[124] AM. BAR ASS'N, *supra* note 2.

[125] *See, e.g.*, Joseph E. Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 HASTINGS CONST. L.Q. 665, 680 n.55 (1997)

[126] *See* Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 L. & SOC'Y REV. 483, 483 (1988).

accused.[127] The autonomy and discretion of a prosecutor impact communications with and about the people a prosecutor encounters during the justice process.[128] Language can generate a sense of fairness that equates to what many would describe as justice.[129] Respect and dignity are exchanged through the terms we use to identify each other.[130] For marginalized populations, the civility displayed through language can help soothe the effects of societal stigmas and the accompanying discrimination.[131] This is especially true for transgender people.[132] Negative stigmas and transphobic humor are still pervasive in popular culture despite recent gains in trans-acceptance.[133] Consciously choosing to use another person's preferred pronouns has positive psychological and emotional impacts, but for a prosecutor such use has legal consequences.[134]

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[127] *See generally* Sabrina Margret Bierer, Vera Inst. of Just., *Bettering Prosecutorial Engagement to Reduce Crime, Prosecutions, and the Criminal Justice Footprint*, 32 Fed.Sent.R. 212, 212, 2020 WL 3163373.

[128] *See* Lissa Griffin & Stacy Caplow, *Changes to the Culture of Adversarialness: Endorsing Candor, Cooperation and Civility in Relationships Between Prosecutors and Defense Counsel,* 38 HASTINGS CONST. L.Q. 845, 868 (2011).

[129] *Cf.* Chan Tov McNamarah, *Some Notes on Courts. and Courtesy*, 107 VA. L. REV. ONLINE 317, 331 (2021), contending that the language used by judges shows "a commitment to fairness and equality."

[130] *See* Chan Tov McNamarah, *Misgendering*, 109 CAL. L. REV. 2227, 2227 (2021).

[131] *Id.* at 2297.

[132] *Id.* at 2256.

[133] *See, e.g.*, STICKS AND STONES (Netflix 2019).

[134] *See* Chan Tov McNamarah, *Misgendering as Misconduct*, 68 UCLA L. REV. DISCOURSE 40, 56 (2020).

This article argues that, in seeking justice, prosecutors have an ethical duty to use preferred pronouns for transgender victims, jurors, and defendants. Sections II, III, and IV discuss the prosecutor's obligations to victims, jurors, and defendants, generally—as defined by the ABA Prosecution Standards and common case law. Section V, VI, VII, and VIII explore the unique experiences of transgender people within the criminal justice system, underscoring the necessity of preferred pronoun use at all stages of the criminal justice process. Part IX argues that intentionally misgendering transgender people who become justice-involved may cross the line into misconduct as defined by the ABA Prosecution Standards or the state bars' adaption of those standards. Part X explores preferred pronoun use under the First Amendment—specifically arguing that the constitutional protections for free speech do not include intentional misgendering. Part XI illustrates the benefits, harms, and potential consequences of failing to recognize a justice-involved person's preferred pronouns by looking closely at recent events in Akron, Ohio. Finally, Part XII provides best practices and recommendations for prosecutors seeking justice for transgender individuals.

I. PROSECUTORS AND VICTIMS

A victim's statement is often the catalyst for a criminal complaint and, as a result of the complaint, the prosecutor could interact with the victim from

charging to disposition.[135] Given the amount of time that the prosecutor spends with a victim and the tendency for victim testimony to bolster the strength of the prosecutor's case, it is natural to assume that the prosecutor has substantive duties and responsibilities to victims of crime.[136] However, the ABA Prosecution Standards do not corroborate this ideal, stating that it is not the prosecutor's duty to serve the interests of the victim.[137]

Standard 3-3.4(b)-(c) require a prosecutor to follow jurisdictional laws and to interview victims as witnesses to the crime perpetrated against them.[138] Advocates dissatisfied with the ethical floor set by the professional standards and limited legislation continue to lobby states to amend their constitutions.[139] The many protections within victims' rights legislation, like Marsy's Law,[140] ensure that victims are treated with dignity and protected from further harm.[141] Thirty states have adopted versions of Marsy's Law,

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[135] *See* Bruce A. Green & Brandon P. Ruben, *Should Victims' Views Influence Prosecutors' Decisions?*, 87 BROOK. L. REV. 1127, 1144 (2022).
[136] *Id.* at 1142.
[137] A.B.A., *supra* note 2.
[138] A.B.A., *supra* note 2, at §3-3.4(b)-(c).
[139] *See* MARSY'S LAW FOR ALL, https://www.marsyslaw.us/ (last visited Nov. 5, 2022).
[140] MARSY'S LAW FOR OHIO, WHAT IS MARCY'S LAW?, https://www.marsyslawforoh.com/what_is_marsy_s_law (last visited Nov. 17, 2022) (Marsy's Law gives crime victims enforceable constitutional rights equal to the rights of the accused, including notification of those rights and notification of the public proceedings of the defendant.)
[141] MARSY'S LAW FOR ALL, *supra* note 21.

binding prosecutors to elevated duties and responsibilities to victims of crime.[142]

For prosecutors driven by a desire to help victims heal, ABA Prosecution Standards set the bar far too low.[143] Fortunately, the gap between the American Bar Association requirements and a passion to serve can be connected with just interactions. The prosecutor can better relate and connect with victims through appropriate language.[144] For this reason, many prosecutors' offices employ case managers and other advocates to help victims navigate through new and existing vulnerabilities.[145] Other offices adopt internal policies that require attorneys and staff to offer specialized care to populations that are more susceptible to victimization.[146] In the absence of dedicated resources and codified policies, prosecutors are left to lean on their broad discretion when addressing the needs of individual victims.[147]

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[142] Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449, n.45 (2021).
[143] *See, e.g.*, Joyce White Vance, *Want to Reform the Criminal Justice System? Focus on Prosecutors*, TIME, July 7, 2020.
[144] *Cf.* McNamarah, *supra* note 11 (contending that the language used by judges shows "a commitment to fairness and equality").
[145] *See Domestic Violence Victims Suffer*, THE FLORIDA BAR NEWS, (Dec. 15, 2008), https://www.floridabar.org/the-florida-bar-news/domestic-violence-victims-suffer/.
[146] 2020 TEX. ATT'Y GENERAL CRIME VICTIMS SERVICES ANNUAL REPORT 8.
[147] Green & Ruben, *supra* note 17, at 1132.

II. PROSECUTORS AND JURORS

During a jury trial, jurors are tasked with deciding which side met its burden and, ultimately, the outcome of a case.[148] Selecting or eliminating the right jurors can be pivotal to the state's probability of meeting its burden and winning the case.[149] Through the voir dire process, prosecutors shape juries by strategically objecting to jurors who are expected to resist the government's version of events.[150] A prosecutor's strategy for jury selection appropriately varies from case to case.[151] However, special care should be taken to ensure that the desire for certain perspectives in the jury box does not crossover into peremptory strikes targeted at protected classes of people.[152]

The ABA Prosecution Standards prohibit prosecutors from eliminating jurors based on any criteria that are illegal or improper such as race, sex,

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[148] *See* A.B.A., *How Courts Work*, https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/jury_role/ (last updated Sept. 9, 2019).

[149] *See generally* Farrald G. Belote, *Jury Research: Spotting Jurors Who Can Hurt*, 12 No. 4 LITIGATION 17 (1986); Cathy E. Bennett, Robert B. Hirschhorn & Heather R. Epstein, *How to Conduct a Meaningful & Effective Voir Dire in Criminal Cases*, 46 SMU L. REV. 659 (1992).

[150] *See* Caren Myers Morrison, *Negotiating Peremptory Challenges*, J. OF CRIM. L. AND CRIMINOLOGY, 9 (2014)

[151] Ryan C. Calvert, *Always Be Closing: Using voir dire to argue misdemeanor cases*, THE TEX. PROSECUTOR: COVER STORY (Jul.-Aug. 2019), https://www.tdcaa.com/journal/always-be-closing-using-voir-dire-to-argue-misdemeanor-cases/.

[152] A.B.A., *supra* note 2, at §3-6.3(b).

religion, national origin, disability, sexual orientation, or gender identity.[153] Additionally, the prosecutor must contest a defense counsel's peremptory challenges that "appear to be based upon such criteria."[154]

Batson v, Kentucky, a 1986 Supreme Court case, granted jurors protection by declaring it unconstitutional to peremptory strike a potential juror based on race.[155] Eight years later, the Court held that gender deserved the same protections in *J.E.B. v. Alabama ex rel T.B.*[156] The Ninth Circuit used *Batson* as its basis to extend constitutional protection against peremptory strikes for sexual orientation.*[157]* The court reasoned that classifications based on sexual orientation are subjected to a level of scrutiny more severe than rational basis to determine whether there is a violation of the equal protection rights under the Fourteenth Amendment.[158]

A *Batson* challenge requires "evidence that 1) the prospective juror is a member of a cognizable group; 2) counsel used a peremptory strike against the individual; and 3) the totality of the circumstances raises an inference that the strike was motivated' by the characteristic in question."[159] The success of a *Batson* challenge does not rest on whether the strike is a strike also

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[153] *Id.*
[154] *Id.*
[155] Batson v. Kentucky, 106 S.Ct. 1712 (1986).
[156] J.E.B. v. Alabama ex rel T.B., 511 U.S. 127 (1994).
[157] SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014).
[158] *Id.* at 474.
[159] *Id.* at 476.

motivated by the furtherance of a particular trial strategy. In *SmithKline*, a trial[160] that involved HIV medication pricing, a gay juror was improperly struck because of the fear that he would be influenced by general concerns in the gay community rather than the facts of the case.[161] Some state courts have also extended *Batson* protection to cover sexual orientation.[162] Some states, including Ohio, refuse to do so.[163] Striking members of a protected class based on sexual orientation creates a false impression that the group members are not capable of being impartial on issues important to the larger community.[164]

III. PROSECUTORS AND DEFENDANTS

The prosecutor's relationship with a defendant is largely indirect. Prosecutors typically communicate with defendants through defense counsel and court proceedings.[165] Prosecutors have limited obligations to defendants that are imposed by The Constitution, criminal procedure rules, and legislative statutes.[166] The American Bar Association imposes additional standards that preserve the resources and integrity of the courts.[167]

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[160] Although SmithKline is a civil case, the holding has been cited in criminal arguments. *See* State v. Cantrill, 2020-Ohio-1235 at 22–25; Morgan v. State, 134 Nev. 200, 211 (2018).
[161] SmithKline Beecham Corp., 740 F.3d at 476.
[162] Morgan, 134 Nev. 200 at 217.
[163] State v. Spitler, 75 Ohio App. 3d 341, 599 N.E.2d 408 (1991).
[164] SmithKline Beecham Corp., 740 F.3d at 486.
[165] *See* Green, *supra* note 1, at 620.
[166] *Id.* at 616.
[167] *See, e.g.*, A.B.A., *supra* note 2, §3-5.2.

Prosecutorial discretion can be used for the benefit of the defendant.[168] Even if the defendant is clearly guilty, a prosecutor has the unilateral power to dismiss, reduce, or enhance criminal charges.[169] In exercising discretion, prosecutors may consider the background of the defendant, the impact of non-prosecution on public welfare, and whether the agreed or likely punishment is disproportionate to the offense.[170]

The overwhelming majority of criminal defendants are indigent.[171] When faced with the financial, emotional, and psychological costs of enduring a criminal trial, indigent defendants are more likely to accept a plea bargain rather than go to trial.[172] Given that 94-97% of criminal cases conclude with a plea agreement rather than a trial[173], the plea-bargaining process is where the majority of the engagement between a prosecutor and defendant occurs.[174] There are little-to-no limitations on prosecutors during the plea-

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[168] *See* Frank Gogal, *What is Prosecutorial Discretion?,* STILT BLOG (Aug. 24, 2022), https://www.stilt.com/blog/author/frank-gogol/page/50/.

[169] Jeffrey Bellin, *Theories of Prosecution*, 108 CAL. L. REV. 1203, 1223 (2020).

[170] A.B.A., *supra* note 2, at §3-5.6(b).

[171] Green, *supra* note 1, at 626.

[172] *See* Molly J. Walker Wilson, *Def. Att'y Bias and the Rush to the Plea*, 65 U. KAN. L. REV. 271, 300 (2016). *See also Notes from the Field: Challenges of Indigent Criminal Def.*, 12 N.Y. CITY L. REV. 203, 238 (2008).

[173] FAIR AND JUST PROSECUTION, ISSUES AT A GLANCE: PLEA BARGAINING 3 (2022), https://fairandjustprosecution.org/wp-content/uploads/2022/02/Plea-Bargaining-Issue-Brief.pdf.

[174] VERA INSTITUTE OF JUST., IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING, (Sept. 2020), https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf.

bargaining stage.[175] The ABA Prosecution Standards only require that the prosecutor avoid negotiating a plea agreement until there is sufficient information to assess the defendant's culpability and collateral consequences of the plea bargain considered.[176] Traditionally, prosecutors have placed little significance on factors that are sympathetic to the defendant. This sentiment is captured at its lowest in the 1968 survey indicating only 27% of prosecutors considered sympathy for the defendant to be a relevant factor in bargaining decisions.[177]

As an alternative to incarceration, prosecutors can establish pre-trial diversion programs for non-violent offenders.[178] Diversion programs, also known as problem-solving courts, often focus on trauma-informed care as part of their approach.[179] These programs were created in the 1970s as a response to the percentage of violent and non-violent crimes fueled by the cocaine market in the United States.[180] Over the decades, diversion programs have been established for vulnerable populations, such as veterans, battered

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[175] Cynthia Alkon, *Bargaining Without Bias*, 73 RUTGERS U.L. REV. 1337, 1338–39 (2021).
[176] A.B.A., *supra* note 2, at §3-5.6(b).
[177] Albert W. Alschuler, THE PROSECUTOR'S ROLE IN PLEA BARGAINING, 36 U. CHICAGO L. REV. 50 (1968).
[178] OHIO REV. CODE ANN. § 2935.36 (2018).
[179] Alkon, *supra* note 57, at 1366.
[180] David Noble, *Mapping the Landscape of Prosecutor-Led Pretrial Diversion*, CRIMINAL LAWYER PRACTITIONER at 8–9 (6th ed. 2020).

women, juveniles, drug abusers, and the mentally ill.[181] The programs are attractive to prosecutors and defendants where successful compliance results in a closed case.[182] In these scenarios, the prosecutor conserves resources and the defendant avoids a conviction.[183]

In recent years, electors across the country have voted for prosecutors that run on progressive policies like bail reform[184], marijuana decriminalization[185], and diversion to specialized dockets.[186] The "progressive prosecutor" places more weight on mitigating factors and defendant characteristics in bringing criminal charges and negotiating plea agreements.[187] A progressive prosecutor may also leverage diversion and restorative justice programs as an alternative punishment to prison.[188]

In truth, progressive prosecutors apply the ABA Prosecution Standards how they were intended.[189] It is to give balanced consideration to all parties

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[181] *See* Becky Hougesen Walters, *The Problem-Solving Court Boom*, 110 ILL. B.J. 30, 31 (2022).
[182] Kay L. Levine, *Victims' Rights in the Diversion Landscape*, 74 SMU L. REV. 501, 519 (2021).
[183] Bellin, *supra* note 51, at 1239–40.
[184] David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 37 (2017).
[185] Bellin, *supra* note 51, at 1245.
[186] *See* Daniel S. McConkie, Jr., *Plea Bargaining for the People*, 104 MARQ. L. REV. 1031, 1087 (2021).
[187] Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 843 (2020)
[188] McConkie, *supra* note 68, at 1052.
[189] *See* A.B.A., ABA SUPPORTS PROTECTING THE INDEPENDENCE OF PROSECUTORS, (Sept. 28, 2023), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/sept-23-wl/prosecutors-0923wl/.

involved and seek justice.[190] Instead of viewing prison as a panacea for crime, progressive prosecutors consider the sometimes-disproportional impact that prison may have on a defendant, which is a direct application of the ABA Prosecution Standards 3-5.2 and 3-7.2.[191] The wide variance between traditional and progressive prosecutors coupled with the idea that progressive prosecution policies meet, but do not exceed, the minimum professional standards show how much room is left for improvement.

IV. TRANSGENDER PEOPLE AND THE JUSTICE SYSTEM

Transgender people are individuals "whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth."[192] The incongruence between expressed gender and assigned gender is medically recognized as a mental disorder, known as gender dysphoria.[193] When a transgender person is forced to live within the confines of their assigned gender, the sense of discomfort can be so intense that it can lead to severe depression and anxiety.[194] Over time, the effects of gender dysphoria can lead to a total withdrawal from society and an inability to participate in

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[190] *See* A.B.A., *supra* note 2, at §3-1.2.

[191] *See*, Seamus Kirst, *These Progressive Prosecutors Want to Reshape Justice in Major American Cities*, TEEN VOGUE, July 29, 2019.

[192] NAT'L CTR. FOR TRANSGENDER EQUAL, TRANSGENDER TERMINOLOGY (2014), https://www.nawj.org/uploads/files/annual_conference/session_materials/transgender/transgender_terminology-ncte.pdf.

[193] Jack Turban, *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASSOC., https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria.

[194] *See* Edmo v. Corizon, Inc., 949 F.3d 489, 493 (9th Cir. 2020).

productive activities.[195] Transgender people may be able to receive hormone therapy, gender reassignment surgery, or both to remedy the deep feelings of unease.[196] Yet there are still legal barriers to obtaining government identification that states the expressed gender rather than the one signed at birth.[197] Presenting conflicting identification documents may activate social stigma and phobias about transgender people, making it more difficult for these individuals to integrate and connect with society.[198]

V. PROSECUTORS AND TRANSGENDER VICTIMS

Transgender people are often treated inhumanely when they are the victims of crimes, and may be especially vulnerable as they progress through their transition.[199] When a transgender person is in transition, their physical characteristics might not align with an identifiable binary gender.[200] Failing to recognize or acknowledge the gender identity of a victim, especially when

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[195] *See* Erin Murphy Fete, *In Need of Transition: Transgender Inmate Access to Gender Affirming Healthcare in Prison*, 55 UIC L. REV. 773, 802 n.32 (2022).
[196] Kimberly J. Winbush, Annotation, *Change of Gender or Sex on Gov't ID, Records, or Forms*, 77 A.L.R. 7th Art. 2 (2022).
[197] *Id.*
[198] *Id.* at *17–18.
[199] *See, e.g.*, Andrew Perez, *Fix-A-Flat Butt Doctor Sentenced to 10 Years in Prison on Manslaughter Charge*, LOCAL10.COM (Mar. 27, 2017 11:18 PM), https://www.local10.com/news/2017/03/28/fix-a-flat-butt-doctor-sentenced-to-10-years-in-prison-on-manslaughter-charge/.
[200] *See generally* Mariana Magalhães et al., *Transition Trajectories: Contexts, Difficulties and Consequences Reported by Young Transgender and Non-Binary Spaniards*, 17 INT'L J. ENV'T RES. & PUB. HEALTH 18:6859, at 1 (2020), https://doi.org/10.3390/ijerph17186859.

the victim's gender is a central fact of the crime, can further victimize and dehumanize the victim.[201]

The number of transgender victims for many crimes is unknown as most law enforcement agencies do not collect statistical data that includes gender identity for non-hate crimes.[202] Furthermore, the criminalization of consensual sex work has had devastating effects on transgender victims.[203] The criminalization of sex work shortens the time available to screen clients or negotiate fees and activities.[204] Transgender sex workers often rush negotiations with clients to avoid detection by the police.[205] First, the quick and opaque nature of the agreement makes the line of consent less clear than more traditional encounters.[206] Second, the criminalization of consensual sex work discourages transgender prostitutes from reporting violent crimes committed against them, like assault and rape, even when these offenses are committed during an otherwise consensual transaction.[207]

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[201] John M. Ohle, *Constructing the Trannie: Transgender People and the Law*, 8 J. GENDER RACE & JUST. 237, 268–69 (2004); *see also* Cynthia Lee, *The Trans Panic Defense Revisited*, 57 AM. CRIM. L. REV. 1411, 1422–23(2020).

[202] Lee, *supra* note 79, at 1423 (noting that the 2015 U.S. Transgender Survey examined the experiences of 27,715 transgender people in the United States. Thirteen percent reported that they had been subjected to a physical attack just within the past year. Five percent reported being physically attacked by strangers in public because of their transgender status.)

[203] SARAH SAKHA ET. AL, IS SEX WORK DECRIMINALIZATION THE ANSWER?, 11–12 (2020), https://www.aclu.org/sites/default/files/field_document/aclu_sex_work_decrim_research_brief_new.pdf.

[204] *Id.* at 5.

[205] *Id.* at 5, 12.

[206] *Id.* at 5.

[207] *Id.* at 7–8, 12.

Transgender victims experience additional traumatization when an assailant employs the trans panic defense.[208] Rooted in the idea that being transgender is inherently misleading and offensive, the trans panic defense uses revelation that a person is transgender as reason to incite or invoke a violent reaction from a reasonable person.[209] While the trans panic defense is not a recognized affirmative defense, it has been used by those who harm transgender people to mitigate their consequences much like defenses of temporary insanity, provocation, or self-defense.[210] "In extreme applications of the trans panic defense, assailants have likened the realization that they are engaged with a transgender person to being sexually assaulted.[211] The then-unwanted contact causes the assailant to lose self-control or feel threatened and respond violently.[212] By characterizing the victim's gender identity as an objectively reasonable excuse for the loss of self-control or fear of harm, the trans panic defense mitigates the assailant's culpability for crimes against transgender people.[213] By fully or partially excusing the perpetrators of

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[208] *See* Victoria L. Steinberg, *A Heat of Passion Offense: Emotions and Bias in "Trans Panic" Mitigation Claims*, 25 B.C. THIRD WORLD L.J. 499, 513–14 (2005).
[209] David Alan Perkiss, *A New Strategy for Neutralizing the Gay Panic Defense at Trial: Lessons from the Lawrence King Case*, 60 UCLA L. REV. 778, 801–02 (2013).
[210] Aimee Wodda & Vanessa R. Panfil, *"Don't Talk to Me About Deception": The Necessary Erosion of the Trans* Panic Defense*, 78 ALB. L. REV. 927, 933 (2014).
[211] *Cf.* Perkiss, *supra* note 91, at 780.
[212] Wodda & Panfil, *supra* note 92, at 933.
[213] *See id.* at 935–36.

crimes against transgender victims, this defense enshrine in the law the notion that LGBT lives are worth less than others.[214]

In 2013, the House of Delegates of the American Bar Association passed a resolution with detailed recommendations for combating the discriminatory effects of the trans panic defense.[215] For prosecutors, the ABA recommends requesting instructions advising juries to make their decisions without improper bias or prejudice against the transgender victim.[216] To comply with the ABA recommendation, the victim must be properly identified as transgender throughout the prosecution process.[217]

VI. PROSECUTORS AND TRANSGENDER JURORS

The voir dire process creates opportunities for improper bias or prejudices against transgender people to creep in. While the ABA Prosecution Standards offer vague guidance, there is little offered as to how the standards are applied to transgender jurors. Advocates argue that the Equal Protection arguments made in *Batson* can be used to protect transgender jurors.[218] Transgender

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[214] AM. BAR ASS'N HOUSE OF DELEGATES, RESOLUTION 113A, at 1 (2013), http://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf.

[215] *Id.* at 13–14.

[216] *Id.* at 13 ("Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim or victims, witnesses, or defendant based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity, or sexual orientation.")

[217] A.B.A., ABA POLICY ON LGBTQ+ ISSUES, https://www.americanbar.org/groups/diversity/resources/celebrating-heritage-months/celebrating_pride_month/aba-policy-on-lbgtq-issues/.

[218] Julia C. Maddera, *Batson in Transition: Prohibiting Preemptory Challenges on the Basis of Gender Identity or Expression*, 116 COLUM. L. REV. 195 (2016).

people deserve the same Constitutional protections as their gay and lesbian counterparts. Some courts have recognized that gays and lesbians have been systematically excluded from institutions of self-governance.[219] The exclusion of transgender people has been more severe, if only because of the difficulties in obtaining the necessary government documents required to serve on a jury.[220] At a minimum, the extension should be made to transgender people because gender identity is as acute as the sexual orientation of gay and lesbian people.[221]

VII. PROSECUTORS AND TRANSGENDER DEFENDANTS

Transgender people have a higher propensity to become ensnared in the legal system because of the stigma and discrimination associated with their gender expression.[222] This societal stigma and discrimination permeate through the discriminatory application of the law and discriminatory policing strategies.[223] The impacts start early; often facing a lack of acceptance at home, transgender teens are more likely to run away or are forced to leave

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[219] SmithKline Beecham Corp. v. Abbott Lab'ys, 740 F.3d 471, 484 (9th Cir. 2014).
[220] Will Tentindo et.al., *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2022 General Election*, UCLA SCHOOL OF L. WILLIAMS INST., (Sept. 2022).
[221] *See generally* Chan Tov McNamarah, *Striking Out Animus: A Framework to Remedy Batson's Blind Spots*, 29 CORNELL J.L. & PUB. POL'Y 945 (2020)
[222] *See generally* Movement Advancement Project and Center for American Progress. Unjust: How the
Broken Juvenile and Criminal Justice Systems Fail LGBTQ Youth (Aug. 2016).
[223] *Id.*

and end up living on the street or in the foster care system.[224] As a result, transgender children in transition are often deprived of a safe and stable environment.[225] The foster care system does not require specialized care or consideration when placing transgender children and they are often placed according to the sex assigned at birth, not according to the gender with which they identify.[226] The lack of policies specifically designed to address the needs of transgender children perpetuates the cycle of rejection. This causes transgender children to run away from their foster homes or be reassigned at the request of the foster parent.[227] As a result, transgender youth in foster care are more likely to be placed in group homes because they are less likely to be adopted by or temporarily placed with private families.[228]

An unstable adulthood may grow from such a tumultuous childhood. The harassment and rejection that transgender teens experience push them out of their homes and schools, making it difficult to build the skills necessary to be productive adults.[229] Consequently, transgender adults are more likely to face

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[224] Lee, *supra* note 84, at 1423 ("The 2015 U.S. Transgender Survey examined the experiences of 27,715 transgender people in the United States. Among transgender individuals who came out to their families, ten percent of respondents reported that a family member acted violently towards them because of their transgender status.").

[225] *Id.*

[226] *But see* Christine L. Olson, *Transgender Foster Youth: A Forced Identity*, 19 TEX. J. WOMEN & L. 25, 27 (2009), for a short list of group homes in the United States specifically designed to meet the needs of LGBT youth.

[227] *Id.*

[228] *Id.*

[229] EVAN ZAVIDOW, VERA INST. OF JUST., TRANSGENDER PEOPLE AT HIGHER RISK FOR JUSTICE SYSTEM INVOLVEMENT (2016), https://www.vera.org/news/gender-and-justice-in-

housing and employment discrimination.[230] The criminalization of homelessness, created by ordinances for loitering, trespassing, etc.,[231] increases the likelihood that homeless transgender people are arrested and charged with a criminal offense. One in five transgender people in men's prisons in California were homeless just before incarceration.[232] California is the state with the largest transgender population and considerable housing protections for transgender people.[233]

In the United States, transgender people are disproportionately harmed by the criminalization of sex work between two consenting adults.[234] When transgender people, especially transgender women, are excluded from the traditional workforce because of their gender identity, sex work is one of few viable options left for survival.[235] Prostitution laws and their enforcement are driven largely by an erroneous conflation of sex trafficking and a voluntary exchange of cash for consensual sexual contact.[236] Criminalizing a person's limited means of survival nearly guarantees a lifetime of entanglement with

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america/transgender-people-at-higher-risk-for-justice-system-involvement (last viewed Oct. 19, 2022).

[230] *See generally* Erin E. Clawson, *I Now Pronoun-Ce You: A Proposal for Pronoun Protections for Transgender People*, 124 PENN ST. L. REV. 247 (2019).

[231] Zora Raglow-DeFranco, The Legal Aid Society of Cleveland, *The Criminalization of Homelessness*, THE ALERT (2019), https://lasclev.org/the-criminalization-of-homelessness/.

[232] MOVEMENT ADVANCEMENT PROJECT, *supra* note 104.

[233] *Id.*

[234] Ohle *supra* note 83, at 11.

[235] *Id.*

[236] *Id.*

the justice system.[237] The pattern created by the criminalization of sex work creates a stigma that affects transgender women who do not participate in sex work.[238] The presumption that a transgender woman is a sex worker increases the likelihood transgender women are profiled by police for prostitution.[239]

While the imposition of criminal sentences is a judiciary responsibility, prosecutors have significant influence in proffering plea deals and providing sentencing recommendations.[240] When a sentence includes incarceration, a transgender prisoner is subjected to conditions that some jurisdictions have determined violated the Eighth Amendment.[241] Placement in jail and prison is not self-determined but selected by genitalia or government records of the prisoner's gender.[242] The increased vulnerability that makes transgender people more susceptible to victimization is compounded while incarcerated.[243] When prison officials know there is substantial risk of serious harm but do not take reasonable measures to abate, the Supreme Court has

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[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *See* Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. U.L. REV. 627, 648 (2021)

[241] *See* Farmer v. Brennan, 81 F.3d 1444, 1447 (7th Cir. 1996) (defining deliberate indifference as, ("[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.")

[242] Zavidow, *supra* note 111.

[243] *See* NAT'L CTR. FOR TRANSGENDER EQUAL., LGBTQ PEOPLE BEHIND BARS, 13–14 (2018), https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf (providing a discussion of key issues facing LGBTQ prisoners.).

held that the prison violates of the Eighth Amendment of the prisoners.[244] Many jails and prisons are not equipped to house transgender people collectively.[245] They do not protect the individuals from the unique threats faced while incarcerated.[246] Left with no other immediate option, transgender people may be housed in solitary confinement.[247] In Ohio, the Department of Rehabilitation and Correction does not have a responsibility to provide special housing considerations for transgender inmates, but requires prison staff to make a case-by-case determination based in-part on the inmate's gender identity.[248] In this situation, Ohio courts have held that placement in isolation is reasonable.[249] Prosecutors should understand that institutional barriers, like solitary confinement as a permanent housing solution, that creates an additional layer of punishment into a prison sentence through severe isolation.[250]

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[244] *See* Brennan, 114 S.Ct. 1970.

[245] *Contra* Gary Cornelius, *Transgender Inmates: Treating Them Fairly Keeping Them Safe*, LEXIPOL (Jul. 2022) (providing tacking of legislative initiatives to provide gender-affirming housing to transgender inmates and detainees).

[246] *See* NAT'L CTR. FOR TRANSGENDER EQUAL., LGBTQ PEOPLE BEHIND BARS 13 (2018).

[247] *Id.*

[248] OHIO DEP'T OF REHAB. AND CORR., NO. 79-ISA-05, LESBIAN, GAY, BISEXUAL, TRANSGENDER, INTERSEX (LGBTI) POLICY (2018).

[249] *See* Harrison v. Ohio Dep't of Rehab. & Corr., 90 Ohio Misc. 2d 32, 695 N.E.2d 1248 (1997).

[250] Alkon, *supra* note 61, at 1362.

VIII. MISGENDERING AND PROSECUTORIAL MISCONDUCT

"Misgendering refers to both the imposition of terms, honorifics, names, or pronouns at odds with a referent's gender, as well as the failure to use terms, honorifics, names, and pronouns in line with a referent's gender."[251] Transgender people experience misgendering in various ways. Being assigned a gender that is at odds with how a person identifies or refusing to assign pronouns to a nonbinary person are forms of misgendering.[252] Intentionally misgendering defendants may cross the line into misconduct that qualifies for ethical review. In 2016, the ABA approved Rule 8.4(g), which made discrimination against or harassment of transgender clients and witnesses based on gender identity while engaged in the practice of law a violation of ethical standards in jurisdictions where the rule is adopted.[253] Some state bars have begun to include gender identity and gender expression in its ethics rules regarding sex discrimination. [254] In April 2022, the Attorney Registration and Disciplinary Commission of Illinois stipulated that any reference to "sex" in a federal, state, or local statute includes transgender individuals for the purposes of applying its anti-discrimination and anti-harassment conduct rule.[255] While Ohio did elect to adopt its version of

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[251] McNamarah, *supra* note 12, at 2252.
[252] *Id.*
[253] MODEL RULES OF PROF'L CONDUCT R. 8.4(g).
[254] *See e.g.*, ILL. MODEL RULE OF PROF'L CONDUCT R. 8.4(j).
[255] *See Ring v. Larkin et al*, 1:22-cv-00895 (ND IL 2022)

Model Rule 8.4(g), the state version includes gender and sexual orientation, but not gender identity.[256] Ohio courts took the distinction a step further in *State v. Cantrill*. The Sixth District Court of Appeals in Ohio held that the prosecutor's repeated misgendering of the defendant throughout the trial and closing arguments did not constitute prosecutorial misconduct.[257]

Once charged, prosecutors have an obligation of courtesy and civility toward transgender defendants, including the use of the defendant's preferred pronouns.[258] Misgendering, accidental or intentional, has irreversible effects that create a lifetime of damage for a transgender defendant.[259] There is an ongoing dispute in the courts as to whether a defendant can petition to have name and gender corrected on the record once entered. In the Fifth and Eighth Circuits, once the improper pronouns or deadname are entered into the record, a defendant is not legally entitled to a correction.[260] District courts in other circuits, like the Third Circuit, have declined to follow this standard, and offers transgender defendants the option to petition the court to amend

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[256] OHIO MODEL RULE OF PROF'L CONDUCT R. 8.4(g).

[257] State v. Cantrill, 6th Dist. Lucas No. L-18-1047, 2020-Ohio-1235 (Mar. 31, 2020).

[258] A.B.A., *supra* note 2, §3-6.2(1).

[259] *See generally* Diana Flynn, *Fifth Circuit Must Reconsider Opinion that Misgenders Trans Litigant*, LAMBDA LEGAL BLOG (Mar. 23, 2020), https://www.lambdalegal.org/blog/20200323_kyle-duncan-fifth-circuit-misgender-trans-litigant.

[260] *See* United States v. Varner, 948 F.3d 250, 253 (5th Cir. 2020); *See also* United States v. Thomason, 991 F.3d 910, 915 (8th Cir. 2021) (holding that "[b]y signing a plea agreement that used masculine pronouns, acknowledging that his own sentencing letter would use masculine pronouns for the sake of clarity, and using masculine pronouns through counsel at the sentencing hearing, [the transgender defendant] waived any claim of misconduct by opposing counsel.").

the pronouns and legal name used on the record, and requires penal agencies to amend existing records to reflect changes granted by local probate courts.[261]

The Supreme Court of the United States has yet to directly weigh in on pronoun use. However, advocates celebrate *Bostock v. Clayton County*,[262] which held that transgender discrimination in the workplace is illegal.[263] It also addressed a transgender party by preferred pronouns instead of using its standard gender-neutral language.[264] On the heels of *Bostock*, President Biden issued Executive Order 13988 directing federal agencies, including the law enforcement agencies, to promulgate Title VII rules to include protections against discrimination based on gender identity.[265] In Ohio, the Fifth District Court of Appeals categorically denied preferred pronoun requests, with both the majority and dissent noting the lack of any legal authority allowing a court to consider such a request.[266]

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[261] United States v. Diamond, No. CR 17-628, 2022 WL 2828989 (E.D. Pa. July 19, 2022).
[262] McNamarah, *supra* note 11, at 319.
[263] Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020).
[264] *Id.*
[265] Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 25, 2021).
[266] State v. Cantrill, 2020-Ohio-1235, at 27.

IX. PREFERRED PRONOUNS AND THE FIRST AMENDMENT

Free speech advocates argue that the forced use of preferred pronouns is a Constitutional violation.[267] First Amendment prominent objections to recognizing the gender identity of transgender people include: 1) transgender people are demanding a special right not afforded to others; 2) semantically, gendered pronouns cannot constitute offensive speech; 3) gendered labels are "just words," and consequences of their misuse are trivial and legally incognizable; and 4) sanctions against misgendering unconstitutionally compels and restricts speech.[268]

Other common defenses used by those resistant to adopting transgender-friendly speech include: 1) gender-appropriate language is a concession that goes against one's beliefs; 2) the belief that pronouns are tied to biological sex; 3) such use is not intended to be disrespectful; 4) misgendering is acceptable as long as it hasn't been declared otherwise by the courts, and; 5) there is no right to be acknowledged.[269]

For a prosecutor, none of these arguments stand as there are specific conduct rules that curtail free speech under the threat of sanction.[270] For example, American Bar Association Model Rule of Professional Conduct 3.6

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[267] *See* Caitlin Ring Carlson & Emma Hansen, *Pronoun Policies in Public Schools: The Case Against First Amendment Exceptions for K-12 Teachers*, 32 GEO. MASON U. CIV. RTS. L.J. 261, 262 (2022).
[268] McNamarah, *supra* note 12.
[269] McNamarah, *supra* note 16, at 48–56.
[270] *See* MODEL RULE OF PROF'L CONDUCT R. 3.6 and 4.4.

prohibits prosecutors from making extrajudicial statements, otherwise protected by the First Amendment, to benefit a case against a defendant.[271] More generally, speech made outside of the courtroom carries more responsibility and heightened concern because prosecutors have the responsibility of presenting evidence on the record.[272]

X. A LOCAL VIEW: AKRON, OHIO

Josie[273] is a transgender woman who was a victim of domestic violence in Akron during the summer of 2022.[274] Despite her physical injuries in a state that requires an officer to arrest the primary aggressor given the circumstances, no arrest was made.[275] The police report that Josie received did not properly identify her gender nor did it recognize the domestic relationship between her and her attacker.[276] These omissions have made it more difficult for prosecutors to seek justice. Over the past three years, Akron—a city of roughly 200,000 people—has seen four transgender women murdered.[277] Only one of these case investigations has resulted in an arrest.[278]

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[271] Immanuel Kim, *A Voice for One, or A Voice for the People: Balancing Prosecutorial Speech Protections with Community Trust*, 86 FORDHAM L. REV. 1331, 1348 (2017).
[272] *See* Scott M. Matheson, Jr., *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV. 865, 908 (1998).
[273] The victim's name has been changed to protect the identity of the victim.
[274] Interview with Steve Arrington, Chief Administrator, Bayard Rustin LGBTQ+ Resource Center, in Akron, Ohio (Sept. 14, 2022).
[275] *Id.*
[276] *Id.*
[277] *Id.*
[278] Eric Marotta, *Sister says Brian Powers was 'beautiful person,' turning his life around before 2020 murder*, AKRON BEACON JOURNAL (Mar. 18, 2023).

The city and the University of Akron are in Summit County, Ohio. Prosecutor Sherri Walsh has been the elected prosecutor in Summit County since 2001. Assistant prosecutors in her office undergo training that prepares them to engage with transgender people with equality and respect.[279] For almost a decade, both the city and county offices benefitted from the advocacy of Chief City Prosecutor, Gert Wilms, who is part of the LGBT community and now serves as LGBT liaison to the city's mayor.[280] Without the presence of Wilms in the city prosecutor's office,[281] LGTB leaders in Akron indicate that transgender victims and defendants are seeing a decline in justice.[282] In the absence of an advocate, local leaders have formed relationships with the judiciary to create solutions that keep transgender defendants out of uniquely harmful prison environments.[283]

XI. RECOMMENDATIONS AND BEST PRACTICES FOR PROSECUTORS

In a perfect world, all people would begin on equal footing, so there would be one standardized application of the law that is synonymous with justice nationwide. We strive to forge a "more perfect union" through our

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[279] Sherri Walsh, Prosecutor, Summit County, Ohio, Address at U. of Akron Prosecutorial Function course (Sept. 14, 2022).
[280] AKRON, OHIO – CHIEF OF STAFF, https://www.akronohio.gov/cms/site/09024cffe5f8d175/index.html (last visited Oct. 19, 2022).
[281] *Id.* (noting that Wilms now serves as the Chief of Staff to the Mayor of the City of Akron.).
[282] Arrington, *supra* note 156.
[283] *Id.*

daily governance. Yet, in reality, we routinely develop legal channels, processes, and policies to address the societal ills that create disparities between us. When a person falls to certain holistic conditions that lead to criminal behavior, courts have routinely stepped in with alternative solutions that counteract systematic effects preventing rehabilitation.[284] The prosecutor's obligation to seek justice may imply exercising prosecutorial discretion to ensure that defendants do not receive unnecessarily harsh punishments at the hands of the law.[285] Prosecutors have accomplished this through decades of diversion programs, decriminalization, procedural assistance, and the development of internal policies.

Diversion programs are an alternative to the harmful effects of traditional criminal justice.[286] Prosecutors are more willing to accept diversion programs when the impetus for crime lies not within the actor, but in the circumstances that surround the actor.[287] In communities like Akron, prosecutor buy-in to diversion programs available through its problem-solving courts has been

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[284] *See generally* ARNOLD VENTURES, A VISION FOR PROSECUTION: PARTNERS IN A HOLISTIC APPROACH TO COMMUNITY SAFETY, https://craftmediabucket.s3.amazonaws.com/uploads/AVProsecutionOne-Pager-v8-3.pdf (last viewed Nov. 8, 2022).

[285] Green, *supra* note 1, at 623.

[286] *See e.g.*, Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors' Perspective*, 88 FORDHAM L. REV. 2287, 2294 (2020).

[287] *See generally* NAT'L CONF. OF STATE LEGIS., PRETRIAL DIVERSION, https://www.ncsl.org/civil-and-criminal-justice/pretrial-diversion.

instrumental in this success.[288] Ohio has one of the most robust problem-solving court systems in the country with more than 263 specialized dockets.[289] Within the state, problem-solving courts exist for drugs, domestic violence, veterans, juveniles, mental health, young adult men, and human trafficking.[290] Although one in five adults experience mental illness,[291] many specialized dockets for mental illnesses in Ohio are limited to defendants with schizophrenia and bipolar disorder and do not include defendants or victims with gender dysphoria.[292] Of the many problem-solving courts established in Ohio, there are no specialized dockets to address homelessness. We know that transgender people are more likely to become entangled with the criminal justice system because of gender dysphoria and chronic homelessness.[293] The combination of housing insecurity and mental health issues related to gender dysphoria create a cocktail that can be a barrier to being a productive,

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[288] Judge Annalise Williams, Akron Municipal Court, Address at University of Akron Prosecutorial Function course (Sept. 20, 2022).
[289] Dan Trevas, *Continuous Progress, Treatment Courts Among O'Connor's Successes,* AKRON LEGAL NEWS (Oct. 21, 2022).
[290] *See* OH. SPECIALIZED DOCKET LIST, https://www.supremecourt.ohio.gov/SpecializedDocketsList/.
[291] Nat'l Alliance on Mental Illness, Mental Illness Health Facts, https://www.nami.org/NAMI/media/NAMI-Media/Infographics/GeneralMHFacts.pdf (last visited Oct. 25, 2022).
[292] See e.g., HOPE COURT, https://www.summitcpcourt.net/specialty-courts/hope-court/ (last visited Nov. 18, 2023).
[293] *See* Evan Zavidow, *Transgender people at higher risk for justice system involvement*, VERA INST. OF JUST. (May 10, 2016).

employed member of society. The alternative is to engage in petty crimes and prostitution for survival.

While the Summit County Court of Common Pleas has its own set of specialized courts, most defendants and most crimes are disposed of within the municipal system. Summit County's specialized courts include family intervention, mental health, recovery, veterans, drunk driving, and human trafficking, developmentally disabled, battered women, and males ages 18-26.[294] With the statutory power to create pre-trial diversion programs[295], a prosecutor could create a court-sponsored intervention program that formalizes the network of services created by organizations like the Bayard Rustin LGBTQ+ Resource Center.

Prosecutors have broad charging discretion. Weighing a multitude of factors, a prosecutor can deprioritize charges related to consensual prostitution, especially when the offender is a member of a vulnerable community.[296] Prosecutors cannot categorically decline to prosecute without bordering on nullification and running afoul of the executive branch's duty

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[294] *See generally* AKRON MUNICIPAL COURT, https://akronmunicipalcourt.org/, (last visited Oct. 18, 2022)(displaying the different courts available in Akron).
[295] OHIO REV. CODE § 2935.36.
[296] *See e.g.*, Nathan Clark, *New Michigan Prosecutor Has Lenient Policies on Everything from Drugs to Prostitution. But is it Allowed?*, MLIVE MEDIA (Sept. 29, 2021), https://www.mlive.com/news/ann-arbor/2021/02/new-michigan-prosecutor-has-lenient-policies-on-everything-from-drugs-to-prostitution-but-is-it-allowed.html.

to faithfully execute the law.[297] However, they may consider consensuality and economic connection to local society in their exercise of discretion.[298]

Prosecutors also have the option to adopt trans-sensitive policies, such as using gender-affirming language when drafting court documents and addressing the transgender person both on and off the record. In the absence of specialized training and explicit internal policies, it is not improbable that elements of the stigma will appear as conscious or unconscious bias.[299] Equitably engaging transgender people in the criminal justice system calls for the development and implementation of specialized practices for prosecutors to meet their professional obligations. While the American Bar Association Criminal Justice Prosecution Standards can be interpreted to apply to transgender victims, jurors, and defendants, there is nothing in the current standards that require cultural competency for gender identity.[300] There is a minimal amount of case law to help more clearly define the duties owed to transgender individuals as they engage with the justice system. Any

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[297] *But cf.*, Alexandra Sandler, *Making Sex Work Safe: Using A Consensus-Based Approach to Create Meaningful Policy for Sex Workers*, 23 CARDOZO J. CONFLICT RESOL. 473, 507 (2022) (discussing the socioeconomic factors that inhibit a prostitute's ability to consent).

[298] *Id.*

[299] Michelle Phillips, *Protecting LGBTQ+ Workers in a Changing Legal Landscape*, N.Y.C. BAR ASS'N (July 2021).

[300] AM. BAR ASS'N, *Anti-bias, professionalism standards teed up for law schools* (May 24, 2021), https://www.americanbar.org/news/abanews/aba-news-archives/2021/05/law-school-standards/.

additional advancements rest within the application of prosecutorial discretion.

As a matter of policy, if the crime involves a transgender victim, the prosecutor should include trans bias question(s) in voir dire in addition to the ABA recommendation to include an instruction to the jury. Lastly, if the prosecutor is unwilling to use gender-affirming pronouns, prosecutors can use gender-neutral alternatives. The use of "ze", "xe", or "they" as a singular pronoun is gaining in popularity to avoid the binary, and sometimes polarizing, use of she or he.[301]

[301] Evan Zavidow, *They and Ze: Power of Pronouns*, CHICAGO BAR ASSOCIATION RECORD, Jan. 2017, at 48.

SLAVES CODES & JIM CROW LAWS AS A BASIS FOR STATE TRUTH COMMISSIONS IN THE UNITED STATES

*TAYLOR TOOMBS**

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INTRODUCTION

Transitional justice is the "range of judicial and non-judicial mechanisms aimed at dealing with a legacy of large-scale [human rights abuses] and violations of international humanitarian law."[302] It is a new approach to bringing a conflict-stricken area to civil society in the future. The

*Taylor R. Toombs, J.D. UA Little Rock William H. Bowen School of Law, 2024; B.A. University of Arkansas at Little Rock, 2020. Many thanks to Professor Anastasia Boles for her recommendation and to all those who have encouraged and assisted me in this process.

[302] Joanna R. Quinn, *The development of transitional justice*, RESEARCH HANDBOOK OF TRANSITIONAL JUSTICE, 15 (Cheryl Lawther, Luke Moffet, & Dov Jacobs eds., 2019).

goal of transitional justice is to ultimately prevent further conflict by delivering accountability and addressing the causes of rights violations.[303]

International Human Rights Law (IHRL) provides the necessary footing for the use of transitional justice in countries.[304] "International Human Rights Law facilitates and empowers transitional justice processes and establishes the obligations that states can take for institutional reforms and the range of measures to take to respond to human rights violations,[305] while also providing limitations to these measures.[306],[307] Transitional justice includes a range of instruments used in both domestic and international human rights and humanitarian law, including international and regional courts and trials, truth-telling and truth commissions (TCs), public apologies and forgiveness, memorialization, pardons and amnesty, and institutional

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[303] Quinn, *supra* note 1 at 33.

[304] *See* Quinn, *supra* note 1 at 95; Frederic Megret and Raphael Vagliano, *Transitional Justice and Human Rights*, RESEARCH HANDBOOK OF TRANSITIONAL JUSTICE, 95 (Cheryl Lawther, Luke Moffet, & Dov Jacobs eds., 2019).

[305] Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 762, 768-769 (2004) ("[T]ransitional justice… [is] something different from the successful accomplishment of a political or economic transition: it [is] a political and economic transition that is consistent with liberal and democratic commitments. (Citation omitted) … [T]hese elements of transitional justice reflect ideals that remain unrealized even in a consolidated liberal democracy such as the US.").

[306] *See* Mégrét, *supra* note 2, at 95.

[307] Frederic Megret and Raphael Vagliano, *Transitional Justice and Human Rights*, RESEARCH HANDBOOK OF TRANSITIONAL JUSTICE, 95 (Cheryl Lawther, Luke Moffet, & Dov Jacobs eds., 2019).

reforms.[308] This note focuses predominantly on the first two listed, international and regional courts and trials, and truth-telling and truth commissions.

Transitional justice depends on the circumstances surrounding a particular form, including the inequalities present in culture, power, and the influence of international actors that ultimately shape mass violence and memory handling.[309] Increased globalization, normalization, and institutionalization[310] of transitional justice through international criminal courts and tribunals and increased United Nations[311] involvement has shifted transitional justice to a moral *and* legal duty of peacebuilding.[312] As countries began to transition into peace, post-war, the view of transitional justice shifted towards recognition and disclosure.[313] Truth commissions are employed to achieve this goal. Truth commissions are those bodies that share the following characteristics[314]:

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[308] Agathe Mora, *Transitional Justice in Humanitarian: Keywords* 215, 216 (Antonio De Lauri ed. 2020).
[309] *Id*.
[310] Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 73 (2003) ("The new millennium appears to be associated with the expansion and normalization of transitional justice.").
[311] Quinn, *supra* note 1, at 29.
[312] Catherine Turner, *Deconstructing Transitional* Justice, 24 L. & CRITIQUE, 193, 198 (2013).
[313] Jonathan Allen, *Balancing Justice, and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission.* 49 U. TORONTO LJ 315, 320 (1999).
[314] Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 1, 11 (2nd ed. 2011).

(1) Truth commissions focus on the past; (2) they investigate a pattern of abuses over time rather than a specific event, (3) a truthy commission is a temporary body, typically in operation for six months to two years, and completing its work with the submission of a report; and (4) these commissions are officially sanctioned, authorized, or empowered by the [country].

This mechanism allows victims to have a say in the national healing from past human rights violations and to confront their perpetrators through the disclosure of truth and accurate telling of the history of conflict.[315] Truth commissions allow a shift in political culture by acknowledging the injustice, which can lead to subsequent prosecutions and other forms of transitional justice.[316]

Although the international community is riddled with the use of transitional justice mechanisms to hold accountable governing regimes guilty of human rights violations, the United States is excluded, despite the political and economic turmoil that continues in the country.[317] The U.S. has failed to

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[315] Allen, *supra* note 12, at 330.

[316] *Id*., at 332 ("[T]he [truth commissions] can be related to compensatory justice and to the creation of a political culture, in which reflection on justice and, in particular, on injustice, figures much more prominently.").

[317] "Transitional justice… [is] [a] means [of] political and economic transition that is consistent with liberal and democratic commitments. .' Such a regime change should respect rights and involve a minimum of violence and instability. People should either retain their property rights or be compensated for their losses. Officials and supporters of the old regime should not be punished for legal acts. They should not be mistreated, humiliated, or denied trials. Instead of being treated

address its history of human rights violations against its citizens even after implementing a democratic standard of the rule of law.[318] This limits the information learned from employing transitional justice mechanisms in the United States, even when occurring on a smaller level.[319] Additionally, transitional justice mechanisms have been employed in democracies such as Canada and South Korea, although not as developed, making the U.S. no exceptional case.[320] With the discrimination and marginalization of certain groups in the U.S., the country is a ready environment for the use of transitional justice similar to the ways of South Africa during apartheid.[321]

In this note, I propose that in the modern U.S., truth commissions can address past discrimination against African Americans by holding each state legally accountable for slave codes and Jim Crow laws. Truth commissions

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as scapegoats, they should be invited to participate as equal citizens in the new regime. Supporters of the new regime should not profit from the transition or manipulate it for personal ends. However, these elements of transitional justice reflect ideals that remain unrealized even in a consolidated liberal democracy such as the United States." Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 hARV. L. rEV. 3, 761, 768 (2004).

[318] Daniel Posthumus and Kelebogile Zvobgo, *Democratizing Truth: An Analysis of Truth Commissions in the United States*, Int'l Journal of Transitional Justice, 1, 9 (2021).

[319] *Id*. at 517.

[320] *Id*., at 514.

[321] Apartheid required, by law, distinct racial groups to live and grow separately and unequally. Laws included requiring people to registered by their racial distinction, physical separation between races by removal of groups from areas set for certain groups, prohibiting interracial marriages, and separate representation for Black South Africans in Parliament. *A History of Apartheid in South Africa,* South African History Online, https://www.sahistory.org.za/article/history-apartheid-south-africa

can address past racial discrimination and its effects in the South. Through truth commissions, the U.S. can attempt to mend the impact of discriminatory laws and practices through recommendations that ultimately guide legislation for peacebuilding within the racially divided U.S. This note seeks to situate the discrimination against American blacks in the South as human rights violations that warrants truth commissions to address past discrimination. In the first section, this note will address the use of transitional justice to address the accountability of those who breach international obligations to human rights and its limitation to only addressing individual culpability through criminal trials. Next, the note will attempt to position the U.S. court-sanctioning of black codes and Jim Crow laws as human rights violations, constituting *system criminality* warranting the use of truth commissions to address the history of these laws on the black community within the U.S. This situating is done through a comparative legal analysis of legislation, cases, and social practices during apartheid in South Africa and the U.S. Reconstruction era up through the 1970s[322] to bring these laws into the purview of transitional justice, specifically the truth commission conversation. In the last section, this note will propose a system of truth commissions within the U.S. to address the *system criminality* perpetuated by

[322] Andrew Valls, *Racial Justice as Transitional Justice*, 36 POLITY, 60–61 (2003) (South Africa and the United States during the post-Civil War Reconstruction era and the Civil Rights era of the 1950s and 60s "transformation of a state that denies fundamental human rights to large portions of its populations based on race.").

the U.S. using statewide truth commissions within the South and the legislation that could follow from such commissions. However, because of the exclusion of the United States from the transitional justice literature, a brief background is necessary to provide some context for this note.

I. BACKGROUND ON TRANSITIONAL JUSTICE

The role of transitional justice began after World War I and remained a viable option to post-conflict after World War II.[323] During this time, domestic justice was surpassed by international justice because of the limits of national sovereignty to handle the human rights violations present.[324] At this time, transitional justice's aim, or victor's justice,[325] was for accountability through international criminal law and its applicability to the individual instead of the country.[326] As time passed, the political conditions in the international community transitioned to political democratization and modernization post World War II and the Cold War.[327] The rule of law shifted at this time, and multiple dilemmas emerged, including retroactivity in the

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[323] Teitel, *supra* note 9 at 72.

[324] *Id*. ("[P]ost–World War II transitional justice began by eschewing national prosecutions instead seeking international criminal accountability for the Reich's leadership.").

[325] *Id*., at 73 ("[T]he Nuremberg prosecution intended to justify and legitimate Allied intervention in the war.").

[326] *Id*.

[327] *Id*., at 74; *see also* Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, UNIVERSITY OF OKLAHOMA PRESS (1991) (Transitional justice had to extend beyond its role in regulating international conflict and began dealing with intra-state conflict to keep up with the world.).

law, tampering with existing laws, and the selectivity of prosecutions.[328] As a result, countries began to forego prosecutions in favor of alternative methods for truth-seeking and accountability.[329] The new phase of transitional justice was framed in collective accountability, peace, and reconciliation as ways to heal an entire society and incorporate the context behind the conflict.[330] This phase was dominated by the reconciliation model to construct an alternative history of past abuses, in other words, truth commissions.[331] Essentially, it gave the ability to offer a broader historical perspective. The shift to truth commissions favored a conception based on collective moral values and collective responsibility to preserve peace.[332] However, truth commissions could not reach their full potential in restoration due to the view that trials were the priority.

A. Traditional Model

The transitional justice literature focuses on public trials.[333] Similar to the criminal trials in the U.S., perpetrators are charged, provided with representation, and allowed a chance to defend themselves. The focus on

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[328] Jon Elster, *On Doing What One Can*, 1 E. EUR. CONST. REV. 15 (1992).
[329] *See* Paul Van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*, 52 J. INT'L AFF. 647 (1999) (noting Zyl discusses the state of the South African judiciary as a factor in South Africa's transitional amnesty agreement).
[330] Teitel, *supra* note 9, at 77; *see also* Turner, *supra* note 11, at 59.
[331] Teitel, *supra* note 9, at 77–78.
[332] *Id.*, at 80.
[333] *Valls*, *supra* note 21, at 66 ("Prosecution necessarily involves specific individuals who committed specific acts"); *see also* Teitel, *supra* note 9 at 80.

criminal trials is because transitional justice only applies to the individual culpability of actors in perpetrating human rights violations against communities.[334] Additionally, the framework between the individual for criminal law and the collective for international law is in opposition.[335] For a criminal trial, there must be a breach of a law, and someone held responsible for that breach is usually determined by countries.[336] While international law is a promise between countries that provides standards on how each country should operate with one another, a question arises on whether this opposition is affected by treaties.

Within criminal law, the most notable public trial is the Nuremberg trials.[337] These are seen as the modern foundations of transitional justice.[338] Immediately following the Second World War, the victorious Allied powers invoked international tribunals both in Germany and Japan through the International Military Tribunal (IMT). The IMT was under the Inter-Allied Resolution on German War Crimes, signed by the United States, France, the

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[334] *Id.*

[335] Lisa J. LaPlante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915, 921 (2009).

[336] "[I]n international criminal law, impunity relates more to the situation where perpetrators of serious human rights or international humanitarian law are not prosecuted and thus take no accountability for the crimes. In other words, impunity grants those committing international crimes an exclusive protection from being punished as ordinary criminals are under normal circumstances." Li Di, Restorative Justice, Impunity and Amnesty in International Criminal Law, 1 Found. L. & Int'l Aff. Rev. 21, 28 (2020).

[337] *Allen*, *supra* note 12, at 316.

[338] *Quinn*, *supra* note 1, at 16.

United Kingdom, and the Soviet Union in 1942 at the height of Nazi aggression in World War II. The IMT was established for the just and prompt trial and punishment of major war criminals of World War II.[339] Each country provided a judge, an alternate, and a prosecutor. The tribunal sat in Nuremberg, Germany, and heard evidence related to 24 persons accused of crimes against peace, war crimes, and crimes against humanity. In 1946, only 12 of the accused were convicted and sentenced to death, seven received prison sentences, and three were acquitted.[340] The Nuremberg trials established that retribution was the goal, and it could only occur through punishing individuals.[341] This is furthered by the dominant use of the International Criminal Court in transitional justice.[342]

B. Critique of the Model

The general purpose of punishment is for retribution, deterrence, reconciliation, and incapacitation under modern criminology.[343] However, besides retribution, one of the purposes of punishment for human rights

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[339] Charter of the International Military Tribunal at Nuremberg, 10 GONZ. J. INT'L L. 87, 87 (2006-2007).
[340] *Quinn*, *supra* note 1, at 16.
[341] *See generally* Charter of the International Military Tribunal at Nuremberg, *supra* note 34 at 87.
[342] Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INTL. L. 481 (2003).
[343] *See* GABRIEL HALLEVY, *The Right to Be Punished: Modern Doctrinal Sentencing* (2013).

violations cannot be completely satisfied with individual criminal liability alone.[344]

The field of transitional justice traditionally is focused on the breaches of civil and political rights when seeking to respond to conflicts.[345] But it ignores factors that lead to these breaches, such as social and economic rights that other forms of transitional justice consider, such as truth commissions and reparations, that are underused and historically considered as alternatives when criminal trials are unavailable.[346] Additionally, the legacy of holding individuals legally culpable for the country's human rights violations opposes the purposes of international law to reconcile. Criminal trials attempt to create conditions that break from the past regime, that is, forward-looking. However, criminal trials do not reveal the importance of reckoning with the past violations endorsed by the previous government.[347]

Furthermore, the market-oriented framing of international criminal justice creates a disservice to the countries using these transitional justice mechanisms. Economically, institutions and their proponents offer criminal justice as a product on a broader market in competition with recipients of

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[344] Zhenni Li, *System Criminality and International Responsibility: Back to Canonical Questions*, 36 WIS. INT'L LJ. 474, 496 (2019) (Individual liability has little to do with deterrence, rehabilitation, and incapacitation when the oppressive regime reoccurs constantly.).
[345] *Quinn*, *supra* note 1, at 33.
[346] *Turner*, *supra* note 11 at 59; *see also* Elin Skaar & Eric Wiebelhaus-Brahm, *The Drivers of Transitional Justice*, 31 NORDIC J. HUM. RTS. 127, 136 (2013).
[347] *Valls*, *supra* note 21, at 58.

donor support.[348] Social justice becomes an investment that gives unclear goals to the tribunals and the donor-recipient countries, which leaves little progress toward transitional justice in addressing more than individual culpability, ultimately limiting the economic and social rights as context to transitional mechanisms.[349] As a result, from the market framing of transitional justice and donor reasons to fund transitional justice, criminal trials are supported more than truth commissions that could address crimes not looked at in the broader scheme of international justice by all countries. Consequently, the dominant use of the criminal model deters the goals of transitional justice that have been codified[350] and recognized[351] by its governing bodies.

C. The Criminal Model is Insufficient

International human rights law requires that all citizens have equal access to justice through established and legitimate legal procedures while ensuring that all individuals, including the country's agents, remain equally

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[348] Kendall, Sara. *Donor's Justice: Recasting International Criminal Accountability*, 24 LEIDEN JOURNAL OF INT'L LAW, 585, 589 (2011).
[349] Quinn, *supra* note 1, at 33.
[350] *See Text of Rome Statute*, 37 ILM 1002, 1004 (1998) ("The persecution of any racial, ethnic, national, cultural, religious, or gender group when committed as part of a *widespread or systematic attack* directed against any civilian population with knowledge of the attack.").
[351] *See* Li, *supra* note 39, at 478, n.7 ("In the Situation in the Republic of Cote d'Ivoire, the ICC identified five 'contextual elements' of crimes against humanity: i) an attack directed against any civilian population; (ii) a State or organizational policy; (iii) an attack of a widespread or systematic nature; (iv) a nexus exists between the individual act and the attack; and (v) knowledge of the attack.").

accountable to the law.352 However, in the U.S., the rule of law during slave codes and the Jim Crow era was not, per se, illegal and unconstitutional.353 The adjudication of racial discrimination held no weight when the regime's culture persisted in discriminatory behavior after legislation from the highest law of the land. 354 This brings back the question of how countries like the United States combat the opposition between criminal law and international human rights law and how treaties affect this.

First, the International Criminal Court (ICC) only has jurisdiction[355] when the Security Council refers a matter in a country to the ICC or the subjected government has accepted the jurisdiction of the ICC (typically by ratifying the Statute or submitting a declaration of acceptance to the ICC).[356] The ICC is "committed to prosecution and can defer to non-prosecutorial programs only in exceptional situations."[357] The U.S. has not accepted the

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[352] Paul J. Angelo, *The Rule of Law, and Transitional Justice: The Balance Between Accountability and Reconciliation* in *The Day After in Venezuela: Delivering Security and Dispensing Justice*, COUNCIL ON FOREIGN RELATIONS (2020).

[353] *Valls*, *supra* note 21, at 64.

[354] *See* Strauder v. West Virginia, 100 U.S. 303 (1879); *see also* Georgia v. McCollum, 505 U.S. 42 (1992) (These two cases show that racial discrimination persists even after cases holding precedent against this behavior passed an entire century before).

[355] *Robinson*, *supra* note 41, at 485 ("The jurisdiction of the ICC is limited to 'the most serious crimes of concern to the international community as a whole,' namely genocide, crimes against humanity, and war crimes.").

[356] *Text of Rome Statute*, *supra* note 45, at 1010 ("The state's acceptance is only effective for crimes occurring after the ratification or acceptance unless the state specifically declares that it accepts jurisdiction over earlier crimes.").

[357] *Robinson*, *supra* note 41, at 486.

jurisdiction of the Rome Statute of the ICC.[358] Therefore, the U.S. would have to be an exceptional case for the ICC to have jurisdiction.

Similarly, the International Court of Justice (ICJ), the principal judicial organ of the United Nations[359], presents further issues with the prosecutorial nature of transitional justice. "It was established in June 1945 by the Charter of the United Nations and began work in April 1946." [360] "The Court's role is to settle legal disputes submitted by States and give advisory opinions on legal questions referred to by authorized United Nations organs and specialized agencies."[361] For the Court to have contentious jurisdiction over a case, the claiming party must establish jurisdiction through one of three ways: special agreement, by virtue of jurisdiction clause, or through the reciprocal effect of declarations made by them under the Statute to allow

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[358] *See* John F. Murphy, *Quivering Gulliver: U.S. Views on a Permanent International Criminal Court*, 34 INT'L LAW. 45, 45 (2000); *see also* Robinson, *supra* note 37 at 486.

[359] Statute of the International Court of Justice art.1, ¶ 1, June 26,1945, 59 Stat. 1055, 33 U.N.T.S.993.

[360] "The Permanent Court of International Justice, the International Court of Justice predecessor, met for the last time in October 1945 in which the transfer of archives happened. Following on February 6, 1946, the first members of the International Court of Justice took place at the First Session of the United States General Assembly and Security Council."
History, INT'L CT. JUST., https://www.icj-cij.org/history (last visited Nov. 12, 2023).

[361] *How the Court Works*, INT'L CT. JUST., https://www.icj-cij.org/how-the-court-works (last visited Oct. 15, 2023).

compulsory *ipso facto* jurisdiction.[362] The finding of the United States' jurisdiction depends on signed treaties and conventions.[363]

Essential to this note is the Universal Declaration of Human Rights (UDHR) and its subsequent covenant, the International Covenant on Civil and Political Rights, both ratified by the United States. The Universal Declaration of Human Rights is one of the first U.N. documents to elaborate on the human rights principles mentioned in the U.N. Charter and is one part of the resolution on the International Bill of Human Rights.[364] "The International Bill of Human Rights was adopted by General Assembly resolution 217 A (III) on December 10, 1948." [365] "The UDHR is not a treaty but a declaration by the United Nations to which the United States is a party."[366] First, the Universal Declaration of Human Rights, if determined to

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[362] *Id.*

[363] Statute of the International Court of Justice art.36, ¶ 2, June 26,1945, 59 Stat. 1055, 33 U.N.T.S.993.

[364] *Universal Declaration of Human Rights*, United Nations, https://www.un.org/en/about-us/universal-declaration-of-human-rights (last visited Nov. 12, 2023).

[365] *Universal Declaration of Human Rights*, United Nations Human Rights Office of the High Commissioner, https://www.ohchr.org/en/universal-declaration-of-human-rights (last visited Nov. 12, 2023).

[366] "The term [declaration] is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations." *Glossary of Terms Relating to Treaty Actions,* United Nations Treaty Collection, https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml#declarations. *See also* United Nations, s*upra* note 63. ("The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by

be a "general principle of law recognized by parties to the United Nations" within the purview of Article 38(2) of the International Court of Justice Statute[367] and its subsequent covenant to which the United States is bound, do not refer the matter of state discriminatory practices against one race to the International Court of Justice,[368] which is one basis for the Court's contentious jurisdiction.[369] The United States has also not given the International Court of Justice compulsory *ipso facto* jurisdiction.[370] Therefore, a claiming state would not be able to bring a legal dispute against the United States because the United States has not accepted compulsory jurisdiction[371], once again showing the limits of the traditional model in addressing situations such as the United States.

As a result, the most severe crimes codified in international statutes give way to the allowance of actions that do not reach this threshold, and

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teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.")

[367] Statute of the International Court of Justice art.38, ¶ 1, June 26,1945, 59 Stat. 1055, 33 U.N.T.S.993.

[368] *See id.* art. 36, ¶ 1 ("The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force.").

[369] Basis of the Court's Jurisdiction, INT'L CT. JUST., https://www.icj-cij.org/basis-of-jurisdiction (last visited Oct. 15, 2023).

[370] *See Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. JUST., https://www.icj-cij.org/declarations (last visited Oct. 15, 2023) (listing seventy-four states having recognized compulsory jurisdiction, but the U.S. is not among them).

[371] *See* How the Court Works, *supra* note 54.

countries like the United States are less likely to be referred by the Security Council to the ICC.[372] Additionally, the United States can avoid the jurisdiction of the International Court of Justice and deal only with advisory proceedings from the ICJ, which are not binding.[373] Therefore, peacebuilding is limited in its frameworks for addressing past conflict and its role in holding collective institutions accountable when it only uses criminal trials or trials in general. [374] It promotes advancing democracy, institution development, and economic development by the more powerful states within the international community, such as the U.S., on smaller and poor, usually authoritarian states, a one-size-fits-all framework putting trials as the main priority of transitional justice.[375]As a result, reconciliation, the ultimate goal of transitional justice, is limited by the dual responsibility of international criminal law and human rights.[376]

However, other forms, such as truth commissions, help to resolve this issue by allowing discourse on the country's responsibility for structures

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[372] *Murphy*, *supra* note 57, at 52.
[373] *How the Court Works*, *supra* note 54.
[374] *Valls*, *supra* note 21, at 58.
[375] *See* Anurug Chakma, *The Peacebuilding of the Chittagong Hill Tracts (CHT), Bangladesh: Donor-Driven or Demand-Driven?*, 5 ASIAN JOURNAL OF PEACEBUILDING 223, 225 (2017).
[376] *Li*, *supra* note 39, at 494 ("[A]s the most severe harm to the international community as a whole, mass atrocities are never individual perpetrators' power against mass victims, but instead originate from the collective system of power. . . .").

permitting human rights violations.[377] Additionally, truth commissions offer a voice for victims to tell their experiences and recommend reform to promote political and social change that are not available in criminal court. For international crimes perpetrated in the past, truth commissions, unlike criminal courts, can not only address the past human rights violations and their impact on individuals temporarily removed from such situations but offer recommendations to address the systems that allowed for such violations.[378] Ultimately, the courts do little work[379] in countries like the United States that have committed systematic discrimination when the perpetrators are unavailable, and the past is unreconciled. Figuring system criminality into the transitional justice conversation of country culpability can reform or dismantle country institutions, such as the United States, for the perpetration of human rights violations.[380]

II. SYSTEM CRIMINALITY

A. Definition

According to international law and transitional justice literature, system criminality is the state-sponsored collective structure used to impose

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[377] *Quinn*, *supra* note 1, at 33.
[378] *Turner*, *supra* note 11, at 64.
[379] *Id.*
[380] *Li*, *supra* note 43, at 496.

terror on specific groups.[381] Critical to understanding system criminality is understanding state infrastructures that have perpetuated and allowed such massive violence in particular communities.[382] Ultimately, conflict is strengthened through discriminatory social, political, and economic channels in state policies.[383] Although not widely acknowledged, this concept has been introduced previously for transitional justice. Before the criminal model was established through the Nuremberg trials, the Versailles settlement criminalized countries who breached the fundamental norms in the international legal system rather than individuals.[384] Following this principle, the 1945 Potsdam Declaration, Section IV was established.[385] After the establishment of the traditional method, the criminal model, the ICC still holds the view.[386] Under the Rome Statute of the international criminal court, the collective nature of crimes against humanity is shown in its definition.[387]As noted above, the U.S. has not accepted the Rome Statute, although a signatory.[388] However, the U.S. has ratified the Universal

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[381] Andre Nollkaemper, Introduction, in 9 SYSTEM CRIMINALITY IN INTERNATIONAL Law (Andre Nollkaemper & Ilarmen van der Wilt ed., 2009).
[382] *Li*, *supra* note 43, at 497.
[383] *See generally* Int'l Ctr. For Transitional Just., *Transitional Justice and Development* (Pablo De Greiffet al. eds., 2009).
[384] *Li*, s*upra* note 43, at 484 n. 50.
[385] Jochen A. Frowein, *Potsdam Agreement on Germany*, ENCYCLOPEDIA OF PUBLIC INT'L LAW 1087, 1088 (1997). https://ahf.nuclearmuseum.org/ahf/key-documents/potsdam-declaration/
[386] *Text of Rome Statute*, *supra* note 45, at 15.
[387] *Id*., at 3.
[388] *Murphy*, *supra* note 57, at 62.

Declaration on Human Rights.[389] The UDHR was not intended to create binding obligations, although it may have the character of a treaty now as customary law[390], creating a recognized goal and commitment by the United

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[389] United Nations, *Universal Declaration on Human Rights*, https://www.un.org/en/about-us/universal-declaration-of-human-rights (last visited Oct. 15, 2023).

[390] United Nations Treaty Collection, *Glossary*, https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml (last visited Oct. 10, 2023) (The term "declarations" is used for various international instruments. However, declarations are not always legally binding. The term is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations. An example is the 1992 Rio Declaration. Declarations can however also be treaties in the generic sense intended to be binding at international law. It is therefore necessary to establish in each individual case whether the parties intended to create binding obligations. Ascertaining the intention of the parties can often be a difficult task. Some instruments entitled "declarations" were not originally intended to have binding force, but their provisions may have reflected customary international law or may have gained binding character as customary law at a later stage. Such was the case with the 1948 Universal Declaration of Human Rights. Declarations that are intended to have binding effects could be classified as follows:

> a. A declaration can be a treaty in the proper sense. A significant example is the Joint Declaration between the United Kingdom and China on the Question of Hong Kong of 1984.
>
> b. An interpretative declaration is an instrument that is annexed to a treaty with the goal of interpreting or explaining the provisions of the latter.
>
> c. A declaration can also be an informal agreement with respect to a matter of minor importance.
>
> d. A series of unilateral declarations can constitute binding agreements. A typical example are declarations under the Optional Clause of the Statute of the International Court of Justice that create legal bonds between the declarants, although not directly addressed to each other. Another example is the unilateral Declaration on the Suez Canal and the arrangements for its operation issued by Egypt in 1957 which was considered to be an engagement of an international character.).

States to strive towards a "...teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance…"[391] Therefore, the ratification of the UDHR provides support for this paper and the consideration that the US has committed system criminality within the definition of this paper.

The value of a country's responsibility for its role in human rights violations is to remove the impunity for states prevalent in the individual culpability framework in international law by allowing a moral case of renouncing discriminatory country policies. [392] However, because of the nature of responsibility within the traditional model of transitional justice, the U.S. is reluctant to deem its actions as crimes against humanity or international crimes.[393] Applying the system criminality definition to the U.S., the country's infrastructure has allowed for crimes against humanity against American blacks through the use of the nation's courts and social segregation among American whites and blacks in transportation.[394] Transportation segregation was then used as a basis for school segregation[395]

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[391] United Nations, *supra* note 63.
[392] Laurel E. Fletcher, A Wolf in Sheep's Clothing? Transitional Justice and the Effacement of State Accountability for International Crimes, 39 Fordham Int'l L.J. 447, 452-453 (2016).
[393] *Posthumus*, *supra* note 17, at 519.
[394] Plessy v. Ferguson, 163 U.S. 537, 551 (1896).
[395] Brown v. Bd. Of Educ., 347 US 483, 495 (1954) (Overturned the "separate but equal" doctrine established by *Plessy*).

and through legislation. Although the U.S. is reluctant to deem its treatment of American blacks as human rights violations, there has been a movement to understand the U.S. as involving the type of system criminality that allows for the use of truth commissions.[396] Additionally, the role of comparative analysis between the U.S. and South Africa can shed light on officially deeming the effect of discriminatory policies and practices of the U.S. as involving the type of system criminality that allows for the use of truth commissions as the international community has done in countries like South Africa.[397]

B. South African Comparison

Apartheid is a system of racial segregation, discrimination, or oppression in housing, employment, public accommodation, health care, freedom of association, freedom of speech, and education.[398] The same was present in the U.S. during the Reconstruction era and up to the 1970s.[399]

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[396] "We express our concern that in some States political and legal structures or institutions, some of which were inherited and persist today, do not correspond to the multi-ethnic, pluricultural and plurilingual characteristics of the population and, in many cases, constitute an important factor of discrimination in the exclusion of indigenous peoples." Declaration and Programme of Action, ¶ 22 *World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance*, 51 ZBORNIK PFZ 1041 (2001). https://www.un.org/en/conferences/racism/durban2001.

[397] *Valls*, *supra* note 21, at 59 (South Africa and the US during the post-Civil War Reconstruction era and the civil rights era of the 1950s and 60s "transformation of a state that denies fundamental human rights to large portions of its populations [based on] race").

[398] *Id*.

[399] *Id*. at 60.

Ultimately, both eras serve as ways to stigmatize blacks as inferior in every aspect of life. The similarities between the U.S. during the Reconstruction era until the 1970s and South Africa during apartheid allow for the comparison between the two countries to situate the U.S.'s racism as a human rights violation or international collective crime to be addressed by transitional justice.

The use of comparative analysis between the two countries is not perfect. It is important to note that this note is limited in the comparative analysis of the two countries. Although both involve racial discrimination against blacks[400]there are many differences in populations, demographics, economics, religions, cultures, and histories of the two countries. Most importantly, American whites have been the majority in population and political and economic power.[401] In contrast, South African whites were in the minority of the total population of South Africa.[402] However, whites

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[400] Because of the use of the term African in both *South African* and *African American*, to show the distinction between culture and race, this note uses the term black as the race to deliver similarities in discrimination between South Africa and the United States that distinguished by its culture, South African or American.

[401] United States Census Bureau. *How has the population changed in the US: Our Changing Population: US*. https://usafacts.org/data/topics/people-society/population-and-demographics/our-changing-population?utm_source=google&utm_medium=cpc&utm_campaign=ND-DemPop&gclid=CjwKCAjw5dqgBhBNEiwA7PryaPnhccfePdIJWb9dWuQUMpyo-sa-NP27h9slkRFQyVgkA1gCGmfxWBoCr4QQAvD_BwE (last visited May 12, 2023) (In the article, I generalize the change between 2010-2021 to guide minorities within the US during the relevant periods).

[402] From 1960 to 1990 the Black population was between 68% and 76%. DREW DESILVER, *Chart of the Week: How South Africa changed, and didn't, over*

dominated the political, economic, and social spheres of the country.[403] Furthermore, South Africa contained a systematic policy to place South African blacks as inferior, but the U.S. had no such national policy on race relations.[404] The majority of the racial policy was conducted and enforced by state governments.[405] Regardless of the differences, both countries, South Africa during apartheid[406] and the U.S. during the Jim Crow era and post-*Plessy v. Ferguson*[407], allow for valid comparisons between the two countries. Both countries in these two periods contained discriminatory laws against blacks that were ultimately upheld by courts if questioned.[408] In both South Africa and the U.S., the blacks were denied the right to vote; in South

Mandela's Lifetime, Pew Research Centerhttps://www.pewresearch.org/short-reads/2013/12/06/chart-of-the-week-how-south-africa-changed-and-didnt-over-mandelas-lifetime/ (DECEMBER 6, 2013).

[403] The National Party, which included mostly Dutch-descended, Afrikaners and many English-speaking whites, governed South Africa from 1948 until 1994. *See National Party*, https://www.sahistory.org.za/article/national-party-np (last visited Nov. 12, 2023). *See also National Party*, Britannica, https://www.britannica.com/topic/National-Party-political-party-South-Africa (last visited Nov. 12, 2033).

[404] The United States has various constitutional amendments to combat national policies negatively affecting race relations. See U.S. Const. amend. XV, §1. See also U.S. Const. amend. XIV.

[405] Presence of local and state policies such as Black Slave Codes and Jim Crow Laws deterring the commitment that the United States had given through its amendments. *Jim Crow* Laws, History. Com. https://www.history.com/topics/early-20th-century-us/jim-crow-laws.

[406] *Posthumus*, *supra* note 19.

[407] Plessy, *supra* note 93, at 551 (upholding constitutionality of separate but equal railway accommodations for blacks).

[408] United States v. Cannon, 750 F.3d 492 (5th Cir. 2014).

Africa[409] this occurred through legislation and in the U.S., this occurred through practical measures.[410] Blacks in both countries suffered overtly racist attitudes from public officials who ultimately appointed government officials with the same attitudes. Most importantly, in both countries, discrimination was strictly based on race.[411] There is a parallel between the opinion of *Dred Scott*, where Chief Justice Roger Taney stated that American blacks "had no rights which the white man was bound to respect,"[412] and the treatment of South African blacks during apartheid. In modern times, the story is similar. South African blacks and American blacks still feel the impact of such discrimination and whites in both countries dominate political and economic power.[413]

Moreover, in practices by U.S. private citizens, American blacks have suffered continued discrimination.[414] Before the Civil Rights Act of 1965[415] blacks had the right to vote. Southern states employed repressive practices to limit the black vote through poll taxes, literacy tests, fraud, intimidation, and

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[409] The Representation of Natives Act No. 16 of 1938 https://www.sahistory.org.za/article/history-apartheid-south-africa.
[410] Along the Color Line: Political," The Crisis, v. 1, n. 1, November 11, 1910. https://glc.yale.edu/along-color-line-political
[411] *Frowein, supra* note 84.
[412] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV.
[413] *Six Charts Explain South Africa's Inequality,* International Monetary Fund. https://www.imf.org/en/News/Articles/2020/01/29/na012820six-charts-on-south-africas-persistent-and-multi-faceted-inequality
[414] *Posthumus*, *supra* note 105.
[415] Civil Rights Act, 42 U.S.C. §§ 1981-2000 (1965).

the most significant being *grandfather clauses* to eliminate descendants of enslaved people from the polls, although per se illegal.[416] In 1875, the U.S. passed the first Civil Rights Act to guarantee freed blacks' equal treatment in public such as hotels, public transportation, and theaters.[417] However, in 1883, several provisions of the Act were ruled unconstitutional by the Supreme Court in the Civil Rights Cases.[418]

The comparison between the U.S. and South Africa shows that the system criminality inflicted by the U.S. warrants transitional justice mechanisms. However, the form of transitional justice must be adapted to understand the context of discrimination in the U.S. and today's effects on American blacks.

III. TRUTH COMMISSIONS IN THE U.S. TO COMBAT SYSTEM CRIMINALITY

As noted above, the criminal model is insufficient to address situations like the one in the U.S.[419] First, the U.S. is an established democracy with its own democracy and court system. The literature has shown that the criminal model will not work well in a system such as the U.S. The international community furthers this by not pressuring the U.S. to accept

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[416] U.S. Const. amend. XV, §1.
[417] 18 Stat. 335, 43 Cong. Ch. 114
[418] Civil Rights Cases, 109 U.S. 3,26 (1883) (The court struck down the challenged provisions of the Civil Rights Act of 1875, holding that the US Constitution did not provide Congress with such authority).
[419] *Valls, supra* note 73.

the International Criminal Court jurisdiction and its absence from the transitional justice literature.[420] Second, other forms of transitional justice are already used in the U.S., such as trials and other processes to remove or punish officials in breach of laws and to compensate victims for these breaches, such as reparations and truth commissions.[421] Although the U.S. has used truth commissions in sub-national and national contexts, the U.S. truth commissions are limited in their operation and long-term effectiveness in addressing the past discrimination of African Americans within the U.S.[422] The U.S. truth commissions have not structured discriminatory laws towards enslaved people, African American citizens, or blacks as human rights violations warranting the use of transitional justice within the U.S. to the level seen in the international community.[423] Statewide truth commissions could address the system criminality of the laws passed and practices upheld by the courts of the U.S.

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[420] *See Posner, supra* note 4, at 764 ("If transitional justice (TJ) is continuous with ordinary justice, then there is no reason to treat transitional justice measures as presumptively suspect on either moral or institutional grounds unless we are to treat the justice systems of consolidated liberal democracies as suspects as well.").
[421] *Posner*, s*upra* note 4, at 765.
[422] *Posthumus*, supra note 17.
[423] *Li*, *supra* note 39, at 496 ("International crimes are not only about systematic crimes but also about systematic fanaticism and systematic unconsciousness.").

A. Traditional U.S. Model

The first U.S. truth commission, the Kerner Commission, was installed in 1967 by President Lyndon Baines Johnson.[424] It studied the circumstances of the nationwide race riots that year and their causes, namely racial segregation and discrimination in policing, employment, housing, and education – problems facing Black communities and communities of color today.[425] Thirteen years later, in 1980, the U.S. Congress formed the Commission on Wartime Relocation and Internment of Civilians (CWRIC) to examine World War II-era persecution of persons of Japanese ancestry.[426] These two commissions set standards for employing more truth commissions in the U.S., although more frequently on the sub-national level.[427] U.S. truth commissions have been used and proposed in Congress to address racial violence by state and non-state actors, with commissions focusing on extrajudicial killings and pushing towards broader issues such as institutional

[424] *The Kerner Commission*, National Musuem of African American History & Culture, https://nmaahc.si.edu/explore/stories/kerner-commission.
[425] National Advisory C'mssn on Civil Disorder United States, *National Advisory Commission on Civil Disorders*, Report, https://www.ojp.gov/ncjrs/virtual-library/abstracts/national-advisory-commission-civil-disorders-report (1967).
[426] Commission on Wartime Internment and Relocation of Civilians, *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians* (1997); Kashima, Tetsuden. "Summary." *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians*, University of Washington Press, 1997, pp. 1–24. *JSTOR*, http://www.jstor.org/stable/j.ctvcwnm2s.6. Accessed 13 Nov. 2023.
[427] Posthumus, *supra* note 17, at 520.

racism.[428] Although different from the global context of truth commissions, the sub-national truth commissions address similar problems as the international community, such as those that Black individuals experienced in South Africa during the apartheid.[429] However, it is a limited view of transitional justice within the U.S.[430]

B. Critique of the Traditional United States Model

This view of truth commissions used by the U.S. limits the truth commissions to investigation purposes alone, creating no backing for holding the U.S. and its states, in general, as culpable actors[431] and refusing to address statewide accountability human rights violations.

It is important to briefly discuss the insufficiency of other forms of transitional justice (compensation for victims, memorials, and monuments).

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[428] *Id*., at 528.

[429] *Id*. at 514.

[430] At a press conference upon the rendering of a guilty verdict for Edgar Ray Killen, Philadelphia Coalition, the multiracial group whose work had prompted the new trial and conviction, declared that:

These three brave young men were not murdered by a lone individual. While a vigilante group may have fired the gun, the State of Mississippi loaded and aimed the weapon. The Mississippi State Sovereignty Commission monitored and intimidated civil rights activists to prevent black voter registration. The White Citizens' Councils enforced white supremacy through economic oppression. And decent people remained silent while evil was done in their name. These shameful actions have been little understood by Mississippi citizens. We must now seek the truth. We call on the State of Mississippi, all of its citizens in every county, to begin an honest investigation into our history. (2005)

Susan M. Glisson, *The Sum of Its Parts: The Importance of Deconstructing Truth Commissions*, 5 RACE & JUST. 192, 194 (2015). (Quoting Schwerner, R. (2005, June)).

[431] *Valls, supra* note 21, at 68–69.

The use of transitional justice mechanisms should be more than an official apology.[432] Additionally, the idea of reparations for all is too broad for a nation like the U.S., which has yet to acknowledge its past and the effects on its citizens[433]. Additionally, when it comes to reparations, there must be a determination of who is considered a victim that should receive compensation.[434] Due to the passing of individuals directly affected by the Jim Crow South and the failure of the Reconstruction era, there is little linkage to the direct victims of discrimination.[435] Further, if we were to think of things like affirmative action and school integration as forms of compensation, these efforts were extremely modest have done little to address the racial inequalities that still exist.[436] Monuments and memorials (Martin Luther King Jr. Monument and the Martin Luther King Jr. holiday) show a past of discrimination but fail to establish what exactly that past is and how it continues to affect citizens today, such as what truth commissions

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[432] Five Times the United States Officially Apologized, Smithsonian Magazine. https://www.smithsonianmag.com/smart-news/five-times-united-states-officially-apologized-180959254/.

[433] "Reparation is the provision of payment or other assistance to someone who has been wronged." *Quinn*, *supra* note 1 at 19.

[434] "Another frequently cited example concerns reparations paid to Canadian citizens of Japanese ancestry in 1988…whom were sent to internsment camps after the Japaneses attac on Pearl Harbor in 1941." *Quinn*, *supra* note 1 at 19.

[435] *Valls*, *supra* note 21, at 66 ("Those who committed abuses under Jim Crow or during the civil rights era are now either dead or old. Still, it is significant that in the last few years, some individuals suspected of crimes, particularly against civil rights workers, have been brought to trial and, in some cases, convicted. Others, however, have been found unfit to stand trial due to age.").

[436] *Id.*, at 66–67.

can do.[437] Therefore, because the use of truth commissions already in the U.S. and the insufficiency of other transitional justice forms for reconciliation, there must be a restructuring of the truth commission process that is already in place in hopes of greater reconciliation within the U.S.[438]

C. A New System of Truth Commissions in the United States

As discussed above, a state truth commission used to mitigate the effects of discrimination by the U.S. is familiar.[439] However, a framework focused on an individual state's culpability is unconventional for the U.S. Similar to international criminal and human rights law, the U.S. has struggled with the limitation of dual responsibility to name and acknowledge State culpability for acts that constitute international crimes.[440]

Before I posit my proposal of what a truth commission could be in the U.S., it is necessary to note a limitation due to the democratic system of the U.S. First, the political culture of the 21st century provides issues to the system I propose in the U.S. In recent years, the attempt to ban Critical Race Theory and to remove the history of violence against marginalized groups negatively affects bipartisan cooperation in the proposed system.[441]

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[437] *Hayner*, *supra* note 12.
[438] *Glisson*, *supra* note 129, at 192.
[439] *The Commission on Wartime Relocation and Internment of Civilians*, *supra* note 125.
[440] Murphy, *supra* note 57, at 52.
[441] Barbara Sprunt, *The Brewing Political Battle Over Critical Race Theory*, (June 29, 202, 5:45 P.M.) https://www.npr.org/2021/06/02/1001055828/the-brewing-political-battle-over-critical-race-theory

Consequently, the proposed system implementation depends on bipartisan and nonpartisan civic and social leaders in the U.S.

First, recognizing that individual states have pushed discriminatory practices and policies, which are crimes against humanity, is the most effective way to frame the state's actions as a crime.[442] Particularly in the American South, black and whites were separated in public accommodations and schools even after precedents outlawed these practices.[443] For example, in 1957, in Arkansas at Central High School, Arkansas governor Orval Faubus ordered the Arkansas National Guard to block nine black students entrance to the school, claiming that it was for the safety of the nine black students.[444] In 1955, in Montgomery, Alabama, Rosa Parks was arrested for refusing to give her seat to a white passenger on public transportation.[445] Besides the use of the law, attempts to combat discrimination were faced with the opposition of the state's white citizens protesting, and most times followed in violence towards those attempting integration.[446] State governments also did not condemn the opposition's actions, which usually resulted in the arrest

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[442] *Turner*, *supra* note 78.
[443] Brown v. Board of Education, 347 U.S. 483 at 495.
[444] Blackpast, *(1958) Orval E. Faubus, Speech on School Integration*, July 26, 2010) https://www.blackpast.org/african-american-history/1958-governor-orval-e-faubus-speech-school-integration/
[445] History.com, *Rosa Parks*, https://www.history.com/topics/black-history/rosa-parks.
[446] *Glisson*, *supra* note 129, at 192.

of the protestors.[447] This social movement to limit the access of American blacks flooded into acquiring and maintaining property through redlining.[448] This is a limited list of the practices of individual states. Nevertheless, these actions constituted breaches of the standard care provided to American citizens under the Equal Protection Clause of the 14th Amendment.[449] Therefore, system criminality brings about the need for reconciliation. As a result, statewide truth commissions can address the human rights crimes that affected American blacks and still affect American blacks today through a truth-seeking process of individual state's actions that perpetuated the discrimination.

Second, once the truth commission has identified and acknowledged the historical past of the U.S., the truth commission is followed by strategic recommendations proposed by authoritative figures within the truth commissions to form legislation to mitigate these effects.[450] The legislation would be limited to the confines of the recommendations by commission members. By doing this, it promotes those directly affected by discriminatory practices of laws within individual states to have an intentional voice in the policies recommended.

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[447] Lichten v. State, 434 S.W.2d 128 (Tex. Crim. App. 1968).
[448] 42 U.S.C. § 3601 et seq.
[449] U.S. Const. Amend. XIV.
[450] Allen, *supra* note 12, at 332.

Third, and I believe most difficult, truth commissions must determine perpetrators of discrimination, victim classification, and who should receive the benefits of policies following the conclusion of the truth commissions.[451] Because I focus on state culpability rather than individual culpability part of the work is done through the use of identifying individual states as perpetrators of crimes. In contrast, the most effective way to identify victims is to use the system of determining race by the Civil Rights Act of 1964 Title VII.[452] The classification of race is determined by how a person holds himself, or herself, out to be identified as, which ultimately contributes to the discrimination faced.[453] Additionally, because of the temporal removal of the possible victims within the state and the periods I focused on within this paper, it is necessary to prove familial history within the specific state to determine the citizenship requirement for victims.[454] However, this presents another difficulty because of the history of most American blacks. Most residential history is undocumented or limited due to American blacks being seen as property and not people before 1870.[455] Therefore, proof of

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[451] Turner, *supra* note 101at 64.
[452] *United Nations*, *supra* NOTE 95, at 4.
[453] *See* Perkins v. Lake Cnty. Dep't of Utils., 860 F. Supp. 1262 (N.D. Ohio 1994).
[454] "Americans concern events that took place four decades earlier. Deliberations on 'how far back should we go' - and whether descendants of victims should be compensated…" Thomas Obel Hansen, Establishing a Normative Framework for Evaluating Diverse Cases of Transitional Justice, 9 INT'l Stud. J. 171, 195 (2012).
[455] Kianna Cox and Christine Cox, *Family history, slavery, and knowledge of Black history*, PEW RESEARCH CENTER, https://www.pewresearch.org/race-

residential history within a specific state would be based on the amount of documentation that can be shown within the state as far back as 1870, with priority given to those with long histories within the state based on the documentation.

CONCLUSION

I do not suggest that this is a complete remedy to the effect of racial discrimination in the U.S. but rather a start to reconciliation in the country. However, this is not to say there will be no issues with this standard. There is an opportunity for the U.S. to reconcile with its citizens for discrimination employed by the state and sanctioned by the government while also bringing a new peacebuilding framework to the country and the international community. However, this is only possible through the recognition of system criminality used by the states in enforcing discriminatory policies and practices and the need for action to address the impacts policies and practices have had on the victims and their descendants. Additionally, this requires the U.S. to implement procedures and standards that not only allow victims to have a voice but have legal backing in precedent to withstand the test of time. I cannot say these proposed truth commissions will receive no pushback, but

ethnicity/2022/04/14/black-americans-family-history-slavery-and-knowledge-of-black-history/ (last visited October 15, 2023).

we can only hope for a future that acknowledges the harm it has done to its citizens.

AN UNCOMFORTABLE PAUSE: A HISTORICAL PERSPECTIVE ON LEGISLATIVE DEFERENCE TO ANIMAL AGRICULTURE AND ARKANSAS'S AG-GAG FIGHT

Ryan Lynn[*]

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INTRODUCTION

Most people in modern society have seen pictures or videos of what happens inside a slaughterhouse or animal research facility.[456] These are the kind of images that may be shared by a friend on social media, shown by protesting activists in a public place, or on a billboard communicating an

* Ryan P. Lynn, J.D. Georgia State University College of Law, 2023; B.S.B.A, University of West Florida, 2015; M.B.A., University of West Florida, 2017. Many thanks to Professor Megan E. Boyd for her thoughtful recommendations, guidance, and mentorship.

[456] Andy Greenberg, *Spy Cams Reveal the Grim Reality of Slaughterhouse Gas Chambers*, Wired (January 18, 2023 11:00 AM), https://www.wired.com/story/dex-pig-slaughterhouse-gas-chambers-videos/ (last visited January 19, 2023).

animal rights message. Similar images can also be seen in movies or documentaries about animal agriculture.[457] Such content may be described as "disturbing," "unsettling," or "shocking." Because of the gripping nature of those pictures and videos, viewers, if they allow the content to sink in, may begin questioning their food and other lifestyle choices.[458] Typically, those images are captured by activists working undercover in slaughterhouses and research facilities.[459] Ag-gag laws, which make it illegal to take pictures or videos inside of a slaughterhouse or obtain a job with the intent to do so, exist solely to prevent those images from being captured.[460]

Ag-gag laws seek to "gag" would-be whistleblowers from documenting and publishing images and videos that show what happens inside slaughterhouses and research facilities.[461] As this article will explain in detail in part *IV: The Ongoing Fight*, ag-gag laws are unconstitutional speech restrictions that prevent activists from spreading the truth in a non-violent manner.[462] Kansas passed the first ag-gag law in 1990.[463] Since then,

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[457] EARTHLINGS, (Libra Max 2005) or the film Fast Food Nation, (Recorded Picture Company 2006).
[458] See generally, Danny Prater, *Meat-Eaters Watch Slaughter Footage for the First Time*, PETA (June 14, 2016), https://www.peta.org/living/food/meat-eaters-watch-slaughter-footage/.
[459] Greenberg, *supra* note 1.
[460] Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017).
[461] ANIMAL LEGAL DEFENSE FUND (ALDF), Ag-Gag Laws, https://aldf.org/issue/ag-gag/ (last visited January 19, 2023).
[462] Meredith Kaufman, The Clash of Agricultural Exceptionalism and the First Amendment: A Discussion of Kansas' Ag-Gag Law, 15 J. Food L. & Pol'y 49 (2019).
[463] Kan. Stat. Ann. § 47-1827.

many states have enacted and amended their own ag-gag laws in an attempt to avoid claims that these statutes inherently violate the First Amendment.[464] Currently, five states have active ag-gag laws: Alabama,[465] Arkansas,[466] Missouri,[467] Montana,[468] and North Dakota.[469] Another six states: Iowa,[470] Kansas,[471] North Carolina,[472] Utah,[473] Idaho,[474] and Wyoming[475] have received unconstitutional rulings in the last few years, though some of those legislatures continue to amend and reenact their statutes.[476]

The lawyers whose First Amendment challenges to ag-gag laws have succeeded have blazed a trail that may guide advocates mounting

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[464] Nicole Pallotta, *Though Ruled Unconstitutional, Industry Continues Pushing Ag-Gag Laws: Updates in North Carolina, Kansas, Iowa, and Ontario*, ANIMAL LEGAL DEFENSE FUND (ALDF) (September 15, 2020), https://aldf.org/article/though-ruled-unconstitutional-industry-continues-pushing-ag-gag-laws-updates-in-north-carolina-kansas-iowa-ontario/.

[465] Ala. Code § 13A-11-153.

[466] Ark. Code Ann. § 16-118-113.

[467] Mo. Ann. Stat. § 578.405 (West)

[468] Mont. Code Ann. § 81-30-103.

[469] N.D. Cent. Code Ann. § 12.1-21.1-02.

[470] Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812 (S.D. Iowa 2019), *aff'd in part, rev'd in part and remanded*, 8 F.4th 781 (8th Cir. 2021); Animal Legal Def. Fund v. Reynolds, Order on Defendants' Motion to Dismiss and Plaintiffs' Motion for Summary Judgment, Case No. 4:21-cv-00231-SMR-HCA (S.D. Iowa 2022) (https://www.calt.iastate.edu/files/reynolds_v.pdf).

[471] Animal Legal Def. Fund v. Kelly, 9 F.4th 1219 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 2647 (2022).

[472] People for the Ethical Treatment of Animals, Inc. v. N. Carolina Farm Bureau Fed'n, Inc., 60 F.4th 815 (4th Cir. 2023); People for the Ethical Treatment of Animals, Inc. v. Stein, 466 F. Supp. 3d 547 (M.D.N.C. 2020).

[473] *Herbert*, 263 F. Supp. 3d 1193.

[474] Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018).

[475] W. Watersheds Project v. Michael, 869 F.3d 1189 (10th Cir. 2017).

[476] Pallotta, *supra* note 9; see also ASPCA, What is Ag-Gag Legislation?, (retrieved May 28, 2023: https://www.aspca.org/improving-laws-animals/public-policy/what-ag-gag-legislation#Ag-Gag%20by%20State).

constitutionality challenges in other states.[477] However, many obstacles still lie in the path of advocates on the quest to slay the ag-gag dragon. Although the Supreme Court of the United States could step in and resolve the issue at the national level, the denial of certiorari in *Kelly v. ALDF* in 2022 indicated that the Court has no intention of wading into the ag-gag waters.[478] Therefore, the five states with ag-gag laws still on the books will require their own difficult legal battles against opponents backed by "big agriculture." This article explores Arkansas's current legal battle in part *V: Arkansas's Ag-Gag Fight*.

While many ag-gag sources explain the technical operation of ag-gag laws,[479] this article takes a different approach by analyzing ag-gag in the broader historical context. This article discusses not only the passage of ag-gag laws in the early 1990s but also the thousands of years of incongruent legislative and social privileges bestowed upon agricultural interests from the

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[477] Ivy Pepin, What Are Ag-Gag Laws and How Many States Have Them?, THE HUMANE LEAGUE (June 7, 2022)

[478] ALDF, *Challenging Kansas' Ag-Gag Law* (April 25, 2022), https://aldf.org/case/animal-legal-defense-fund-et-al-v-coyler-et-al/, showing that certiorari was denied. This denial of certiorari can certainly be interpreted as a victory for opponents of ag-gag, but another perspective is to question why the Supreme Court wouldn't take up certiorari to affirm—in a ruling that applies to all ag-gag laws—that all ag-gag laws are First Amendment violations.

[479] Maggie Strong, *The Show-Me State's Hidden Cruelty: How Missouri's Ag-Gag Laws Unconstitutionally Silence Animal-Welfare Whistleblowers*, 63 ST. LOUIS U. L.J. (2019).; Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUMBIA LAW REVIEW 991, 1021 (2015); BRUCE A. WAGMAN, SONIA S. WAISMAN, PAMELA D. FRASCH, ANIMAL LAW, *Commercial Uses of Animals: C. "Ag-Gag" Laws* 619-639 (2019).

beginning of human civilization. By understanding the cultural and legal mechanisms upon which ag-gag laws are built, advocates for free speech and animal rights may obtain new knowledge necessary to understanding the strategies and goals of their opponents. This story begins at the dawn of civilization, where cultural and legislative deference to animal farming began

I. THE DOMESTIC REVOLUTION

Twelve thousand years ago, our ancestors began trading their nomadic lives for settled lives.[480] The ancestors of those early settlers lived highly successful lives for millennia as hunters, foragers, and travelers.[481] As hunter-gatherers began making minimal changes with each generation in what amounted to gradual steps toward a settled life,[482] they became domesticated just like the grains and herds they tended.[483]

Prior to domestication, the daily activities of our prehistoric ancestors revolved around securing food and safety.[484] Hunter-gatherers developed a wide range of effective survival[485] and communication skills.[486] They lived

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[480] Erin Blakemore, *What was the Neolithic Revolution?*, NATIONAL GEOGRAPHIC (April 5, 2019), https://www.nationalgeographic.com/culture/article/neolithic-agricultural-revolution.
[481] Yuval Noah Harari, Sapiens: A Brief History of Humankind 79 (2015).
[482] Marion Benz et al, *The Construction of Neolithic Corporate Identities*, 20 STUDIES IN EARLY NEAR EASTERN PRODUCTION 1, 1 (2017).
[483] HARARI, *supra* note 26 at 80.
[484] *Id.* at 47-48.
[485] *Id.* at 48-49.
[486] *Id.* at 24.

deeply spiritual[487] and emotional lives with complex social structures.[488] They developed closely attuned relationships with the forests, riverbanks, and valleys where they lived.[489] They utilized their bodies in every way imaginable, likely attaining what is considered today "peak athletic performance."[490] They possessed expert abilities in a wide range of skills like making fire, fashioning weapons and tools, understanding which plants are edible and which are poisonous, and hunting without guns, compound bows, or GPS.[491] They typically enjoyed varied diets consisting of different fruits, nuts, wild grains, tubers, wild animals, and mushrooms.[492] Thus, the common assumption that our hunter-gatherer ancestors lived poor, struggling lives is false.[493] The average hunter-gatherer had a balanced diet, appreciable leisure time, and significant exercise.[494]

A question that piques the interest of economists, historians, and biologists alike is, "what caused people to trade their highly successful lives

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[487] Hervey C. Peoples et al., *Hunter-Gatherers and the Origins of Religion*, 27 HUMAN NATURE 261, 277 (2016).
[488] Marcus J. Hamilton et al., *The Complex Structure of hunter-gatherer social networks*, 274 PROCEEDINGS OF THE ROYAL SOCIETY B: BIOLOGICAL SCIENCES 2195, 2200-01 (2007).
[489] HARARI, *supra* note 26 at 48.
[490] *Id.* at 49.
[491] *Id.* at 48-49.
[492] *Id.* at 51.
[493] *Id.* at 52.
[494] *Id*.

as hunter-gatherers for the back-breaking lifestyles of farmers?"[495] The answer is not simply, "they did it for food security," or "it just happened gradually, over time."[496] Complete justifications for settlement—like explaining the decisions of human populations today—are complicated,[497] and a complete retelling is beyond the scope of this article. Despite the complexity of the retelling, one activity is associated with all instances of human settlement, whether it was the driving force or the result: *agriculture*.[498] The beginnings of agricultural settlement occurred during the Neolithic Period, about twelve thousand years ago.[499] As people began exerting control over herds and edible plants, sedentary lifestyles became a necessity.[500] Sedentism introduced many social opportunities (e.g., food security, organized religion, law, specialization) and many social challenges (e.g., increased population, disease, political corruption).[501]

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[495] Eleni Asouti, *Human Palaeoecology in Southwest Asia During the Early Pre-Pottery Neolithic (c. 9700-8500 cal BC): the Plant Story*, 20 STUDIES IN EARLY NEAR EASTERN PRODUCTION 21, 21 ("one of the most enduring questions posed by prehistoric archaeology worldwide attracting the interest of prehistorians, anthropologists, economists, geographers and natural scientists alike: how and why did late Paleolithic societies abandon long-lived and highly successful foraging and hunting economies in order to adopt farming?").

[496] *Id.* at 44-45.

[497] *Id.*

[498] See *id*; see also Ofer Bar-Yosef, *The Natufian culture in the Levant, threshold to the origins of agriculture*, 6.5 EVOLUTIONARY ANTHROPOLOGY: ISSUES, NEWS, AND REVIEWS 159, 174 (1998).

[499] Blakemore, *supra* note 25; *see also* Asouti, *supra* note 40 at 44.

[500] HARARI, *supra* note 26 at 85.

[501] Blakemore, *supra* note 25.

Agricultural settlement was partially driven by rapid climate change.[502] The most recent ice age, the Younger Dryas, ended around 11,500 years ago.[503] Rapid climate change in the closing centuries of the Younger Dryas triggered the transition to early small-scale farming.[504] What followed were simultaneous agricultural settlements around the world that developed independently of each other.[505] As people began settling and farming, "civilization" began to appear.[506] Cities, villages, religions, festivals, and laws popped up in these various cradles of civilization: Mesopotamia & the Levant, Ancient-Egypt, the Indus-River Valley, the Chinese Yangtze River, Mesoamerica, and Ancient-Peru.[507]

A. Monuments, Festivals, and Beer

The Fertile Crescent is an area of early agricultural settlement that extends across the Levant and Mesopotamia.[508] In the very middle of The Fertile Crescent, in modern-day Southern Turkey, is a peculiarly shaped,

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[502] HARARI, *supra* note 26 at 85.

[503] Asouti, *supra* note 40 at 11; see also NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. Department of Commerce, THE YOUNGER DRYAS 1 (November 2021), https://www.ncei.noaa.gov/sites/default/files/2021-11/3%20The%20Younger%20Dryas%20-FINAL%20NOV%20%281%29.pdf.

[504] Ofer Bar-Yosef, *Climatic Fluctuations and Early Farming in West and East Asia*, 52.S4 CURRENT ANTHROPOLOGY, THE ORIGINS OF AGRICULTURE: NEW DATA, NEW IDEAS 175, 188 (October 2011).

[505] HARARI, *supra* note 26 at 78.

[506] Blakemore, *supra* note 25.

[507] Lesley Kennedy, *The 6 Earliest Human Civilizations*, HISTORY (August 9, 2022), https://www.history.com/news/first-earliest-human-civilizations.

[508] Osamu Maeda et al., Narrowing the harvest: Increasing the sickle investment and the rise of domesticated cereal agriculture in the Fertile Crescent, 145 QUATERNARY SCIENCE REVIEWS 226, 227 (August 2016).

manmade mound called Göbekli Tepe.[509] In 1995, while investigating Göbekli Tepe, archaeologists uncovered giant stone T-shaped monoliths arranged in a circular formation, indicative of a ceremonial site used by groups of hunter-gatherers as a sort-of festival grounds.[510] This discovery has altered the way we view the lives of our prehistoric ancestors by complicating our understanding of why they abandoned their successful hunter-gatherer lifestyles and opted for grueling farm life.[511]

"[T]he social systems changed before, not as a result of, the shift to farming."[512] The existence of Göbekli Tepe raises the question: How did different groups of hunter-gatherers coordinate the massive operations required to construct huge monuments?[513] "An answer to how this was achieved lies in the widespread evidence for extensive feasting, including the consumption of—most likely alcoholic—beverages. . ."[514] The construction laborers of Göbekli Tepe may have been paid in feasts: massive feasts of wild animals and processed wild grains accompanied by beer, also made from wild

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[509] Oliver Dietrich et al., The role of cult and feasting in the emergence of Neolithic communities. New evidence from Göbekli Tepe, south-eastern Turkey, 86 ANTIQUITY 674, 675 (August 2012).
[510] Andrew Curry, *Göbekli Tepe: The World's First Temple?*, SMITHSONIAN MAGAZINE (November 2008), https://www.smithsonianmag.com/history/gobekli-tepe-the-worlds-first-temple-83613665/.
[511] HARARI, *supra* note 26 at 91.
[512] Dietrich, *supra* note 54 at 684.
[513] *Id.* at 686-687.
[514] *Id.* at 687.

grains.[515] By creating multi-day festivals centered around feasting, drinking, dancing, and—of course—working, the planners at Göbekli Tepe may have set into motion humanity's shift toward settled life.[516]

Göbekli Tepe is dated around 11,000 years old;[517] not long after the end of the last ice age.[518] Similar sites to Göbekli Tepe originated independently throughout pre-history.[519] The discoveries at this site and others tell us that the origins of human settlement may have centered around huge communal festivals and religious ceremonies that brought people together for massive parties complete with music, dancing, and primitive beer.[520]

B. Revolution or Miscalculation?

Whether settlement motivated agriculture or agriculture motivated settlement is a controversial debate in the world of Neolithic studies.[521] However, the relationship between food domestication and settlement are so linked as to be inseparable.[522] The geographic origin of domesticated wheat,

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[515] *Id.* at 690.
[516] HARARI, *supra* note 26 at 91.
[517] Curry, *supra* note 55.
[518] Asouti, *supra* note 40 at 22.
[519] Brice G. Trigger, *A Thermodynamic Explanation of Symbolic Behaviour*, 22.2 WORLD ARCHAEOLOGY 119, 120 (October 1990).
[520] Dietrich, *supra* note 54 at 692.
[521] Michael Balter, *The Seeds of Civilization*, SMITHSONIAN MAGAZINE (May 2005), https://www.smithsonianmag.com/history/the-seeds-of-civilization-78015429/.
[522] *Id.*

for example, lies less than twenty miles from Göbekli Tepe.[523] The ancient ancestors of cows, pigs, chickens, goats, and sheep were all domesticated during the same period.[524] Plants and animals were not the only lifeforms that became domesticated during the Neolithic age—humans did too.[525] Still, this does not demand a conclusion that the agricultural revolution was a brilliant economic decision of our ancestors.[526] While the common assumption may be that the agricultural revolution was a boon for humankind, the daily lives of those early farmers were objectively worse—far worse—than the daily lives of our hunter-gatherer ancestors.[527]

The human body evolved over millions of years to support a nomadic lifestyle and its associated activities like running, climbing, throwing, and swimming.[528] When our ancestors switched to farming in such a short period of time, it literally hurt.[529] Injuries increased because human bodies were not designed for the repetitive motion and constant heavy lifting that tending to crops and herds required.[530] Disease spiked because human immune systems were not accustomed to living within large populations in close proximity to

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[523] HARARI, *supra* note 26 at 90, citing to Manfred Heun et al., *Site of Einkorn Wheat Domestication Identified by DNA Fingerprinting*, 278 SCIENCE 1312.
[524] HARARI, *supra* note 26 at 91-92.
[525] *Id.* at 81.
[526] *Id.* at 82-83.
[527] *Id.*
[528] *Id.* at 80.
[529] *Id.* at 80-81.
[530] *Id*.

each other.[531] People's average height decreased because the formerly well-nourished hunter-gatherers' diet now consisted of only two or three food sources, causing malnourishment.[532] Moreover, following the switch to farming, child mortality soared.[533] Another question arises here: if farm life was so much worse, why not revert to hunting and gathering again? Although we may be tempted to believe that our ancestors must have made this choice deliberately, it is likely that our ancient ancestors forgot about their past as hunter-gatherers, and in forgetting, their lives became worse.[534]

C. Domestication's Effect on Animals

In addition to the harmful effect on humans, the cultural shift toward sedentism and domestication has also negatively affected animals.[535] Chickens have a natural lifespan of up to seven years and will roam a 300-foot radius when left to their own volition,[536] but on a farm, they live in cages

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[531] *Id.* at 86.

[532] Stephanie Marciniak et al., An integrative skeletal and paleogenomic analysis of stature variation suggests relatively reduced health for early European farmers, 119 ANTHROPOLOGY 1, 2 (April 2022).

[533] HARARI, *supra* note 26 at 86.

[534] *Id.* at 87.

[535] Yuval Noah Harari, *Industrial farming is one of the worst crimes in history*, THE GUARDIAN (September 25, 2015), https://www.theguardian.com/books/2015/sep/25/industrial-farming-one-worst-crimes-history-ethical-question#_=_.

[536] Gregory Gaines, *7 Proven Tips: How Far Will Free Range Chickens Roam*, FARM ANIMAL REPORT, (May 12, 2023) (retrieved May 28, 2023: https://www.farmanimalreport.com/2020/04/08/how-far-will-a-free-range-chicken-roam-im-freeee/).

and barns too packed to walk around and are typically slaughtered after only a few months of life.[537]

Most cattle can live twenty-five years or more in the wild but only make it a few years on a farm.[538] Male cattle born into the dairy trade are slaughtered within a few months of being born.[539] Before slaughter, the male calves are kept in pens so narrow that it is impossible for them to turn around.[540] This practice makes the calves' muscles soft and tender[541] — part of the process for producing veal, a luxury dish.[542] The females, however, are not slaughtered immediately. Instead, dairy farmers artificially inseminate and impregnate cows before they are two years old.[543] Farmers plan these pregnancies years in advance to optimize the cows' reproductive output before they, too, are slaughtered.[544] Allowing cows to nurse their calves would impede the agricultural production of commercial dairy products, so farmers separate calves from their mothers at an early age.[545]

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[537] HARARI, *supra* note 26 at 93.
[538] *Id*.
[539] *Id.* at 96.
[540] *Id*.
[541] *Id.*
[542] Hemi Kim, *Where Does Veal Come From?*, SENTIENT MEDIA (December 14, 2022), https://sentientmedia.org/what-is-veal/.
[543] Mike Stelle, Age at first calving in dairy cows: which months do you aim for to maximise productivity?, 5 VETERINARY EVIDENCE 1, 2 (March 19, 2020).
[544] G. Robert Hagevoort and J. Armando Garcia, *When Should Dairy Cows Be Inseminated?*, COLLEGE OF AGRICULTURAL, CONSUMER AND ENVIRONMENTAL SCIENCES: NEW MEXICO STATE UNIVERSITY (August 2013), https://pubs.nmsu.edu/_b/B117.pdf.
[545] HARARI, *supra* note 26 at 95.

The process of making another fine dining experience—foie gras, the fatty liver of a duck or goose—involves inserting a tube in the bird's throat to feed her high-calorie food, causing the liver to grow to ten times the appropriate size.[546] These waterfowl live incredibly short lives compared to their natural life span, which can be up to twenty years.[547] Instead, as assets in the foie gras trade, birds are force-fed three times daily for thirty days before being slaughtered.[548]

Pigs raised for slaughter live their unnaturally short six-month lives in cramped pens, unable to turn around, before spending their final moments on the back of an eighteen-wheeler to be lined up and slaughtered along with their peers.[549] Researchers have established that pigs experience fear, restricted movement, stress, pain, and other negative experiences during the slaughter process.[550] While marketing for pork products avoids bringing up the realities of slaughter, this process is a normal part of the supply chain for

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[546] Grace Hussain, *Is This the Beginning of the End for Foie Gras?*, SENTIENT MEDIA (January 26, 2022), https://sentientmedia.org/foie-gras/.
[547] Volia Schubiger, *Goose Lifespan: How Long Do Geese Live?*, A Z ANIMALS (February 6, 2022) (retrieved May 28, 2023: https://a-z-animals.com/blog/goose-lifespan-how-long-do-geese-live/).
[548] Petition Before the United States Department of Agriculture (USDA), Food Safety Inspection Service (FSIS), The Humane Society of the United States, et al (November 28, 2007) (retrieved May 28, 2023: https://www.fsis.usda.gov/sites/default/files/media_file/2020-07/Petition-ALDF-Information-FoieGras.pdf).
[549] PETA, *Pig Transport and Slaughter*, https://www.peta.org/issues/animals-used-for-food/factory-farming/pigs/pig-transport-slaughter/ (last visited January 7, 2023).
[550] Søren Saxmose Nielsen, *Welfare of pigs at slaughter*, EFSA Panel on Animal Health and Welfare (2020), 10.2903/j.efsa.2020.6148

creating bacon, sausage, and pork chops.[551] Most slaughterhouses kill at a rate of 1,100 pigs per hour.[552]

Slaughter befalls all animals raised to produce animal products, regardless of whether they had a "good life" on a free-range farm or were packed into a concentrated animal feeding operation (CAFO) before being slaughtered.[553] Still, it is the condition of farmed animals' lives – not their slaughter – that some critics characterize as cruel:

> What makes the existence of domesticated farm animals particularly cruel is not just the way in which they die but above all how they live. . . . The root of the problem is that domesticated animals have inherited from their wild ancestors many physical, emotional and social needs that are redundant in farms. Farmers routinely ignore these needs without paying any economic price. They lock animals in tiny cages, mutilate their horns and tails, separate mothers from offspring, and selectively breed monstrosities. The animals suffer greatly, yet they live on and multiply.[554]

If increased population and procreation rates are the goal of evolution, then pigs, cows, ducks, and chickens are all success stories.[555] However, measuring by the lifespan, living conditions, and health tells a different story. Despite the increased global population of all these species, they suffer cruel

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[551] *Id*.

[552] PETA, *supra* note 94.

[553] PETA, *Free-Range and Organic Meat, Eggs, and Dairy Products: Conning Consumers?*, https://www.peta.org/issues/animals-used-for-food/animals-used-food-factsheets/free-range-organic-meat-eggs-dairy-products-conning-consumers/ (last visited January 7, 2023).

[554] Harari, *supra* note 80.

[555] HARARI, *supra* note 26 at 93.

lives and a miserable, fearful existence while living only fractions of their normal lifespan.[556]

Humankind's shift to sedentism and animal agriculture has also affected marine life.[557] Farmed fish are confined in cramped spaces, living in water clouded with their own excrement.[558] Meanwhile, their wild relatives ("wild caught" salmon and tuna) are swept out of their habitats by the trillions every year in the industrial fishing trade.[559] These nets capture seals, whales, dolphins, sharks, and many other unintended animals: what the industry calls "by-catch."[560]

While most humans and animals today exist in a manner inconsistent with the millions of years of evolution that made us the organisms we are, our species bears a large degree of culpability. One of the main victims of our choices—animals—never had a say in the matter. Thus, industrial animal

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[556] Harari, *supra* note 80.

[557] THE HUMANE LEAGUE, *Factory fish farming: What it is and why it's cruel to fish* (March 9, 2021), https://thehumaneleague.org/article/factory-fish-farming (last visited January 7, 2023).

[558] *Id.*

[559] Michael Pellman Rowland, *Two-Thirds Of The World's Seafood Is Over-Fished – Here's How You Can Help*, FORBES (July 24, 2017), https://www.forbes.com/sites/michaelpellmanrowland/2017/07/24/seafood-sustainability-facts/?sh=21d81ba4bbfe.

[560] Richard Harris, *Whales, Dolphins Are Collateral Damage In Our Taste For Seafood*, NPR (Jan. 8, 2014), https://www.npr.org/sections/thesalt/2014/01/07/260555381/thousands-of-whales-dolphins-killed-to-satisfy-our-seafood-appetite.

farming raises ethical questions[561] Why does humanity still engage in industrial animal farming when…

- …we know the people working in animal agriculture face significant psychological trauma?[562]
- …the lives of farmed animals have made them the most miserable creatures in existence?[563]
- …more than three-quarters of epidemics and pandemics are cause by animal agriculture?[564]
- …consumption of animal products can be destructive to the long-term health of humans?[565]
- …industrial animal farming is one of the largest contributors to greenhouse gas emissions,[566] water usage,[567] and deforestation?[568]
- …we can meet all our nutritional needs on plants alone with better economic feasibility?[569]

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[561] Harari, *supra* note 80.

[562] Andrew Gough, *The disturbing link between slaughterhouse workers and PTSD*, SURGE ACTIVISM (January 24, 2021), https://www.surgeactivism.org/articles/slaughterhouse-workers-and-ptsd.

[563] Harari, *supra* note 80.

[564] Justin Bernstein and Jan Dutkiewicz, A Public Health Ethics Case for Mitigating Zoonotic Disease Risk in Food Production, 6 Food Ethics 1, 1 (2021).

[565] Neal D. Barnard and Frederic Leroy, Children and adults should avoid consuming animal products to reduce risk for chronic disease: Debate Consensus, 112 THE AMERICAN JOURNAL OF CLINICAL NUTRITION 937, 937-940 (2020).

[566] F.P. O'Mara, The significance of livestock as a contributor to global greenhouse gas emissions today and in the near future, 166-167 ANIMAL FEED SCIENCE AND TECHNOLOGY 7, 8 (2011); see Sailesh Rao, Animal Agriculture is the Leading Cause of Climate Change – Position Paper, CLIMATE HEALERS, https://climatehealers.org/wp-content/uploads/2021/04/JES-Rao.pdf (last visited January 7, 2023).

[567] P.W. Gerbens-Leenes, The water footprint of poultry, pork and beef: A comparative study in different countries and production systems, 1-2 WATER RESOURCES AND INDUSTRY 25, 25 (2013).

[568] FOOD AND AGRICULTURE ORGANIZATION, United Nations, COP 26: AGRICULTURAL EXPANSION DRIVES ALMOST 90 PERCENT OF GLOBAL DEFORESTATION, https://www.fao.org/newsroom/detail/cop26-agricultural-expansion-drives-almost-90-percent-of-global-deforestation/en, (June 11, 2021).

[569] Philip J. Tuso et al., *Nutritional update for physicians: plant-based diets*, 17 THE PERMANENTE JOURNAL 61, 61 (2013).

Complete answers to these questions are beyond the scope of this article, but these are the conversations that ag-gag laws aim to suppress.

II. THE LEGAL REVOLUTION

The term "agricultural revolution" is a bit of a misnomer; it was not just agriculture that experienced a revolution twelve thousand years ago.[570] With agriculture came a transformed focus on the future that changed the way people thought about themselves and the world.[571] While nomadic groups likely had some basic rules that sought to foster success and cooperation of their roaming bands ("oldest eat first," "make no noise on a hunt," or "move south when the leaves change colors"), those rules were likely informal, changing, and inconsistently enforced.[572] As our ancestors became farmers and began to live in societies, laws took on a more serious character, and agricultural privilege was central in early lawmaking.[573]

Archaeological discoveries not far from Göbekli Tepe suggest that agriculture's powerful legislative influence may be just as old as humankind's earliest legal codes.[574] Throughout the rest of this paper, readers are urged to consider a question about each agricultural law discussed: *Is the*

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[570] HARARI, *supra* note 26 at 101.
[571] *Id.* at 100.
[572] Megan Gambino, *How Humans Became Moral Beings*, SMITHSONIAN MAGAZINE (May 3, 2012), https://www.smithsonianmag.com/science-nature/how-humans-became-moral-beings-80976434/.
[573] K.V. Nagarajan, *The Code of Hammurabi: An Economic Interpretation*, 2 INTERNATIONAL JOURNAL OF BUSINESS AND SOCIAL SCIENCE 108, 111 (2011).
[574] HARARI, supra note 26 at 106.

law a necessary protection to ensure increased food security, or is it an instance of lawmakers ceding their duty to the powerful interests of animal farmers?

A. Legislation and Empire

Sumerians built the world's first major cities around 5000 B.C.E.[575]

The Sumerian King List (SKL) is an ancient document of which archaeologists have excavated sixteen different copies throughout Mesopotamia.[576] Each copy of the SKL is a clay tablet with cuneiform impressions that breaks down the different dynastic periods of ancient Mesopotamia and begins with a familiar reference to a great flood.[577] The pre-flood dynasty lists gods who allegedly ruled over Mesopotamia.[578] According to the Sumerians, "[a]fter the flood had swept over, and the kingship descended from heaven, the kingship was in [Kish]."[579] The SKL thus demonstrates the Sumerians' intention of establishing divine right.[580] The ancient Sumerian rulers who sought to establish their reigns and enforce laws on their domain knew that entrenching their status would be significantly aided by linking themselves to other-worldly powers.[581]

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[575] Nicola Crüsemann et al., Uruk: First City of the Ancient World 1 (2019).
[576] THE SUMERIAN KING LIST, LIVIUS, https://www.livius.org/sources/content/anet/266-the-sumerian-king-list/, (hereinafter SKL).
[577] *Id*.
[578] *Id*.
[579] *Id*.
[580] Sara E. Cole, *How to Be King in Mesopotamia*, GETTY (May 4, 2021), https://www.getty.edu/news/how-to-be-king-in-mesopotamia/.
[581] *Id.*

The SKL also reflects the importance that animal farmers held in Mesopotamian culture, as many of the kings listed on the SKL carry descriptors, such as "the shepherd, who ascended to heaven and put all countries in order."[582] Gilgamesh, the Mesopotamian king central to the world's oldest mythology,[583] was also nicknamed "the shepherd."[584]

Sumerian kings were often described as the shepherds of their people.[585] Why not revere the wheat farmer on equal footing with the shepherd? It does not seem farfetched to think of the wheat farmer as just as critical as, if not more critical than, the shepherd for food security of early civilizations. One plausible explanation is that livestock transcended the status of a simple commodity.[586] "When we focus on what they were actually doing for the states of early Mesopotamia, sheep and goats emerge as complicated forms of social, political, economic, religious, and cultural capital."[587] When the work of legislation, foreign relations, and domestic

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[582] SKL, *supra* note 121.
[583] Micah Sadigh, *The Foundation of Existentialism in the Oldest Story Ever Told*, 21 EXISTENTIAL ANALYSIS 76, 76 (January 2010).
[584] Maureen Gallery Kovacs, *The Epic of Gilgamesh*, http://www2.latech.edu/~bmagee/103/gilgamesh.htm (last accessed January 7, 2023).
[585] Kathryn Grossman and Tate Paulette, *Wealth-on-the-hoof and the low-power state: Caprines as capital in early Mesopotamia*, 60 JOURNAL OF ANTHROPOLOGICAL ARCHAEOLOGY 1, 13 (December 2020).
[586] *Id.* at 13-15.
[587] *Id.* at 15.

governance began, shepherds may have been favored not only for economic reasons, but also because of the political and social power they possessed.[588]

The earliest discoveries of writing are neither great poems nor religious texts; they are accounting records found in Uruk, the first Sumerian mega-city, dated around 3000 B.C.E.[589] "Writing wasn't a gift from the gods. It was a tool that was developed for a very clear reason: to run an economy."[590] The early instances of writing and trade occurred between farmers, merchants, and temples.[591] They traded grains, sheep, jars, and other goods all related to the production of food.[592] Going from accounting records to contract drafting is not a far leap; if one can memorialize a transaction that occurred in the past, one can also memorialize an intention to engage in a transaction in the future.[593] With all these components coming together—writing, accounting, and contracts—it would not be long until people created the first written laws.[594] The driver for all these mechanisms that necessitated the recording of abstract concepts was that of the agricultural revolution.[595]

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[588] *Id*.
[589] Tim Harford, *How the world's first accountants counted on cuneiform*, BBC NEWS (June 12, 2017), https://www.bbc.com/news/business-39870485; *see also* HARARI, *supra* note 26 at 124.
[590] *Id*.
[591] *Id.*
[592] *Id.*
[593] *Id.*
[594] HARARI, *supra* note 26 at 126.
[595] Harford, *supra* note 134; HARARI, *supra* note 26 at 121.

The Sumerian king, Urukagina, who ruled around 2400 B.C.E,[596] developed the Reforms of Urukagina that purported to privatize land, fishing spots, boats, and herd animals.[597] Despite references to his reforms being found in different Sumerian artifacts,[598] the so-called Reforms of Urukagina may have been more of an aspiration than actual legislation.[599] Urukagina was usurped by another Sumerian king who was thrust into power by a group of Sumerian shepherds, further indicating the political power that animal farmers possessed at this early point of human civilization.[600] After Urukagina's usurper took control, the Sumerians lost control of the Mesopotamian city states, as Sargon and the Akkadians took over in 2334 B.C.E.[601]

The Sargonid dynasty lasted 222 years, ended in 2112 B.C.E., and apparently did not feature many legal innovations.[602] Sargon is often considered the world's first emperor since he was the first to rule over a broad

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[596] Ferris J. Stephens, *Notes on Some Economic Texts of the Time of Urukagina*, 49 REVUE D'ASSYRIOLOGIE ET D'ARCHÉOLOGIE ORIENTALE 129 (1955).
[597] *Id.*
[598] Alfred Haldar, *Mesopotamia: Myth and Reality*, 6 SCRIPTA INSTITUTI DONNERIANI ABOENSIS 31, 34 (January 1972), (*please see* the three artifacts are referred to as Cone A, Cone B and C (two pieces of the same cone), and the Ovale Plate.)
[599] *Id.* at 34-35.
[600] *Id.*
[601] *Id.*
[602] Stephanie Mary Dalley, *Sargon*, BRITANNICA, https://www.britannica.com/biography/Sargon (last accessed January 7, 2023). ("While none of the Mesopotamian legal codes are a product of the Akkadian Empire, this may also be because the purported capital city of Agade (Akkad) has never been found.")

swath of land and people.[603] The fall of the Akkadian Empire led to the "Sumerian Renaissance."[604] It was in the Sumerian Renaissance that the first real legislation (not just an attempt at one-time changes, like those offered under Urukagina) arose in Mesopotamia with the Code of Ur-Nammu, dated around 2100 B.C.E.[605] Ur-Nammu's code established a legal writing format that is still used to this day: the "if-then" logic (If someone does X, then Y is the treatment.).[606] Other legal codes have been discovered in Mesopotamian archaeological sites like the Code of Lipit-Ishtar and the Laws of Eshnunna, which are dated after the code of Ur-Nammu, around 1930 B.C.E.[607]

Eventually, rule over Mesopotamia passed to the Babylonian Empire around 1900 B.C.E.,[608] where we find the preeminent ancient legislation from the most legendary of Mesopotamian rulers: The Code of Hammurabi, dated around 1780 B.C.E.[609] Hammurabi—nicknamed the "good shepherd"[610]—developed his code through both legislative and judicial decisions;[611] its 282

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603 *Id.*

604 Gillian Adams, *The First Children's Literature? The Case for Sumer*, 14 CHILDREN'S LITERATURE 1, 1 (1986); see also Alfred Haldar, *Mesopotamia: Myth and Reality*, 6 SCRIPTA INSTITUTI DONNERIANI ABOENSIS 36, 37-38 (1972), https://journal.fi/scripta/article/view/67068.

605 *Id*.

606 BRITTANICA, *Ascendancy of Akkad*, https://www.britannica.com/place/Mesopotamia-historical-region-Asia/Ascendancy-of-Akkad (last accessed January 7, 2023).

607 Haldar, *supra* note 143 at 42.

608 *Id.* at 41.

609 *Id.*; HARARI, *supra* note 26 at 106.

610 Nagarajan, *supra* note 118 at 109.

611 HARARI, *supra* note 26 at 106.

rules covered many aspects of civilized society.[612] The code helps us understand how daily life in Babylonian society revolved around agriculture and how legislators gave deference to animal farmers.[613] Most notably, an important tort limitation for ox merchants is found in §§ 250-251 of the code.[614] Oxen were often used for ploughing fields and were brought to market to be sold or rented for that purpose.[615] These two laws describe a public hazard that was frequent enough to warrant direct consideration in Hammurabi's Code:

> If an ox gores a person in his going to a crowded place, causes death, this case does not have fine. If an ox of a person, a gore like its gore, they inform him about its victim, he does not cut his horn, does not shackle his ox, this ox gores a son of a person, causes death, he shall give ½ Mana[/mina] silver.[616]

To put this law in today's terms, if an ox kills someone, the penalty is nothing. If that ox is known to be a goring ox, and the known goring ox's

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[612] Saad D. Abulhab, *The Law Code of Hammurabi: Transliterated and Literally translated from its Early Classical Arabic Language*, JOHN JAY COLLEGE OF CRIMINAL JUSTICE, PUBLICATIONS AND RESEARCH (2017), https://academicworks.cuny.edu/jj_pubs/165/ (last accessed January 18, 2023).

[613] See *id.* (§ 8 which mandates 30-fold damages for the theft of a sheep, donkey, or boat. § 57 indicates that shepherds who graze on another's land must pay for the cost of that grazing. While other types of theft and trespass are punishable by death in Hammurabi's code, theft of grass and trespass by a shepherd is punishable by roughly the cost to rehabilitate that strip of land. § 57 also indicates that contracts for land grazing were likely a common societal feature. Also § 250 limits liability for an ox merchant's ox injuring or killing someone in a marketplace.; see also Nagarajan, *supra* note 118 at 111 ("The predominant activity in Hammurabi's realm was agriculture.").)

[614] *Id.*

[615] See Abulhab, *supra* note 157 at § 249 (discussing the renting of an ox).

[616] *Id.* at § 250-251.

owner does not mitigate the risk by cutting off the top of its horn, the penalty for goring a person is half a mina of silver.[617]

Babylonian society likely did not regard oxen as sentient beings or companion animals. Rather, oxen were treated as productive assets used mostly in cropping operations. Thus, this limitation was not a form of forgiveness for the captivated animal, rather, it should be understood as a legislative favor given to ox merchants. "Known to be a goring ox," also does not mean facially that the ox has gored someone in the past. If we apply a textualist interpretation, there is wiggle room for the ox merchant in § 251 to argue that, even though this ox gored someone in the past, it does not qualify the ox as a "known goring ox." Imagine a Babylonian legal advocate defending an ox merchant in front of a high court: "Your honor, just because this ox gored another person in the past does not mean that he is 'known to be' a goring ox. Perhaps the ox was provoked! This plaintiff has utterly failed to meet his burden and it would go against the intent of the legislature and

[617] A "mina" or mana was a unit of measurement for the Babylonian's that was somewhere between twenty-three and thirty-four ounces, THE EDITORS OF ENCYCLOPEDIA BRITANNICA, *Mina*, BRITANNICA, https://www.britannica.com/science/mina-unit-of-weight (last accessed January 7, 2023). Today, one ounce of silver is approximately twenty-one dollars, so an ox merchant's penalty for his ox killing a person in a market would be about $250, MARKETS INSIDER, *Silver*, https://markets.businessinsider.com/commodities/silver-price (last accessed January 7, 2021).

precedent of this court to hold my client liable under a statute that he did not breach and make him pay a penalty that he could not reasonably foresee."[618]

The liability limitation for ox merchants and denial of recovery for victims of ox goring stands in contrast to the absence of liability limitations for other professionals in Babylonian society. For example, § 108 contains a physical punishment for a tavern-keeper who refuses to accept corn as a form of payment: "If a tavern-keeper does not accept corn according to gross weight in payment of drink, but takes money, and the price of the drink is less than that of the corn, she shall be convicted and thrown into the water."[619] Being thrown into a body of water in what seems like a Monty-Python-style public shaming ritual is a harsh form of punishment for wanting someone to pay in money instead of corn. Where the ox merchant's liability was limited when his ox killed someone, the tavern keeper was subjected to a physical punishment and public shaming for simply insisting on being paid in currency instead of corn. The main difference between these two merchants is that one sold beer and the other sold animals.

Further, contrast the negligence protection for ox merchants with Hammurabi's infamous *lex talionis*, where a tortfeasor is dealt a punishment

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[618] Thomas V. Happer, *Babylonian Procedure*, 3 NOTRE DAME L. REV. 258 (1928), (Babylonian legal proceedings may have been shockingly similar to modern trial procedure.)

[619] THE CODE OF HAMMURABI, Translated by L. W. King (ca. 1780 B.C.E.), https://avalon.law.yale.edu/ancient/hamframe.asp (last visited January 18, 2023).

congruent to the harm he caused; "an eye for an eye."[620] Also, contrast § 251, requiring half a mina of silver when a known goring ox (a high burden of proof for the aggrieved) kills a human, with § 24 of Hammurabi's code, which provided "[if a robber kills or kidnaps someone and escapes], the tribe and the chief shall measure (and give) to his people (family) 1 Mana[/mina] silver."[621] Suddenly the value of a human life was worth twice as much when taken by an unknown intruder versus a known goring ox in the market.

B. The Commons of Rome and Britain

Lawmakers throughout history continued to make exceptions for agricultural interests,[622] though Rome enshrined some legislation that fostered the success of the small farmer over that of the wealthy landowner.[623] Various pieces of Roman legislation extended the rights to public land grazing; for example, the Roman Agrarian Law of 111 B.C.E. included tax exclusions for the use of others' private land for cattle grazing.[624] The Roman concept of public land grazing would later be carried on in English law until

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[620] Abulhab, *supra* note 157 at § 196.

[621] Abulhab, *supra* note 157 at § 24.

[622] As seen by the portions of the Code of Hammurabi discussed above; also seen in the many Roman and English laws that will be discussed hereinafter and the extreme degree of deference to animal agriculture in the American legal system as noted by Sonia Weil, *Big-Ag Exceptionalism: Ending the Special Protection of the Agricultural Industry*, 10 DREXEL L. REV. 183, 185 (2017).

[623] As seen in the Roman Agrarian Law of 111 B.C.E. that expresses a desire to prevent the extreme consolidation of public rights to common land, YALE LAW SCHOOL, AGRARIAN LAW; 111 B.C., https://avalon.law.yale.edu/ancient/agrarian_law.asp (last accessed January 7, 2023).

[624] *Id.*

the 1600s, when Parliament began enclosing common land.[625] While public grazing rights may seem at first blush to be another form of incongruent protection, the practice was the lifeblood of the small farmer.[626] Thus, public grazing rights run against the grain of most agricultural laws of antiquity by providing an economic and practical incentive to the peasant who likely did not own enough land upon which to graze his relatively small herd.[627] Generally, public land was not just open for uninhibited use.[628] Instead, the shepherd or rancher would require a property right to use certain public land.[629]

Rome's desire to support the small farmer by instituting public land laws was thwarted by consolidation of land, which the Agrarian Law of 111 B.C.E. attempted to curb.[630] Beyond providing guidance regarding public

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[625] UK PARLIAMENT, *Enclosing the Land*, https://www.parliament.uk/about/living-heritage/transformingsociety/towncountry/landscape/overview/enclosingland/ (last accessed January 7, 2023).

[626] BARBARA BRADBY HAMMOND AND J.L. HAMMOND, THE VILLAGE LABOURER, 1760-1832 97 (1912), ("For enclosure was fatal to three classes: the small farmer, the cottager, and the squatter. To all of these classes their common rights were worth more than anything they received in return. Their position was just the opposite of that of the lord of the manor. The lord of the manor was given a certain quantity of land (the conventional proportion was one-sixteenth) in lieu of his surface rights, and that compact allotment was infinitely more valuable than the rights so compensated. Similarly, the tithe-owner stood to gain with the increased rent. The large farmer's interests were also in enclosure, which gave him a wider field for his capital and enterprise. The other classes stood to lose.").

[627] *Id.*

[628] *Id.* at 30.

[629] *Id.* ("It is important to remember that no farmer, however large his holdings or property, or however important his social position, was at liberty to cultivate his strips as he pleased. . . . courts decided which seed should be sown in the different fields, and the dates at which they were to be opened and closed to common pasture.").

[630] This phenomenon is explained in the preface Forward of the AGRARIAN LAW, *supra* note 168.

land rights, which may have been one of the most central political debates amongst the Romans, Roman law instituted some tort limitations like those of the Mesopotamians. An older Roman law dated around 450 B.C.E., the Twelve Tables, contained liability limitations for farm animals eating fruit that has fallen from a neighbor's tree.[631] The ensuing property dispute is apparent in this situation, and the Twelve Tables prioritized the rights of the animal farmer over those of the fruit farmer.[632]

The Justinian Code, which governed life in the Byzantine Empire during the Sixth Century C.E., instituted double damages for injury to property when the property was a farmer's cattle: "You can bring suit under the Aquilian Law (the Lex Aquilla) for double the damage which you have sustained through your cattle having been unjustly shut up and killed, or allowed to perish by hunger."[633] Around the same time, the Salic Law, a Frankish legal code, also set significant monetary penalties for the theft of different farm animals.[634]

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631 YALE LAW SCHOOL, *The Twelve Tables*, https://avalon.law.yale.edu/ancient/twelve_tables.asp (last accessed January 7, 2023).
632 *Id*.
633 THE ENACTMENTS OF JUSTINIAN, https://droitromain.univ-grenoble-alpes.fr/Anglica/CJ3_Scott.htm (last accessed January 7, 2023).
634 YALE LAW SCHOOL, *The Salic Law*, https://avalon.law.yale.edu/medieval/salic.asp (last accessed January 7, 2023).

Even after Britannia became self-governing in the Fifth Century C.E.,[635] "Roman law . . . gave form and direction to the development of . . . Anglo-American common law and equity jurisprudence."[636] The British continued the trend of legislative deference to powerful agricultural interests. For example, the Statute of Laborers in 1351 is a notoriously draconian statute that sentenced laborers, like farmhands, to prison time for leaving a job or bargaining for more pay before their employment terms ended.[637] The Statute of Laborers was specifically enacted to prevent workers from seeking higher pay in the wake of a labor shortage after the Black Death; the "problem" of workers bargaining for higher wages and flexible employment terms was specifically pervasive for farm owners who held less negotiating power due to the shortage of labor.[638]

In the early Seventeenth Century, the Enclosure Acts began.[639] The Enclosure Acts were over 5,000 stand-alone laws created by the English

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[635] Michael E. Jones and John Casey, The Gallic Chronicle Restored: A Chronology for the Anglo-Saxon Invasions and the End of Roman Britain, 19 BRITANNIA 367, 397 (1988).
[636] Richard A. Pacia and Raymond A. Pacia, *Roman Contributions to American Civil Jurisprudence*, R.I.B.J. 5, 6 (May 2001).
[637] YALE LAW SCHOOL, *The Statute of Laborers; 1351*, https://avalon.law.yale.edu/medieval/statlab.asp (last accessed January 7, 2023).
[638] See *id.*; see also John H. Munro, *Before and after the Black Death: money, prices, and wages in fourteenth-century England*, Selected Proceedings of Two International Conferences at The Royal Danish Academy of Sciences and Letters in Copenhagen in 1997 and 1999 335, 345 (December 2004), https://mpra.ub.uni-muenchen.de/15748/1/MPRA_paper_15748.pdf (last accessed January 7, 2023).
[639] UK PARLIAMENT, *supra* note 170.

Parliament that did away with common land and consolidated it.[640] While Roman legislation at least attempted to put some controls around the rampant consolidation of agricultural power,[641] English law marched in the opposite direction. The Enclosure Acts allowed a wealthy farmer to buy or simply be given exclusive rights to tracts of land, thus enclosing the land from common use.[642] The result was a collapse of the small farming economy of pre-industrial England.[643] Since many cattle and sheep farmers did not own the large amounts of land that feeding a herd required, they were forced to move to metropolitan areas in search of work when they were outbid in their attempts to hold onto their common land rights.[644]

As these farmers moved to cities in search of work, some were successful in transitioning to metropolitan life, but many were not.[645] The destruction of the small farmer caused extreme poverty, which led people to lives of crime and piracy for generations to come.[646] Enclosure may have

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[640] *Id.*

[641] AGRARIAN LAW, *supra* note 168.

[642] HAMMOND, *supra* note 171 at 43-71, (explaining the enclosure process and important developments in detail).

[643] *Id.* at 97-106, (explaining "the village after enclosure.")

[644] *Id.* at 98-99, ("The small farmer either emigrated to America or to an industrial town, or became a day labourer.").

[645] *Id.* at 105 ("The enclosures created a new organisation of classes. The peasant with rights and a status, with a share in the fortunes and government of his village, standing in rags, but standing on his feet, makes way for the labourer with no corporate rights to defend, no corporate power to invoke, no property to cherish, no ambition to pursue, bent beneath the fear of his masters, and the weight of a future without hope.").

[646] Cheng Ling and Xie Jiguang, *An Exploration of the Historical Background to the Prevalence of Piracy in England During the Elizabethan Era*, 3 JOURNAL OF SOCIOLOGY

been a significant contributor to the Golden Age of Piracy since pirating was one of the few ways these former entrepreneurs could obtain success and exert some level of control over their lives and fortunes.[647] The Enclosure Acts were also likely a contributing factor to the beginnings of big corporate agriculture as England's farming industry became dominated by bigger and bigger entities wielding immense political power.[648] Data suggests that the most significant profit growths for wealthy landowners during and after enclosure were driven by animal agriculture.[649] The Enclosure Acts were not abrupt; they happened gradually over a few centuries.[650] That gradual but steady change demonstrates how pervasive and effective seemingly innocuous policies can become when they ripple out into the future.

AND ETHNOLOGY 6, 8 (2021) ("The enclosure movement resulted in the displacement of large numbers of peasants, who were forced into piracy.").

[647] See *id.*; See also ROYAL MUSEUMS GREENWICH, *The Golden Age of Piracy*, https://www.rmg.co.uk/stories/topics/golden-age-piracy (last accessed January 7, 2023).

[648] HAMMOND, *supra* note 171 at 48-49 summarizing examples of powerful landowners getting whatever they asked for in Parliament while groups of commoners banded together were consistently steamrolled; see also CAMBRIDGE UNIVERSITY PRESS, *The Agricultural Revolution*, 45 MEDICAL HISTORY 44, 48 (2001), (discussing the operational success of large-scale farmers like Thomas Coke of Norfolk who benefited handsomely from a vast holding of consolidated land. Thomas Coke was one of the wealthiest men in Eighteenth Century England whose wealth was likely multiplied by the consolidation allowed by enclosure. Unsurprisingly, Coke was a member of Parliament,) see also THE HISTORY OF PARLIAMENT, *COKE, Thomas William I (1754-1842), of Holkham, Norf.*, https://www.historyofparliamentonline.org/volume/1790-1820/member/coke-thomas-i-william-1754-1842 (last visited January 7, 2023).

[649] Mark Overton, *Re-Establishing the English Agricultural Revolution*, 44 THE AGRICULTURAL HISTORY REVIEW 1, 19 (1996) ("The most significant change, however, was with livestock; the numbers of sheep rose by 33 per cent and the value of their output increased by an astonishing 590 per cent. This was because flocks kept only for folding on the arable and for their wool were replaced by flocks of improved breeds of sheep which were better fed with fodder crops and kept primarily for their mutton.").

[650] UK PARLIAMENT, *supra* note 170.

The legislative and judicial preference for wealthy animal farmers seems obvious when looking at ancient and pre-industrial laws and society in hindsight. However, this partiality is not limited only to antiquity. England's Enclosure Acts were still effective in the Twentieth Century.[651] Other legislative carveouts, like Hammurabi's tort limitation for ox merchants, Justinian's double property damages for farm animals, and King Edward's draconian employment regulations are mirrored in modern America. To understand the forces that have entrenched ag-gag laws, we should draw connections between these historic privileges and modern privileges bestowed upon big agriculture.

III. THE LEGAL AND CULTURAL FOUNDATIONS FOR AG-GAG

Where England built on Rome's legislative deference to major agricultural interests, America took big agriculture's legislative influence to new heights.[652] "Agricultural exceptionalism" is a term used by economists and legal scholars to sum up the cultural attitude and legal deference America gives to agricultural interests, especially the producers of animal products, in the form of exceptions from generally applicable statutes and regulations.[653] More broadly, agricultural exceptionalism can also refer to both the

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[651] *Id*.

[652] Charlotte E. Blattner & Odile Ammann, Agricultural Exceptionalism and Industrial Animal Food Production: Exploring the Human Rights Nexus, 15.2 Journal of Food Law & Policy 92, 102 (2002).

[653] *Id*.

traditional portrayal of animal farming as a critical American institution and the steps governments take to actively favor animal farmers over others.[654] Throughout history, three mechanisms can be identified as features of broad-reaching agricultural exceptionalism: advertising, disproportionate economic incentives, and immunity from laws and liability. These features have been present in the law and broader culture since the time of Hammurabi and have existed throughout American history.

1. *Advertising* – The mythologizing of the glory of agriculture, especially animal agriculture, can be traced back thousands of years.[655] Today when we think of advertising, we may picture something like a "Got Milk?" billboard or a Hardee's commercial. Animal agriculture corporations and lobbyists fund pseudo-scientific studies about the "beneficial" health effects of animal products and anti-vegan rhetoric that demonize plant-based substitutes like margarine, plant-milk, and imitation meats.[656]

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[654] *Id.*

[655] Grossman, *supra* note 130.

[656] Consider this widely cited study: Tanja Kongerslev Thorning et al., *Milk and dairy products: good or bad for human health? An assessment of the totality of scientific evidence*, 60.10 FOOD & NUTRITION RESEARCH 1 (2016). It finds that on every aspect of human health dairy is good, however, the study lacks any explanation of a concrete scientific process and instead bases its findings on the conclusion that (1) a higher ratio of lean body mass supports overall health, (2) high protein foods are a necessary nutritional component for achieving a healthy lean body mass, (3) dairy products are high in protein, and (4) therefore dairy is good for you and any health risks must be negated by the fact that it is a high protein food source. The final section of this study contains a "conflicts of interest" section. That section is long and nearly every group listed is a major European or American dairy lobbyist group or corporation who has their interest in the continued

2. *Disproportionate Economic Incentives* – The tax dollars that animal agriculture receives from legislatures are so extreme that the normal rules of business and economics simply do not apply to the producers of animal products. Animal agriculture collectively receives billions of dollars per year in subsidies.[657] It accesses billions more in special tax treatments, like the special § 1231 gains and losses that allows animal farmers to access the preferential capital gains rate for gains on the sale of livestock.[658] The same part of the Tax Code allows animal farmers to preserve losses on the sale of livestock to offset ordinary losses.[659] Thus, animal farmers receive the best of both worlds when it comes to the tax treatment of capital gains and losses on the sale of livestock.[660]

3. *Immunity from Statutes, Regulations, and Liability* – These are special laws that do not pertain to the rest of society, and they are typically a perversion of long-standing legal principles. This prong culminates in modern ag-gag laws.[661]

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success of dairy. The phenomenon of biased nutritional studies is nothing new, see the premise of the book, *Unsavory Truth*, MARION NESTLE, UNSAVORY TRUTH (2018); *See also* Ed Winters, *This is how the dairy industry lied to the world*, YOUTUBE (October 10, 2020) (Retrieved May 28, 2023) https://www.youtube.com/watch?v=roIWg4ntj9k.

[657] Christina Swell, *Removing the Meat Subsidy: Our Cognitive Dissonance Around Animal Agriculture*, 73.1 COLUMBIA JOURNAL OF INTERNATIONAL AFFAIRS 307 (2020).

[658] I.R.C. § 1231(b)(3) (2017).

[659] *Id*.

[660] *Id*.

[661] Marceau, *supra* note 24 at 1021.

The following sections provide an overview of the advertising tactics used to sell animal products, the development of animal farming in the Americas, and pre-ag-gag legislative efforts that favored big agriculture to a comical degree.

A. The Real Cost of a Big Mac

Agriculture is one of the most heavily subsidized activities in America.[662] Figuring out exactly how much money goes to subsidize the producers of meat and dairy products can be a challenge, but the 2013 book, *Meatonomics*, measured total meat and dairy subsidies at $38 billion.[663] The *Meatonomics* figure differs from other sources that measure the livestock subsidy in other ways, the main difference being the inclusion of indirect subsidies.[664] For example, some estimates will not include subsidies for livestock feed, transportation subsidies, energy subsidies, and other activities that inure to the benefit of industrial animal farmers.[665] While consumers leaving the grocery store say to themselves, "I would buy less meat & dairy and more fruits & vegetables if they weren't so darn expensive," the reason

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[662] NATIONAL PRIORITIES PROJECT, *Federal Spending: Where Does the Money Go*, https://www.nationalpriorities.org/budget-basics/federal-budget-101/spending/ (last accessed January 7, 2023), the top seven categories are: (1) Social Security, Unemployment & Labor, 2.81 trillion, 39.63%; (2) Medicare & Health, 1.61 trillion, 22.67%; (3) Military, 773.28 billion, 10.91%; (4) Education, $439.98 billion, 6.21%; (5) Interest on Debt, $303.03 billion, 4.27%; (6) Veterans' Benefits, $256.04 billion, 3.61%; (7) Food & Agriculture, $240.61 billion, 3.39%.

[663] Swell, *supra* note 203.

[664] *Id.*

[665] *Id.*

for this phenomenon is largely because of the disproportionate allocation of farm subsidies. "A $5 Big Mac would cost $13 if the retail price included hidden expenses that meat producers offload onto society."[666] Keeping industrialized animal agriculture profitable is costing United States taxpayers a lot of money.[667]

B. Animal Agriculture and American Values

In 1904, journalist Upton Sinclair went to work in a Chicago meatpacking plant and documented the horrific working conditions to which employees were subjected.[668] Sinclair's goal was to advance a dialogue about workers' rights by exposing inhumane working conditions.[669] Sinclair used his undercover research as the basis for his novel—*The Jungle*—which quickly became a national sensation.[670] Sinclair's novel is a fictional story based on many true stories that immigrants experienced while working in the horrendous conditions of the Chicago Stockyards.[671] The truths exposed by Sinclair's book shocked America's conscience and raised so much public

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[666] Indira Joshi et al., *Saving the Planet: The Market for Sustainable Meat Alternatives*, SUTARDJA CENTER FOR ENTREPRENEURSHIP & TECHNOLOGY TECHNICAL REPORT 1, 10 (2015).
[667] *Id.*
[668] Constitutional Rights Foundation (CRF), *Upton Sinclair's The Jungle: Muckraking the meat-Packing Industry*, 24.1 Bill of Rights in Action (2008), https://www.crf-usa.org/bill-of-rights-in-action/bria-24-1-b-upton-sinclairs-the-jungle-muckraking-the-meat-packing-industry.html (accessed May 9, 2022).
[669] *Id.*
[670] *Id.*
[671] *Id.*

concern that the meat packing industry was forced to change.[672] Congress passed the Meat Inspection Act in 1906.[673] Through this Act, Congress gave the United States Department of Agriculture (USDA) the authority to stop shipments of meat from facilities that failed to meet certain regulatory standards, thus giving Congress greater authority over the meat packers.[674]

Ag-gag laws have created civil and criminal penalties that are wielded by government entities and corporations against workers and animal rights activists who expose animal agriculture through Sinclairian tactics.[675] State legislatures across the country have taken drastic steps to suppress whistleblowers and chill speech by punishing those who speak truthfully about what is happening inside agriculture and research facilities.[676] When the government regulates speech because of the viewpoint of the speaker or because of the content of the speech, the government bears the burden of proving that the law is narrowly tailored to achieve a compelling interest.[677] As courts have continually ruled when analyzing the merits of ag-gag laws, there is no valid public interest for ag-gag laws; they exist solely to give

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[672] *Id*.
[673] *Id*.
[674] *Id*.
[675] Animal Legal Def. Fund v. Otter, 118 FSupp. 3d 1195, 1201-2 (D. Idaho 2015), (*aff'd in part, rev'd in part sub nom.* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018), 118 F. Supp. 3d at 1201-2.)
[676] Marceau, *supra* note 24 at 1021.
[677] Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1227 (10th Cir. 2021), cert. denied, 212 L. Ed. 2d 605, 142 S. Ct. 2647 (2022).

special status to big agriculture.[678] Advocates for workers' rights, environmental protection, freedom of speech, and animal welfare should be asking: *Why do legislators want to prevent people from seeing what happens to animals in agriculture and research facilities?*

Human beings strive for consistency between thoughts and actions.[679] The symbolic distance between a person's choices and the consequences of those choices is called cognitive dissonance.[680] The meat paradox is a specific type of cognitive dissonance that arises when a consumer of animal products has their belief that they are a moral person challenged by images of the atrocities of animal agriculture and research.[681]

Slaughterhouse videos cause cognitive dissonance for animal products consumers.[682] Thus, those consumers must either (1) change their behavior by consuming fewer animal products, (2) change their knowledge by seeking alternative facts, or (3) change their moral stance to be consistent

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[678] *Id.*; for example, in *Kelly*, 9 F.4th at 1225, the court discusses comments made by legislators who enacted Kansas' ag-gag statute. The comments reflect the legislature's only cognizable motivation, which is to favor agricultural facilities and limit public scrutiny of their practices: "[The legislative history] confirms what the text of the law alone demonstrates: the Act places pro-animal facility viewpoints above anti-animal facility viewpoints."

[679] Leonid Perlovsky, *A challenge to human evolution—cognitive dissonance*, 4 FRONTIERS IN PSYCHOLOGY 1, 1 (2013).

[680] *Id*.

[681] Elisa Aaltola, The Meat Paradox, Omnivore's Akrasia, and Animal Ethics, 9 ANIMALS 1, 1 (2019).

[682] *Id.*

with the new knowledge.[683] Since behavior change on an individual level means opting for more plant-based choices over animal products, legislators and companies whose financial success depends on a high demand for animal products seek to maintain the knowledge or moral change strategies of reducing dissonance.[684] For example, meat and dairy lobbyist groups frequently fund the creation of pro-meat and dairy "scientific studies," that appear to be biased because of their funders' conflicts of interest.[685] Since animal farmers fear that people are more likely to start flirting with vegetarianism or veganism after seeing images from inside slaughterhouses, animal farmers depend on legislative techniques to cover up their activities and artificially reduce the demand for competing plant-based products.[686] Enter ag-gag.

Ag-gag laws prevent consumers from being forced to confront the meat paradox.[687] The features of ag-gag laws that support the knowledge and moral change strategies to resolving dissonance line in the chilling of free

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[683] *Id*.

[684] Maya Mathur et al., Reducing meat consumption by appealing to animal welfare: protocol for a meta-analysis and theoretical review, 9 SYSTEMATIC REVIEWS 1, 6-7 (2020); see also Jemima Webber, How Livestock Farmers are Responding to the Rise of Veganism, PLANT BASED NEWS, (August 13, 2021), https://plantbasednews.org/opinion/the-long-read/livestock-farmers-veganism/ (accessed May 9, 2022).

[685] Michael Greger M.D. FACLM, Conflicts of Interest in the Annals of Internal Medicine Meat Studies, 58 NUTRITION FACTS, (July 22, 2022).

[686] *Id.*; *see also* Aaltola, *supra* note 226.

[687] Swell, *supra* note 203; *see also* Aaltola, *supra* note 226.

speech, which prevents activists from capturing images inside of animal facilities.[688] Those features are driven by viewpoint discrimination and include (1) anti-lying provisions for obtaining employment;[689] (2) criminalization and civil causes of action for taking and sharing pictures and videos;[690] and (3) trespass harm that punishes individuals based on their motivations for obtaining permissive access to an agriculture or research facility.[691]

C. A History of America's Agribusiness

Although American indigenous peoples domesticated and engineered plants to yield food more efficiently, the only animal that American indigenous peoples ever domesticated was the dog.[692] Christopher Columbus arrived in America in 1492.[693] In 1493, when Columbus came back to America on his second voyage, he brought with him domesticated cows and pigs.[694] One year later, Columbus himself wrote a letter to the Spanish crown

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[688] Marceau, *supra* note 24.

[689] Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1226, (10th Cir. 2021), (*cert. denied*, No. 21-760, 2022 WL 1205840 (U.S. Apr. 25, 2022).)

[690] *Id*.

[691] *Id*.

[692] Sunmin Park et al., *Native American foods: History, culture, and influence on modern diets*, 3.2 JOURNAL OF ETHNIC FOODS 171, 175 (2016) ("It is important to keep in mind that many Native Americans were largely hunter/gatherers until the Europeans arrived. Although many Native American tribes had well-developed agriculture, they did not have domesticated animals, and they still depended heavily on the wild plants and animals for food."); Angela R. Perri et al., *Dog domestication and the dual dispersal of people and dogs into the Americas*, 118.6 PNAS 1 (2021).

[693] G.A. Bowling, *The Introduction of Cattle Into Colonial North America*, 25.2 JOURNAL OF DAIRY SCIENCE 129, 130 (1942).

[694] *Id*.

in 1494 pleading for a ship full of cattle in exchange for enslaved indigenous people.[695] Soon, nearly every European power began sending colonists to America accompanied with shipments of livestock and slaves whose predominant occupation in the Americas was farming.[696]

The agrarian mercantile economy of colonial America featured many landowners who grew and raised almost all their own food.[697] After the ratification of the United States Constitution in 1789, the founders of the United States of America had an opportunity to design a nationalized economy that would allow the colonies to pool resources for optimal economic growth.[698] They did just that.[699] 1790 was a crucial year marking a turning point for animal agriculture in the United States.[700] Multiple factors came together in 1790 to aid the rapid development of large-scale animal farming: (1) the core tenets of capitalism and corporate law became widely accepted by major farmers;[701] (2) the Supreme Court interpreted the United

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[695] *Id.* ("In an attempt to fill this need, Columbus, in 1494, urged the Spanish King and Queen to authorize contractors to deliver to the new country cattle and beasts of burden annually, for which they might be paid by giving them Indian [sic] slaves. Whether or not this recommendation of Columbus' was adopted and followed to any great extent, we do not know. By 1512, however, stock-raising had become a fixed industry in the West Indies, and considerable numbers of cattle were being raised.").

[696] *Id.* at 129.

[697] John J. McCusker & Russell R. Menard, The Economy of British America, 1607-1789 301 (1985).

[698] Richard Sylla, *Financial Foundations: Public Credit, the National Bank, and Securities Markets*, FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S 59, 59 (2010).

[699] *Id*.

[700] *Id*. at 64.

[701] Meyer Weinberg, *A Short History of American Capitalism*, NEW HISTORY PRESS, (2002) ("During the second period, 1790-1865, several industries became organized along

States Constitution to permit the creation of a central bank that would increase lending and consolidation;[702] (3) crops and farming operations reached a critical mass that allowed for the production of both food for people and the massive amounts of feed required to maintain livestock;[703] and (4) cattle, hogs, chickens, and other domesticated animals also reached a critical mass to sustain a major industry, further supported by the abundance of crops and money.[704] These four factors, along with incredibly cheap labor in the form of slavery, swirled together to create a monster of the industrial era: big agriculture.[705]

Around the turn of the Twentieth Century, American families flocked to cities, leaving behind their family farms.[706] Farming became the purview of big business, and governments increased their support of these already powerful entities.[707] As the bargaining power of big agriculture expanded, the

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capitalist lines and some sectors of agriculture lost their subsistence character until by the period's end agriculture as a whole was producing for the market.").

[702] Scott Bombot, *Hamilton's Treasury Department and a great Constitutional debate*, NATIONAL CONSTITUTION CENTER, (Sep. 2, 2020), https://constitutioncenter.org/blog/hamiltons-treasury-department-and-a-great-constitutional-debate (accessed May 9, 2022).

[703] JT Lemon, *Agriculture and Society in Early America*, 35.1 THE AGRICULTURAL HISTORY REVIEW 76 (1987).

[704] *Id*.

[705] David R. Meyer, *The Roots of American Industrialization, 1790-1860*, ECON. HIST., https://eh.net/encyclopedia/the-roots-of-american-industrialization-1790-1860/ (last visited January 7, 2023); James I. Stewart, *The Economics of American Farm Unrest, 1865-1900*, ECON. HIST., https://eh.net/encyclopedia/the-economics-of-american-farm-unrest-1865-1900/ (last visited January 7, 2023).

[706] *Id.*

[707] Grace Skogstad, Ideas, Paradigms and Institutions: Agricultural Exceptionalism in the European Union and the United States, 11.4 GOVERNANCE 463 (2002).

industry flexed its lobbying sway over legislatures, resulting in laws uniquely designed to protect and prefer animal products.[708]

1. *Anti-Margarine Laws*

One of the strangest legislative efforts in American history was the anti-margarine laws.[709] "It was the misfortune of margarine to become entangled in the structural transition from one social order to another . . . and to find itself confronted with an opponent with special clout."[710] That "opponent with special clout" was the dairy industry.[711]

Margarine entered American markets in 1875 and by 1881 it was contraband as Missouri became the first state to outright ban the substance.[712] Other states followed Missouri's lead and enacted similar laws which, "forbade the manufacture, sales, or possession of margarine with intent to sell."[713] Some statutes criminalized dealing in margarine, with penalties ranging from one thousand-dollar fines to up to one year in jail.[714] The constitutionality of these laws was questionable, with some being struck down, some being upheld, and others evolving before being challenged in the

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[708] Stewart, *supra* note 250.
[709] Chris Berube, *I Can't Believe It's Pink Margarine*, 99 PERCENT INVISIBLE, (October 19, 2021), https://99percentinvisible.org/episode/i-cant-believe-its-pink-margarine/.
[710] Richard A. Ball & J. Robert Lilly, *The Menace of Margarine: The Rise and Fall of a Social Problem*, 29.5 SOC. PROBS. 488, 488 (1982).
[711] *Id.*
[712] *Id.* at 489
[713] *Id.*
[714] *Id*.

courts.[715] New York's margarine ban was struck down by the Court of Appeals of New York in 1885.[716] The Court ruled that under the New York and United States constitutions, the State could not criminalize the production and sale of margarine solely on the ground that the substance was competitive with butter.[717]

Conversely, the Supreme Court of the United States upheld Pennsylvania's anti-margarine law as well as the criminal conviction of Mr. Powell, a grocer in Harrisburg, for selling packages of margarine labeled as "Oleomargarine Butter."[718] The Court did not dispute the State's claims that margarine was harmful to public health and that dealing in margarine was inherently fraudulent.[719] The *Powell* decision and state legislation in the 1880s "represented a victory for those who insisted that the police power of the state be used to regulate or prohibit stigmatized substances even when no danger had been established."[720]

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[715] *Id.*

[716] People v. Marx, 99 N.Y. 377, 385 (1885)

[717] *Id.* (Morris Marx was a margarine wholesaler who was tried as a criminal for, what the prosecution claimed was, deceiving buyers into thinking they were buying half-priced butter. He was found not guilty under the argument that the criminal statute imposed an unconstitutional criminal penalty whose goal was to support dairy producers. The court explained that the legislature has constitutional means for achieving that support that does not involve the creation of an unconstitutional penalty.)

[718] Powell v. Pa., 127 U.S. 678, 687 (1888).

[719] *Id.*

[720] Ball, *supra* note 255 at 489.

In 1886, while legislatures were experimenting with different ways to limit the availability of margarine, special interest dairy groups from 26 states convened in New York.[721] This summit laid the foundations for the Oleomargarine Act of 1886.[722] The Act imposed taxes and licensing fees on margarine sellers, and it further emboldened the anti-margarine movement, leading to some bizarre state laws.[723] By 1900, thirty-five states had passed laws regulating the color of margarine.[724] Many states forbade the sale of yellow margarine, so margarine producers evaded these rules by selling yellow dye and "squeeze packs" for consumers to mix at home to obtain a butter-like presentation.[725] Other states went even further, mandating that all margarine be sold as pink.[726]

The anti-margarine movement did not stop at ensuring margarine never be yellow. Advertising campaigns tried to convince consumers that margarine was hazardous to their health and positioned it as something that would cheapen the existence of their families.[727] When food researchers found that butter had vitamins A and D, the dairy lobby promoted this as evidence of the superiority of butter; but margarine manufacturers simply

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[721] *Id.*
[722] *Id.*
[723] *Id*.
[724] *Id*.
[725] Berube, *supra* note 254.
[726] Ball, *supra* note 255.
[727] *Id*. at 491.

started fortifying margarine by adding those vitamins.[728] The fortification process allowed margarine to mirror the nutritional content of butter, but pro-dairy advertisers responded by smearing margarine as an "unnatural," laboratory concoction.[729] Anti-margarine advertising continued when new hydrogenation processes allowed margarine producers to begin using coconut oil, causing anti-margarine campaigns that discussed the "threat of a foreign invasion by the 'coconut cow.'"[730]

Nevertheless, margarine development and distribution continued. Margarine manufacturers eventually began using cottonseed oil, which helped large cotton-producing states like Georgia and Texas become involved in the margarine trade.[731] World War II increased the demand of margarine and expedited the repeal of anti-margarine laws.[732] Margarine's rally intensified in the 1970s as people became calorie conscious, and food science linked butter to weight gain and heart disease.[733] Consumers began seeing margarine as modern, and stopped perceiving it as something that would only be used by the lower class.[734] Margarine's journey from being painted as an unnatural and dangerous imposter to being preferred over butter

[728] *Id.* at 494.
[729] *Id*.
[730] *Id*. at 495.
[731] *Id*.
[732] *Id*.
[733] *Id*. at 496.
[734] *Id*. at 497.

took nearly a century.[735] Its initial struggles were not the result of consumer preference, but were driven by the dairy industry's influence in state legislatures, along with expensive and coordinated anti-margarine advertising campaigns.[736] These same strategies are currently being used by animal product producers to quell demand for plant-based products such as nut- and grain-based milks, egg substitutes, and imitation meats.[737]

2. *Anti-Plant Milk Laws*

While the anti-margarine laws may seem like a bizarre historical footnote, an identical movement is happening with plant milk and other dairy imitation products today.[738] The dishonest spirit of the anti-margarine movement has been resurrected in the Dairy Pride Act.[739] The Act states: "Consumption of dairy foods provides numerous health benefits, including lowering the risk of diabetes, metabolic syndrome, cardiovascular disease, and obesity."[740] The Act would prevent dairy alternatives from being labeled as "milk", "cheese", "yogurt", or "butter."[741] The Dairy Pride Act is founded

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[735] *Id*.
[736] *Id*.
[737] Marsha Mercer, *Stop Milking It, Dairy Farmers Tell Plant-Based Competitors*, PEW RSCH. CTR., (March 2, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/03/02/stop-milking-it-dairy-farmers-tell-plant-based-competitors.
[738] Dairy Pride Act, S. 1346, 117th Cong. (2021); Dairy Pride Act, H.R. 2828, 117th Cong. (2021).
[739] S. 1346, 117th Cong., 1st sess. (2021); H.R. 2828, 117th Cong., 1st sess. (2021).
[740] S. 1346, 117th Cong., 1st sess. (2021); H.R. 2828, 117th Cong., 1st sess. (2021).
[741] S. 1346, 117th Cong., 1st sess. (2021); H.R. 2828, 117th Cong., 1st sess. (2021).

on the idea that consumers might buy almond milk assuming it has the same nutritional content as cow milk.[742] The Dairy Pride Act contains contested claims about the benefits and risks of dairy consumption.[743] Furthermore, the law is insufficiently targeted at its claimed purpose of ensuring that consumers are not duped by slick marketing and labeling methods into not having their nutritional needs met. Milk alternatives that have identical nutritional value due to fortification would be disallowed from labeling themselves as "milk," while dairy products with none of the purported benefits of milk—such as buttermilk—would be allowed to use words that this act seeks to reserve for dairy products.[744]

3. *The Man Behind the Curtain*

Behind the disproportionate sums of taxpayer dollars used to prop up animal farming,[745] animal agriculture and research facilities are also exempt from federal regulations that would otherwise cause them to change their practices.[746] Animal agricultural and research facilities are exempt from animal cruelty statutes, even though more animals are deliberately abused

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[742] S. 1346, 117th Cong., 1st sess. (2021); H.R. 2828, 117th Cong., 1st sess. (2021).
[743] Rebecca L. Raciti, THE TERMINOLOGY WARS: THE DAIRY PRIDE ACT AND ITS POTENTIAL IMPINGEMENT ON INNOVATION, 14.2 Ohio State Business Law Journal 263, 275-277 (2021).
[744] *See generally* S. 1346, 117th Cong., 1st sess. (2021); H.R. 2828, 117th Cong., 1st sess. (2021).
[745] Swell, *supra* note 203.
[746] Weil, *supra* note 167.

and killed in those facilities than in any other arena.[747] Animal agricultural facilities are exempt from most environmental regulations, even though it is one of the most significant contributors to rapid climate.[748] Additionally, animal agricultural facilities are exempt from parts of the Fair Labor Standards Act, despite the fact that animal agriculture is statistically one of the most mentally damaging occupations for workers.[749] While farm subsidies play offense by inflating the finances of animal products producers, exemptions from regulations and legislation play defense by giving those facilities a free pass from complying with laws meant to remedy the harms of which they are the greatest perpetrators.

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[747] David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals*, 2 LEWIS AND CLARK ANIMAL L. REV.123 (1996).

[748] ALDF, Factory Farm Exemptions from Key Environmental Law Challenged in Court (December 13, 2018), https://aldf.org/article/factory-farm-exemptions-from-key-environmental-law-challenged-in-court/.

[749] Exemptions from Act's requirements, 29 CFR § 780.2; Karen Victor and Antoni Barnard, *Slaughtering for a living: A hermeneutic phenomenological perspective on the well-being of slaughterhouse employees*, INT J QUAL STUD HEALTH WELL-BEING (2016) ("Our understanding of the initial trauma of having to slaughter, recurring nightmares that follow in the immediate period after employment, evidence of maladjustment and poor coping, as well as living with the psycho-social consequences of slaughtering work lead to an examination of the reasons for continuing to work on the slaughterfloor. This examination revealed a perception of limited resources and minimal alternatives for these employees. Seemingly they mostly feel forced to do slaughterwork and confess an inability to escape the role as they regard it as their sole competence and only means to provide for their families. Destructive behaviour towards others spill-over from the work to home environment. Such violence and participant experiences of social detachment and isolation intensifies negative affect and psychological defences that occurred earlier in the adjustment process, exacerbating in turn the negative spill-over and social consequences. If slaughter workers are unable to find meaning and comprehension, they ultimately begin to display a learned helplessness and an inability to reflect positively on their occupational choices and alternatives.")

D. The Inevitability of Ag-Gag

In 1981, Ingrid Newkirk and Alex Pacheco, the founders of People for the Ethical Treatment of Animals (PETA), embarked on a journey to liberate a group of monkeys subjected to animal testing in a federally funded laboratory in Silver Spring, Maryland.[750] PETA's strategy involved Pacheco getting a job at the laboratory and taking pictures to expose the research methods to which the monkeys were being subjected.[751] PETA eventually sued for custody of the monkeys and won, but the legal battle took a decade.[752] As the custody battle was wrapping up, farmers and researchers began to respond to digital activism by lobbying legislators to quell their fear of activists with the passage of ag-gag laws in the early 1990s.[753]

Favoritism of animal agriculture is present in American history at all stages and dates back to the beginnings of lawmaking.[754] Hammurabi's code gifted tort immunity to ox merchants in Babylonian marketplaces.[755] Various Roman laws gave tax breaks, tort limitations, and increased property damages to animal farmers.[756] English laws restricted employee bargaining power and

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[750] Peter Carlson, *The Great Silver Spring Monkey Debate*, THE WASHINGTON POST, (Feb. 24, 1991), https://www.washingtonpost.com/archive/lifestyle/magazine/1991/02/24/the-great-silver-spring-monkey-debate/25d3cc06-49ab-4a3c-afd9-d9eb35a862c3/ (accessed May 9, 2022).

[751] *Id.*

[752] Int'l Primate Prot. League v. Administrators of Tulane Educ. Fund, 500 U.S. 72, 72, (1991).

[753] Marceau, *supra* note 24.

[754] Bowling, *supra* note 238.

[755] Abulhab, *supra* note 157 at § 250.

[756] AGRARIAN LAW, *supra* note 168; The Enactments of Justinian, *supra* note 206.

ushered in the Enclosure Acts that destroyed the small farmer in favor of big agriculture.[757] At the beginnings of the European colonization of America, Columbus himself wrote to the Spanish crown that he would send a shipment of indigenous slaves in exchange for livestock.[758] Slavery persisted throughout America to support agricultural activities, despite it being an obvious contradiction of American ideals.[759] Child labor persists to this day throughout American agriculture.[760] Anti-margarine laws prevented people from buying and selling a cheap and harmless butter substitute.[761] Organizations farming and experimenting on animals are exempt from animal cruelty statutes, environmental regulations, and fair labor standards.[762] Protesters exercising their rights under the First Amendment have been prosecuted as terrorists when they attempt to expose the truths of what is happening inside animal research and agricultural facilities.[763] It all adds up. When the long history of deference to animal agriculture is taken collectively, the passage of ag-gag laws and the three-plus decades of their

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[757] HAMMOND, *supra* note 171.

[758] Bowling, *supra* note 238.

[759] Gavin Wright, *Slavery and American Agricultural History*, 77 Agric. Hist. 527, 527 (2003).

[760] Margaret Wurth, *Children Working in Terrifying Conditions in US Agriculture*, HUMAN RIGHTS WATCH, (Nov. 13, 2019), https://www.hrw.org/news/2019/11/13/children-working-terrifying-conditions-us-agriculture# (accessed May 9, 2022).

[761] Ball, *supra* note 255.

[762] Blattner, *supra* note 197.

[763] Alleen Brown, *The Green Scare*, The Intercept, (Mar. 23, 2019), https://theintercept.com/2019/03/23/ecoterrorism-fbi-animal-rights/ (accessed May 9, 2022).

continuance are no surprise. Ag-gag laws are just one notch in a long line of measures that have sought to unconstitutionally strip the people of individual liberties in exchange for conditions that favor big agriculture.[764]

IV. THE ONGOING FIGHT

Ag-gag is short for agricultural gagging because the laws seek to prevent would-be whistleblowers from exposing the practices of animal farms and research facilities.[765] Kansas passed the first ag-gag bill in 1990.[766] The Farm Animal and Research Facilities Protection Act made it illegal to take pictures and videos inside research and agricultural facilities.[767] The law was only recently deemed unconstitutional in late 2021 by the Tenth Circuit and the Supreme Court has since denied certiorari.[768] After Kansas enacted its law in 1990, many other states enacted or amended their own ag-gag laws.[769] Some have followed a trend like Kansas, where (1) the initial law is passed, (2) it is later amended to cover more activities, until (3) the law is

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[764] Barbara E. Willard, *The American story of meat: Discursive influences on cultural eating practice*, 36.1 THE J. OF POPULAR CULTURE 105, 116 (2002).
[765] Animal Legal Defense Fund, The Dangers of Ag-Gag Laws, https://www.youtube.com/watch?v=3S4r3KcoGis&t=272s.
[766] Kan. Stat. Ann. § 47-1827; Jon Parton, *10th Circuit finds Kansas 'Ag-gag' law unconstitutional*, COURTHOUSE NEWS SERVICE, (August 19, 2021) https://www.courthousenews.com/10th-circuit-finds-kansas-ag-gag-law-unconstitutional/ (accessed May 9, 2022).
[767] 1990 Kan. ALS 192, 1990 Kan. Sess. Laws 192, 1990 Kan. SB 776.
[768] Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1226, (10th Cir. 2021), *cert. denied*, No. 21-760, 2022 WL 1205840 (U.S. Apr. 25, 2022).
[769] Caitlin Ceryes & Christopher Heaney, *"Ag-Gag" Laws: Evolution, Resurgence, and Public Health Implications*, 28.4 NEW SOLUTIONS 664, 667 (2019).

finally ruled unconstitutional.[770] The following is the text of Kansas'—now unconstitutional—ag-gag law:

> (a) No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility, damage or destroy an animal facility or any animal or property in or on an animal facility.
>
> (b) No person shall, without the effective consent of the owner, acquire or otherwise exercise control over an animal facility, an animal from an animal facility or other property from an animal facility, with the intent to deprive the owner of such facility, animal or property and to damage the enterprise conducted at the animal facility.
>
> (c) No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility:
>
> (1) Enter an animal facility, not then open to the public, with intent to commit an act prohibited by this section;
> (2) remain concealed, with intent to commit an act prohibited by this section, in an animal facility;
> (3) enter an animal facility and commit or attempt to commit an act prohibited by this section; or
> (4) enter an animal facility to take pictures by photograph, video camera or by any other means.
>
> (d) (1) No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility, enter or remain on an animal facility if the person:
>
> (A) Had notice that the entry was forbidden; or
> (B) received notice to depart but failed to do so.
>
> (2) For purposes of this subsection (d), "notice" means:

[770] *Id.*

(A) Oral or written communication by the owner or someone with apparent authority to act for the owner;
(B) fencing or other enclosure obviously designed to exclude intruders or to contain animals; or
(C) a sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

(e) No person shall, without the effective consent of the owner and with the intent to damage or destroy the field crop product, damage or destroy any field crop product that is grown in the context of a product development program in conjunction or coordination with a private research facility or a university or any federal, state or local governmental agency.

(f) No person shall, without the effective consent of the owner and with the intent to damage or destroy the field crop product, enter any property, with the intent to damage or destroy any field crop product that is grown in the context of a product development program in conjunction or coordination with a private research facility or a university or any federal, state or local governmental agency.

(g) (1) Violation of subsection (a) or (e) is a severity level 7, nonperson felony if the facility, animals, field crop product or property is damaged or destroyed to the extent of $25,000 or more. Violation of subsection (a) or (e) is a severity level 9, nonperson felony if the facility, animals, field crop product or property is damaged or destroyed to the extent of at least $1,000 but less than $25,000. Violation of subsection (a) or (e) is a class A nonperson misdemeanor if the facility, animals, field crop product or property damaged or destroyed is of the value of less than $1,000 or is of the value of $1,000 or more and is damaged to the extent of less than $1,000.

(2) Violation of subsection (b) is a severity level 10, nonperson felony.

> (3) Violation of subsection (c) is a class A, nonperson misdemeanor.
> (4) Violation of subsection (d) or (f) is a class B nonperson misdemeanor.
>
> (h) The provisions of this section shall not apply to lawful activities of any governmental agency or employees or agents thereof carrying out their duties under law.[771]

In essence, Kansas' ag-gag statute criminalized an activist (1) entering an animal agriculture or research facility and not disclosing their intentions; (2) taking pictures or videos with the intent of casting the facility in a negative light; and (3) remaining at the facility after receiving notice to leave. The following subsections analyze the common features of ag-gag laws that unconstitutionally chill speech; and finally, discusses Kansas' failed attempt at reviving its ag-gag law.

A. CONSTITUTIONALITY ANALYSIS OF KANSAS' AG-GAG LAW

Many other states joined have joined Kansas in seeking to silence big-agriculture whistleblowers. Although Arkansas's ag-gag law is relatively new in comparison, enacted in 2017.[772] Kansas' act begins with a set of definitions. One of those terms, "effective consent," is particularly important to understand in analyzing the constitutionality of Kansas' ag-gag laws. Effective consent, as defined in section two of Kansas' original ag-gag

[771] Kan. Stat. Ann. § 47-1827.
[772] Ark. Code Ann. § 16-118-113.

statute, requires consent "by a person legally authorized to act for the owner" the statute continues, stating that:

> Consent is not effective if:
> (1) Induced by force or threat;
> (2) given by a person the offender knows is not legally authorized to act for the owner; or
> (3) given by a person who by reason of youth, mental disease or defect or under the influence of drugs or alcohol is known by the offender to be unable to make reasonable decisions.[773]

Section three uses the term effective consent, in subsection (a) applying to any damage or destruction of "an animal facility or any animal or property in or on an animal facility."[774] In subsection (b), effective consent applies to the acquisition or exercise of "control over an animal facility, an animal from an animal facility or other property from an animal facility, with the intent to deprive the owner of such facility, animal or property and to damage the enterprise conducted at the animal facility."[775] Subsection (c) introduces one of the keystones of all ag-gag legislation, providing that no person shall takes pictures or video inside an animal facility without effective consent.[776] Subsection (d) is a rephrasing of the common law concept of trespass, and subsection (g) provides the criminal penalties, which includes

[773] Kan. Stat. Ann. § 47-1826(e).
[774] Kan. Stat. Ann. § 47-1827(a).
[775] *Id*.
[776] *Id*.

felony charges.[777] Section four contains the last substantive provision of the bill, which creates a civil cause of action for anyone harmed by any of the acts described by section three.[778] The statue went through multiple amendments during the late 1990s and into the 2010s; revisions include protections of field crops in the same way that livestock were shielded by the statute and the inclusion of what would become known as a "lying provision" in subsection (b).[779] The lying provision was enacted by a 2012 amendment and created criminal and civil liability for individuals who obtained employment at facilities through dishonest means.[780] A Kansas legislator made the State's intentions clear:

> In some states, animal rights activists with an anti-agriculture agenda have lied on job applications in order to gain access to farms or ranches and take undercover video, some of which is believed to be staged. This amendment is a tool that can be used against people using fraud to gain access to farms.[781]

A more viewpoint discriminatory statement could hardly be made.

B. THE CHILLING EFFECT ON SPEECH

Jurisprudence has evolved to give plaintiffs a better shot at standing in animal and environmental cases, including cases challenging ag-gag laws.[782] Historically, plaintiffs seeking to protect animals through the courts

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[777] *Id*.
[778] *Id*.
[779] *Id.*; *Herbert*, 263 F. Supp. 3d at 1198.
[780] *Kelly*, 9 F.4th at 1225.
[781] *Id.* at 1233.
[782] *Herbert*, 263 F. Supp 3d at 1199.

had difficulty proving that they had been harmed by the defendants' actions.[783] This difficulty came from the fact that standing was usually given only to plaintiffs who could prove they had suffered a concrete or measurable injury, a doctrine called injuries-in-fact.[784] Through cases like *Sierra Club v. Morton* (1972), the injuries-in-fact doctrine became more inclusive, recognizing that individual plaintiffs can argue for standing by showing harm to the environment or animals because of biodiversity loss or representational harm to satisfy the injury-in-fact hurdle.[785] This evolution of the standing doctrine gave First Amendment advocates a foundation to build upon when seeking standing to challenge ag-gag laws. In a 2017 case, *ALDF v. Herbert*, the ALDF challenged the constitutionality of Utah's ag-gag law.[786] The Utah District Court clearly laid out the standing roadmap for ag-gag plaintiffs.[787]

> To show standing to sue, a plaintiff must demonstrate (1) an injury, (2) caused by the conduct complained of, (3) that is redressable. This inquiry becomes somewhat complicated when the alleged injury, as here, is a chilling effect of speech based on a threat of future prosecution. On the one hand, allegations of a subjective chill or of possible future injury do not satisfy the injury in fact requirement. On the other, a plaintiff need not expose himself to actual arrest or prosecution to be entitled to challenge a statute.[788]

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[783] Marguerite Hogan, Standing for Nonhuman Animals: Developing A Guardianship Model from the Dissents in Sierra Club v. Morton, 95 CAL. L. REV. 513, 523 (2007).
[784] *Id.*
[785] Sierra Club v. Morton, 405 U.S. 727 (1972).
[786] *Herbert*, 263 F. Supp. 3d.
[787] *Id.* at 1199-1200.
[788] *Id*. (internal quotations omitted).

The court clarifies that it is not necessary for a plaintiff to first break a law to then challenge its constitutionality.[789] As such, the court developed a three-part test for the first element—proving an injury—when the harm is a chilling of free speech.[790] To prove an injury,

> Such a plaintiff must demonstrate: (1) that in the past, the plaintiff engaged in the kind of speech implicated by the statute; (2) that the plaintiff has a desire, but no specific plans, to engage in the speech; and (3) that the plaintiff presently has no intention of engaging in the speech because of a credible threat the statute will be enforced.[791]

After a plaintiff shows a chilling of speech, arguing for the unconstitutionality of the substantive provisions are also predicated on First Amendment arguments.[792] If a state law restricting constitutionally protected speech is challenged, "the State must justify the law by articulating the problem it is meant to address and demonstrating the law is properly tailored to address that problem."[793] If a challenge employs a First Amendment argument, the law in question will be subject to strict scrutiny if it is a content-based restriction that would require an analysis of the content of the speech itself to determine whether it violates the law.[794] The First Amendment antenna should shoot up the moment a law signifies an intention to analyze

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[789] *Id*.
[790] *Id*.
[791] *Id*. (emphasis added).
[792] *Id*.
[793] *Id*.
[794] *Kelly*, 9 F.4th at 1226.

the content of speech and the motivations behind it in determining whether a violation of that law has occurred.

1. Viewpoint Discrimination and Strict Scrutiny

One of the most important cases in the ag-gag fight does not deal with ag-gag laws at all.[795] Xavier Alvarez was a member of a water district board in California who identified himself at various meetings and during elections as a retired United States Marine and recipient of the Congressional Medal of Honor.[796] Not only did Alvarez not receive the Medal, he never served as a Marine.[797] He was criminally charged under the Stolen Valor Act, and the case went to the Supreme Court where the issue was whether the Stolen Valor Act was an unconstitutional violation of free speech.[798] Justice Kennedy, writing for the majority, explained that the Stolen Valor Act was an unconstitutional violation of the First Amendment as a content-based restriction.[799] The Court ruled that the government bears the burden of showing why a content-based restriction—a restriction on the freedom of expression based on the content of that expression—is not violative of the First Amendment.[800] Justice Kennedy warned against the danger of a government permit to pass content-based speech restrictions without that

[795] United States v. Alvarez, 567 U.S. 709 (2012).
[796] *Id.* at 713.
[797] *Id*. at 714.
[798] *Id*.
[799] *Id.* at 723-4.
[800] *Id*.

government having to articulate exactly why free speech is not warranted in that circumstance.[801]

> Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth. . . . Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out. Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment. . . . But the Stolen Valor Act is not so limited in its reach. Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.[802]

Ag-gag laws are the exact kind of danger Justice Kennedy was referring to. As content-based restrictions that chill speech, Ag-gag laws go a few steps further than the unconstitutional Stolen Valor Act as a more pervasive category of content-based restrictions known as viewpoint discrimination.[803] In *ALDF v. Kelly*, the court found that all of the subsections

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[801] *Id.*
[802] *Id.*
[803] *Kelly*, 9 F.4th at 1228.

of Kansas' ag-gag law were unconstitutional because each provision is only enforceable against individuals whose speech "is made with the intent 'to damage the enterprise conducted at the animal facility.'"[804] Furthermore, unlike the speaker in *Alvarez*, whistleblowers exposing what is happening inside animal facilities are not engaged in false speech.[805] Rather, those individuals are exposing the truth by taking pictures and videos and showing the public what is happening to the workers and animals producing food which is consumed by a majority of Americans.[806] The only potentially false speech that ag-gag whistleblowers are engaged in is statements made to secure a position of employment inside a facility, which is *still* subject to the strict scrutiny demanded by the courts when a law engages in viewpoint discrimination.[807] Ultimately, those activists seeking employment are not doing so for personal, fraudulent, financial gain, like that contemplated by Justice's Kennedy's opinion quoted above, rather their motivation is a simple dissemination of the truth to serve what they perceive to be a public good.

2. Lying Provisions

Kansas' lying provision applies to any person who may use dishonest means to gain access to, and control over, an animal facility.[808] The lying

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[804] *Id.* at 1232.
[805] *Id*.
[806] Marceau, *supra* note 24.
[807] Herbert, 263 F. Supp 3d at 1202.
[808] *Kelly*, 9 F.4th at 1233.

provision of Kansas' ag-gag law is like that of Utah's, which was stuck down as unconstitutional in 2017.[809] The Utah Court succinctly lays out why the lying provision is subject to, and does not withstand, strict scrutiny.[810] "The speech in question is the lie itself, and the only way to know whether a lie is a lie is to review what was said. This is perhaps the quintessential example of a content-based restriction."[811] The court goes on to explain that the provision does not withstand strict scrutiny as it, "targets, for example, the employee who lies on her job application but otherwise performs her job admirably, and it criminalizes the most diligent well-trained undercover employees."[812] The court also describes that the lying provision could be applied to those who give a common white lie in obtaining a job with any employer.[813] For these reasons, ag-gag lying provisions are unconstitutional when subject to strict scrutiny since the laws criminalize a lie and serve no valid purpose that a legislature can justify.[814]

3. Recording Provisions

Subsection (c) of Kansas' ag-gag law prohibits taking photos or videos that seek to damage the enterprise.[815] When asked whether photos and

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[809] *Id.*; *Herbert*, 263 F. Supp 3d at 1210.
[810] *Herbert*, 263 F. Supp 3d at 1210.
[811] Id.
[812] *Id.* at 1212-3.
[813] *Id.*
[814] *Kelly*, 9 F.4th at 1233.
[815] *Id.*

videos are considered speech, the Tenth Circuit has held that "an individual who photographs animals or takes notes about habitat conditions is creating speech."[816] Legal theorists have reached the same conclusion that photos and videos constitute speech:

> The expressive value of recording is not limited to partisan politics or public policy controversies. Video recording also functions as a manner of revealing broader truths, ranging from the pragmatic—such as law enforcement and journalistic investigations—to the aesthetic and moral—such as promoting discourse about the manner in which our society treats animals.[817]

The moment of pause that a person may experience after seeing a video showing what happens in a slaughterhouse is the moment that legislators like those in Kansas' are working hard to prevent.[818] That uncomfortable pause makes people stop and consider their choices, and in doing so, may cause them to close the dissonance gap by thinking twice about their food choices.[819] Not only is the punishment of protected, free speech unconstitutional,[820] but it also seeks to shroud consumers in an alternate reality, to prevent people from seeing where their food comes from; and avoid

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816 *Kelly*, 9 F.4th at 1236.
817 *Id*.
818 *Id*.
819 Perlovsky, *supra* note 224.
820 Marceau, *supra* note 24.

that uncomfortable moment of pause.[821] Preventing that moment of pause is directly contrary to the public interest in knowing the truth.[822]

4. Trespass Harm

Subsection (d) of the Kansas statute sets forth a provision about trespass, which follows the same analysis as subsections (b) and (c), as it also applies the "effective consent" term to speech used to obtain access to an animal facility.[823] Since the act does not punish all entry by deception, but only that entry that would seek to cause harm to the facility, it is viewpoint discriminatory on its face.[824] This provision would only apply to individuals seeking to expose the truth about activities carried out in animal facilities.[825] However, if someone obtained access to make the facility look like a wholesome and caring place, then that person would *not* be subject to punishment because they would have no intent to damage the enterprise.[826] Kansas did not attempt to argue that this provision is content neutral.[827] In giving its final ruling, the Tenth Circuit wrote:

> Even if deception used to obtain consent to enter is unprotected speech due to the entry upon private property, Kansas may not discriminate between speakers based on the unrelated issue of whether they intend to harm or help the

[821] Ed Winters, *The most important video that you'll see on your behaviour (cognitive dissonance, explained)*, YOUTUBE (October 31, 2020) (last visited May 30, 2023: https://www.youtube.com/watch?v=c3oTDJsdURM).
[822] Marceau, *supra* note 24.
[823] *Kelly*, 9 F.4th at 1236.
[824] *Id*.
[825] *Id*.
[826] *Id*.
[827] *Id*.

> enterprise. But that is the effect, and stated purpose, of the provisions at issue. And the statute is not limited to false speech lacking constitutional protection. Instead, it punishes entry with the intent to tell the truth on a matter of public concern.[828]

C. KELLY V. ALDF

Following the Tenth Circuit's ruling in 2021, Kansas petitioned the Supreme Court of the United States for certiorari, claiming each of the provisions of its ag-gag law constitutional.[829] Kansas argued that the Tenth Circuit was wrong on every count.[830] Kansas also argued that the Tenth Circuit misapplied *Alvarez* and argued for a different interpretation of the content-based restriction standards.[831] Kansas argued that under Ninth Circuit precedent, a provision that prohibits employment by deception is *not* viewpoint discriminatory, and encouraged the Supreme Court to adopt this interpretation.[832] Kansas' petition also uses an Eighth Circuit ruling which upheld a law prohibiting trespass onto private property by deception; however, that case is not on point because the Iowa provision, "contains no intent requirement and instead proscribes obtaining access to an agricultural production facility by false pretenses regardless of one's intent. The Tenth Circuit thus addressed a materially different state law implicating a different

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[828] *Id.* (internal citations omitted).
[829] Brief of Petitioner, Kelly v. Animal Legal Defense Fund, 142 S. Ct. 2647 (2022) (No. 21-760).
[830] *Id.*
[831] *Id.*
[832] *Id.*

legal analysis."[833] As the ALDF pointed out in its response to Kansas' petition, the Ninth and Eighth Circuit decisions did not turn on viewpoint discrimination like the Tenth Circuit's, which was largely because the text of Kansas' ag-gag law is facially viewpoint discriminatory.[834] The Supreme Court declined to review Kansas' petition for certiorari.[835]

ALDF v. Herbert summarizes the central conflict of ag-gag battles and provides important considerations for lawmakers:

> There can be no doubt that today, over 200 years after Washington implored Congress to safeguard the agricultural industry, the industry remains crucially important to the continued viability of the nation. Similarly important to the nation's continued viability, however, is the safeguarding of the fundamental rights Washington helped enshrine into the Constitution. Utah undoubtedly has an interest in addressing perceived threats to the state agricultural industry, and as history shows, it has a variety of constitutionally permissible tools at its disposal to do so. Suppressing broad swaths of protected speech without justification, however, is not one of them.[836]

V. ARKANSAS'S AG-GAG FIGHT

Two key aspects of Arkansas's ag-gag law make it unique: (1) not only does it reference agricultural businesses but also pertains to all "commercial property," and (2) it expressly disables any state actor from

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[833] Brief of Respondents, Kelly v. Animal Legal Defense Fund, 142 S. Ct. 2647 (2022) (No. 21-760).
[834] *Id*.
[835] Animal Legal Def. Fund v. Kelly, 9 F.4th 1219 (10th Cir.), *cert. denied*, 142 S. Ct. 2647 (2022).
[836] *Herbert*, 263 F. Supp 3d at 1213.

suing under the statute, making civil causes of action available only to private parties.[837]

The ALDF attempted to challenge the constitutionality of the Arkansas statute in 2020 when it brought a pre-enforcement challenge against Peco Foods, a major poultry producer.[838] Before the case began, ALDF and other plaintiffs sent a letter to Peco asking Peco to waive its right to sue under the statute.[839] Peco never responded to the letter.[840] The ALDF and other plaintiffs then sued Peco to challenge the merits of the statute.[841] In the initial suit, the United States District Court for the Eastern District of Arkansas erroneously ruled that the ALDF did not have standing to bring the claim.[842] On appeal, the Eighth Circuit remanded the case back to the District Court, explaining that it is plausible that Peco could sue under the statute, thus chilling speech and warranting an exploration of the merits of ALDF's claim.[843] The Eighth Circuit ruled that ALDF's "alleged fear of enforcement is objectively reasonable."[844] Upon remand, the District Court should have considered the merits that challenged the constitutionality of the statute.

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[837] Ark. Code Ann. § 16-118-113.
[838] Animal League Def. Fund v. Vaught, No. 4:19CV00442 JM, 2020 WL 10319760 (E.D. Ark. Feb. 14, 2020*), rev'd and remanded sub nom.* Animal Legal Def. Fund v. Vaught, 8 F.4th 714 (8th Cir. 2021).
[839] *Id*.
[840] *Id*.
[841] *Id*.
[842] Animal Legal Def. Fund v. Vaught, 8 F.4th 714, 721 (8th Cir. 2021).
[843] *Id.*
[844] *Id*.

The District Court agreed that ALDF now had standing to sue but did not delve into the merits of ALDF's claim.[845] Instead, the analysis focused whether "state action" existed in the case or was possible under the statute.[846] Based on the District Court's analysis, neither the ALDF nor any other party can raise a constitutionality challenge unless they are first sued.[847] This is because of the unique quirk of Arkansas's statute that expressly allows only a private cause of action and not by a state actor.[848] Thus, state action can never occur, and a plaintiff has no right to have the merits of a claim reviewed unless it is first sued:

> The Court has struggled with this question, since the Eighth Circuit has determined that the facts alleged by Plaintiffs presents an "actual case or controversy." But absent any precedent that allows a plaintiff to proceed offensively against a private actor for First Amendment violations, this Court is not going find an existing right on these facts.[849]

This case was decided on March 31, 2023, an appeal has yet to be filed as this article is being published. Since the Eighth Circuit seems more receptive to ALDF's claim, there may be a different analysis and conclusion than that reached by the District Court that explores the merits of the ALDF's constitutionality challenge. Perhaps the Eighth Circuit will rule that the

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[845] *Animal League Def. Fund v. Peco Foods, Inc.*, No. 4:19CV00442 JM, 2023 WL 2743238 (E.D. Ark. Mar. 31, 2023)
[846] *Id*.
[847] *Id.*
[848] *Id.*
[849] *Id.*

existence of the statute itself is reflective of state action. Ultimately, the private action quirk is a legislative technique designed to make it procedurally difficult for plaintiffs to challenge the merits of the statute. If the ALDF appeals, it is possible that the Eighth Circuit will expand the procedural umbrella to cover statutes that strictly prohibit state action.

Importantly, the Court recognized that Arkansas's law is modeled after North Carolina's unconstitutional ag-gag law.[850] The reason the North Carolina claim succeeded is because the plaintiffs sued the University of North Carolina, a state actor.[851] In referencing North Carolina's law, the Court has admitted that the statute may unconstitutionally chill speech, but that it will not do anything about the chilling effect until a plaintiff sues under the statute and an unconstitutionality defense is raised.[852] Arkansas's ag-gag statute is provided below.

> Civil cause of action for unauthorized access to property
>
> (a) As used in this section:
>
> (1) "Commercial property" means:
>
> (A) A business property;
>
> (B) Agricultural or timber production operations, including buildings and all outdoor areas that are not open to the public; and

[850] *Id.*
[851] *Id.*
[852] *Id.*

(C) Residential property used for business purposes; and

(2) "Nonpublic area" means an area not accessible to or not intended to be accessed by the general public.

(b) A person who knowingly gains access to a nonpublic area of a commercial property and engages in an act that exceeds the person's authority to enter the nonpublic area is liable to the owner or operator of the commercial property for any damages sustained by the owner or operator.

(c) An act that exceeds a person's authority to enter a nonpublic area of commercial property includes an employee who knowingly enters a nonpublic area of commercial property for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and without authorization subsequently:

(1) Captures or removes the employer's data, paper, records, or any other documents and uses the information contained on or in the employer's data, paper, records, or any other documents in a manner that damages the employer;

(2) Records images or sound occurring within an employer's commercial property and uses the recording in a manner that damages the employer;

(3) Places on the commercial property an unattended camera or electronic surveillance device and uses the unattended camera or electronic surveillance device to record images or data for an unlawful purpose;

(4) Conspires in an organized theft of items belonging to the employer; or

(5) Commits an act that substantially interferes with the ownership or possession of the commercial property.

(d) A person who knowingly directs or assists another person to violate this section is jointly liable.

(e) A court may award to a prevailing party in an action brought under this section one (1) or more of the following remedies:

(1) Equitable relief;

(2) Compensatory damages;

(3) Costs and fees, including reasonable attorney's fees; and

(4) In a case where compensatory damages cannot be quantified, a court may award additional damages as otherwise allowed by state or federal law in an amount not to exceed five thousand dollars ($5,000) for each day, or a portion of a day, that a defendant has acted in violation of subsection (b) of this section, and that in the court's discretion are commensurate with the harm caused to the plaintiff by the defendant's conduct in violation of this section.

(f) This section does not:

(1) Diminish the protections provided to employees under state or federal law; or

(2) Limit any other remedy available at common law or provided by law.

(g) This section does not apply to a state agency, a state-funded institution of higher education, a law

> enforcement officer engaged in a lawful investigation of commercial property or of the owner or operator of the commercial property, or a healthcare provider or medical services provider.[853]

CONCLUSION

Since the dawn of civilization, powerful agricultural interests have profoundly influenced legislation. Using that influence in recent decades, they have succeeded in lobbying for the enactment of ag-gag laws that restrict people from taking pictures or videos showing what happens inside of a slaughterhouse. The motivation for that restriction is to assist consumers in ignoring the realities about where their food comes from. The lawyers fighting to protect free speech have succeeded in achieving unconstitutional rulings in federal courts throughout the county. Arkansas's ag-gag statute was drafted to make such a challenge difficult and to give defense lawyers and judges who are sympathetic to agricultural interests plenty of tools to impede animal rights organizations from being able to argue the merits of the law. The argument on the merits is one that plaintiffs in ag-gag cases will win. Thus, as seen in *ALDF v. Peco*, the defensive strategy has evolved into erecting more procedural hurdles. While Arkansas's ag-gag statute has chilled speech in Arkansas since 2017, policy makers in Arkansas could remedy this infringement on the First Amendment by advocating for its

[853] Ark. Code Ann. § 16-118-113.

repeal in favor of protecting fundamental speech rights over unconstitutional agricultural protections.